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Counsel for Defendant Aircraft Cylinders of America, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BROOK NEF and NEF FLYING)
SERVICE, INC., an Idaho corporation,)
)
Plaintiffs,)
)
vs.)
)
ENGINE COMPONENTS, INC., a)
foreign corporation; TULSA AIRCRAFT)
ENGINES, INC., a foreign corporation;)
AIRCRAFT CYLINDERS OF AMERICA,)
INC., a foreign corporation,)
)
Defendants.)
_____)

CASE NO. CIV-04-362-E-BLW

**MEMORANDUM IN SUPPORT OF
DEFENDANT ACA'S MOTION TO
DISMISS FOR LACK OF PERSONAL
JURISDICTION**

TULSA AIRCRAFT ENGINES, INC.,)
a foreign corporation,)
Counterclaimant,)
vs.)
BROOK NEF and NEF FLYING)
SERVICE, INC., an Idaho corporation,)
Counterdefendants.)

TULSA AIRCRAFT ENGINES, INC.,)
a foreign corporation,)
Cross-Plaintiff,)
vs.)
ENGINE COMPONENTS, INC.,)
a foreign corporation,)
Cross-Defendant.)

COMES NOW DEFENDANT, Aircraft Cylinders of America, Inc. (hereinafter "ACA"), by and through counsel of record, and submits the following Memorandum in Support of Defendant ACA's Motion to Dismiss for Lack of Personal Jurisdiction.

PROCEDURAL HISTORY and FACTUAL BACKGROUND

Plaintiffs Brook Nef and Nef Flying Service (hereinafter "Nef") filed this lawsuit on June 3, 2004 in the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville. Docket No. 2. Defendant Tulsa Aircraft Engines, Inc. removed the lawsuit to the United States District Court for the District of Idaho on July 12, 2004 based on diversity jurisdiction. Docket No. 1.

In Nef's Complaint and Demand for Jury Trial, Counts Seven through Ten are directed towards ACA. Docket No. 2. Those Counts contain claims for negligence, strict liability, and breach of warranties. *Id.*

Brook Nef is the president and sole stockholder of Nef Flying Services, Inc., an Idaho corporation in the agricultural spraying business. *Id.* Brook Nef flies the crop dusters used to perform the agricultural spraying. *Id.* Brook Nef alleges he was involved in an airplane crash on July 3, 2002 while crop dusting and that the crash resulted in significant personal injuries and the destruction of the plane. *Id.* Nef alleges that the crash occurred when the top portion of one of the cylinders in the rebuilt engine separated from the lower half of the cylinder, causing the engine to lose power. *Id.*

Nef allegedly purchased the engine from Defendant Tulsa Aircraft Engines, Inc. (hereinafter "Tulsa"). *Id.* Nef further alleges that Defendant Engine Components, Inc. (hereinafter "Components") and ACA are manufacturers of engine cylinders and that one or both of said defendants (Components and/or ACA) manufactured the faulty cylinders used by Tulsa in the rebuilt engine. *Id.* Nef claims the cylinders were defectively manufactured in such a way as to make them unreasonably dangerous. *Id.*

The following information about ACA is contained in the Affidavit of Rama Palepu in support of ACA's Motion to Dismiss for Lack of Personal Jurisdiction and is relevant to ACA's Motion to Dismiss for Lack of Personal Jurisdiction:

1. Rama Palepu is the president and chief executive officer for ACA.
2. ACA's principal place of business is in Oklahoma and it is an Oklahoma corporation.

It became a corporation in 1981. ACA is not registered or otherwise qualified to do

business in Idaho.

