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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18-56256

D.C. No. 2:18-cv-02421-JFW-E

[Filed December 2, 2020]

BROIDY CAPITAL MANAGEMENT, LLC; and ELLIOTT BROIDY, *Plaintiffs-Appellants*,	)
v.	)
STATE OF QATAR, *Defendant-Appellee.*	)

OPINION

Appeal from the United States District Court for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted February 11, 2020
Pasadena, California

Before: Jay S. Bybee, Daniel P. Collins, and Daniel A. Bress, Circuit Judges.

App. 2

Opinion by Judge Collins

SUMMARY*

Foreign Sovereign Immunities Act

The panel affirmed the district court's dismissal, for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act, of an action brought against the State of Qatar, alleging violation of the Computer Fraud and Abuse Act and other causes of action.

The panel held that neither the FSIA's exception to immunity for tortious activity nor its exception for commercial activity applied, and the State of Qatar therefore was immune from jurisdiction.

The panel concluded that all of plaintiffs' tort claims were barred under the discretionary function exclusion from the tortious activity exception because the challenged conduct met two criteria: (1) it was discretionary in nature or involved an element of judgment or choice; and (2) the judgment was of the kind that the exception was designed to shield. The first criterion was met because there was no showing that Qatari or international law proscribed Qatar's actions. The second criterion was met because Qatar's alleged actions involved considerations of public policy.

Plaintiffs argued that the commercial activity exception applied because their action was based upon

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

a commercial activity carried on in the United States by Qatar. The panel concluded that plaintiffs' claims were based on the alleged surreptitious intrusion into their servers and email accounts in order to obtain information and the dissemination of such information to others, including persons in the media, and this conduct did not qualify as commercial activity within the meaning of the FSIA.

COUNSEL

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OPINION

COLLINS, Circuit Judge:

Plaintiffs-Appellants Elliott Broidy and his investment firm, Broidy Capital Management, LLC, sued the State of Qatar and various other defendants after Qatari agents allegedly hacked into Plaintiffs' computer servers, stole their confidential information, and leaked it to the media in a retaliatory effort to embarrass Broidy and thereby to neutralize his ability

to continue to effectively criticize the Qatari regime and its alleged support of terrorism. The district court dismissed the claims against Qatar for lack of subject matter jurisdiction, concluding that Qatar was immune under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq*. Although for somewhat different reasons, we agree with the district court that subject matter jurisdiction is lacking under the FSIA, and we therefore affirm its judgment dismissing this action.

I

A

Qatar's motion to dismiss relied on a "facial attack on the subject matter jurisdiction of the district court" under the FSIA, and therefore, in reviewing de novo the district court's order granting that motion, we take as true the well-pleaded allegations of Plaintiffs' operative First Amended Complaint. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009); *see also Holden v. Canadian Consulate*, 92 F.3d 918, 920 (9th Cir. 1996) (de novo review applies to dismissal for lack of jurisdiction under the FSIA). In addition, we note that Plaintiffs' opposition to Qatar's motion to dismiss requested leave to amend "in order to incorporate additional allegations based on Plaintiffs' discovery efforts," and the then-current status of those discovery efforts were set forth in a contemporaneously filed declaration from Plaintiffs' counsel. The district court, however, denied leave to amend based on its conclusion that "discovery had failed to provide any evidence that might cure or change the Court's analysis that it lacks subject matter jurisdiction over Qatar" and that

further amendment would be futile. Because we review that determination de novo, *see Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004), and because we apply the same standards in evaluating the sufficiency of a proposed amendment as we do to the underlying complaint, *see Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988), we likewise take as true for purposes of this appeal the additional well-pleaded contentions that are contained in that declaration of counsel. Considering these allegations together, we take the following factual assertions as true for purposes of this appeal.

In response to being sanctioned diplomatically and commercially by several of its neighbors in June 2017 for its alleged "support for terrorism and its close ties to Iran," Qatar launched "a wide-ranging and extremely well-resourced effort to influence public opinion in the United States." In addition to attempting to burnish Qatar's image with the U.S. Government, Qatar's "public relations campaign" sought to "curtail[] the influence of individuals that could undermine the standing of the State of Qatar in the United States." One of the persons whose influence Qatar sought to blunt was Elliott Broidy ("Broidy"), the CEO of an investment firm in Los Angeles called Broidy Capital Management, LLC ("BCM"). In addition to his business ventures, Broidy has been active in public affairs, serving on the Homeland Security Advisory Council for several years and also taking leadership roles in various political and civic organizations. Starting in March 2017, Broidy became an outspoken critic of Qatar, condemning it for its alleged support for terrorism. His activities were

perceived by Qatar as thwarting its public relations efforts, such as when Broidy and others persuaded many "American Jewish leaders to refuse to meet with the Emir" of Qatar when the Emir traveled to New York in the fall of 2017 for the General Assembly of the United Nations. Qatar also perceived that Broidy "'had been influential' in shaping the White House's views on Qatar." As a result, one registered agent for Qatar noted that "Broidy's name [came] up in Embassy meetings often," and Qatar decided to target him in order to limit his future influence.

The centerpiece of Qatar's purported targeting of Broidy was a concerted series of cyberattacks aimed at BCM's California-based computer servers. In the latter half of 2017, Qatar retained the New York-based firm of Global Risk Advisors LLC ("GRA") to coordinate that effort, and GRA thereafter introduced Qatar "to cyber mercenaries in various countries to coordinate technical aspects of the illegal intrusion." Thereafter, through a series of "spearphishing" attacks aimed at several persons connected to Broidy, including his executive assistant, the hackers obtained access to BCM's Los Angeles-based servers. Beginning on January 16, 2018, and continuing through at least February 25, 2018, the hackers engaged in "thousands" of instances of unauthorized access into BCM's servers and obtained "Plaintiffs' private communications, emails, documents and intellectual property."

Subsequent forensic investigation revealed that the hackers were largely able to hide the origins of the attacks on BCM's servers by routing their communications through Virtual Private Networks

("VPNs"). However, two brief glitches in the VPN system revealed that at least two attacks in February 2018 originated from an IP address in Doha, Qatar, that belongs to an internet service provider that is majority-owned by Qatar. Additional forensic analysis also established that persons using IP addresses from Vermont "directly accessed Plaintiffs' servers 178 times from February 12, 2018 to February 25, 2018." Plaintiffs contend that these Vermont-based attacks were direct, *i.e.*, that they were not "associated with VPNs or similar anonymization tools."

After the hackers obtained Plaintiffs' private documents, the stolen materials were converted into PDF format and distributed to several U.S. media outlets via email and hand-delivery. A New York-based public relations firm that Qatar had previously hired in connection with its efforts to influence U.S. public opinion, Stonington Strategies LLC ("Stonington"), participated in this plan to "organize and disseminate Plaintiffs' stolen emails to media organizations." The metadata from some of these leaked PDFs revealed timestamps from the Central and Eastern Time Zones, suggesting that the conversion of these files into PDF format took place in the United States. Plaintiffs also allege that "many of the instances of unlawful distribution of illegally obtained [documents] took place within the United States."

The result of the dissemination of the stolen materials was an unflattering series of articles in March 2018 in the Wall Street Journal, the New York Times, and the Huffington Post alleging that, in exchange for tens of millions of dollars, Broidy and his

wife had sought to scuttle a criminal investigation connected to a Malaysian state investment fund. As a consequence, Plaintiffs suffered reputational harm and other injuries.

B

Based on these allegations, Plaintiffs filed this action against Qatar and various other defendants in the district court. In the operative First Amended Complaint, Plaintiffs asserted 10 causes of action against Qatar, GRA, Stonington, and numerous individuals arising from the alleged unauthorized access into Plaintiffs' servers and the subsequent distribution of stolen materials. Specifically, Plaintiffs alleged that the unlawful intrusion into the servers to obtain information was actionable under the common law tort of intrusion upon seclusion, as well as under the civil suit provisions of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(g); the Stored Communications Act, 18 U.S.C. § 2707(a); the Digital Millennium Copyright Act, 17 U.S.C. § 1203(a); and the California Comprehensive Computer Data Access and Fraud Act, *see* Cal. Penal Code § 502(e). Plaintiffs also alleged that the unlawful acquisition and dissemination of the stolen materials were actionable under common-law theories of conversion and intrusion upon seclusion, as well as under the civil actions authorized by California Penal Code § 496(c) (relating to receipt of stolen property); the California Uniform Trade Secrets Act, *see* Cal. Civ. Code §§ 3426.2, 3426.3; and the Defend Trade Secrets Act, 18 U.S.C. § 1836(b). The complaint also alleged a cause of action for "civil conspiracy," but as the district court correctly noted,

there is no such cause of action under California law. *See*, *e.g.*, *Kenne v. Stennis*, 179 Cal. Rptr. 3d 198, 210 (Ct. App. 2014) ("Conspiracy is not a cause of action. It is a theory of liability under which persons who, although they do not actually commit a tort themselves, share with the tortfeasor or tortfeasors a common plan or design in its perpetration."). Based on these claims, Plaintiffs sought declaratory, monetary, and injunctive relief, as well as attorneys' fees.[1]

Qatar filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(2) for lack of subject matter and personal jurisdiction, asserting that it was immune under the FSIA. In opposing Qatar's motion, Plaintiffs argued that two of the FSIA's exceptions—the tortious activity exception and the commercial activity exception—defeated Qatar's claimed immunity. On August 8, 2018, the district court granted Qatar's motion, finding both exceptions inapplicable. The tortious activity exception did not apply, according to the district court, because Plaintiffs had failed to "allege at least 'one entire tort' occurring in the United States" as required by our decision in *Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 646 (9th Cir. 1984), *abrogated in part on other grounds as recognized in Joseph v Office of Consulate Gen. Of Nigeria*, 830 F.2d 1018, 1026 (9th Cir. 1987). The district court concluded that all of the torts alleged by Plaintiffs were "premised on allegedly wrongful conduct by Qatar, its agents, or co-conspirators in gaining access to Plaintiff's data servers from outside

[1] Plaintiffs also sought punitive damages, but such damages are not available against Qatar. *See* 28 U.S.C. § 1606.

the United States, making each tort transnational." The alleged attacked from Vermont, the court held, "were merely the continuation of purported conduct allegedly originating in Qatar and 'do not demonstrate an independent tort occurring entirely within the United States'" (citation omitted). The district court held that the commercial activity exception was inapplicable because Qatar's alleged conduct–hacking and cyberespionage–did not qualify as "commercial activity" within the meaning of the FSIA. The district court therefore dismissed the action against Qatar without leave to amend.

Shortly thereafter, the district court dismissed GRA, Stonington, and various individual defendants affiliated with those entities for lack of personal jurisdiction. With the approval of the district court, Plaintiff's claims against three remaining individual defendants, who had not been served, were voluntarily dismissed without prejudice and a formal "final, appealable judgment" was entered by the district court. *See Galaza v Wolf*, 954 F.3d 1267, 1272 (9th Cir. 2020) (where dismissal of remaining claims without prejudice is done with "the approval and meaningful participation of the district court," the resulting judgment is final and appealable). Plaintiffs timely appealed the judgment, challenging only the dismissal of the claims against Qatar.

II

The FSIA is the "'sole basis'" for obtaining jurisdiction over a foreign state in a civil action. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (citation omitted). Under the FSIA, a foreign

state "shall be immune from the jurisdiction of the courts of the United States" unless one of the Act's enumerated exceptions applies. 28 U.S.C. § 1604. This default rule of immunity reflects "the absolute independence of every sovereign authority" and also "helps to induce each nation state, as a matter of international comity, to respect the independence and dignity of every other, including our own." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017) (simplified).

The Act, however, contains a number of explicit exceptions to this default rule of foreign sovereign immunity, thereby acknowledging that there are some limited situations in which a foreign state entity should be subject to suit. In establishing such exceptions, the FSIA generally codifies the so-called "restrictive theory" of sovereign immunity, under which immunity "is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 705–06 (9th Cir. 1992) (citation and internal quotation marks omitted). Although this "restrictive theory of sovereign immunity was developed in the context of commercial activities of states, . . . it is not limited to claims arising out of contractual relationships," and in appropriate circumstances it also imposes liability upon a foreign state for torts, such as traffic accidents, committed by that state's agents. *See* Restatement (Third) of the Foreign Relations Law of the United States § 454 cmt. a (Am. L. Inst. 1987). The FSIA thus contains separate exceptions that permit certain actions against foreign states based on their commercial activities, 28 U.S.C.

§ 1605(a)(2), as well as certain actions based on the tortious acts of their agents, *id.* § 1605(a)(5). If either of these exceptions is applicable, then the district court may assert jurisdiction over a "nonjury civil action against [the] foreign state," but only "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity." 28 U.S.C. § 1330(a); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) ("Sections 1604 and 1330(a) work in tandem: § 1604 bars . . . jurisdiction when a foreign state *is* entitled to immunity, and § 1330(a) confers jurisdiction . . . when a foreign state is *not* entitled to immunity.").[2]

There is, of course, no dispute that the State of Qatar qualifies as a "foreign state" for purposes of the FSIA, and it is therefore immune from jurisdiction here unless Plaintiffs' claims fit within one of the FSIA's enumerated exceptions. Plaintiffs invoke both the tortious activity exception and the commercial activity exception, and it is their burden to make an initial showing as to the applicability of one or both of them. *Packsys, S.A. v. Exportadora de Sal, S.A.*, 899 F.3d 1081, 1088 (9th Cir. 2018). We agree with the district court that as a matter of law neither exception is

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[2] Plaintiffs are therefore wrong in suggesting that the district court can assert jurisdiction over this entire action against Qatar so long as any *one* of their claims fits within an exception in the FSIA. This "foot-in-the-door" approach cannot be reconciled with the limited grant of jurisdiction in § 1330(a). *See Simon v. Republic of Hungary*, 812 F.3d 127, 141 (D.C. Cir. 2016) (courts must "make FSIA immunity determinations on a claim-by-claim basis").

applicable here, although our reasoning differs in some respects from the district court's. We discuss each exception in turn.

A

Subject to two enumerated exclusions, the FSIA's tortious activity exception allows a foreign sovereign to be sued in any case:

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

28 U.S.C. § 1605(a)(5); *see also Liu v. Republic of China*, 892 F.2d 1419, 1425 (9th Cir. 1989). Although the actual words of the statute require only that a claimant's *injury* occur in the United States, *see* 28 U.S.C. § 1605(a)(5), the Supreme Court has stated that this exception "covers only torts occurring within the territorial jurisdiction of the United States," *Amerada Hess*, 488 U.S. at 441. *See also Asociación de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524 (D.C. Cir. 1984) (Scalia, J.) ("Although the statutory provision is susceptible of the interpretation that only the effect of the tortious action need occur here, where Congress intended such a result elsewhere in the FSIA it said so more explicitly."). Accordingly, we have held that, while not "every aspect of the tortious conduct" must "occur in the United States," the exception in § 1605(a)(5) applies only where the

plaintiff alleges "at least one entire tort occurring in the United States." *Olsen*, 729 F.2d at 646.

The parties vigorously dispute how *Olsen*'s "entire tort" rule applies to Plaintiffs' allegations in this case, but we find it unnecessary to address this issue because Plaintiffs' claims fall within one of § 1605(a)(5)'s express exclusions from the tortious activity exception. *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) ("[W]e may affirm based on any ground supported by the record."). In addition to preserving a foreign sovereign's immunity over a specified list of torts, § 1605(a)(5) also expressly precludes any tort claim against a foreign state "based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A). We conclude that all of Plaintiffs' tort claims are barred under this "discretionary function" exclusion from the FSIA's tortious activity exception.

As we have previously observed, "[t]he language of the discretionary function exclusion closely parallels the language of a similar exclusion in the Federal Tort Claims Act ('FTCA'), so we look to case law on the FTCA when interpreting the FSIA's discretionary function exclusion." *Holy See*, 557 F.3d at 1083. Accordingly, the FSIA's discretionary function exclusion applies if the challenged conduct "meets two criteria: (1) it is 'discretionary in nature' or 'involve[s] an element of judgment or choice' and (2) 'the judgment is of the kind that the discretionary function exception was designed to shield.'" *Id*. at 1083–84 (quoting

United States v. Gaubert, 499 U.S. 315, 322–23 (1991)). Although Qatar ultimately has the burden to establish that the exclusion applies, that burden arises only if Plaintiffs have "'advance[d] a claim that is facially outside the discretionary function exception.'" *Id.* at 1084 (citation omitted). We conclude that the particular tortious conduct that Plaintiffs allege in this case facially satisfies both of *Gaubert*'s criteria, and that the discretionary function exclusion therefore applies.

1

As the Supreme Court has recognized, "conduct cannot be discretionary unless it involves an element of judgment or choice." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Accordingly, the discretionary function exclusion cannot apply when an applicable "statute, regulation, or policy specifically *prescribes* a course of action." *Id.* (emphasis added). Put another way, a defendant is not exercising discretion if it is "bound to act in a particular way." *Gaubert*, 499 U.S. at 329. Applying similar reasoning, we have also held that the FTCA's comparable discretionary function exception does not apply when the defendants' assertedly discretionary actions are specifically *proscribed* by applicable law. *Fazaga v. FBI*, 965 F.3d 1015, 1065 (9th Cir. 2020) (conduct that violates "federal constitutional or statutory directives" is not within the FTCA's discretionary function exception); *Tobar v. United States*, 731 F.3d 938, 946 (9th Cir. 2013) (same where conduct violated agency's "own regulations and policies" (emphasis omitted)); *Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004) ("'[F]ederal officials do not possess discretion to violate

constitutional rights.'" (citation omitted)). Plaintiffs contend that "[t]his principle is dispositive here," because their operative complaint alleges multiple violations of specific federal and state statutory prohibitions. We disagree.

