SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JERRY CADIGAN and NANCY CATON CADIGAN, as the Proposed Administrators of the Estate of TREVOR NORRIS CADIGAN, Deceased,	
Plaintiffs,	Index No. 152286/2018
-against-	
LIBERTY HELICOPTERS, INC., a New York Corporation; NYONAIR LLC, a New Jersey Limited Liability Company; FLYNYON LLC, a New Jersey Limited Liability Company; MERIDIAN CONSULTING I CORPORATION, INC., a Delaware Corporation; RICHARD ZEMKE VANCE, a Connecticut resident; AIRBUS HELICOPTERS, S.A.S., a French Corporation; AIRBUS HELICOPTERS, INC., a Delaware Corporation; And APICAL INDUSTRIES, INC. d/b/a DART AEROSPACE, a California Corporation,	
Defendants.	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT APICAL INDUSTRIES, INC.'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND IN SUPPORT OF THEIR CROSS-MOTION TO DEFER RULING ON THE MOTION TO DISMISS AND TO COMPEL DEFENDANT APICAL INDUSTRIES, INC. TO SUBMIT TO JURISDICTIONAL DISCOVERY

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Defendants.	:	

Plaintiffs, by and through counsel, respectfully submit this Memorandum of Law, together with the accompanying Affirmation of Matthew F. Schwartz and supporting exhibits, in opposition to the motion by defendant Apical Industries, Inc. to dismiss the complaint for lack of personal jurisdiction pursuant to CPLR Rule 3211(a)(8) and in support of their cross-motion to defer ruling on the motion to dismiss and compel defendant Apical Industries, Inc. to submit to jurisdictional discovery pursuant to CPLR Rule 3211(d) for the reasons set forth below.

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I. FACTUAL BACKGROUND AND PROCEDURAL CONTEXT OF MOTION

A. Introduction

Plaintiffs have brought this action against several defendants, including Apical Industries, Inc. (hereinafter "Apical"), the company that designed, manufactured and supplied the allegedly defective helicopter emergency flotation system. *Amd. Complt.*, ¶¶ 344-399.[1] Notwithstanding that there exists no dispute that Apical did design, manufacture and supply the helicopter emergency flotation system at issue, Apical has moved to dismiss the complaint on the grounds that this Court may not properly exercise jurisdiction over it, before providing any discovery on the issue.

The chronology of pertinent events is as follows:

March 11, 2018	Crash of a Liberty Helicopters helicopter resulting in death of Plaintiffs' deceased, Trevor Norris Cadigan
March 13, 2018	Lawsuit filed in this case
March 28, 2018	Amended Complaint filed in this case
June 18, 2018	Apical Industries, Inc. d/b/a DART Aerospace files Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to CPLR 3211(A)(8)
July 10, 2018	Plaintiffs' jurisdictional discovery served upon Defendant Apical Industries, Inc. d/b/a DART Aerospace

Counsel for Apical have advised that they will not agree to conduct jurisdictional discovery *Schwartz Aff.*, Exh. A.

B. Basic Facts Underlying Plaintiffs' Claims Against Apical

On March 11, 2018, Trevor Norris Cadigan was a passenger in a helicopter on an aerial photography tour operated by Liberty Helicopters when the helicopter lost altitude and descended into the East River off Manhattan. *Amd. Complt.*, ¶¶ 45-47. The helicopter rolled to its side and

[1] A copy of the Amended Complaint ("*Amd. Complt.*") is annexed as Exhibit A to the Massamillo Affirmation.

sank, drowning Mr. Cadigan. *Amd. Complt.*, ¶¶ 48-50. The helicopter was equipped with an emergency flotation system manufactured by Apical. *Amd. Complt.*, ¶¶ 344-399.

Trevor Cadigan's parents, Jerry Cadigan and Nancy Caton Cadigan, as Proposed Administrators of his Estate, filed this action against Liberty Helicopters, Inc., NYONair LLC, FlyNYON LLC and Richard Zemke Vance on March 13, 2018. See Docket No. 1. On March 28, 2018, Plaintiffs filed their First Amended Complaint adding Meridian Consulting I Corporation, Inc., Airbus Helicopters, S.A.S., Airbus Helicopters, Inc. and Apical Industries, Inc. d/b/a DART Aerospace as defendants. *Massamillo Aff.*, Exh. A.