3. ACA owns no property in Idaho and maintains no office or bank accounts in Idaho. Furthermore, ACA has no employees or telephone listings in Idaho. It does not maintain an agent for service of process in Idaho. ACA does not have a regional distributor in Idaho. Neither does ACA have an agent in Idaho to sell products, services or warranties.
4. ACA pays no taxes in Idaho. It does not regularly solicit business in Idaho. It does not carry out a consistent course of conduct in Idaho. ACA has done limited advertising in prior years (2001 and part of 2002 and either 1997 or 1998) in a magazine called Trade A Plane, but ACA received no response to that advertisement. ACA has no way of knowing whether any of those issues of Trade A Plane were circulated or found their way to Idaho. ACA's market is to FAA certified shops which do engine rebuilding.
5. ACA does not own stock in or otherwise control any Idaho corporation. Neither ACA, its officers, its agents, nor its employees have attended ACA related meetings or conventions in Idaho.
6. ACA does not regularly solicit business in Idaho. It does not carry out a consistent course of conduct in Idaho. ACA does not advertise in magazines, newspapers or other publications that are distributed in Idaho.
7. ACA is a member of the aircraft engine cylinder reconditioning industry. ACA developed a chroming process known as Nu-Chrome. Nu-Chrome is used on aircraft cylinders to improve cylinder durability and corrosion resistance while minimizing

oil consumption.

8. ACA does not manufacture aircraft cylinders. It simply applies Nu-Chrome to cylinders shipped to ACA by the owner of the cylinder.
9. During the Nu-Chrome application process, ACA does not disassemble the cylinder.
10. It is neither the usual nor customary practice for ACA to x-ray the cylinder for hairline fractures in the cylinder, nor is it the usual custom or practice of the aircraft cylinder reconditioning industry to do so. ACA visually inspects the cylinder on at least four or more occasions during the time the cylinder is in ACA's control. During each inspection, lighted mirrors are inserted into the barrel of the cylinder. The established practice and procedure upon finding any defect in the cylinder is to reject the cylinder and to immediately notify the customer. A cylinder with a crack cannot be successfully chromed. In thirty years in this industry, Mr. Palepu has only found cracks in incoming cylinders on two or three occasions.
11. ACA never contemplated or intended – by agreeing with owners of the cylinders to apply Nu-Chrome – that it would be subject to lawsuits in Idaho or any other state based on manufacturing defects.
12. If ACA has to defend this lawsuit in Idaho, or its officers or employees must assist in doing so, ACA's business would be severely disrupted and negatively impacted by the absence of key personnel during the times they had to travel to Idaho to attend litigation-related matters.

APPLICABLE LAW AND ANALYSIS

I. Brook Nef and Nef Flying Service Bears the Burden of Proof to Establish that Personal Jurisdiction Exists Over ACA.

Nef bears the burden of demonstrating that jurisdiction exists. *Data Disc, Inc. v. Technology Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). Where the motion is based on written materials rather than an evidentiary hearing, "a plaintiff need only make a prima facie showing of jurisdictional facts." *Id.* Plaintiff cannot, however, "simply rest on the bare allegations of its complaint." *Amba Marketing Systems, Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977). When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff is "obligated to come forward with facts, by affidavit or otherwise, supporting personal jurisdiction." *Id.*

For purposes of personal jurisdiction, the Court "may not assume the truth of allegations in a pleading which are contradicted by affidavit." *Alexander v. Circus Circus Enterprises, Inc.*, 972 P.2d 261, 262 (9th Cir. 1992) (citations omitted). If the court holds an evidentiary hearing or the case proceeds to trial, Plaintiff must prove that jurisdiction exists by a preponderance of the evidence. *Data Disc, Inc.*, 557 F.2d at 1285.

II. There Is No Personal Jurisdiction Over ACA Under the Idaho Long-Arm Statute.

In federal court, the plaintiff must prove that personal jurisdiction comports with Idaho's long-arm statute and Federal constitutional principles of due process. *Lake v. Lake*, 817 F.2d 1416, 1420 (9th Cir. 1987). Idaho's Supreme Court imposes a two-part test for resolving long-arm jurisdiction issues:

In order for an Idaho court to exert jurisdiction over an out-of-state defendant, two criteria must be met; the act giving rise to the cause of action must fall within the scope of our long-arm statute and the constitutional standards of due process must be met.