In drawing upon the relevant caselaw applicable to the U.S. Government under the FTCA's discretionary function exception, we must apply those principles *mutatis mutandis* in construing the scope of the similar language used in the FSIA with respect to a foreign state. The discretion of the U.S. Government is, of course, cabined by the applicable limitations in the U.S. Constitution, federal statutes and regulations, and any other relevant binding source of law. But the *policy discretion* of a *foreign sovereign* is not evaluated by those same constraints, but rather by the corresponding limitations that bind *that* sovereign, whether contained in its own domestic law or (we will assume) in applicable and established principles of international law. We drew precisely this distinction in *Risk v. Halvorsen*, 936 F.2d 393 (9th Cir. 1991), in which we upheld Norway's immunity under the FSIA on the ground that the discretionary function exclusion applied to the challenged actions of Norwegian officials, despite the fact that those actions "may constitute a violation of California criminal law." *Id.* at 396–97. We noted that we had previously held that the FSIA's discretionary function exclusion "'is inapplicable when an employee of a foreign government violates *its own internal law*,'" but we concluded that this principle did not apply in *Risk*, because there was "no assertion that the Norwegian officials violated any Norwegian law." *Id.* at 396 (quoting *Liu*, 892 F.2d at 1431) (emphasis

added); *see also Liu*, 892 F.2d at 1431 (discretionary function exclusion did not apply where, in ordering assassination, Taiwanese official had violated Taiwanese law). And *Risk* similarly distinguished *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980), on the ground that it involved an alleged assassination in violation of international law. *Risk*, 936 F.2d at 396 (noting that *Letelier* addressed "'action that is clearly contrary to the precepts of humanity'"); *cf. MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 922 n.4 (D.C. Cir. 1987) (similarly distinguishing *Letelier* in a case involving Peru's alleged criminal violation of D.C. zoning laws in establishing a chancery, noting that "it is hardly clear that, even if a criminal act were shown, it would automatically prevent designation of Peru's acts as discretionary").

The alleged actions that Qatar took here have not been shown to violate either Qatari law or applicable international law. The parties do not dispute that, under Qatari law, the various criminal prohibitions against hacking, theft, or disclosure of trade secrets do not bind government agents acting in accordance with official orders. Indeed, it would perhaps be surprising if the domestic law of any country prohibited its own government agents from engaging in covert cyberespionage and public relations activities *aimed at foreign nationals in other countries*. Nor have the specific forms of cyberespionage alleged here been shown to violate judicially enforceable principles of international law. *Cf. Letelier*, 488 F. Supp. at 673. The status of peacetime espionage under international law is a subject of vigorous debate, *see*, *e.g.*, Patrick

C.R. Terry, *"The Riddle of the Sands"—Peacetime Espionage and Public International Law*, 51 Geo. J. Int'l L. 377, 380–85 (2020); A. John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 Mich. J. Int'l L. 595, 601–07 (2007), and the parties have not pointed us to any sufficiently clear rule of international law that would impose a mandatory and judicially enforceable duty on Qatar *not* to do what it allegedly did here. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–31 (2004) (explaining why courts should exercise great caution before purporting to identify and enforce norms of international law).

In the absence of a showing that Qatari or international law proscribes Qatar's actions here, that alleged conduct involves an exercise of discretion by Qatar that satisfies the first *Gaubert* criterion. *Cf. Fazaga*, 965 F.3d at 1024, 1065 (to the extent that "Defendants did not violate any federal constitutional or statutory directives, the discretionary function exception *will bar* Plaintiffs' FTCA claims" concerning alleged "covert surveillance program" aimed at mosque (emphasis added)).

2

There is, however, a further element that must be satisfied before the FSIA's discretionary function exclusion may be applied, *viz.*, the "judgment" involved must be "'of the kind that the discretionary function exception was designed to shield.'" *Holy See*, 557 F.3d at 1083–84 (citation omitted). This criterion is satisfied if the challenged "'governmental actions and decisions'" are "'based on considerations of public policy.'" *Id.* at

1084 (citation omitted); *see also Risk*, 936 F.2d at 395 (challenged acts must be "'grounded in social, economic, and political policy'" (citation omitted)). Thus, "[a]lthough driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy." *Gaubert*, 499 U.S. at 325 n.7. Here, there can be little doubt that Qatar's alleged actions involved considerations of public policy that are sufficient to satisfy *Gaubert*'s second criterion.

Plaintiffs' complaint alleges that, in response to a diplomatic and economic boycott, Qatar undertook the challenged actions as one component of a public-relations strategy "to influence public opinion in the United States" by "curtailing the influence of individuals," such as Broidy, who "could undermine the standing of the State of Qatar in the United States." Indeed, although the *Letelier* court found that the discretionary function exclusion did not apply to the challenged assassination in that case because it "clearly" violated international law—*i.e.*, because it failed what we have described as *Gaubert*'s first criterion—that court also expressly acknowledged that Chile's act, however reprehensible it might have been, was "one most assuredly involving policy judgment." 488 F. Supp. at 673; *see also Macharia v. United States*, 334 F.3d 61, 67 (D.C. Cir. 2003) (because matters of embassy location and security involved considerations that "'affect foreign relations,'" they satisfied *Gaubert*'s "second step" (citation omitted)). We therefore conclude that Qatar's alleged conduct here involved "the type of discretionary judgments that the exclusion was designed to protect." *Holy See*, 557 F.3d at 1084.

Because Plaintiffs have failed to "'advance a claim that is facially outside the discretionary function'" exclusion, the tortious activity exception to foreign sovereign immunity in § 1605(a)(5) is inapplicable here as a matter of law. *Id.* (citation omitted).

B

Plaintiffs also contend that the FSIA's commercial activity exception allows the U.S. courts to assert jurisdiction over Plaintiffs' claims against Qatar, but we again disagree.

Section 1605(a)(2) contains three separate clauses that set forth three alternative variations for asserting jurisdiction over a foreign state based on its commercial activities. In this court, Plaintiffs rely only on one of the formulations, namely, the one that allows jurisdiction over a foreign state in a "case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). In applying this clause, we must first identify what are the activities on which "the action is based" and then determine whether those activities are "commercial" within the meaning of the FSIA. *Id.* Applying this two-step analysis, we conclude that the challenged actions of Qatar here do not constitute "commercial activity."

As noted, the "crucial" first step "in determining whether the basis of this suit was a commercial activity is defining the 'act complained of here.'" *MOL, Inc. v. People's Republic of Bangladesh*, 736 F.2d 1326, 1328 (9th Cir. 1984) (citation omitted); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 356 (1993). "Although the Act

contains no definition of the phrase 'based upon,'" the Supreme Court has held that the "phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his [or her] theory of the case." *Nelson*, 507 U.S. at 357. As explained earlier, all of Plaintiffs' claims are based upon either or both of two types of activities: (1) the surreptitious intrusion into Plaintiffs' servers and email accounts in order to obtain information; and (2) the dissemination of such information to others, including persons in the media. *See supra* at 7–8. Plaintiffs point out that these alleged activities are connected to other allegedly commercial conduct (such as the hiring of a public relations firm), but that other conduct is not what the suit "is based" on. 28 U.S.C. § 1605(a)(2). Even taking as true Plaintiffs' allegations that Qatar entered into various contracts in the United States to carry out its operations, "those facts alone entitle [Plaintiffs] to nothing under their theory of the case," and these activities therefore "are not the basis for [Plaintiffs'] suit." *Nelson*, 507 U.S. at 358. It is the "torts, and not the arguably commercial activities that preceded [or followed] their commission," that "form the basis for [Plaintiffs'] suit." *Id*.

The next question, then, is whether Qatar's "tortious conduct itself . . . qualif[ies] as 'commercial activity' within the meaning of the Act." *Nelson*, 507 U.S. at 358. The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). The statute further explains that the "commercial character of an activity shall be determined by reference to the nature" of the activity,

"rather than by reference to its purpose." *Id*. In assessing whether the "nature" of particular state actions is commercial, courts look to whether they "are the type of actions by which a private party engages in trade and traffic or commerce." *Weltover*, 504 U.S. at 614 (simplified); *see also Adler v. Federal Republic of Nigeria*, 219 F.3d 869, 875–76 (9th Cir. 2000) (considering whether the defendants' challenged conduct was "what every private party does in the open market (notwithstanding the fact that their precise undertakings were illegal)"); *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 167 (D.C. Cir. 1994) ("[W]e take from *Weltover* the key proposition that in determining whether a given government activity is commercial under the [FSIA], we must ask whether the activity is one in which commercial actors typically engage."). "[W]hether a state acts 'in the manner of' a private party is a question of behavior, not motivation." *Nelson*, 507 U.S. at 360 (citation omitted).

We have little difficulty in concluding that, without more, a foreign government's conduct of clandestine surveillance and espionage against a national of another nation in that other nation is not "one in which commercial actors typically engage." *Cicippio*, 30 F.3d at 167; *see also*, *e.g.*, *Democratic Nat'l Comm. v. Russian Fed'n*, 392 F. Supp. 3d 410, 429 (S.D.N.Y. 2019) ("Transnational cyberattacks are not the 'type of actions by which a private party engages in trade and traffic or commerce.'" (citation omitted)). A foreign government engaged in such conduct is not exercising "powers that can also be exercised by private citizens," but rather is employing powers that—however controversial their status may be in international

law—are "peculiar to sovereigns." *Nelson*, 507 U.S. at 360 (citations and internal quotation marks omitted).

Plaintiffs point out that there are bad actors in the commercial sphere who employ similar tactics, but any application of this argument to the particular facts of this case seems difficult to reconcile with *Nelson*. In that case, plaintiff Scott Nelson was allegedly arrested, imprisoned, and beaten by police officials in Saudi Arabia, assertedly in retaliation for his reporting of safety defects in the state-owned hospital at which he worked. 507 U.S. at 352–53. Nelson and his wife sued both the Saudi government and the hospital (among others), claiming that the commercial activity exception applied in light of the employment-related context in which the conduct occurred. *Id*. at 358. After identifying the tortious conduct—*e.g.*, the arrest, imprisonment, and beatings—as "the basis for the Nelsons' suit," the Court held that this conduct "fail[ed] to qualify as 'commercial activity.'" *Id*. Emphasizing that the actual tortious conduct was an exercise of the police power, rather than an act that can be "'performed by an individual acting in his own name,'" the Court held that, "however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." *Id*. at 361–62 (citation omitted). Just as exercising police and penal powers "is not the sort of action by which private parties can engage in commerce," *id*. at 362, a foreign government's deployment of clandestine agents to collect foreign intelligence on its behalf, without more, is the sort of peculiarly sovereign conduct that all national

governments (including our own) assert the distinctive power to perform. Because the conduct Qatar allegedly engaged in here "'can be performed only by the state *acting as such*,'" *id.* (emphasis added) (citation omitted), it is not "commercial" for purposes of the commercial activity exception. And we agree with the D.C. Circuit to the extent that it concluded that a foreign government's use of "irregular operatives" to perform uniquely sovereign actions, such as occurred in this case, is not sufficient to distinguish *Nelson*. *Cicippio*, 30 F.3d at 168.

Having determined that Qatar's conduct of the espionage action against Plaintiffs was not a commercial activity, we also reject Plaintiffs' argument that Qatar's subsequent use of the materials it obtained constituted a "commercial" activity within the meaning of the FSIA. Although Plaintiffs contend that the materials that were accessed and disseminated included commercially sensitive materials, including trade secrets, there is no allegation that Qatar made commercial use of the materials. Plaintiffs contend that any consideration of Qatar's subsequent uses is an improper consideration of purpose, but we disagree. The Supreme Court confirmed in *Weltover* that it was not precluding consideration of the "context" of a sovereign's actions, and what a foreign sovereign does with covertly obtained intelligence is certainly an aspect of the "outward form of the conduct that the foreign state performs." 504 U.S. at 615, 617. To paraphrase the D.C. Circuit, when the outward actions are judged in context, there is an objective difference between (1) stealing the trade secrets of a "commercial rival" and deploying them against that rival and

(2) stealing confidential materials from a policy critic and publishing embarrassing excerpts from them. *Cf. Cicippio*, 30 F.3d at 168 ("Perhaps a kidnapping of a commercial rival could be thought to be a commercial activity."). Here, the context confirms that Qatar was not acting "in the manner of a private player" in the marketplace. *Weltover*, 504 U.S. at 614. Although the materials were of commercial value to *Plaintiffs*, the statute's focus is on whether the particular actions *that the foreign sovereign took* amounted to the conduct of "'trade and traffic or commerce,'" *id.* (citation omitted), and we agree with the district court that they were not.

III

Our ruling in this case is neither an affirmation that the alleged conduct actually occurred nor an endorsement of any such conduct. Our task is to assume the allegations to be true and then to apply the limitations of the FSIA according to the statute's plain terms. Having done so, we conclude that the FSIA bars Plaintiffs' claims against Qatar here.

The judgment of the district court is **AFFIRMED**.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No.CV 18-2421-JFW(Ex)

[Filed: August 8, 2018]

Date: August 8, 2018

Title: Broidy Capital Management, LLC, et al. *-v-* State of Qatar, et al.

PRESENT:

HONORABLE JOHN F. WALTER,
UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:
None

ATTORNEYS PRESENT FOR DEFENDANTS:
None

PROCEEDINGS (IN CHAMBERS):

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT STATE OF QATAR'S MOTION TO DISMISS PURSUANT TO RULES 12(b)(1) AND 12(b)(2) OF THE FEDERAL

RULES OF CIVIL PROCEDURE [filed 6/27/18; Docket No. 112]; and

ORDER DENYING AS MOOT DEFENDANT STATE OF QATAR'S MOTION TO STAY DISCOVERY PENDING RESOLUTION OF DEFENDANT STATE OF QATAR'S MOTION TO DISMISS [filed 6/6/18; Docket No. 80]

On June 6, 2018, Defendant State of Qatar ("Qatar") filed a Motion to Stay Discovery Pending Resolution of Defendant State of Qatar's Motion to Dismiss ("Motion to Stay"). On June 11, 2018, Plaintiffs Broidy Capital Management LLC ("Broidy Capital") and Elliott Broidy ("Broidy") (collectively, "Plaintiffs") filed their Opposition. On June 15, 2018, Qatar filed a Reply. On June 27, 2018, Qatar filed a Motion to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(2) of the Federal Rules of Civil Procedure ("Motion to Dismiss"). On July 9, 2018, Plaintiffs filed their Opposition. On July 16, 2018, Qatar filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found the matter appropriate for submission on the papers without oral argument. The matter was, therefore, removed from the Court's July 30, 2018 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background

Broidy is a California businessman who owns and operates California-based Broidy Capital and is a prominent critic of Qatar's policies. In late 2017, hackers began using sophisticated techniques to infiltrate the computer systems and accounts belonging to Plaintiffs and certain of their associates and family members. First Amended Complaint ("FAC"), ¶ 97-116. As a result, the hackers stole Plaintiffs' personal and professional files, correspondence, trade secrets, business plans, and other confidential and private documents. The confidential information was packaged into documents that were disseminated to journalists affiliated with various media organizations in the United States. The journalists then wrote stories that largely exploited the private and confidential information contained in the stolen documents. Forensic investigators retained by Plaintiffs, Ankura Consulting Group, LLC ("Ankura"), initially determined that the unauthorized access originated from Internet Protocol ("IP") addresses in the United Kingdom and the Netherlands. However, a more thorough review of server data revealed that on February 14 and 19, 2018, the attackers accessed Broidy Capital's server from an IP address in Doha, Qatar. Broidy claims that he became aware of Qatar's involvement in these unlawful actions through Joel Mowbray, a longstanding acquaintance of both Defendant Nicolas D. Muzin ("Muzin") and Broidy. FAC, ¶¶ 10-13 and 133-37. In a conversation with Mowbray – the contents of which Mowbray later relayed to Broidy – Muzin told Mowbray that Qatar was "after" Mowbray and Broidy. Based on Mowbray's

conversations with Muzin (and the discovery of the IP address in Doha, Qatar), Broidy concluded that Qatar was responsible for the attack on his and Broidy Capital's servers and filed this action on March 26, 2018.

Plaintiffs' original Complaint alleged seven tort causes of action against Defendants Qatar, Muzin, and Muzin's company, Stonington Strategies LLC ("Stonington") and alleged that Plaintiffs' computer systems were accessed without authorization from an IP address in Qatar and that their contents were subsequently disseminated to media outlets. On April 2, 2018, Plaintiffs filed an Ex Parte Application for Temporary Restraining Order ("Application") and a request for expedited discovery. On April 4, 2018, the Court entered an Order denying Plaintiffs' Application and request for expedited discovery.