C. Publicly Available Facts Support the Exercise of Jurisdiction or, at the Very Least, the Undertaking of Jurisdictional Discovery

Apical is a privately held company[2] and a subsidiary of DART Helicopter Services, Inc.[3] On its website, Apical describes its presence as "worldwide:"

> With an impressive line-up of over 850 STC's and 5,000 products, DART offers a comprehensive portfolio of aftermarket products and services for civil and military operators, all major rotorcraft OEMs, completion centers and MRO facilities.
>
> DART Aerospace has extensive experience in collaborating with the widest range of aerospace authorities around the world, such as the FAA, EASA, and TCCA. With 40 new STCs issued annually, DART has the true capabilities and certification expertise you need for your fleet operations.

Schwartz Aff., Exh. E.

Apical has a "Global Presence" in 120 countries and ships "over 27,000 parts" every year. *Id.* Further, Apical advertises that **"[no] matter where you are,** we ensure you get the correct support you need." *Id.* (emphasis added).

[2] DART Aerospace, https://www.dartaerospace.com/en/ (last visited August 30, 2018).
[3] Aviation Pros, http://www.aviationpros.com/press_release/10398291/steven-e-joseph-new-general-manager-of-dart-helicopter-services (last visited August 30, 2018); Bloomberg, https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=49437236 (last visited August 30, 2018).

On Apical's website, customers may view products and prices[4] as well as request quotes and contact Technical Support through the website.[5] It claims to have a "[c]omprehensive network of Service Centers and approved third-party partners located in America, Europe and Australasia," (*Schwartz Aff.*, Exh. F), and that it "offers a worldwide support network for all your needs" and "[t]rust DART as an important partner, **wherever you are.**" *Schwartz Aff.*, Exh. G. (emphasis added). One of those approved maintenance centers is operated by Uniflight which has a service facility in Rome, New York (See "DART Aerospace Launches New Approved Maintenance Center Network, Offering Very Competitive Aftermarket Solutions to Better Serve the Industry," published January 12, 2016 [*Schwartz Aff.*, Exh. H] and Uniflight "Locations" web page [*Schwartz Aff.*, Exh. I]). Apical has also partnered with Pall Aerospace in Port Washington, New York to produce air filtration systems for helicopters. *Schwartz Aff.*, Exh. J. Apical also promotes that it is "North America's leader in Emergency Flotation Systems and Liferafts." *Schwartz Aff.*, Exh. K.

Plaintiffs have also sued Liberty Helicopters, which owned and/or operated the subject helicopter equipped with Apical's defective emergency flotation system. Liberty Helicopters has the largest helicopter fleet in New York City (See "Why Fly With Liberty?" web page, *Schwartz Aff.*, Exh. L). Liberty Helicopters' maintenance center is located just outside New York City in Kearny, New Jersey.[6]

Apical seeks to be dismissed for lack of personal jurisdiction, but all of the facts are not yet known to make that determination. This motion sets out the facts that are needed and requests an opportunity to conduct jurisdictional discovery on this issue. Document requests and a

[4] DART Aerospace, https://www.dartaerospace.com/en/gear-up/flotation-equipment.html (last visited August 30, 2018).
[5] DART Aerospace, https://dartaerospace.com/en/contact/ (last visited August 30, 2018).
[6] Liberty Helicopters, https://www.libertyhelicopter.com/about-sp-2001052626/contact html (last visited August 30, 2018).

designated agent deposition notice to obtain these facts were served upon Defendant Apical on July 10, 2018 and are attached (Plaintiffs' Request for Production of Documents On Jurisdictional Issues to Defendant Apical Industries, Inc., d/b/a DART Aerospace (*Schwartz Aff.*, Exh. M) and Plaintiffs' Notice of Videotaped Depositions of Defendant Apical Industries, Inc. d/b/a DART Aerospace's CPLR 3106(d) Designated Agents (*Schwartz Aff.*, Exh. N). Further, Plaintiffs noticed the deposition of Alan Madore who is the President and CEO of Apical Industries (*Schwartz Aff.*, Exh. O). Alain Madore executed an Affidavit which was attached to Defendant's Motion. As noted above, Apical has refused to provide any responses to Plaintiffs' discovery requests and has refused to sit for deposition. *Schwartz Aff.*, Exh. A.