Smalley v. Kaiser, 130 Idaho 909, 912, 950 P.2d 1248 (1997) (citing *Saint Alphonsus Regional Medical Center v. Washington*, 123 Idaho 739, 742, 852 P.2d 491 (1993)).

Idaho Code §5-514 states, in part:

Any person, firm, company, association or corporation, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, firm, company, association or corporation, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state which is hereby defined as the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association or corporation;

(b) The commission of a tortious act within this state

Nef alleges claims against ACA for negligence, strict liability and breach of warranties. The Complaint and Demand for Jury Trial¹ fails to allege with any specificity that ACA committed any torts or conducted any business *within* Idaho. I.C. § 5-514.

Under Idaho's long-arm statute, personal jurisdiction over ACA does not exist unless Nef can point to a tort or a business activity in which ACA participated *within* Idaho, out of which Nef's claims arose. In this case, Nef will not be able to meet this burden.

First, ACA has never transacted business within the State of Idaho. As mentioned above, ACA is not registered to do business in Idaho, it owns no property and maintains no office or bank

¹It is unclear whether the Complaint and Demand for Jury Trial has been verified. The verification page was not attached to the copy of the Complaint and Demand for Jury Trial attached to the Affidavit of L. Jeff Severson in Support of Notice of Removal (Docket No. 2).

accounts in Idaho. It does not have employees or agents located in Idaho. Furthermore, it pays no taxes to the State of Idaho and it does not regularly solicit business or do advertising in Idaho. In short, ACA has not conducted business activity *within* the State of Idaho; therefore, the facts of this case do not fall within I.C. § 5-514(a).

To determine whether the facts of this case fall within I.C. § 5-514(b), it is useful to analyze the Idaho Supreme Court's decision in *Doggett v. Electronics Corp. of America*, 93 Idaho 26, 454 P.2d 63 (1969). In *Doggett*, Cloyd Doggett was injured when a steam boiler exploded during installation in Idaho. *Doggett*, 93 Idaho at 27, 454 P.2d at 64. The cause of the explosion was "traced to two **component parts, each manufactured** by separate companies and sold by [Boiler Engineering & Supply Co. and Bradley Boiler Co.] as part of one complete unit." *Id.*, 93 Idaho at 28, 454 P.2d at 65 (emphasis added). One of the manufactured parts was known as the "fire eye control" and it was "designed to monitor flame in burners." *Id.* The other component part was a metering system manufactured "to modulate the flow of fuel and combustion air to industrial burners." *Id.* Doggett alleged that the failure of either or both of the manufactured component parts caused his injuries. *Id.* Doggett filed his lawsuit against the manufacturer of the boiler, the manufacturers of the component parts and two of the boiler manufacturers' agents who were installing the boiler at the time of the explosion. *Id.* The lawsuit contained causes of action in tort and breach of warranty. *Id.*

Under the facts of *Doggett*, the Idaho Supreme Court found that the component parts manufacturers' conduct satisfied the long-arm statute, even though those manufacturers had no contacts with Idaho other than that their product was blamed for the explosion. *Id.*, 93 Idaho at 31, 454 P.2d at 68. The Court, however, limited jurisdiction to causes of action sounding in tort. *Id.*

The Court pointed out the impact of Idaho Code § 5-516 on jurisdiction determinations to other causes of action:

5-516. Limitation on causes of action. – Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over such defendant is based upon this section.

Id., 92 Idaho at 32, 454 P.2d at 69. The Court concluded, therefore, that jurisdiction over the causes of action sounding in tort did not give the Court jurisdiction over the component parts manufacturers for all causes of action. *Id.*

Applying *Doggett* to the facts of this case shows that Idaho does not have jurisdiction over ACA under I.C. § 5-514(b), either. ACA was not the manufacturer of the cylinder, the engine or any component part of the engine. It simply applied Nu-Chrome to the cylinder manufactured by another company and placed in the engine by yet another company. ACA's role in this process is much like the role an automobile industrial painter plays. The painter does not manufacture the vehicle, the engine or any of the component parts. It simply applies a coat of paint to protect the exterior of the car from the elements (and for aesthetic purposes).