On May 24, 2018, Plaintiffs filed a First Amended Complaint, alleging causes of action for: (1) violation of the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030(a)(2)(C) and (a)(5); (2) violation of the California Comprehensive Computer Data Access and Fraud Act, California Penal Code § 502; (3) receipt and possession of stolen property in violation of California Penal Code § 496; (4) invasion of privacy by intrusion upon seclusion; (5) conversion; (6) violation of Stored Communications Act, 18 U.S.C. § 27012; (7) violation of Digital Millennium Copyright Act, 17 U.S.C. § 1201 *et seq.*; (8) violation of the California Uniform Trade Secrets Act, California Civil Code § 3426 *et seq.*; (9) misappropriation of trade secrets in violation of the Trade Secrets Act, 18 U.S.C. § 1836 *et seq.*; and

(10) civil conspiracy. The First Amended Complaint added a number of factual allegations, many on information and belief, concerning the method by which the hack purportedly occurred, including that the hackers used virtual private networks to disguise their identities. FAC, ¶¶ 97-116. Plaintiffs also alleged that the "hack" began with "phishing" emails, disguised as Gmail security alerts, sent to Broidy's wife and his executive assistant on January 14, 2018. *Id.*, ¶¶ 97-100, 109-111. Plaintiffs alleged that Broidy's wife and his executive assistant provided their usernames and passwords in response to these disguised Gmail security alerts, which an unidentified third party then used to access the email accounts and remotely control those accounts via a Russian mail service called "mail.ru." *Id*. Plaintiffs contend that the third party logged into Plaintiffs' email accounts on "thousands" of occasions, using different IP addresses. *Id*., ¶ 113. Although Plaintiffs also named additional defendants, including Sheikh Mohammed Bin Hamad Bin Khalifa Al Thani ("Al Thani"), Ahmed Al-Rumaihi ("Al-Rumaihi"), and Global Risk Advisors LLC ("Global Risk"), in their First Amended Complaint Plaintiffs did not plead any specific facts suggesting that these defendants were engaged in any unlawful hacking activity. Plaintiffs allege that Qatar is responsible for the hack based on the two logins determined to have originated from an IP address registered to a computer located somewhere in Doha, Qatar. *Id.*, ¶ 115.

II. Legal Standard

A. Rule 12(b)(1)

The party mounting a Rule 12(b)(1) challenge to the Court's jurisdiction may do so either on the face of the pleadings or by presenting extrinsic evidence for the Court's consideration. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) ("Rule 12(b)(1) jurisdictional attacks can be either facial or factual"). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In ruling on a Rule 12(b)(1) motion attacking the complaint on its face, the Court accepts the allegations of the complaint as true. *See, e.g., Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air*, 373 F.3d at 1039. "With a factual Rule 12(b)(1) attack . . . a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment. It also need not presume the truthfulness of the plaintiff['s] allegations." *White*, 227 F.3d at 1242 (internal citation omitted); *see also Thornhill Pub. Co., Inc. v. General Tel & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) ("Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary . . . '[N]o presumptive truthfulness attaches to plaintiff's

allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.'") (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (9th Cir. 1977)). "However, where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine v. U.S.*, 704 F.2d 1074, 1077 (9th Cir. 1983). It is the plaintiff who bears the burden of demonstrating that the Court has subject matter jurisdiction to hear the action. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

B. Rule 12(b)(2)

1. Procedural Considerations

Under Rule 12(b)(2) of the Federal Rules of Civil Procedure, the Court may decide a question of personal jurisdiction on the basis of affidavits and documentary evidence submitted by the parties, or may hold an evidentiary hearing on the matter. *See* 5A Wright & Miller, Federal Practice and Procedure, § 1351, at pp. 253-59 and n. 31-35 (2d ed. 1990); *Rose v. Granite City Police Dept.*, 813 F. Supp. 319, 321 (E.D. Pa. 1993). Whichever procedure is used, plaintiff bears the burden of establishing that jurisdiction is proper. *See Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995); *Flynt Distributing Co. v. Harvey*, 734 F.2d 1389, 1392 (9th Cir. 1984). In this case, the pleadings, declarations

and documentary evidence submitted by the parties provide an adequate basis for evaluating jurisdiction. Accordingly, no evidentiary hearing is necessary.

Because this matter is being decided on the basis of affidavits and documentary evidence, Plaintiffs need only make a prima facie showing of personal jurisdiction. *See Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986). All allegations in Plaintiffs' complaint must be taken as true, to the extent not controverted by Defendant's affidavits, and all conflicts in the evidence must be resolved in their favor. *AT&T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996) (citing *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989)). If Plaintiffs' evidence constitutes a prima facie showing, this is adequate to support a finding of jurisdiction, "notwithstanding [a] contrary presentation by the moving party." *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995).

2. Substantive Standard

Whether a federal court can exercise personal jurisdiction over a non-resident defendant turns on two independent considerations: whether an applicable state rule or statute permits service of process on the defendant, and whether the assertion of personal jurisdiction comports with constitutional due process principles. *See Pacific Atlantic Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir. 1985).

California's long-arm statute extends jurisdiction to the limits of constitutional due process. *See Gordy v. Daily News, L.P.*, 95 F.3d 829, 831 (9th Cir. 1996); Cal.

Code. Civ. Proc. § 410.10 ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States"). Consequently, when service of process has been effected under California law, the two prongs of the jurisdictional analysis collapse into one – whether the exercise of jurisdiction over the defendant comports with due process. *See Fireman's Fund Ins. Co. v. National Bank of Cooperative*, 103 F.3d 888, 893 (9th Cir. 1996); *Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir. 1974).

The Fourteenth Amendment's Due Process Clause permits courts to exercise personal jurisdiction over a defendant who has sufficient "minimum contacts" with the forum state that "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). There are two recognized bases for personal jurisdiction over nonresident defendants: (1) "general jurisdiction," which arises where the defendant's activities in the forum state are sufficiently "substantial" or "continuous and systematic" to justify the exercise of jurisdiction over him in all matters; and (2) "specific jurisdiction," which arises when a defendant's specific contacts with the forum have given rise to the claim in question. *See Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408, 414-16 (1984). *See Doe v. American Nat'l Red Cross*, 112 F.3d 1048, 1050-51 (9th Cir. 1997); *Fields*, *supra*, 796 F.2d at 301-02.

III. Discussion

A. The Foreign Sovereign Immunities Act of 1976

The Foreign Sovereign Immunities Act of 1976 ("FSIA") provides "the sole basis" for obtaining jurisdiction over foreign countries in federal or state courts:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 and 1607 of this chapter.

28 U.S.C. § 1604; *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). The FSIA establishes a fundamental rule that foreign sovereigns are not subject to the jurisdiction of United States courts unless a specific statutory exception to immunity applies. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 394 (2015) (*citing Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993)); *see also* 28 U.S.C. § 1604. This important rule is rooted in diplomatic and international sensitivities of the highest order. *See, e.g., Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017) (foreign sovereign immunity "recognizes the absolute independence of every sovereign authority and helps to induce each nation state, as a matter of international comity, to respect the independence and dignity of every other, including our own") (quotations

and citations omitted). It is the plaintiff that has the burden of offering proof that one of the FSIA's limited exemptions applies. *Meadows v. Dominican Republic*, 817 F.2d 517, 522-23 (9th Cir. 1987). Once the plaintiff "offers evidence that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply." *Joseph v. Office of the Consulate Gen. of Nig.*, 830 F.2d 1018, 1021 (9th Cir. 1987).

The exceptions to the FSIA are construed narrowly, consistent with the overall statutory objective of preserving the sovereign immunity of foreign states. *See, e.g., Schermerhorn v. Israel*, 876 F.3d 351, 358 (D.C. Cir. 2017) ("The FSIA is premised on 'a presumption of foreign sovereign immunity' qualified only by a small number of 'discrete and limited exceptions'") (citation omitted); *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1155-56 (7th Cir. 2001) (holding that any expansion of the FSIA exceptions bears "significantly on sensitive foreign policy matters," which "might have serious foreign policy implications"). If one of these narrow exceptions does not apply, the Court lacks both subject matter and personal jurisdiction over the foreign state. *See* 28 U.S.C. § 1330(a)-(b); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 489 & n.5 (1983) (holding that the FSIA provides personal jurisdiction only if subject matter jurisdiction exists and service of process has been made in accordance with the Act).

B. The Court Lacks Subject Matter Jurisdiction Over Qatar.

The Court concludes that Plaintiffs' claims against Qatar fall outside any applicable exception to the FSIA and, therefore, the Court lacks subject matter jurisdiction over Qatar. Foreign sovereign immunity under the FSIA "recognizes the absolute independence of every sovereign authority and helps to induce each nation state, as a matter of international comity, to respect the independence and dignity of every other, including our own." *Helmerich & Payne Int'l Drilling*, 137 S. Ct. at 1319. In recognition of these fundamental principles, immunity of a foreign sovereign is the rule and litigation is the exception. The exceptions to immunity set forth in the FSIA are triggered by only a handful of narrow factual circumstances, and the Court concludes that none of those exceptions are applicable in this case.

1. The Noncommercial Tort Exception Does Not Apply.

In this case, Plaintiffs allege in the First Amended Complaint that the noncommercial tort exception applies. FAC, ¶ 30. Under the FSIA's noncommercial tort exception set forth at 28 U.S.C. § 1605(a)(5), immunity is only abrogated in actions:

> for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

Courts read this exception narrowly, which is consistent with the general presumption that foreign states are entitled to sovereign immunity and Congress's objective in enacting the noncommercial exception, which was to "eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law." *Amerada Hess*, 488 U.S. at 439-40 (*citing* H.R. Rep. No. 94-1487, at 14 and 20-21 (1976); S. Rep. No. 94-1310, at 14 and 20-21 (1976); U.S. Code Cong. & Admin. News 1976, pp. 6613 and 6619)); *see also MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987) (noting that the legislative history of the noncommercial tort exception "counsels that the exception should be narrowly construed so as not to encompass the farthest reaches of common law"); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1525 (D.C. Cir. 1984) ("We decline to convert [the noncommercial tort exception] into a broad exception for all alleged torts that bear some relationship to the United States").

The noncommercial tort exception "makes no mention of 'territory outside the United States' or of 'direct effects' in the United States," and, thus, Congress' deliberate word choice indicates that the noncommercial tort exception "covers only torts occurring within the territorial jurisdiction of the United States." *Amerada Hess*, 488 U.S. at 441; *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985). The Ninth Circuit follows the "entire tort" rule, and plaintiffs must allege at least "one entire tort" occurring in the United States in order

to escape the immunity demanded by the FSIA. *Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 646 (9th Cir. 1984), *abrogated on other grounds as stated in Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1026 (9th Cir. 1987); *Alperin v. Vatican Bank,* 2007 WL 4570674, at *9 (N.D. Cal. Dec. 27, 2007) (dismissing action where "plaintiffs have failed to show that 'one entire tort' has occurred in the United States"), *aff'd*, 360 F. App'x 847 (9th Cir. 2009), *amended in part*, 365 F. App'x 74 (9th Cir. 2010).

In *Doe v. Federal Democratic Republic of Ethiopia*, 851 F.3d 7 (D.C. Cir. 2017), the D.C. Circuit held that "[t]he entire tort – including not only the injury but also the act precipitating that injury – must occur in the United States." *Id*. at 10 (*quoting Jerez v. Republic of Cuba*, 775 F.3d 419, 424 (D.C. Cir. 2014)). The D.C. Circuit also held that electronic espionage launched from a foreign country "is a transnational tort" that does not fall within the FSIA's noncommercial tort exception. *Doe*, 851 F.3d at 11. The court found that "Ethiopia's placement of the FinSpy virus on [the plaintiff's] computer although completed in the United States when [the plaintiff] opened the infected e-mail attachment, began outside the United States." *Id*. at 9. Therefore, the court concluded that "[t]he tort [the plaintiff] allege[d] thus did not occur 'entirely' in the United States." *Id*. at 11.

In this case, Plaintiffs have failed to allege a tort occurring entirely in the United States.[1] The

[1] Plaintiffs' reliance on their cause of action for civil conspiracy is misplaced because civil conspiracy is not an independent tort

substantive torts alleged by Plaintiffs in their First Amended Complaint are all premised on allegedly wrongful conduct by Qatar, its agents, or co-conspirators in gaining access to Plaintiffs' data servers from outside the United States, making each tort transnational.[2] FAC, ¶ 115 ("On February 14, 2018 and February 19, 2018, unlawful and unauthorized connections originated from an IP address in Qatar. These two unlawful and unauthorized intrusions into BCM's California email server were not masked by VPNs, even though the connections immediately before and immediately after the access were routed through VPNs, possibly because the VPN failed or because the accessing computer automatically connected to Plaintiff BCM's network before the VPN could be activated. These connections revealed the actual location of a computer or computers accessing Plaintiff BCM's

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under California law and, thus, cannot provide a basis for the application of the FSIA's noncommercial tort exception. *Entm't Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1228 (9th Cir. 1997)*; Santa Fe Pac. Realty Corp. v. United States*, 780 F. Supp. 687, 693 (E.D. Cal. 1991) (holding that because there is no separate tort of civil conspiracy under California law, if the underlying tort is subject to immunity under the Federal Tort Claims Act, "the conspiracy claim is likewise barred"). Because Plaintiffs' substantive causes of action fail under the "entire tort rule," Qatar "cannot be bootstrapped into tort liability by the pejorative plea of conspiracy." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 459 (Cal. 1994).

[2] The Court agrees with Qatar's analysis that liability under Plaintiffs' claims will require proof of access, receipt, intrusion, interference, taking, circumventing, and misappropriation of Plaintiffs' private and confidential information that occurred in Qatar. *See*, Motion 12:7-13:12 and Reply, 4:3-6.

network from an IP address in Qatar"). Consistent with the allegations in the First Amended Complaint, Plaintiffs have steadfastly claimed that their servers were accessed from outside the United States since the filing of their original Complaint.[3] See Complaint, ¶ 73 ("Although initial forensic analysis of the BCM email server logs suggested that the unauthorized access originated from IP addresses in the United Kingdom

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[3] Plaintiffs argue in their Opposition that the alleged hack may have occurred in Vermont. However, Plaintiffs concede that they have failed to allege in their First Amended Complaint that an "entire tort" occurred within the United States, and have alleged merely that for some causes of action, "at least some instances of unlawful [conduct] occurred in the United States." FAC, ¶¶ 165, 171, and 182. In addition, even if the Court considered these unsupported conclusory allegations, it is clear on the face of the First Amended Complaint that those instances were merely the continuation of purported conduct allegedly originating in Qatar and "do not demonstrate an independent tort occurring entirely within the United States." *Greenpeace, Inc. v. State of France*, 946 F.Supp. 773, 786 (C.D. Cal. 1996) (holding that alleged unlawful detention of plaintiffs on French military and civil aircraft in Los Angeles did not constitute entire tort in the United States where detention was continuation of conduct begun outside of United States jurisdiction). The *Greenpeace* court also rejected as erroneous Plaintiffs' interpretation of *Olsen*, 729 F.2d 641, as permitting a court to exercise jurisdiction over all tort causes of action alleged in a complaint "if any 'entire tort' took place in the United States" because "*Olsen* does not extend FSIA jurisdiction to tortious conduct occurring overseas." *Greenpeace*, 946 F.Supp. At 785. Moreover, to the extent that Plaintiffs seek to amend their First Amended Complaint to allege that the alleged hack occurred solely within the United States, any such allegation would be directly contradictory to the allegations in their Complaint and First Amended Complaint and the declarations and other evidence in support of the temporary restraining order that the hack occurred, in whole or in part, in Qatar.

and the Netherlands, a more thorough review of server data from February 14, 2018 revealed that the attack had originated from an IP address in Qatar. On information and belief, the IP addresses in the Netherlands and the United Kingdom originally identified were used to mask the true identity of the source of the intrusion. Plaintiff Broidy's advanced cyber unit was able to uncover problems with the attacker's obfuscation technique on February 14, 2018, which revealed that the attack originated in Qatar").

Even prior to filing their original Complaint, Plaintiffs were convinced based on their investigation that Qatar was responsible for the attack and that it originated in Qatar. Specifically, Ankura, the forensic experts hired by Plaintiffs, determined "that individuals located in Qatar [were] responsible for the unauthorized activity" based on two mistakes or brief failures in the attacker's IP address obfuscation techniques on February 14, 2018 and February 19, 2018 which revealed that the IP address "is a Qatar source IP registered to a physical location in Doha, Qatar." April 2, 2018 Declaration of J. Luke Tenery (Docket No. 31-5), ¶ 11. Counsel for Plaintiffs, presented the evidence of Qatar's unlawful attacks to the Ambassador of Qatar, Al Thani, in a letter dated March 19, 2018. In the letter counsel for Plaintiffs advised Al Thani that:

> The individuals located in Qatar tied to this attack evidently believed they could maintain anonymity by trying to disguise their malicious activity targeting Mr. Broidy's servers. They were wrong. Mr. Broidy's advanced cyber crime

> forensics unit has established Qatar's ties to this illegal hacking operation.

March 19, 2018 Letter from Lee S. Wolosky to Sheikh Meshal bin Hamad Al Thani (Docket No. 319). The letter concluded with this warning: "[i]f, as you have suggested, the attack on Mr. Broidy that originated in Qatar was not authorized by your government, then we expect your government to hold accountable the rogue actors in Qatar who have caused Mr. Broidy substantial damages."[4] *Id.*

Although Plaintiffs argue the Court should apply the noncommercial tort exception, Plaintiffs focus on the injury they sustained and ignore that the conduct precipitating that injury involved unlawful access or "hacking" Plaintiffs' servers, which Plaintiffs' own evidence demonstrates originated in Qatar by actors who were acting on behalf of Qatar or who were conspiring with Qatar. In effect, Plaintiffs argue for an expanded interpretation of Section 1605(a)(5) that would allow the Court to find subject matter jurisdiction if the injury, as in this case, occurred in the United States regardless of whether the tortious conduct causing the injury occurred within the United States. However, this interpretation has been overwhelmingly rejected by the courts that have considered the issue. *See, e.g., Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984), *cert.*

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[4] The ambassador of Qatar never responded to the March 19, 2018 letter. Plaintiffs construed Qatar's failure to respond as an admission that Qatar was responsible for the hack and immediately filed this action.

denied 469 U.S. 881 (1984); *Asociacion de Reclaimantes v. United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied* 470 U.S. 1051 (1985); *Olsen*, 729 F.2d 1984; *In re the Matter of the Complaint of Sedco, Inc.*, 543 F.Supp. 561 (S.D. Tex. 1982); *Australian Government Aircraft Factories v. Lynne*, 743 F.2d 672, 674-75 (9th Cir. 1988) (holding that injuries to pilot's family in the United States were insufficient to support jurisdiction); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 589 n. 10 (9th Cir. 1983) ("We need not decide whether § 1605(a)(5) may ever provide jurisdiction for tort actions in which the tortious act or omission occurs outside the United States. The language of § 1605(a)(5) suggests that only the injury need occur in the United States, but the legislative history declares that, 'the tortious act or omission must occur within the jurisdiction of the United States'") (citation omitted).

Despite Plaintiffs argument to the contrary, the entire tort rule applied by the Ninth Circuit in *Olsen*, 729 F.2d 641, is consistent with the application of the entire tort rule in other circuits. In *Olsen*, the plaintiffs asserted a single cause of action for the wrongful death of their parents in a plane crash in California. *Id.* at 643. In weighing whether the noncommercial tort exception applied, the court considered a number of "potentially tortious acts and omissions occurring both in Mexico and the United States." *Id.* at 645-46. The court found that the plaintiffs had alleged conduct occurring entirely in the United States constituting "a single tort – the negligent piloting of the aircraft" to bring the plaintiffs' wrongful death claim within the exception. *Id.* at 646. Thus, the negligent piloting that occurred in the United States was an independent and

sufficient cause of the plaintiffs' injuries – an entire tort. By holding that the plaintiffs must allege "at least one entire tort occurring in the United States" to bring a claim under the noncommercial tort exception, the *Olsen* court did not change the entire tort rule. Instead, the Ninth Circuit held subject matter jurisdiction could only be exercised to the extent that the plaintiffs sought relief for a tort taking place entirely within United States. *Id.* at 646; *see also Greenpeace*, 946 F. Supp. at 785 holding that "*Olsen* does not extend FSIA jurisdiction to tortious conduct occurring overseas" and that "only those torts which occurred entirely within the United States support jurisdiction under section 1605(a)(5)").

The primary reason most courts have rejected a broad interpretation of Section 1605(a)(5) as argued for by Plaintiffs is the specific legislative history indicating Congress's clear intention that the tortious act or omission as well and the injury must occur in the United States. Specifically, the legislative history reveals that:

> Section 1605(a)(5) is directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities. It denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; ***the tortious act or omission must occur within the***

> ***jurisdiction of the United States***, and must not come within one of the exceptions enumerated in the second paragraph of the subsection.

H.R. Rep. No. 94-1487, at 20-21 (1976); S. Rep. No. 94-1310, at 20-21 (1976); U.S. Code Cong. & Admin. News 1976, p. 6619 (emphasis added). Although it is possible to construe Section 1605(a)(5) as Plaintiffs urge to mean that the tortious act or omission can occur anywhere in the world provided that the injury occurs in the United States, the Court cannot do so in light of the applicable case law and the clear legislative history to the contrary.

Moreover, Section 1605(a)(2) demonstrates that when Congress intended to provide jurisdiction for acts outside the United States which have an effect inside the United States, it said so explicitly. Section 1605(a)(2) provides that there is no immunity for a foreign state's commercial activities outside the United States that cause "direct effect in the United States." The legislative history reveals that this provision was adopted in accordance with the principles in the Restatement (Second) of The Foreign Relations Law of the United States, § 18 (1965), which provides that a nation has jurisdiction to attach legal consequences to conduct outside its borders that causes an effect within its borders. Significantly, there is no reference to Section 18 of the Restatement in the committee reports discussing Section 1605(a)(5).

Accordingly, the Court concludes that the claims alleged by Plaintiffs do not fall within the scope of the

FSIA's noncommercial tort exception and, therefore, this Court lacks subject matter jurisdiction.[5] [6]

2. The Commercial Activity Exception Does Not Apply.

Plaintiffs also allege in the First Amended Complaint that the commercial activity exception applies. FAC, ¶ 31. Under the FSIA's commercial activity exception set forth at 28 U.S.C. § 1605(a)(2), a foreign state is not immune when "the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state

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[5] Because the Court concludes that the noncommercial tort exception does not apply, the Court need not and does not address the discretionary function rule.

[6] Even Scott A. Gilmore, who argues for a broad interpretation of the noncommercial tort exception of the FSIA in his very interesting article "Suing the Surveillance States: The (Cyber) Tort Exception to the Foreign Sovereign Immunities Act," 46 Columbia Human Rights Law Review 227 (Spring 2015), acknowledges that "[s]o far, the policy debate on cybersecurity has taken it for granted that foreign states enjoy immunity for cyber attacks on U.S. targets." Given the reluctance of the other courts that have considered the issue to abandon a narrow interpretation of Section 1605(a)(5) and the growing prevalence of attacks in cyberspace, it may be an appropriate time for Congress to consider a cyber attack exception to the FSIA which, at the moment, effectively precludes civil suits in United States courts against foreign governments or entities acting on their behalf in the cyberworld.

elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

"Commercial activity" is defined in the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). "Commercial activity carried on in the United States by a foreign state" refers to commercial activity carried on by the foreign state that has substantial contact with the United States. 28 U.S.C. § 1603(e). "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

In *Nelson*, 507 U.S. at 360, the Supreme Court held that commercial activity under the FSIA refers to "only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." "[A] foreign state engages in commercial activity . . . where it acts in the manner of a private player within the market." *Id*. (quotation omitted); *see also* Restatement (Third) of The Foreign Relations Law of the United States, § 451 (1987) ("Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried on by private persons"). Therefore, with respect to the commercial activity exception to the FSIA, the relevant question "is whether the particular actions that the foreign state performs . . . are the type of actions by which a private party engages in trade and traffic or commerce."

Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992) (quotation omitted). Thus, a court does not consider whether the specific act was one that only a sovereign would actually perform. *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000). Instead, the court should consider whether the "category of conduct" is commercial in nature. *Id.*

"Application of the commercial activities exception is predicated on the existence of a sufficient nexus between the plaintiff's asserted cause of action and the foreign state's commercial activity." *Embassy of the Arab Republic of Egypt v. Lasheen*, 603 F.3d 1166, 1170 (2010). "The commercial activity relied upon . . . to establish jurisdiction must be the activity upon which the lawsuit is based. The focus must be solely upon those specific acts that form the basis of the suit." *Am. W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 796–97 (9th Cir. 1989) (quotation, emphasis, and citation omitted). In other words, the phrase "based upon" in § 1605(a)(2) "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under [its] theory of the case." *Nelson*, 507 U.S. at 357.

In this case, Plaintiffs allege that, as part of an aggressive information and government relations campaign, Qatar and its alleged agents engaged in hacking and dissemination of the private information of a known critic of Qatar's policies. FAC, ¶¶ 88-92. The Court concludes that the alleged conduct is not commercial in nature. Neither the broader information and government relations campaign nor Qatar's specific "black operation" is the type of action by which

private, commercial enterprises typically engage in trade or commerce. Accordingly, the alleged conduct is not commercial activity that would justify the lifting of foreign sovereign immunity.

Although Plaintiffs argue that Qatar's alleged contracts with its agents are commercial because "sophisticated cyber-attack[s] and information campaign[s]" are activities in which private citizens can engage (Opposition, p. 16), "the issue is whether the particular actions that the foreign state performs . . . are the type of actions by which a private party engages in trade and traffic or commerce." *Republic of Argentina v. Weltover,* Inc., 504 U.S. 607, 614 (1992). Cyber-attacks are not the "typical acts of market participants." *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994); *see also Eringer v. Principality of Monaco*, 2011 WL 13134271, at *6 (C.D. Cal. Aug. 23, 2011), *aff'd*, 533 F. App'x 703 (9th Cir. 2013); *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131 (D.D.C. 2008).

Accordingly, the Court concludes that the claims alleged by Plaintiffs do not fall within the scope of the FSIA's commercial activity exception and, therefore, this Court lacks subject matter jurisdiction.[7]

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[7] The Court is always concerned when its decision may effectively deprive parties of a forum to pursue legitimate claims of wrongdoing. However, this is a natural result of recognizing foreign sovereign immunity as provided for in both the general rule and the explicit mandate of the FSIA. *See Sachs v. Republic of Austria*, 695 F.3d 1021, 1026 (9th Cir. 2012) ("Any injustice that results is not greater than the mine-run of cases – jurisdiction over a foreign state is, after all, ordinarily not available").

C. Qatar is a Necessary, But Not Indispensable Party.

1. Qatar is a Necessary Party.

Whether a party is indispensable is determined pursuant to Rule 19. "The inquiry is a practical, fact-specific one, designed to avoid the harsh results of rigid application." *Dawavendewa v. Salt River Project Agr. Imp. And Power Dist.,* 276 F.3d 1150*,* 1154 (9th Cir. 2002); *see also Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir.1990). Under the Rule 19 inquiry, the court must determine: (1) whether a party is necessary to the action; and then, (2) if the party is necessary, but cannot be joined, whether the party is indispensable such that in "equity and good conscience" the suit should be dismissed. *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir.1991) (*quoting Makah Indian Tribe*, 910 F.2d at 558).

In determining whether a party is necessary under Rule 19, the court considers whether, in the absence of that party, complete relief can be accorded to the plaintiff. *See, e.g., Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir.1992). In the alternative, the court considers whether a party claims a legally protected interest in the subject of the suit such that a decision in its absence will: (1) impair or impede its ability to protect that interest; or (2) expose an existing party to the risk of multiple or inconsistent obligations by reason of that interest. See Fed. R. Civ. P. 19(a); *Makah Indian Tribe*, 910 F.2d at 558. If a party satisfies either of these alternative tests, it is a necessary party to the litigation. *See Clinton v. Babbitt*, 180 F.3d 1081, 1088 (1999).

In this case, if Plaintiffs prevail, they cannot be accorded complete relief in the absence of Qatar. Plaintiffs seek injunctive relief prohibiting all defendants, including Qatar, from accessing Plaintiffs' protected computers without authorization, accessing and altering data on Plaintiffs' computers and networks, and otherwise unlawfully obtaining Plaintiffs confidential information. However, because the Court lacks subject matter jurisdiction over Qatar under the FSIA, only the remaining defendants – and not Qatar – would be bound by such an injunction. Thus, under Rule 19(a)(1), Qatar is a necessary party.

2. Qatar is Not an Indispensable Party.

After concluding that Qatar is a necessary party and immune from this action under the FSIA, the Court must next consider whether it is an indispensable party. Under Rule 19(b), if Qatar is an indispensable party, Plaintiffs' entire action must be dismissed. A party is indispensable if in "equity and good conscience," the court should not allow the action to proceed in its absence. Fed. R. Civ. P. 19(b); *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996). To make this determination, the Court must balance four factors: (1) the prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum. *See Kescoli*, 101 F.3d at 1310. The Ninth Circuit cautions that if no alternative forum exists, courts should be "extra cautious" before dismissing the suit. *Makah Indian Tribe*, 910 F.2d at 560.

If the necessary party enjoys sovereign immunity from suit, some courts have noted that there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as "one of those interests 'compelling by themselves,'" which requires dismissing the suit. *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 777 (D.C. Cir.1986) (*quoting* 3A James W. Moore et al., *Moore's Federal Practice* ¶ 19.15 (1984)); *see also Enterprise Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989). However, despite these out-of-circuit decisions, the Ninth Circuit has continued to apply the four part balancing test to determine whether a necessary party is also an indispensable party. *See Confederated Tribes*, 928 F.2d at 1499; *see also SourceOne Glob. Partners, LLC v. KGK Synergize, Inc.*, 2009 WL 1346250, at *4 (N.D. Ill. May 13, 2009) ("If the inability to join a sovereign as a party had the automatic effect of nullifying the suit against other private defendants, Rule 19 would be rendered superfluous in these cases. That is not the law") (*citing Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008)).

In this case, despite Qatar's argument to the contrary, it is difficult to see how Qatar or any of the remaining defendants would be prejudiced if this action proceeded without Qatar. The Court concludes that the types of "comity and dignity interests" that the Supreme Court held would make dismissal of an action under Rule 19(b) necessary – claims arising "from events of historical and political significance," the sovereign having " a unique interest in resolving the" claims, or a "comity interest in allowing a foreign state to use its own courts for a dispute if it has a right" –

are not present in this action. *See Pimentel*, 553 U.S. at 866. In addition, any potential prejudice by Qatar's absence from this action can be lessened or avoided entirely by crafting injunctive relief that would affect only the remaining defendants, and not Qatar. *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998) (reversing a district court's dismissal of Ecuadoran residents' suit against an American oil company on the basis that the participation of the Republic of Ecuador, the current owner and operator of oil drilling equipment, was necessary to afford plaintiffs the full scope of equitable relief they sought, because plaintiffs' claims against the American oil company could proceed even if equitable claims involving the Republic of Ecuador had been dismissed). Moreover, the Court is concerned that Plaintiffs would not have an adequate remedy if this action was dismissed because it is unlikely that an alternative forum would be available. *See, e.g. Jota*, 157 F.3d at 160 ("Though extreme cases might be imagined where a foreign sovereign's interests were so legitimately affronted by the conduct of litigation in a U.S. forum that dismissal is warranted without regard to the defendant's amenability to suit in an adequate foreign forum, this case presents no such circumstances").

D. Plaintiffs' Request to Amend Their First Amended Complaint and for Jurisdictional Discovery is Denied.

Where a motion to dismiss is granted, a district court must decide whether to grant leave to amend. Generally, the Ninth Circuit has a liberal policy favoring amendments and, thus, leave to amend should

be freely granted. *See, e.g., DeSoto v. Yellow Freight System, Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a Court does not need to grant leave to amend in cases where the Court determines that permitting a plaintiff to amend would be an exercise in futility. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile"). "Leave to amend may be denied if a court determines that allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733, 742 (9th Cir. 2008) (quotations and citations omitted).

In this case, Plaintiffs have already had two opportunities to allege claims that would fall within an exception to the sovereign immunity provided by the FSIA and have failed to present "non-conclusory allegations that, if supplemented with additional information, will materially affect the court's analysis with regard to the applicability of the FSIA." *Crist v. Republic of Turkey*, 995 F. Supp. 5, 12 (D.D.C. 1998) (citation omitted). Although Plaintiffs have had any opportunity to conduct discovery, that discovery had failed to provide any evidence that might cure or change the Court's analysis that it lacks subject matter jurisdiction over Qatar. In addition, Plaintiffs have failed to identify with particularity how the additional discovery they would seek could cure the jurisdictional defects in the First Amended Complaint. *See Greenpeace,* 946 F. Supp. at 789.

Accordingly, Plaintiffs' request to amend their First Amended Complaint and to take jurisdictional discovery is denied.

IV. Conclusion

For all the foregoing reasons, Qatar's Motion is **GRANTED in part and DENIED in part**. Qatar's motion to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(2) is **GRANTED**, and Qatar is **DISMISSED** from this action without leave to amend.[8] Qatar's motion to dismiss the First Amended Complaint pursuant to Rule 19 is **DENIED**. Plaintiffs' request to amend their First Amended Complaint and to take jurisdictional discover is **DENIED**. In light of the Court's dismissal of Qatar from this action, Qatar's Motion to Stay Discovery Pending Resolution of Defendant State of Qatar's Motion to Dismiss is **DENIED as moot**.

IT IS SO ORDERED.

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[8] Because the Court lacks subject matter jurisdiction, the Court also necessarily lacks of personal jurisdiction over Qatar. *See, e.g., Verlinden*, 461 U.S. at 489 & n. 5 (holding that the FSIA provides personal jurisdiction only if subject matter jurisdiction exists and service of process has been made in accordance with the Act).

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. CV 18-2421-JFW(Ex)

[Filed August 16, 2018]

Date: August 16, 2018

Title: Broidy Capital Management, LLC, et al. *-v-* State of Qatar, et al.

PRESENT:

HONORABLE JOHN F. WALTER,
UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:
None

ATTORNEYS PRESENT FOR DEFENDANTS:
None

PROCEEDINGS (IN CHAMBERS):

ORDER GRANTING STONINGTON DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT [filed 7/9/18; Docket No. 129]; and

ORDER DENYING AS MOOT STONINGTON DEFENDANTS' MOTION TO STAY THE CASE OR IN THE ALTERNATIVE TO STAY DISCOVERY [filed 6/7/18; Docket No. 81]

On June 7, 2018, Defendants Stonington Strategies LLC ("Stonington") and Nicolas D. Muzin ("Muzin") (collectively, the "Stonington Defendants") filed a Motion to Stay the Case or in the Alternative to Stay Discovery ("Motion to Stay"). On June 11, 2018, Plaintiffs Elliott Broidy ("Broidy") and Broidy Capital Management LLC ("Broidy Capital") (collectively, "Plaintiffs") filed their Opposition. On June 18, 2018, the Stonington Defendants filed a Reply. On July 9, 2018, the Stonington Defendants filed a Motion to Dismiss First Amended Complaint ("Motion to Dismiss"). On July 23, 2018, Plaintiffs filed their Opposition. On July 30, 2018, the Stonington Defendants filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found these matters appropriate for submission on the papers without oral argument. The matters were, therefore, removed from the Court's hearing calendar and the parties were given advance notice.[1] After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

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[1] The Motion to Stay was removed from the Court's July 30, 2018 hearing calendar. The Motion to Dismiss was removed from the Court's August 13, 2018 hearing calendar.