The Idaho Supreme Court in *Doggett* was focused on whether it had personal jurisdiction over the overall boiler manufacturer or the manufacturers of the component parts of the boiler. The facts of this case are clearly distinguishable, therefore, from *Doggett*. See also *Schneider v. Sverdsten Logging Co., Inc.*, 104 Idaho 210, 211, 657 P.2d 1078, 1079 (1983) (focus of Court was similar to *Doggett* Court – Schneider brought suit against companies for the negligent design, manufacture, repair, maintenance, inspection and operation of a helicopter which crashed in Idaho) and *National Union Fire Ins. Co. of Pittsburgh, PA v. Aerohawk Aviation, Inc.*, 259 F.Supp.2d 1096, 1099 (D. Idaho 2003) (focus of Court was similar to *Doggett* Court – Plaintiff insurer sued defendant

parts manufacturer claiming liability either in strict liability or in negligence for selling defective autofeather pressure switches which caused the insured's aircraft to crash).

Doggett, Schneider and *National Union* each show that when Idaho courts have found that there was a tortious act committed *within* Idaho under the long-arm statute, it has been because the tortious act was committed by the manufacturer of the overall product or its sub-components. In this case, ACA had nothing to do with the cylinder manufacturing process or the engine manufacturing process. ACA's role was to apply Nu-Chrome and return the cylinder to a third party so that party could incorporate the cylinder into the aircraft engine. ACA has, therefore, committed no tortious act within the State of Idaho.

Most importantly, ACA does not fall within the definition of "manufacturer" under Idaho's Product Liability statutes. Idaho Code § 6-1402(2) states:

(2) "Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer. A product seller acting primarily as a wholesaler, distributor, or retailer of a product may be a "manufacturer" but only to the extent that it designs, produces, makes, fabricates constructs, or remanufactures the product before its sale.

ACA did not design, produce, make, fabricate, construct or remanufacture the cylinder.

Any argument that the chroming itself qualifies as the product also fails. Idaho Code § 6-1402(3) defines "product" in the following way:

(3) "Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce.

The chroming is not an object with intrinsic value that is capable of delivery as an assembled product or as a component part. The chroming is a process.

Doggett, Schneider and *National Union* are distinguishable from the facts of the case at hand because those cases deal specifically with manufactured products. The application of Nu-Chrome onto the cylinders is a process. The chroming is not an independent product; nor is it part of the manufacturing process.

Furthermore, *ACA* has committed no torts within Idaho because it does not carry out a consistent course of conduct in Idaho and it has no physical presence here. *ACA* does no advertising in Idaho. There is no basis for alleging tortious conduct *within* Idaho under the facts of this case.

Even if the Court determines the long-arm statute is satisfied under I.C. § 5-514(b) based on tortious conduct, the Court should – consistent with *Doggett* – limit jurisdiction to only the causes of action sounding in tort. Specifically, *the Court should dismiss the causes of action against ACA sounding in breach of warranty* based on lack of personal jurisdiction.

Long-arm jurisdiction pursuant to I.C. § 5-514 does not lie under the allegations contained in Nef's Complaint; nor, as discussed below, are constitutional due process standards met.

III. The Court Also Lacks Personal Jurisdiction Over ACA Under a Due Process Analysis.

In the event the Court determines Nef has somehow met the requirements of Idaho's long-arm statute, the Court should dismiss this case for lack of personal jurisdiction under due process analysis. Due process "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations."

International Shoe Co. v. Washington, 326 U.S. 310, 319, 90 L.Ed. 95, 66 S.Ct. 154 (1945).