I. Factual and Procedural Background

Broidy is a California businessman who owns and operates California-based Broidy Capital and is a prominent critic of Qatar's policies. In late 2017, hackers began using sophisticated techniques to infiltrate the computer systems and accounts belonging to Plaintiffs and certain of their associates and family members. First Amended Complaint ("FAC"), ¶ 97-116. As a result, the hackers stole Plaintiffs' personal and professional files, correspondence, trade secrets, business plans, and other confidential and private documents. The confidential information was packaged into documents that were disseminated to journalists affiliated with various media organizations in the United States. The journalists then wrote stories that largely exploited the private and confidential information contained in the stolen documents. Forensic investigators retained by Plaintiffs, Ankura Consulting Group, LLC ("Ankura"), initially determined that the unauthorized access originated from Internet Protocol ("IP") addresses in the United Kingdom and the Netherlands. However, a more thorough review of server data revealed that on February 14 and 19, 2018, the attackers accessed Broidy Capital's server from an IP address in Doha, Qatar. Broidy claims that he became aware of Qatar's involvement in these unlawful actions through Joel Mowbray, a longstanding acquaintance of both Muzin, who owns and operates Stonington, and Broidy.[2] FAC,

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[2] The Embassy of the State of Qatar retained Stonington to develop and implement a communications and government affairs strategy and this relationship was memorialized in a consulting

¶¶ 10-13 and 133-37. In a conversation with Mowbray – the contents of which Mowbray later relayed to Broidy – Muzin told Mowbray that Qatar was "after" Mowbray and Broidy. Based on Mowbray's conversations with Muzin (and the discovery of the IP address in Doha, Qatar), Broidy concluded that Qatar was responsible for the attack on his and Broidy Capital's computer systems and accounts and filed this action on March 26, 2018.

Plaintiffs' original Complaint alleged seven tort causes of action against Defendants Qatar, Muzin, Stonington and alleged that Plaintiffs' computer systems were accessed without authorization from an IP address in Qatar and that their contents were subsequently disseminated to media outlets. On April 2, 2018, Plaintiffs filed an Ex Parte Application for Temporary Restraining Order ("Application") and a request for expedited discovery. On April 4, 2018, the Court entered an Order denying Plaintiffs' Application and request for expedited discovery.

On May 24, 2018, Plaintiffs filed a First Amended Complaint, alleging causes of action for: (1) violation of the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030(a)(2)(C) and (a)(5); (2) violation of the California Comprehensive Computer Data Access and Fraud Act, California Penal Code § 502; (3) receipt and

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agreement, the Qatari Embassy Agreement. FAC, ¶¶ 20-21 and 63. The First Amended Complaint alleges that the Stonington Defendants' consulting activities occurred in and were directed at decision-makers in Washington, D.C. and New York City, and included setting up meetings between Qatari officials and various individuals and groups in those cities. *Id.*, ¶¶ 11-14, 65, and 89.

possession of stolen property in violation of California Penal Code § 496; (4) invasion of privacy by intrusion upon seclusion; (5) conversion; (6) violation of Stored Communications Act, 18 U.S.C. § 27012; (7) violation of Digital Millennium Copyright Act, 17 U.S.C. § 1201 *et seq*.; (8) violation of the California Uniform Trade Secrets Act, California Civil Code § 3426 *et seq*.; (9) misappropriation of trade secrets in violation of the Trade Secrets Act, 18 U.S.C. § 1836 *et seq*.; and (10) civil conspiracy. The First Amended Complaint added a number of factual allegations, many on information and belief, concerning the method by which the hack purportedly occurred, including that the hackers used virtual private networks to disguise their identities. FAC, ¶¶ 97-116. Plaintiffs also alleged that the "hack" began with "phishing" emails, disguised as Gmail security alerts, sent to Broidy's wife and his executive assistant on January 14, 2018. *Id.*, ¶¶ 97-100, 109-111. Plaintiffs alleged that Broidy's wife and his executive assistant provided their usernames and passwords in response to these disguised Gmail security alerts, which an unidentified third party then used to access the email accounts and remotely control those accounts via a Russian mail service called "mail.ru." *Id*. Plaintiffs contend that the third party logged into Plaintiffs' email accounts on "thousands" of occasions, using different IP addresses. *Id*., ¶ 113. Although Plaintiffs also named additional defendants, including Sheikh Mohammed Bin Hamad Bin Khalifa Al Thani ("Al Thani"), Ahmed Al-Rumaihi ("Al-Rumaihi"), Kevin Chalker ("Chalker"), David Mark Powell ("Powell"), and Global Risk Advisors LLC ("Global Risk"), in their First Amended Complaint, Plaintiffs did not plead any specific facts demonstrating

that these defendants were engaged in any unlawful hacking activity. Instead, Plaintiffs allege that Qatar is responsible for the hack based on the two logins determined to have originated from an IP address registered to a computer located somewhere in Doha, Qatar. *Id.*, ¶ 115.

With respect to the Stonington Defendants, the First Amended Complaint contains no allegations that they unlawfully accessed or "hacked" Plaintiffs' computer systems and accounts. Instead, Plaintiffs allege that Qatar initially retained the Stonington Defendants to develop and implement a government relations strategy for Qatar and that the strategy "quickly focused on an effort to put a pro-Jewish spin on the State of Qatar," which included the Stonington Defendants' attempts to set up meetings with and trips to Qatar for various American Jewish leaders. *Id.,* ¶¶ 63-64 and 84. Plaintiffs also allege that another aspect of the government relations strategy involved the Stonington Defendants' efforts to set up meetings between Qatari officials and various former and current American government officials. *Id.*, ¶¶ 69-70. Plaintiffs then allege that because Broidy "exercised his right to speak out on an issue of national and international concern" by criticizing Qatar, the Stonington Defendants thereafter "targeted" Broidy.[3] *Id.*, ¶ 91. Based on Plaintiffs' allegations on

[3] In the First Amended Complaint, Plaintiffs generally allege that they were "targeted" by the "Defendants" and the "Agent Defendants." *Id.* at 91. "Agent Defendants" is defined as including the Stonington Defendants, Global Risk, Chalker, Powell, Al-Rumaihi and ten additional "John Doe" defendants.

information and belief, this "targeting and fingering" involved the Stonington Defendants "conspir[ing] with the other Defendants from within the United States to organize and disseminate Plaintiffs' stolen emails to media organizations" and that Stonington "was among the vehicles used by the State of Qatar to funnel funds to others involved in the attack." *Id.*, ¶ 9. Plaintiffs conclude that the Stonington Defendants "implicated" themselves with respect to disseminating the materials unlawfully obtained from Plaintiffs' computer systems and accounts by comments Muzin made in his conversations with Mowbray. For example, Plaintiffs allege that "Muzin demonstrated further foreknowledge of press reports about Plaintiff Broidy based on illegally obtained information when he informed Mowbray [on February 27, 2018] that there were 'reporters circulating around' to focus on issues relating to Plaintiff Broidy, the Middle East, and George Nadar" even though "[t]he first published report of any alleged connection between Nadar and Plaintiff Broidy did not occur until March 3, 2018." *Id.*, ¶¶ 133-34. Plaintiffs also allege that "[o]n March 5, 2018, Defendant Muzin informed Mowbrey that there was "more stuff coming" from the *New York Times*" and that "Muzin further acknowledged [to Mowbray] that everyone he 'fingered' was 'in danger.'" *Id.*, ¶¶ 135-36.

II. Legal Standard

A. Rule 12(b)(1)

The party mounting a Rule 12(b)(1) challenge to the Court's jurisdiction may do so either on the face of the pleadings or by presenting extrinsic evidence for the Court's consideration. *See White v. Lee*, 227 F.3d 1214,

1242 (9th Cir. 2000) ("Rule 12(b)(1) jurisdictional attacks can be either facial or factual"). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In ruling on a Rule 12(b)(1) motion attacking the complaint on its face, the Court accepts the allegations of the complaint as true. *See, e.g., Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air*, 373 F.3d at 1039. "With a factual Rule 12(b)(1) attack . . . a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment. It also need not presume the truthfulness of the plaintiff['s] allegations." *White*, 227 F.3d at 1242 (internal citation omitted); *see also Thornhill Pub. Co., Inc. v. General Tel & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) ("Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary . . . '[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.'") (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (9th Cir. 1977)). "However, where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to

the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine v. U.S.*, 704 F.2d 1074, 1077 (9th Cir. 1983). It is the plaintiff who bears the burden of demonstrating that the Court has subject matter jurisdiction to hear the action. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

B. Rule 12(b)(2)

Under Rule 12(b)(2) of the Federal Rules of Civil Procedure, the Court may decide a question of personal jurisdiction on the basis of affidavits and documentary evidence submitted by the parties, or may hold an evidentiary hearing on the matter. *See* 5A Wright & Miller, Federal Practice and Procedure, § 1351, at pp. 253-59 and n. 31-35 (2d ed. 1990); *Rose v. Granite City Police Dept.*, 813 F. Supp. 319, 321 (E.D. Pa. 1993). Whichever procedure is used, plaintiff bears the burden of establishing that jurisdiction is proper. *See Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995); *Flynt Distributing Co. v. Harvey*, 734 F.2d 1389, 1392 (9th Cir. 1984). In this case, the pleadings, declarations and documentary evidence submitted by the parties provide an adequate basis for evaluating jurisdiction. Accordingly, no evidentiary hearing is necessary.

Because this matter is being decided on the basis of affidavits and documentary evidence, Plaintiffs need only make a prima facie showing of personal jurisdiction. *See Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986). All allegations in Plaintiffs' complaint must be taken as true, to the

extent not controverted by Defendant's affidavits, and all conflicts in the evidence must be resolved in their favor. *AT&T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996) (citing *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989)). If Plaintiffs' evidence constitutes a prima facie showing, this is adequate to support a finding of jurisdiction, "notwithstanding [a] contrary presentation by the moving party." *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995).

C. Rule 12(b)(6)

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. "A Rule 12(b)(6) dismissal is proper only where there is either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Summit Technology, Inc. v. High-Line Medical Instruments Co., Inc.*, 922 F. Supp. 299, 304 (C.D. Cal. 1996) (quoting *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988)). However, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and alterations omitted). "[F]actual allegations must be enough to raise a right to relief above the speculative level." *Id.*

In deciding a motion to dismiss, a court must accept as true the allegations of the complaint and must construe those allegations in the light most favorable to the nonmoving party. *See, e.g., Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Summit Technology*, 922 F. Supp. at 304 (citing *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) *cert. denied*, 454 U.S. 1031 (1981)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990) (citations omitted). However, a court may consider material which is properly submitted as part of the complaint and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201 without converting the motion to dismiss into a motion for summary judgment. *See, e.g., id.*; *Branch v. Tunnel*, 14 F.3d 449, 454 (9th Cir. 1994).

Where a motion to dismiss is granted, a district court must decide whether to grant leave to amend. Generally, the Ninth Circuit has a liberal policy favoring amendments and, thus, leave to amend should be freely granted. *See, e.g., DeSoto v. Yellow Freight System, Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a Court does not need to grant leave to amend in cases where the Court determines that permitting a plaintiff to amend would be an exercise in

futility. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

III. Discussion

A. Plaintiffs Have Not Demonstrated that the Stonington Defendants Are Subject to Personal Jurisdiction in California.

Whether a federal court can exercise personal jurisdiction over a non-resident defendant turns on two independent considerations: whether an applicable state rule or statute permits service of process on the defendant, and whether the assertion of personal jurisdiction comports with constitutional due process principles. *See Pac. Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir. 1985). California's long-arm statute extends jurisdiction to the limits of constitutional due process. *See Gordy v. Daily News, L.P.*, 95 F.3d 829, 831 (9th Cir. 1996); Cal. Code. Civ. Proc. § 410.10 ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States"). Consequently, when service of process has been effected under California law, the two prongs of the jurisdictional analysis collapse into one—whether the exercise of jurisdiction over the defendant comports with due process. *See Fireman's Fund Ins. Co. v. Nat'l Bank of Cooperative*, 103 F.3d 888, 893 (9th Cir. 1996); *Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir. 1974).

The Fourteenth Amendment's Due Process Clause permits courts to exercise personal jurisdiction over a defendant who has sufficient "minimum contacts" with the forum state such that "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). There are two recognized bases for personal jurisdiction over nonresident defendants: (1) "general jurisdiction," which arises where the defendant's activities in the forum state are sufficiently "substantial" or "continuous and systematic" to justify the exercise of jurisdiction over him in all matters; and (2) "specific jurisdiction," which arises when a defendant's specific contacts with the forum have given rise to the claim in question. *See Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408, 414–16 (1984); *Doe v. Am. Nat'l Red Cross*, 112 F.3d 1048, 1050–51 (9th Cir. 1997).

1. General Jurisdiction

General jurisdiction allows a court to hear any and all claims against a defendant regardless of whether the claims relate to the defendant's contacts with the forum state. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) ("[A] finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities in the world.") For general jurisdiction to exist, a defendant's affiliations with the forum state must be "so 'continuous and systematic' as to render [it] essentially at home in the forum[.]" *Daimler AG v. Bauman*, 571 U.S. 117, 138–39 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564

U.S. 915, 919 (2011)). In the case of a corporation, "[t]he paradigmatic locations where general jurisdiction is appropriate . . . are its place of incorporation and its principal place of business." *Ranza v. Nike*, *Inc.*, 793 F.3d 1059, 1069 (9th Cir. 2015) (internal citation omitted). "Only in an 'exceptional case' will general jurisdiction be available anywhere else." *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014).

Plaintiffs do not contend that the Stonington Defendants are subject to general jurisdiction in California. Indeed, in the First Amended Complaint, Plaintiffs allege that Stonington is incorporated in Delaware with its principle place of business in New York and Muzin is a resident of Maryland. FAC, ¶¶ 20-21. Therefore, Plaintiffs are not residents of California. Moreover, the First Amended Complaint is devoid of any allegations that suggest that the Stonington Defendants' contacts with California "are so continuous and systematic as to render [it] essentially at home" in the state. *Daimler*, 571 U.S. at 138–39 (internal quotation marks and citation omitted). In addition, there is nothing about this case that would suggest it is an exceptional case that would justify finding general jurisdiction outside of Stonington's place of incorporation and principal place of business or Muzin's state of residency. *See Lindora, LLC v. Isagenix Int'l, LLC*, 198 F. Supp. 3d 1127, 1137–38 (S.D. Cal. 2016). Accordingly, the Court concludes that the Stonington Defendants are not subject to general jurisdiction in California.

2. Specific Jurisdiction

For a court to exercise specific jurisdiction, the plaintiff's suit must arise out of or relate to the defendant's contacts with the forum. *Bristol-Meyers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1778 (2017). The Ninth Circuit applies a three-part test to determine whether a court has specific jurisdiction over a defendant:

> (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 plaintiff's 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.

Axiom Foods, Inc. v. Acerchem Int'l, Inc., 874 F.3d 1064, 1068 (9th Cir. 2017). A plaintiff bears the burden of establishing the first two prongs. *Schwarzenegger*, 374 F.3d at 802. If the plaintiff fails to satisfy either of the first two prongs, then personal jurisdiction over the defendant does not lie in the forum state. *Id.* If the plaintiff succeeds on the first two prongs, then the defendant must present a compelling case as to why exercising jurisdiction would be unreasonable. *Id.*

a. Purposeful Direction

The first prong of the specific jurisdiction test, although commonly referred to as the purposeful availment requirement, actually consists of two distinct concepts. *Id*. A plaintiff may satisfy this element by demonstrating that the defendant "has either (1) 'purposefully availed' [it]self of the privilege of conducting activities in the forum [state], or (2) 'purposefully directed' [its] activities toward the forum." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006). The purposeful availment concept generally applies in contract cases, whereas the purposeful direction concept applies in tort cases. *Axiom*, 874 F.3d at 1069; *see also Fiore v. Walden*, 688 F.3d 558, 576 (9th Cir. 2012), *rev'd on other grounds* by *Walden v. Fiore*, 571 U.S. 277 (2014). Because Plaintiff alleges that the Stonington Defendants engaged in tortious conduct, the Court will apply the purposeful direction test. *See Axiom*, 874 F. 3d at 1069.

To determine whether a defendant purposefully directed its tortious activity toward the forum state, a court must apply the "effects test" from *Calder v. Jones*, 465 U.S. 783 (1984). *Id.* This test examines whether: (1) the defendant committed an intentional act; (2) the act was expressly aimed at the forum state; and (3) the act caused harm the defendant knew would likely be suffered in the forum state. *Id.*

(1) Whether the Stonington Defendants Committed an Intentional Act.

In the context of the *Calder* test, an intentional act is "an external manifestation of the actor's intent to perform an actual, physical act in the real world, not including any of its actual or intended results." *Washington Shoe Co. v. A-Z Sporting Goods, Inc.*, 704 F.3d 668, 675 (9th Cir. 2012). Plaintiffs do not allege that the Stonington Defendants specifically hacked Plaintiffs' computer systems and accounts. With respect to dissemination of Plaintiffs' confidential and private information stolen from Plaintiffs' computer systems and accounts to members of the media, Plaintiffs allege on information and belief that the Stonington Defendants "conspired with the other Defendants from within the United States to organize and disseminate Plaintiffs' stolen emails to media organizations" and that Stonington "was among the vehicles used by the State of Qatar to funnel funds to others involved in the attack." However, Plaintiffs fail to allege any facts to support these conclusory allegations.[4] Bengley v. County of Kauai, 2018 WL 363

[4] For example, Plaintiffs allege that "[o]n March 8, 2018, Defendant Muzin demonstrated his knowledge that Plaintiff Broidy had been successfully targeted by the State of Qatar by stating: 'I did not cause the Broidy stuff, just because I have information' and 'I don't know all the details, but I know that I am hearing repeatedly that there's a lot more coming.'" FAC, ¶ 122. Plaintiffs argue that this and similar allegations demonstrate that the Stonington Defendants "targeted" Plaintiffs. However, as the Court pointed out in its April 4, 2018 Order denying Plaintiffs' ex parte application for a temporary restraining order, although it is

8083 (D. Haw. July 31, 2018) ("The district court has stated, although allegations upon information and belief may state a claim after *Iqbal* and *Twombly*, a claim must still be based on factual content that makes liability plausable, and not be formulaic recitations of the elements of a cause of action") (internal quotations omitted). In addition, although Plaintiffs also allege that generic "Defendants" or "Agent Defendants" conducted or otherwise took part in disseminating Plaintiffs' stolen information to the media, Plaintiffs do not dispute – because they could not – that the conclusory allegations against "Defendants" or "Agent Defendants" are insufficient to establish personal jurisdiction of the Stonington Defendants. *See, e.g., Head v. Las Vegas Sands, LLC*, 298 F. Supp. 3d 963, 973 (S.D. Tex. 2018) ("[A] plaintiff must submit evidence supporting personal jurisdiction over each defendant, and cannot simply lump them all together") (*citing Calder*, 465 U.S. at 790).

Therefore, the Court concludes that Plaintiffs have failed to sufficiently allege that the Stonington Defendants committed any of the intentional acts, such as hacking Plaintiffs' computer systems or accounts or

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clear that Muzin was aware that various members of the press were investigating and planning to publish stories regarding Plaintiffs, these types of allegations in no way implicate the Stonington Defendants in the hack of Plaintiffs' computer systems and accounts or the dissemination of Plaintiffs' private and confidential information. *See, e.g., Axiom Foods*, 874 F.3d at 1070 (holding that a "theory of individualized targeting . . . will not, on its own, support the exercise of specific jurisdiction").

disseminating Plaintiffs' confidential and private information – that are at issue in this action.[5]

(2) Whether the Express Aiming Requirement is Satisfied.

When considering the express aiming requirement, the Supreme Court has held that courts must focus on a defendant's "own contacts" with the forum and not on the plaintiff's connections to the forum. *See Axiom*, 874 F.3d at 1070. The "express aiming" analysis "depends, to a significant degree, on the specific type of tort or other wrongful conduct at issue." *Picot v. Weston*, 780 F.3d 1206, 1214 (9th Cir. 2015) (*quoting Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 807 (9th Cir. 2004)). To be satisfied, the "express aiming" inquiry requires "something more" than "a foreign act with foreseeable effects in the forum state." *Washington Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 675 (9th Cir. 2012) (*citing Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000)). For instance, the delivery or consumption of products in the forum state that are "random," "fortuitous," or "attenuated" does not satisfy the express aiming analysis. *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1230 (9th Cir. 2011) (*quoting Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 486 (1985)).

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[5] In their Opposition to the Stonington Defendants' Motion to Stay, Plaintiffs concede that "it currently is unclear" whether Muzin "participated in the dissemination of the stolen materials." Motion to Stay, 19:15-18.

In *Axiom Foods*, the Ninth Circuit discussed how the express aiming requirement should be applied when all the alleged tortious conduct occurs online. *Axiom Foods* involved the distribution of an email newsletter that violated several trademarks to 343 email recipients, 55 of whom had companies in California and 10 of whom were physically located in California. The Ninth Circuit first rejected as too attenuated the fact that 55 recipients had companies in California, particularly where there was no information about the residence of those recipients or the legal or operational relationships between those recipients and their companies *Axiom Foods*, 874 F.3d at 1070. Focusing on the 10 recipients who were physically located in California, the Ninth Circuit held that "[i]t can hardly be said that California was the focal point both of the newsletter and of the harm suffered." *Id.* at 1070-71 (internal quotation marks and alterations omitted). The Ninth Circuit stressed that sending one newsletter to a maximum of 10 recipients located in California, in a market where the defendant had no sales or clients, "barely connected [the defendant] to California residents, much less to California itself." *Id.* at 1071. Thus, although *Axiom Foods* does not explicitly decide how the express aiming requirement should be addressed when all of the alleged activity occurs online, *Axiom Foods* does suggest that minimal online activity, when unaccompanied by any connections to the forum state in the physical world, are not enough to confer personal jurisdiction.

At least one court in this circuit has explicitly concluded the express aiming analysis is the same whether the intentional tort was committed via the

internet or in "the non-virtual world." *Erickson v. Nebraska Machinery Co.*, 2015 WL 4089849, at *4 (N.D. Cal. July 6, 2015). In *Erickson,* the district court concluded that a defendant who posted a California plaintiff's copyrighted images on its website did not expressly aim its conduct at California. *Id.* The district court reasoned that "[t]he mere act of copying Erickson's photographs and posting them on NMC's website did not involve entering California, contacting anyone in California, or otherwise reaching out to California." *Id*. Similarly, in *Caracal Enterprises LLC v. Suranyi*, 2017 WL 446313, at *2-3 (N.D. Cal. Feb. 2, 2017), another court in this circuit found that the *Calder* test was not satisfied where "the only claimed contact between [the defendant] and California is the fact that [the defendant] allegedly misappropriated" a software program licensed by a California company. *See also NexGen HBM v. Listreports, Inc.*, 2017 WL 4040808, at *1-5, 10-14 (D. Minn. Sept. 12, 2017) (finding that the express aiming component of the *Calder* test was not satisfied in case where defendants allegedly misappropriated trade secrets and committed other intentional torts by accessing a Minnesota-based company's website where there was no evidence that the defendants knew the company was based in Minnesota or intended the effects to be felt there).

In this case, the Court concludes that although Plaintiffs allege in the First Amended Complaint that their email server is located in Los Angeles and Google LLC's server(s) are located in California, "[i]t can hardly be said that California was the focal point" of the hacking. *Axiom Foods*, 784 F.3d at 1070-71. Instead, the location of the servers appears to be

"random," "fortuitous," or "attenuated" to Defendants' purported actions and intent to hack Plaintiffs' computer systems and accounts to obtain confidential and private information to disseminate to the media. *See Mavrix Photo*, 647 F.3d at 1230; *see also Morrill v. Scott Financial Corporation*, 873 F.3d 1136, 1145 (9th Cir. 2017) (stating that the foreseeability of some incidental harm in the forum state does not show express targeting and "obscures the reality that none of [the] challenged conduct has anything to do with [the forum state] itself" (alterations in original)).

Although Plaintiffs argue that the Stonington Defendants' "targeting and fingering" Plaintiffs is sufficient to satisfy the express aiming requirement, the Court disagrees. *See Walden*, 571 U.S. at 286 (explaining that "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction."). As discussed above, Plaintiffs cannot establish personal jurisdiction by alleging that "Defendants" or "Agent Defendants" took actions in or aimed at California because those sorts of "shotgun" pleadings do not satisfy Plaintiffs' burden to demonstrate personal jurisdiction with respect to each defendant. *Head*, 298 F. Supp. 3d at 973; *see also Calder*, 465 U.S. at 790 ("Each defendant's contacts with the forum State must be assessed individually"); *Select Comfort Corp. v. Kittaneh*, 161 F.Supp. 3d 724, 731 (D. Minn. 2014) (holding that each defendant's forum contacts must be considered independently). Moreover, Plaintiffs do not allege that the Stonington Defendants hacked Plaintiffs' computer systems and accounts and have conceded that it is "unclear" if the Stonington Defendants participated in the

dissemination of information. In fact, the only "targeting and fingering" Plaintiffs affirmatively allege by the Stonington Defendants involved discussions about Broidy as an opponent in the public relation battle between Qatar and the UAE and the Stonington Defendants' lobbying efforts against Broidy's attempts to undermine Qatar, and the great majority of these activities are alleged to have taken place in either Washington, D.C. or New York City.

Furthermore, the fact that Broidy Capital, a California corporation, and Broidy, a California resident, allegedly suffered harm as a result of the Stonington Defendants' actions is not sufficient to satisfy this element of the *Calder* test. As the Supreme Court recently re-iterated, the mere injury to a forum resident is not a sufficient connection to the forum to provide personal jurisdiction over a defendant under *Calder*. *See Walden*, 571 U.S. at 289–90; *see also Axiom*, 874 F.3d at 1069–70 (recognizing that in *Walden*, the Supreme Court rejected the Ninth Circuit's conclusion that a defendant's knowledge of a plaintiffs' strong forum connections plus the foreseeable harm that a plaintiff suffers is sufficient to establish specific jurisdiction). In this case, Plaintiffs have failed to allege that the Stonington Defendants regularly traveled to California, conducted any activities within California, or had any other meaningful contacts within California. Accordingly, the effects of the Stonington Defendants' allege conduct in "targeting and fingering" Plaintiffs is "not connected to [California] in a way that makes those effects a proper basis for jurisdiction." *Id.*

(3) Whether the Stonington Defendants Caused Foreseeable Harm in the Forum.

The final prong of the *Calder* test considers whether a defendant's actions "caused harm that it knew was likely to be suffered in the forum." *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (internal citation omitted). "The touchstone of this requirement is not the magnitude of the harm, but rather its foreseeability." *Id.* at 1207. There is foreseeable harm when a jurisdictionally sufficient amount of harm is suffered in the forum state. *Id.* However, "[t]he foreseeability of injury in a forum" alone is not enough to confer personal jurisdiction in that forum. *Axiom Foods*, 874 F.3d at 1070.

The Court concludes that Plaintiffs have failed to establish the final prong of *Calder*. The Stonington Defendants' allegedly wrongful conduct consisted of "targeting and fingering" Plaintiffs, which includes discussing Plaintiffs at meetings the Stonington Defendants had with various Qatari officials and others in Washington, D.C. and New York City. Similarly, Plaintiffs have failed to allege that any conversations the Stonington Defendants may have had with members of the press regarding Plaintiffs took place in California. In addition, even if Plaintiffs could allege that the Stonington Defendants were involved in the hacking, "the fortuitous presence of a server" or contacts with California-based technology companies that are not parties to the litigation are not enough to

confer personal jurisdiction. *Rosen v. Terapeak, Inc.*, 2015 WL 12724071, at *9 (C.D. Cal. Apr. 28, 2015) (availability of app in California-based Apple's App Store, use of California-based eBay servers, and license from eBay were insufficient to confer personal jurisdiction in California); *Browne v. McCain*, 612 F. Supp. 2d 1118, 1124 (C.D. Cal. 2009) (relationship with California-based YouTube and presence of YouTube servers in California insufficient to confer personal jurisdiction in California); *Chang v. Virgin Mobile USA, LLC*, 2009 WL 111570, at *3 (N.D. Tex. Jan. 16, 2009) (plaintiffs "cannot rely on the fortuitous location of Flickr's servers to establish personal jurisdiction" over a defendant). Thus, the Court concludes that it was not foreseeable that the Stonington Defendants' conduct in other forums was likely to cause harm in California. Accordingly, this prong of the *Calder* test has not been satisfied.

Because the Court concludes that Plaintiffs have failed to satisfy the first, second and third prongs of the *Calder* purposeful direction test, Plaintiffs have failed to meet the first part of the Ninth Circuit's three-part test for specific jurisdiction.

b. Claim Arises Out of or Relates to Forum-Related Activities

To satisfy the second part of the specific jurisdiction test, a plaintiff's claims must "arise[ ] out of or relate[] to the defendant's forum-related activities." *Schwarzenegger*, 374 F.3d at 802. The Ninth Circuit applies a "but for" test to determine forum-related conduct. *Fiore*, 688 F.3d at 582. Therefore, a plaintiff must demonstrate that it would not have suffered its

alleged injuries in the forum state but for the defendant's actions. *Id.* Because the Stonington Defendants lack any meaningful contact with California and the Stonington Defendans' alleged "targeting and fingering" of Plaintiffs took place in Washington D.C. and New York City, the Court concludes that Plaintiffs have failed to satisfy the second part of the specific jurisdiction test.

c. Reasonableness of Exercising Jurisdiction

Even if Plaintiffs had been able to establish a prima facie case for jurisdiction over the Stonington Defendants, the burden would then shift to the Stonington Defendants to present a compelling case as to why exercising jurisdiction would not be reasonable. *Schwarzenegger*, 374 F.3d at 802. In determining whether jurisdiction is reasonable, courts consider seven factors: (1) the extent of a defendant's purposeful interjection into the forum; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the dispute; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *See CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1079 (9th Cir. 2011) (internal citation omitted). "No one factor is dispositive; a court must balance all seven." *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir.1998).

In this case, the Court finds that it would be unreasonable to exercise jurisdiction over the Stonington Defendants. The Court concludes that the Stonington Defendants could not have reasonably anticipated that they would be required to defend this action in California. Indeed, the Stonington Defendants lack any contacts with California. In addition, it would be extremely burdensome to require the Stonington Defendants to defend this action in California given that all of their personnel, including those with knowledge of the facts relevant to this action, and their potential witnesses are located on the East Coast and would have to travel to California.

Regardless of whether this case is adjudicated in California or another state, there is minimal concern about conflicts with states' sovereignty because many of Plaintiffs' claims are based on federal law and this Court is confident any federal court that is tasked with adjudicating those claims will be able to fairly and correctly apply California law to Plaintiffs' state law claims. In addition, there is no indication that this matter could be more efficiently resolved in California. Although Plaintiff may have an interest in litigating this action in California because it is more convenient, the Ninth Circuit has held that "the plaintiff's convenience is not of paramount importance" to the reasonableness inquiry *Dole Food, Inc. v. Watts*, 303 F.3d 1104, 1116 (9th Cir. 2002).

After balancing all of the reasonableness factors, the Court finds that those factors weigh heavily in favor of the Stonington Defendants. Therefore, the Court concludes that it would be unreasonable to

exercise personal jurisdiction over the Stonington Defendants.

Accordingly, the Court concludes that it does not have personal jurisdiction over the Stonington Defendants.[6]

B. Jurisdictional Discovery

The decision whether to grant jurisdictional discovery is typically within the discretion of the district court. *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977). "[W]here pertinent facts bearing on the question of jurisdiction are in dispute, discovery should be allowed." *Am. West Airlines, Inc. v. GPA Grp., Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989). However, "where 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." *Caddy*, 453 F.3d at 1160

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[6] Plaintiffs cannot establish personal jurisdiction based on their conspiracy claim. "California law does not recognize conspiracy as a basis for acquiring jurisdiction over a foreign defendant." *EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp.*, 711 F. Supp. 2d 1074, 1089 (C.D. Cal. 2010) (citations omitted). Therefore, "actions taken by co-conspirators in furtherance of the conspiracy cannot be attributed to a conspirator for purposes of establishing personal jurisdiction." *Id.*; *see* 12 Cal. Jur. 3d Civil Conspiracy § 3 ("Conspiracy is not a basis for acquiring personal jurisdiction over a party."); *see also Stauffacher v. Bennett*, 969 F.2d 455, 460 (7th Cir.1992) ("The cases are unanimous that a bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough"), *superseded on other grounds by* Fed. R. Civ. P. 4(k)(2).

(quoting *Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 562 (9th Cir. 1995)). Although Plaintiffs have conducted substantial discovery and filed a First Amended Complaint, they continue to rely on group pleading and conclusory allegations, which are insufficient to establish personal jurisdiction. Although Plaintiffs request leave to amend and the opportunity to conduct jurisdictional discovery, they have offered nothing but mere speculation how that discovery would assist in pleading facts that would allow the Court to exercise personal jurisdiction over the Stonington Defendants. Accordingly, the Court declines to grant jurisdictional discovery or leave to amend.

IV. Conclusion

For all the foregoing reasons, the Stonington Defendants' Motion to Dismiss for lack of personal jurisdiction is **GRANTED**, and the Stonington Defendants are **DISMISSED** from this action without leave to amend.[7] Plaintiffs' request to amend their First Amended Complaint and take jurisdictional discovery is **DENIED**. In light of the Court's dismissal of the Stonington Defendants from this action, the Stonington Defendants' Motion to Stay is **DENIED as moot**.

IT IS SO ORDERED.

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[7] Because the Court concludes that it does not have personal jurisdiction over the Stonington Defendants, it need not address the Stonington Defendants' arguments with respect to derivative sovereign immunity, diplomatic agent immunity, or Plaintiffs' failure to state a claim.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. CV 18-2421-JFW(Ex)

[Filed August 22, 2018]

Date: August 22, 2018

Title: Broidy Capital Management, LLC, et al. *-v-* State of Qatar, et al.

PRESENT:

HONORABLE JOHN F. WALTER,
UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:
None

ATTORNEYS PRESENT FOR DEFENDANTS:
None

PROCEEDINGS (IN CHAMBERS):

ORDER GRANTING GLOBAL RISK ADVISORS LLC'S AND KEVIN CHALKER'S MOTION TO DISMISS PURSUANT TO RULES 12(b)(1), (b)(2), AND 12(b)(6) OF THE

FEDERAL RULES OF CIVIL PROCEDURE [filed 7/23/18; Docket No. 172]

On July 23, 2018, Defendants Global Risk Advisors LLC ("Global Risk") and Kevin Chalker ("Chalker") (collectively, the "Global Defendants") filed a Motion to Dismiss Pursuant to Rules 12(b)(1), (b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure ("Motion"). On August 6, 2018, Plaintiffs Broidy Capital Management LLC ("Broidy Capital") and Elliott Broidy ("Broidy") (collectively, "Plaintiffs") filed their Opposition. On August 13, 2018, the Global Defendants filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for August 27, 2018 is hereby vacated and the matter taken off calendar. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background

Broidy is a California businessman who owns and operates California-based Broidy Capital and is a prominent critic of the State of Qatar's ("Qatar") policies. In late 2017, hackers began using sophisticated techniques to infiltrate the computer systems and accounts belonging to Plaintiffs and certain of their associates and family members. First Amended Complaint ("FAC"), ¶ 97-116. As a result, the hackers stole Plaintiffs' personal and professional files, correspondence, trade secrets, business plans, and other confidential and private documents. The confidential information was packaged into documents

that were disseminated to journalists affiliated with various media organizations in the United States. The journalists then wrote stories that largely exploited the private and confidential information contained in the stolen documents. Forensic investigators retained by Plaintiffs, Ankura Consulting Group, LLC ("Ankura"), initially determined that the unauthorized access originated from Internet Protocol ("IP") addresses in the United Kingdom and the Netherlands. However, a more thorough review of server data revealed that on February 14 and 19, 2018, the attackers accessed Broidy Capital's server from an IP address in Doha, Qatar. Broidy claims that he became aware of Qatar's involvement in these unlawful actions through Joel Mowbray ("Mowbray"), a longstanding acquaintance of both Nicolas D. Muzin ("Muzin"), who owns and operates Stonington Strategy LLC ("Stonington"), and Broidy. FAC, ¶¶ 10-13 and 133-37. In a conversation with Mowbray – the contents of which Mowbray later relayed to Broidy – Muzin told Mowbray that Qatar was "after" Mowbray and Broidy. Based on Mowbray's conversations with Muzin (and the discovery of the IP address in Doha, Qatar), Broidy concluded that Qatar was responsible for the attack on his and Broidy Capital's computer systems and accounts and filed this action on March 26, 2018.