"[The] constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant purposefully established 'minimum contacts' in the forum State." . . . [M]inimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the

privilege of conducting activities in the forum State, thus invoking the benefits and protections of its laws.”

Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solan County, 480 U.S. 102, 108-09, 107 S.Ct. 1026 (1987) (citations omitted).

A. General Jurisdiction Does Not Exist.

A defendant's activities within the forum state must be “continuous and systematic” or “substantial” in order for the state to have a sufficient relationship with the defendant to assert general jurisdiction when the claims alleged against those defendants are unrelated to the defendants' activities in the forum state. *Lake*, 817 F.2d at 1420. Minimal contacts with the forum state do not create general jurisdiction:

The level of contact with the forum state necessary to establish general jurisdiction is quite high. See, e.g., *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984) (no jurisdiction over foreign corporation that sent officers to forum for a negotiating session, accepted checks drawn from a forum bank, purchased equipment from the forum, and sent personnel to the forum to be trained); *Cabbage*, 744 F.2d at 667-68 (no general jurisdiction over non-resident doctors despite significant number of patients in forum, use of forum's state medical insurance system and telephone directory listing that reached forum); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1330-31 (9th Cir. 1984) (no general jurisdiction over defendants despite several visits and purchases in forum, solicitation of contract in forum which included choice of law provision favoring forum, and extensive communication with forum), *cert. denied*, 471 U.S. 1066, 85 L. Ed. 2d 500, 105 S. Ct. 2143 (1985); *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242-43 (9th Cir. 1984) (foreign corporation's sales and marketing efforts in forum state, including solicitation of orders, promotion of products to potential customers through the mail and through showroom displays, and attendance at trade shows and sales meetings, were insufficient contact to assert general jurisdiction).

Shute v. Carnival Cruise Lines, 897 F.2d 377, 380-381 (9th Cir. 1988) (emphasis added), reversed

on other grounds, 499 U.S. 585; 111 S. Ct. 1522; 113 L. Ed. 2d 622 (1991). The Ninth Circuit has acknowledged that it "regularly has declined to find general jurisdiction even where the contacts with [the forum State] were quite extensive." *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851, n.3 (9th Cir. 1993).

There are no contacts between Idaho and ACA which might give rise to an assertion of general jurisdiction. ACA is not incorporated in Idaho. Its principle place of business is in Oklahoma. ACA has no employees in Idaho, owns no property in Idaho, and does not maintain an agent for service in Idaho. ACA is not registered to do business in Idaho. It does no advertising in Idaho and does not carry out a consistent course of conduct in Idaho. General jurisdiction does not exist.

B. Specific Jurisdiction Does Not Exist.

If the defendant's contacts are neither substantial, nor continuous and systematic, but the cause of action arises out of or is related to the defendant's forum activities, "limited" or "specific" personal jurisdiction may exist. *Lake*, 817 F.2d at 1420-21. Whether a forum state may assert specific jurisdiction depends on the quality and nature of the defendant's contacts with the forum state in relation to the cause of action. *Id.* at 1421, citing *Data Disc, Inc. v. Systems Technology Associates., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977).

A Court may exercise "specific jurisdiction" when the following requirements are met:

- (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 privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; **and**
- (3) the exercise of jurisdiction must comport with fair play and

substantial justice, i.e. it must be reasonable.

Lake, 817 F.2d at 1421 (emphasis added). Each of these three elements is discussed below.

1. Purposeful Availment.

An exercise of specific jurisdiction is appropriate only if the nonresident defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239-40 (1958)). The court's focus in the due process analysis is on the defendant's relationship to the forum and the litigation, rather than the plaintiff's relationships to them. As stated in *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228 (1958):

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State

The requirement that the defendant engage in some form of affirmative conduct allowing or promoting the transaction of business within the forum ensures that a defendant "will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174 (1985) (emphasis added).