Plaintiffs' original Complaint alleged seven tort causes of action against Defendants Qatar, Muzin, and Stonington and alleged that Plaintiffs' computer systems were accessed without authorization from an IP address in Qatar and that their contents were subsequently disseminated to media outlets. On April 2, 2018, Plaintiffs filed an Ex Parte Application for

Temporary Restraining Order ("Application") and a request for expedited discovery. On April 4, 2018, the Court entered an Order denying Plaintiffs' Application and request for expedited discovery.

On May 24, 2018, Plaintiffs filed a First Amended Complaint, alleging causes of action for: (1) violation of the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030(a)(2)(C) and (a)(5); (2) violation of the California Comprehensive Computer Data Access and Fraud Act, California Penal Code § 502; (3) receipt and possession of stolen property in violation of California Penal Code § 496; (4) invasion of privacy by intrusion upon seclusion; (5) conversion; (6) violation of Stored Communications Act, 18 U.S.C. § 27012; (7) violation of Digital Millennium Copyright Act, 17 U.S.C. § 1201 *et seq.*; (8) violation of the California Uniform Trade Secrets Act, California Civil Code § 3426 *et seq.*; (9) misappropriation of trade secrets in violation of the Trade Secrets Act, 18 U.S.C. § 1836 *et seq.*; and (10) civil conspiracy. The First Amended Complaint added a number of factual allegations, many on information and belief, concerning the method by which the hack purportedly occurred, including that the hackers used virtual private networks to disguise their identities. FAC, ¶¶ 97-116. Plaintiffs also alleged that the "hack" began with "phishing" emails, disguised as Gmail security alerts, sent to Broidy's wife and his executive assistant on January 14, 2018. *Id.*, ¶¶ 97-100, 109-111. Plaintiffs alleged that Broidy's wife and his executive assistant provided their usernames and passwords in response to these disguised Gmail security alerts, which an unidentified third party then used to access the email accounts and

remotely control those accounts via a Russian mail service called "mail.ru." *Id.* Plaintiffs contend that the third party logged into Plaintiffs' email accounts on "thousands" of occasions, using different IP addresses. *Id.*, ¶ 113. Although Plaintiffs also named additional defendants, including Sheikh Mohammed Bin Hamad Bin Khalifa Al Thani ("Al Thani"), Ahmed Al-Rumaihi ("Al-Rumaihi"), Chalker, David Mark Powell ("Powell"), and Global Risk, in their First Amended Complaint Plaintiffs did not plead any specific facts suggesting that these defendants were engaged in any unlawful hacking activity. Plaintiffs allege that Qatar is responsible for the hack based on the two logins determined to have originated from an IP address registered to a computer located somewhere in Doha, Qatar. *Id.*, ¶ 115.

With respect to the Global Defendants, the First Amended Complaint contains only seven allegations, and six of those allegations are made on information and belief. Plaintiffs allege that Global Risk is headquartered in New York City and its subsidiary, Global Risk Advisors (EMEA) Limited ("Global Risk EMEA") is based in Doha, Qatar. *Id.*, ¶¶ 5 and 25. Plaintiffs also allege that Global Risk EMEA obtained a license to operate in Qatar months before the alleged conspiracy began and that Global Risk EMEA had been retained to conduct or coordinate offensive cyber operations on behalf of Qatar. *Id.*, ¶ 95. In addition, on information and belief, Plaintiffs allege that the Global Risk Defendants "personally supervised" aspects of an "information operation against Plaintiffs" and that unspecified "Qatari Defendants" retained the Global Risk Defendants "to coordinate and implement the

hack." *Id.*, ¶ 6. However, Plaintiffs do not allege the any details of the Global Risk Defendants' purported supervision. Plaintiffs also do not allege when or where the Global Defendants' alleged coordination and implementation of the hack occurred or what the alleged coordination and implementation entailed. Moreover, Plaintiffs allege on information and belief that the Global Risk Defendants introduced Qatar to unspecified "cyber mercenaries" in "various [but unspecified] countries." *Id.,* at ¶¶ 6-7. Although Plaintiffs do not allege what role, if any, the Global Risk Defendants played in the dissemination of Plaintiffs' materials obtained through the alleged hack, Plaintiffs allege that Qatar, acting through "Agent Defendants," was responsible for disseminating the emails and documents allegedly stolen from Plaintiffs.[1] Id., ¶ 126. Plaintiffs also do not allege that any of Plaintiffs' emails were ever possessed, let alone disseminated, by the Global Risk Defendants.

II. Legal Standard

A. Rule 12(b)(1)

The party mounting a Rule 12(b)(1) challenge to the Court's jurisdiction may do so either on the face of the pleadings or by presenting extrinsic evidence for the Court's consideration. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) ("Rule 12(b)(1) jurisdictional

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[1] In the First Amended Complaint, Plaintiffs generally allege that they were "targeted" by the "Defendants" and the "Agent Defendants." *Id.* at 91. "Agent Defendants" is defined as including Stonington, Muzin, the Global Risk Defendants, Powell, Al-Rumaihi and ten additional "John Doe" defendants.

attacks can be either facial or factual"). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In ruling on a Rule 12(b)(1) motion attacking the complaint on its face, the Court accepts the allegations of the complaint as true. *See, e.g., Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air*, 373 F.3d at 1039. "With a factual Rule 12(b)(1) attack . . . a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment. It also need not presume the truthfulness of the plaintiff['s] allegations." *White*, 227 F.3d at 1242 (internal citation omitted); *see also Thornhill Pub. Co., Inc. v. General Tel & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) ("Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary. . . '[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.'") (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (9th Cir. 1977)). "However, where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should

await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine v. U.S.*, 704 F.2d 1074, 1077 (9th Cir. 1983). It is the plaintiff who bears the burden of demonstrating that the Court has subject matter jurisdiction to hear the action. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

B. Rule 12(b)(2)

Under Rule 12(b)(2) of the Federal Rules of Civil Procedure, the Court may decide a question of personal jurisdiction on the basis of affidavits and documentary evidence submitted by the parties, or may hold an evidentiary hearing on the matter. *See* 5A Wright & Miller, Federal Practice and Procedure, § 1351, at pp. 253-59 and n. 31-35 (2d ed. 1990); *Rose v. Granite City Police Dept.*, 813 F. Supp. 319, 321 (E.D. Pa. 1993). Whichever procedure is used, plaintiff bears the burden of establishing that jurisdiction is proper. *See Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995); *Flynt Distributing Co. v. Harvey*, 734 F.2d 1389, 1392 (9th Cir. 1984). In this case, the pleadings, declarations and documentary evidence submitted by the parties provide an adequate basis for evaluating jurisdiction. Accordingly, no evidentiary hearing is necessary.

Because this matter is being decided on the basis of affidavits and documentary evidence, Plaintiffs need only make a prima facie showing of personal jurisdiction. *See Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986). All allegations in Plaintiffs' complaint must be taken as true, to the extent not controverted by Defendant's affidavits, and

all conflicts in the evidence must be resolved in their favor. *AT&T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996) (citing *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989)). If Plaintiffs' evidence constitutes a prima facie showing, this is adequate to support a finding of jurisdiction, "notwithstanding [a] contrary presentation by the moving party." *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995).

C. Rule 12(b)(6)

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. "A Rule 12(b)(6) dismissal is proper only where there is either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Summit Technology, Inc. v. High-Line Medical Instruments Co., Inc.*, 922 F. Supp. 299, 304 (C.D. Cal. 1996) (quoting *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988)). However, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and alterations omitted). "[F]actual allegations must be enough to raise a right to relief above the speculative level." *Id.*

In deciding a motion to dismiss, a court must accept as true the allegations of the complaint and must

construe those allegations in the light most favorable to the nonmoving party. *See, e.g., Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Summit Technology*, 922 F. Supp. at 304 (citing *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) *cert. denied*, 454 U.S. 1031 (1981)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990) (citations omitted). However, a court may consider material which is properly submitted as part of the complaint and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201 without converting the motion to dismiss into a motion for summary judgment. *See, e.g., id.*; *Branch v. Tunnel*, 14 F.3d 449, 454 (9th Cir. 1994).

Where a motion to dismiss is granted, a district court must decide whether to grant leave to amend. Generally, the Ninth Circuit has a liberal policy favoring amendments and, thus, leave to amend should be freely granted. *See, e.g., DeSoto v. Yellow Freight System, Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a Court does not need to grant leave to amend in cases where the Court determines that permitting a plaintiff to amend would be an exercise in futility. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of

leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

III. Discussion

A. Plaintiffs Have Not Demonstrated that the Global Risk Defendants Are Subject to Personal Jurisdiction in California.

Whether a federal court can exercise personal jurisdiction over a non-resident defendant turns on two independent considerations: whether an applicable state rule or statute permits service of process on the defendant, and whether the assertion of personal jurisdiction comports with constitutional due process principles. *See Pac. Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir. 1985). California's long-arm statute extends jurisdiction to the limits of constitutional due process. *See Gordy v. Daily News, L.P.*, 95 F.3d 829, 831 (9th Cir. 1996); Cal. Code. Civ. Proc. § 410.10 ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States"). Consequently, when service of process has been effected under California law, the two prongs of the jurisdictional analysis collapse into one—whether the exercise of jurisdiction over the defendant comports with due process. *See Fireman's Fund Ins. Co. v. Nat'l Bank of Cooperative*, 103 F.3d 888, 893 (9th Cir. 1996); *Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir. 1974).

The Fourteenth Amendment's Due Process Clause permits courts to exercise personal jurisdiction over a

defendant who has sufficient "minimum contacts" with the forum state such that "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). There are two recognized bases for personal jurisdiction over nonresident defendants: (1) "general jurisdiction," which arises where the defendant's activities in the forum state are sufficiently "substantial" or "continuous and systematic" to justify the exercise of jurisdiction over him in all matters; and (2) "specific jurisdiction," which arises when a defendant's specific contacts with the forum have given rise to the claim in question. *See Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408, 414–16 (1984); *Doe v. Am. Nat'l Red Cross*, 112 F.3d 1048, 1050–51 (9th Cir. 1997).

1. General Jurisdiction

General jurisdiction allows a court to hear any and all claims against a defendant regardless of whether the claims relate to the defendant's contacts with the forum state. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) ("[A] finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities in the world."). For general jurisdiction to exist, a defendant's affiliations with the forum state must be "so 'continuous and systematic' as to render [it] essentially at home in the forum[.]" *Daimler AG v. Bauman*, 571 U.S. 117, 138–39 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). In the case of a corporation, "[t]he paradigmatic locations where general jurisdiction

is appropriate . . . are its place of incorporation and its principal place of business." *Ranza v. Nike*, *Inc.*, 793 F.3d 1059, 1069 (9th Cir. 2015) (internal citation omitted). "Only in an 'exceptional case' will general jurisdiction be available anywhere else." *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014).

Plaintiffs do not contend that the Global Risk Defendants are subject to general jurisdiction in California. Indeed, in the First Amended Complaint, Plaintiffs allege that Global Risk is "a limited liability company formed under the law of Delaware, with its primary place of business in New York, New York," and that Chalker "is a citizen of the United States and is domiciled in the state of New York." FAC, ¶¶ 22-23. Therefore, the Global Risk Defendants are not residents of California. Moreover, the First Amended Complaint is devoid of any allegations that suggest that the Global Risk Defendants' contacts with California "are so continuous and systematic as to render [it] essentially at home" in the state. *Daimler*, 571 U.S. at 138–39 (internal quotation marks and citation omitted). In addition, there is nothing about this case that would suggest it is an exceptional case that would justify finding general jurisdiction outside of Global Risk's place of incorporation and principal place of business or Chalker's state of residency. *See Lindora, LLC v. Isagenix Int'l, LLC*, 198 F. Supp. 3d 1127, 1137–38 (S.D. Cal. 2016). Accordingly, the Court concludes that the Global Risk Defendants are not subject to general jurisdiction in California.

2. Specific Jurisdiction

For a court to exercise specific jurisdiction, the plaintiff's suit must arise out of or relate to the defendant's contacts with the forum. *Bristol-Meyers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1778 (2017). The Ninth Circuit applies a three-part test to determine whether a court has specific jurisdiction over a defendant:

> (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 plaintiff's claim must be one which arises out of or relates to the defendant's forum-related activities; and
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> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.

Axiom Foods, Inc. v. Acerchem Int'l, Inc., 874 F.3d 1064, 1068 (9th Cir. 2017). A plaintiff bears the burden of establishing the first two prongs. *Schwarzenegger*, 374 F.3d at 802. If the plaintiff fails to satisfy either of the first two prongs, then personal jurisdiction over the defendant does not lie in the forum state. If the plaintiff succeeds on the first two prongs, then the defendant must present a compelling case as to why exercising jurisdiction would be unreasonable. *Id.*

a. Purposeful Direction

The first prong of the specific jurisdiction test, although commonly referred to as the purposeful availment requirement, actually consists of two distinct concepts. *Id*. A plaintiff may satisfy this element by demonstrating that the defendant "has either (1) 'purposefully availed' [it]self of the privilege of conducting activities in the forum [state], or (2) 'purposefully directed' [its] activities toward the forum." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006). The purposeful availment concept generally applies in contract cases, whereas the purposeful direction concept applies in tort cases. *Axiom*, 874 F.3d at 1069; *see also Fiore v. Walden*, 688 F.3d 558, 576 (9th Cir. 2012), *rev'd on other grounds* by *Walden v. Fiore*, 571 U.S. 277 (2014). Because Plaintiff alleges that the Global Risk Defendants engaged in tortious conduct, the Court will apply the purposeful direction test. *See Axiom*, 874 F. 3d at 1069.

To determine whether a defendant purposefully directed its tortious activity toward the forum state, a court must apply the "effects test" from *Calder v. Jones*, 465 U.S. 783 (1984). *Id.* This test examines whether: (1) the defendant committed an intentional act; (2) the act was expressly aimed at the forum state; and (3) the act caused harm the defendant knew would likely be suffered in the forum state. *Id.*

(1) Whether the Global Risk Defendants Committed an Intentional Act.

In the context of the *Calder* test, an intentional act is "an external manifestation of the actor's intent to perform an actual, physical act in the real world, not including any of its actual or intended results." *Washington Shoe Co. v. A-Z Sporting Goods, Inc.*, 704 F.3d 668, 675 (9th Cir. 2012). Plaintiffs allege on information and belief that the Global Risk Defendants "personally supervised" aspects of the "information operation against Plaintiffs." However, Plaintiffs fail to allege any facts to support these conclusory allegations. *Bengley v. County of Kauai*, 2018 WL 363 8083 (D. Haw. July 31, 2018) ("The district court has stated, although allegations upon information and belief may state a claim after *Iqbal* and *Twombly*, a claim must still be based on factual content that makes liability plausable, and not be formulaic recitations of the elements of a cause of action") (internal quotations omitted). In addition, although Plaintiffs allege that generic "Defendants" or "Agent Defendants" conducted or otherwise took part in disseminating Plaintiffs' stolen information to the media, Plaintiffs do not dispute – because they could not – that the conclusory allegations against "Defendants" or "Agent Defendants" are insufficient to establish personal jurisdiction of the Global Risk Defendants. *See, e.g., Head v. Las Vegas Sands, LLC*, 298 F. Supp. 3d 963, 973 (S.D. Tex.2018) ("[A] plaintiff must submit evidence supporting personal jurisdiction over each defendant, and cannot simply lump them all together") (*citing Calder*, 465 U.S. at 790).

Therefore, the Court concludes that Plaintiffs have failed to sufficiently allege that the Global Risk Defendants committed any of the intentional acts, such as hacking Plaintiffs' computer systems or accounts or disseminating Plaintiffs' confidential and private information – that are at issue in this action.

(2) Whether the Express Aiming Requirement is Satisfied.

When considering the express aiming requirement, the Supreme Court has held that courts must focus on a defendant's "own contacts" with the forum and not on the plaintiff's connections to the forum. *See Axiom*, 874 F.3d at 1070. The "express aiming" analysis "depends, to a significant degree, on the specific type of tort or other wrongful conduct at issue." *Picot v. Weston*, 780 F.3d 1206, 1214 (9th Cir. 2015) (*quoting Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 807 (9th Cir. 2004)). To be satisfied, the "express aiming" inquiry requires "something more" than "a foreign act with foreseeable effects in the forum state." *Washington Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 675 (9th Cir. 2012) (*citing Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000)). For instance, the delivery or consumption of products in the forum state that are "random," "fortuitous," or "attenuated" does not satisfy the express aiming analysis. *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1230 (9th Cir. 2011) (*quoting Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 486 (1985)).