The United States Supreme Court held in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559 (1980), that a defendant corporation "purposely avails" itself of a forum where the defendant introduces its product into the interstate "stream of commerce" and reasonably

foresees that those products will be delivered into the forum state. However, "foreseeability" should not be interpreted too broadly because, taken to its logical extensions, foreseeability would mean that each seller of a product would have to be prepared to defend lawsuits where ever the product traveled. *National Union*, 259 F.Supp.2d at 1104. The "foreseeability" that is critical in making this analysis under due process requirements is that the defendant's conduct and connection with the forum is such that it "reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297. As a result, there must be a showing of affirmative conduct by a foreign defendant directed at the forum state before a court can find the defendant purposely availed itself of the protections of the forum state. *Id.*, 444 U.S. at 297-98.

The United States Supreme Court attempted to refine the "stream of commerce" theory in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S.Ct. 1026 (1987). Unfortunately, the Justices split on how to approach the "stream of commerce" theory, so no clear guidance was provided. *National Union*, 259 F.Supp.2d at 1104.

Justice O'Connor, joined by three other Justices, concluded that the placement of the product into the "stream of commerce" is not – without more – an act of the defendant purposefully directed toward the forum State. *Asahi*, 480 U.S. at 112. The opinion held the defendant had to show an additional affirmative act purposefully directed at the forum state to satisfy minimum contacts requirements. *Id.* The opinion stated:

Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sale agent in the forum State.

Id.

Justice Brennan, also joined by three Justices, rejected Justice O'Connor's approach and concluded that considering the economic benefit received from sales in the forum state, jurisdiction was proper where the manufacturer or seller has placed its goods in the stream of commerce with knowledge that those goods will reach the forum state. *Id.*, 480 U.S. at 116-17 (Those "benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State."). Justice Stevens rejected both theories. *National Union*, 259 F.Supp.2d at 1104-05.

The various circuits have split as to how to apply *Asahi* to "stream of commerce" issues (*National Union*, 259 F.Supp.2d at 1105), and the Ninth Circuit has not definitively come down on one side or the other. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 381 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585, 111 S.Ct. 1522 (1991) (because the defendant engaged in three of the four types of conduct articulated by Justice O'Connor's opinion, the court found it unnecessary to choose between the two competing theories in *Asahi*). More recent cases, however, indicate the Ninth Circuit has adopted Justice O'Connor's approach and require some sort of affirmative conduct. *Estigoy v. OSG Car Carriers, Inc.*, 33 Fed. Appx. 844, 845-46 (9th Cir. 2002) and *MCA Records v. Charly Records, LTD*, 1997 U.S. App. Lexis 3684 at 13-14 (9th Cir. 1997).

In this case, the case law cited above does not provide Idaho courts with specific jurisdiction over ACA. Once again, Nu-Chrome is not a "product" as defined in Idaho Code. Neither is ACA a "manufacturer" as therein defined. ACA simply had no product to place in the "stream of commerce." Even if ACA did have a product or was considered a manufacturer for purposes of

Asahi and its progeny, there is no indication that ACA has taken any affirmative action to avail itself of the protection of Idaho. There is no indication that ACA did anything which would have placed it on notice that it could be haled into Idaho's courts. There is no specific jurisdiction over ACA.

2. "But For" Test.

To determine whether a particular claim arises out of forum-related activities and thereby satisfies the second requirement for specific jurisdiction, the Ninth Circuit relies on the "but for" test. *See Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *reversed on other grounds* 499 U.S. 585, 111 S.Ct. 1522 (1991). The question under this test as applied to this case is: But for Defendants' contacts with Idaho, would Plaintiff's claims against Defendants have arisen? *Id.* This question cannot be answered directly because ACA did not have any qualifying contacts with Idaho.

"The 'but for' test preserves the requirement that there be some nexus between the cause of action and the defendant's activities in the forum." *Shute*, 897 F.2d at 385. Nef fails to present facts which establish the required nexus. ACA had no activities in the forum state which can be connected to the causes of action.

4. Reasonableness.

Once it has been decided that a defendant purposefully established minimum contacts with a forum, "he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable" in order to defeat personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985). In determining whether the exercise of jurisdiction comports with "fair play and substantial justice," and is therefore "reasonable," the Court is required to consider seven factors:

(1) the extent of the defendants' purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendants' state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Core-Vent, 11 F.3d at 1488. None of these factors is dispositive, so the Court must balance them.

Roth v. Marquez, 942 F.2d 617, 623 (9th Cir. 1991).

The burden shifts to ACA to establish a "compelling case" that the Court's exercise of personal jurisdiction is unreasonable *only if* Nef has sustained its burden of proving that ACA's activities were purposefully directed at Idaho and the claims arise out of ACA's contacts with Idaho. *Jane Doe v. American National Red Cross*, 112 F.3d 1048, 1052 (9th Cir. 1997), citing *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1198 (9th Cir. 1988). As discussed above, Nef cannot sustain its burden of proving either purposeful availment or that the claims alleged against ACA arose out of activities occurring in Idaho. Unless Nef sustains its burden of proof in this regard, the Court need not consider the third prong of the test for specific jurisdiction.

In the event the Court does determine that ACA purposefully established minimum contacts with Idaho, ACA asserts that under the balancing of the seven factors in the third prong, specific jurisdiction does not exist. Under the first factor, ACA's purposeful interjection into Idaho does not exist. ACA conducted no business in Idaho, did not have agents or property here, and carries on no other activities to suggest it has interjected itself into Idaho. Under the second factor, the burden on ACA of defending this lawsuit in Idaho is heavy. If ACA has to come to Idaho to attend to litigation related activities, it will burden its business activities in Oklahoma where it principal place of

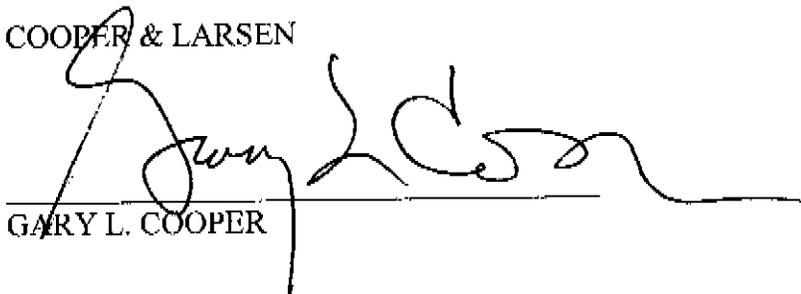
business exists. The fourth factor, the forum state's interest in adjudicating the dispute, does not appear to affect the analysis. The causes of action before the Court do not involve complex legal questions or issues whose resolution requires an interpretation of law unique to Idaho courts. Oklahoma courts can certainly apply the relevant Idaho statutes. The third and sixth factors do not appear to significantly affect the analysis. Finally, under the seventh factor, there is an alternative forum available in Oklahoma to try this case.

CONCLUSION

Based on the analysis above, ACA respectfully requests that the Court grant its Motion to Dismiss for Lack of Personal Jurisdiction.

DATED this 3rd day of September, 2004.

COOPER & LARSEN



GARY L. COOPER

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2004, I served a true and correct copy of the foregoing to:

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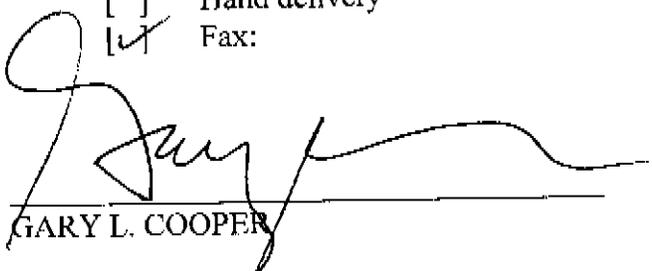
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