In *Axiom Foods*, the Ninth Circuit discussed how the express aiming requirement should be applied

when all the alleged tortious conduct occurs online. *Axiom Foods* involved the distribution of an email newsletter that violated several trademarks to 343 email recipients, 55 of whom had companies in California and 10 of whom were physically located in California. The Ninth Circuit first rejected as too attenuated the fact that 55 recipients had companies in California, particularly where there was no information about the residence of those recipients or the legal or operational relationships between those recipients and their companies. *Axiom Foods*, 874 F.3d at 1070. Focusing on the 10 recipients who were physically located in California, the Ninth Circuit held that "[i]t can hardly be said that California was the focal point both of the newsletter and of the harm suffered." *Id.* at 1070-71 (internal quotation marks and alterations omitted). The Ninth Circuit stressed that sending one newsletter to a maximum of 10 recipients located in California, in a market where the defendant had no sales or clients, "barely connected [the defendant] to California residents, much less to California itself." *Id.* at 1071. Thus, although *Axiom Foods* does not explicitly decide how the express aiming requirement should be addressed when all of the alleged activity occurs online, *Axiom Foods* does suggest that minimal online activity, when unaccompanied by any connections to the forum state in the physical world, are not enough to confer personal jurisdiction.

At least one court in this circuit has explicitly concluded the express aiming analysis is the same whether the intentional tort was committed via the internet or in "the non-virtual world." *Erickson v. Nebraska Machinery Co.*, 2015 WL 4089849, at *4

(N.D. Cal. July 6, 2015). In *Erickson,* the district court concluded that a defendant who posted a California plaintiff's copyrighted images on its website did not expressly aim its conduct at California. *Id.* The district court reasoned that "[t]he mere act of copying Erickson's photographs and posting them on NMC's website did not involve entering California, contacting anyone in California, or otherwise reaching out to California." *Id*. Similarly, in *Caracal Enterprises LLC v. Suranyi*, 2017 WL 446313, at *2-3 (N.D. Cal. Feb. 2, 2017), another court in this circuit found that the *Calder* test was not satisfied where "the only claimed contact between [the defendant] and California is the fact that [the defendant] allegedly misappropriated" a software program licensed by a California company. *See also NexGen HBM v. Listreports, Inc.*, 2017 WL 4040808, at *1-5, 10-14 (D. Minn. Sept. 12, 2017) (finding that the express aiming component of the *Calder* test was not satisfied in case where defendants allegedly misappropriated trade secrets and committed other intentional torts by accessing a Minnesota-based company's website where there was no evidence that the defendants knew the company was based in Minnesota or intended the effects to be felt there).

In this case, the Court concludes that although Plaintiffs allege in the First Amended Complaint that their email server is located in Los Angeles and Google LLC's server(s) are located in California, "[i]t can hardly be said that California was the focal point" of the hacking. *Axiom Foods*, 784 F.3d at 1070-71. Instead, the location of the servers appears to be "random," "fortuitous," or "attenuated" to Defendants' purported actions and intent to hack Plaintiffs'

computer systems and accounts to obtain confidential and private information to disseminate to the media. *See Mavrix Photo*, 647 F.3d at 1230; *see also Morrill v. Scott Financial Corporation*, 873 F.3d 1136, 1145 (9th Cir. 2017) (stating that the foreseeability of some incidental harm in the forum state does not show express targeting and "obscures the reality that none of [the] challenged conduct has anything to do with [the forum state] itself" (alterations in original)).

Although Plaintiffs argue that the Global Risk Defendants' "personal supervision" of the "information operation against Plaintiffs" is sufficient to satisfy the express aiming requirement, the Court disagrees. *See Walden*, 571 U.S. at 286 (explaining that "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction."). The few scant allegations referring to the Global Risk Defendants are based on information and belief and Plaintiffs fail to allege any factual basis for any of these allegations. *Iqbal*, 556 U.S. at 686 ("[The Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context"). In addition, as discussed above, Plaintiffs cannot establish personal jurisdiction by alleging that "Defendants" or "Agent Defendants" took actions in or aimed at California because those sorts of "shotgun" pleadings do not satisfy Plaintiffs' burden to demonstrate personal jurisdiction with respect to each defendant. *Head*, 298 F. Supp. 3d at 973; *see also Calder*, 465 U.S. at 790 ("Each defendant's contacts with the forum State must be assessed individually"); *Select Comfort Corp. v. Kittaneh*, 161 F.Supp. 3d 724,

731 (D. Minn. 2014) (holding that each defendant's forum contacts must be considered independently).

Furthermore, the fact that Broidy Capital, a California corporation, and Broidy, a California resident, allegedly suffered harm as a result of the Global Risk Defendants' actions is not sufficient to satisfy this element of the *Calder* test. As the Supreme Court recently re-iterated, the mere injury to a forum resident is not a sufficient connection to the forum to provide personal jurisdiction over a defendant under *Calder*. *See Walden*, 571 U.S. at 289–90; *see also Axiom*, 874 F.3d at 1069–70 (recognizing that in *Walden*, the Supreme Court rejected the Ninth Circuit's conclusion that a defendant's knowledge of a plaintiffs' strong forum connections plus the foreseeable harm that a plaintiff suffers is sufficient to establish specific jurisdiction). In this case, Plaintiffs have failed to allege that the Global Risk Defendants regularly traveled to California, conducted any activities within California, or had any other meaningful contacts within California. Accordingly, the effects of the Global Risk Defendants' allege conduct in "personally supervising" aspects of the "information operation against Plaintiffs" is "not connected to [California] in a way that makes those effects a proper basis for jurisdiction." *Id.*

(3) Whether the Global Risk Defendants Caused Foreseeable Harm in the Forum.

The final prong of the *Calder* test considers whether a defendant's actions "caused harm that it knew was

likely to be suffered in the forum." *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (internal citation omitted). "The touchstone of this requirement is not the magnitude of the harm, but rather its foreseeability." *Id.* at 1207. There is foreseeable harm when a jurisdictionally sufficient amount of harm is suffered in However, "[t]he foreseeability of injury in a forum" alone is not enough to confer personal jurisdiction in that forum. *Axiom Foods*, 874 F.3d at 1070.

The Court concludes that Plaintiffs have failed to establish the final prong of *Calder*. The Global Risk Defendants' allegedly wrongful conduct consisted of "personally supervising" aspects of the "information operation against Plaintiffs," and Plaintiffs speculate that this was accomplished by the Global Defendants, who are located in New York City, and its subsidiary, Global Risk EMEA, located in Doha, Qatar. Accordingly, Plaintiffs have failed to allege that any of the purported "coordination and implementation" of the hack by the Global Risk Defendants took place in California, rather than in New York or Qatar. In addition, "the fortuitous presence of a server" or contacts with California-based technology companies that are not parties to the litigation are not enough to confer personal jurisdiction. *Rosen v. Terapeak, Inc.*, 2015 WL 12724071, at *9 (C.D. Cal. Apr. 28, 2015) (availability of app in California-based Apple's App Store, use of California-based eBay servers, and license from eBay were insufficient to confer personal jurisdiction in California); *Browne v. McCain*, 612 F. Supp. 2d 1118, 1124 (C.D. Cal. 2009) (relationship with California-based YouTube and presence of YouTube

servers in California insufficient to confer personal jurisdiction in California); *Chang v. Virgin Mobile USA, LLC*, 2009 WL 111570, at *3 (N.D. Tex. Jan. 16, 2009) (plaintiffs "cannot rely on the fortuitous location of Flickr's servers to establish personal jurisdiction" over a defendant). Thus, the Court concludes that it was not foreseeable that the Global Risk Defendants' conduct in other forums was likely to cause harm in California. Accordingly, this prong of the *Calder* test has not been satisfied.

Because the Court concludes that Plaintiffs have failed to satisfy the first, second and third prongs of the *Calder* purposeful direction test, Plaintiffs have failed to meet the first part of the Ninth Circuit's three-part test for specific jurisdiction.

b. Claim Arises Out of or Relates to Forum-Related Activities

To satisfy the second part of the specific jurisdiction test, a plaintiff's claims must "arise[ ] out of or relate[] to the defendant's forum-related activities." *Schwarzenegger*, 374 F.3d at 802. The Ninth Circuit applies a "but for" test to determine forum-related conduct. *Fiore*, 688 F.3d at 582. Therefore, a plaintiff must demonstrate that it would not have suffered its alleged injuries in the forum state but for the defendant's actions. *Id.* Because the Global Risk Defendants lack any meaningful contact with California and the Global Risk Defendants' alleged "supervision" of the "information operation against Plaintiffs" took place in New York City and Doha, Qatar, the Court concludes that Plaintiffs have failed

to satisfy the second part of the specific jurisdiction test.

c. Reasonableness of Exercising Jurisdiction

Even if Plaintiffs had been able to establish a prima facie case for jurisdiction over the Global Risk Defendants, the burden would then shift to the Global Risk Defendants to present a compelling case as to why exercising jurisdiction would not be reasonable. *Schwarzenegger*, 374 F.3d at 802. In determining whether jurisdiction is reasonable, courts consider seven factors: (1) the extent of a defendant's purposeful interjection into the forum; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the dispute; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *See CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1079 (9th Cir. 2011) (internal citation omitted). "No one factor is dispositive; a court must balance all seven." *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir.1998).

In this case, the Court finds that it would be unreasonable to exercise jurisdiction over the Global Risk Defendants. The Court concludes that the Global Risk Defendants could not have reasonably anticipated that they would be required to defend this action in California. Indeed, the Global Risk Defendants lack any contacts with California. In addition, it would be

extremely burdensome to require the Global Risk Defendants to defend this action in California given that all of their personnel, including those with knowledge of the facts relevant to this action, and potential witnesses are located on the East Coast and in Qatar and would have to travel to California.

Regardless of whether this case is adjudicated in California or another state, there is minimal concern about conflicts with states' sovereignty because many of Plaintiffs' claims are based on federal law and this Court is confident any federal court that is tasked with adjudicating those claims will be able to fairly and correctly apply California law to Plaintiffs' state law claims. There is also no indication that this matter could be more efficiently resolved in California. Although Plaintiff may have an interest in litigating this action in California because it is more convenient, the Ninth Circuit has held that "the plaintiff's convenience is not of paramount importance" to the reasonableness inquiry. *Dole Food, Inc. v. Watts*, 303 F.3d 1104, 1116 (9th Cir. 2002).

After balancing all of the reasonableness factors, the Court finds that those factors weigh heavily in favor of the Global Risk Defendants. Therefore, the Court concludes that it would be unreasonable to exercise personal jurisdiction over the Global Risk Defendants.

Accordingly, the Court concludes that it does not have personal jurisdiction over the Global Risk Defendants.[2]

B. Jurisdictional Discovery

The decision whether to grant jurisdictional discovery is typically within the discretion of the district court. *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977). "[W]here pertinent facts bearing on the question of jurisdiction are in dispute, discovery should be allowed." *Am. West Airlines, Inc. v. GPA Grp., Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989). However, "where 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." *Caddy*, 453 F.3d at 1160 (quoting *Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 562 (9th Cir. 1995)). Although Plaintiffs have conducted substantial discovery and filed a First

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[2] Plaintiffs cannot establish personal jurisdiction based on their conspiracy claim. "California law does not recognize conspiracy as a basis for acquiring jurisdiction over a foreign defendant." *EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp.*, 711 F. Supp. 2d 1074, 1089 (C.D. Cal. 2010) (citations omitted). Therefore, "actions taken by co-conspirators in furtherance of the conspiracy cannot be attributed to a conspirator for purposes of establishing personal jurisdiction." *Id.*; *see* 12 Cal. Jur. 3d Civil Conspiracy § 3 ("Conspiracy is not a basis for acquiring personal jurisdiction over a party."); *see also Stauffacher v. Bennett*, 969 F.2d 455, 460 (7th Cir. 1992) ("The cases are unanimous that a bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough"), *superseded on other grounds by* Fed. R. Civ. P. 4(k)(2).

Amended Complaint, they continue to rely on group pleading and conclusory allegations, which are insufficient to establish personal jurisdiction. Although Plaintiffs request leave to amend and the opportunity to conduct jurisdictional discovery, they have offered nothing but mere speculation how that discovery would assist in pleading facts that would allow the Court to exercise personal jurisdiction over the Global Risk Defendants. Accordingly, the Court declines to grant jurisdictional discovery or leave to amend.

IV. Conclusion

For all the foregoing reasons, the Global Risk Defendants' Motion is **GRANTED**, and the Global Risk Defendants are **DISMISSED** from this action without leave to amend.[3] Plaintiffs' request to amend their First Amended Complaint and take jurisdictional discovery is **DENIED**.

IT IS SO ORDERED.

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[3] Because the Court concluded that it does not have personal jurisdiction over the Global Risk Defendants, it need not address the Global Risk Defendants' arguments with respect to derivative sovereign immunity, diplomatic agent immunity, or Plaintiffs' failure to state a claim.

APPENDIX E

[Filed: September 20, 2018]

Text Entry Order: The Court has reviewed the Joint Statement Regarding Further Meet and Confer on Plaintiffs Motion for Leave to Pursue Appeal Pursuant to September 6 Order of the Court (Joint Statement), filed September 19, 2018 (Docket No. 216). In response to Plaintiffs request for clarity, the Court has not entered a final judgment with respect to Qatar or any other defendant in this action. In light of Plaintiffs apparent to dismiss the Unserved Defendants, Plaintiffs shall file the dismissals on or before September 24, 2018. After the dismissals are filed, Lead Counsel are ordered to meet and confer and prepare a joint proposed Judgment. The parties shall lodge a joint proposed Judgment with the Court on or before September 26, 2018. In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment, along with a declaration outlining their objections to the opposing party's version, no later than September 26, 2018. All issues regarding the Designations made pursuant to the Protective Order shall be submitted to Magistrate Judge Charles F. Eick. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (sr) TEXT ONLY ENTRY (Entered: 09/20/2018)

APPENDIX F

JS-6

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Civil Case No.:
2:18-CV-02421-JFW-(Ex)

[Filed September 27, 2018]

[Assigned to Hon. John F. Walter]

BROIDY CAPITAL MANAGEMENT LLC and ELLIOTT BROIDY,	)
Plaintiffs,	)
v.	)
STATE OF QATAR, STONINGTON STRATEGIES LLC, NICOLAS D. MUZIN, GLOBAL RISK ADVISORS LLC, KEVIN CHALKER, DAVID MARK POWELL, MOHAMMED BIN HAMAD BIN KHALIFA AL THANI, AHMED AL-RUMAIHI, and DOES 1-10,	)
Defendants.	)

ORDER OF FINAL JUDGMENT

Amended Complaint Filed: March 26, 2018

On August 8, 2018, the Court issued an order granting a Motion to Dismiss brought by Defendant State of Qatar pursuant to Rule 12(b)(1) and Rule 12(b)(2) on the basis that Qatar is immune from suit under the Foreign Sovereign Immunities Act, and thereby dismissed Qatar from this action without leave to amend. **Dkt. 198.**

On August 16, 2018, the Court issued an order granting a Motion to Dismiss brought by Defendants Stonington Strategies and Nicolas D. Muzin (collectively, the "Stonington Defendants") for lack of personal jurisdiction, and thereby dismissed the Stonington Defendants from this action without leave to amend. **Dkt. 209.** Because the Court lacked jurisdiction over Plaintiffs' claims against the Stonington Defendants, the dismissal is properly considered as a dismissal without prejudice.

On August 22, 2018, the Court issued an order granting a Motion to Dismiss brought by Defendants Global Risk Advisors and Kevin Chalker (collectively, the "GRA Defendants") for lack of personal jurisdiction, and thereby dismissed the GRA Defendants from this action without leave to amend. **Dkt. 212.** Because the Court lacked jurisdiction over Plaintiffs' claims against the GRA Defendants, the dismissal is properly considered as a dismissal without prejudice.

On September 20, 2018, the Court issued a minute order, **Dkt. 219,** that provided:

> … In light of Plaintiffs apparent willingness to dismiss the Unserved Defendants, Plaintiffs shall file the dismissals on or before September 24, 2018 After the dismissals are filed, Lead Counsel are ordered to meet and confer and prepare a joint proposed Judgment. The parties shall lodge a joint proposed Judgment with the Court on or before September 26, 2018. In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment, along with a declaration outlining their objections to the opposing party's version, no later than September 26, 2018. All issues regarding the Designations made pursuant to the Protective Order shall be submitted to Magistrate Judge Charles F. Eick.

Pursuant to that order, on September 24, Plaintiffs filed a Notice of Voluntary Dismissal, voluntarily dismissing the remaining defendants in this action: David Mark Powell, Mohammed Bin Hamad Bin Khalifa Al Thani, and Ahmed Al-Rumaihi (collectively, the "Unserved Defendants"). **Dkt. 223.** The Plaintiffs' dismissal of the Unserved Defendants was made without prejudice.

Accordingly, as all defendants have been dismissed from this action,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Final Judgment is entered in favor of the State of Qatar, the Stonington Defendants and the GRA

Defendants on Plaintiffs' First Amended Complaint, and Plaintiffs shall take nothing thereby.

2. Judgment as to the Stonington Defendants and the GRA Defendants is without leave to amend and without prejudice.

3. Plaintiffs' First Amended Complaint is dismissed, as to all causes of action.

4. All issues regarding the Designations made pursuant to the Protective Order shall be submitted to Magistrate Judge Charles F. Eick.

5. This order constitutes a final, appealable judgment.

DATED: September 27, 2018

/s/
The Honorable John F. Walter
United States District Judge