II. LEGAL AUTHORITY AND ANALYSIS

A. The Court Has Jurisdiction over Apical

New York applies a two step-analysis in determining whether a non-domiciliary may be sued in New York. *LaMarca v Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 214, 713 N.Y.S.2d 304, 307 (2000). First, the court must determine "whether [the] long-arm statute (CPLR 302) confers jurisdiction over it in light of its contacts with this State." *Id* If so, the court must determine "whether the exercise of jurisdiction comports with due process." *Id.*

1. New York's Long-Arm Statute Requires Facts About the Defendant's Operations

The provision on which Plaintiffs believe jurisdiction rests is that involving a tortious act without the state causing an injury within the state:

> 3. commits a tortious act without the state causing injury to person or property within the state . . . if he
>
> . . . .
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; . . . .

CPLR § 302(a)(3).

This provision "was intended to provide a jurisdictional basis for the traditional products liability or negligence action where goods are manufactured out of state, allegedly defectively, and are shipped into this state, and then used by a domiciliary who suffers injury…" *Gen. Motors Acceptance Corp. v Richardson*, 59 Misc.2d 744, 749, 300 N.Y.S.2d 757, 762 (Sup Ct 1969). Jurisdiction on this basis requires the satisfaction of five elements:

> First, that defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce.

LaMarca, supra, at 214, 713 N.Y.S.2d at 307.

Here, the first three elements are easily satisfied: Apical manufactured the defective helicopter emergency flotation system outside New York, the failure of the flotation system was one of the contributing causes of the sinking of the helicopter into the East River in New York and the drowning of Trevor Cadigan, and the claims against Apical arise directly from these tragic events.

The fourth element, that defendant expected or should reasonably have expected its act to have consequences in the State, does not require that the defendant "foresee the specific event that produced the alleged injury." *Id.* Rather, the defendant "need only reasonably foresee that any defect in its product would have direct consequences within the State." *Id.* (internal citations omitted).

The last element, defendant's deriving substantial revenue from interstate or international commerce, "is designed to narrow 'the long-arm reach to preclude the exercise of jurisdiction over

nondomiciliaries who might cause direct, foreseeable injury within the State but 'whose business operations are of a local character.'" *Id.* at 215, 713 N.Y.S.2d at 308.

The Court of Appeals decision in *LaMarca* illustrates how these factors are to be assessed. In *LaMarca*, an employee of the Town of Niagara was injured when he fell from a garbage truck equipped with a loading device made by Pak-Mor, a Texas corporation that manufactured garbage-hauling equipment. *Id* at 213, 713 N.Y.S.2d at 306. Pak-Mor successfully moved to dismiss the complaint based on lack of jurisdiction, contending that it sold the equipment at issue to a distributor in Virginia, that it had no property, offices, or employees in New York, and that in the year of the accident, its sales revenues in New York were less than 3% of its total earnings. *Id*

The Court of Appeals, however reversed, and found that there was a basis for jurisdiction. The Court noted that the invoice for the defective equipment noted Niagara, New York as the destination for the loading device and listed the device as a "New York Light Bar." *Id.* at 213, 713 N.Y.S.2d at 307. Because "Pak–Mor's invoice, including its reference to a 'New York Light Bar,' shows that it knew the rear-loader was destined for use in New York," the court found that "Pak–Mor had reason to expect that any defects would have direct consequences in this State." *Id*

In analyzing the fifth element of long arm jurisdiction, the *La Marca* court found that Pak-Mor, as a Texas corporation with a manufacturing facility in Virginia, could "hardly be characterized as 'local.'" *Id* at 215, 713 N.Y.S.2d at 308. Further, the Court found that Pak-Mor's sales in New York and its advertising in nationally published trade magazines showed that "the company derive[d] substantial revenue from interstate commerce," and therefore had "no difficulty in concluding that CPLR 302(a)(3)(ii) was satisfied in this case." *Id.*

Here, Apical admits that it has derived $194,000 from sales in New York since 2010. Even that figure could be substantially understated. Sales of Apical products to companies outside of

New York for use in the state provide a basis for jurisdiction as was the case in *LaMarca*. That could be a significant factor here where, for example, Apical products sold to Liberty Helicopters, as a New York tour operator, would be used in New York. That likely includes the emergency flotation system on the subject helicopter – another fact that discovery will provide. Further, Apical may be selling its products to a distributor outside of New York to be sold to end users in New York.

From the limited information that is publicly available, we know that Apical has affiliated itself with a service center provider (Uniflight) that has at least one service center in Rome, New York. *Schwartz Aff.*, Exhs. E-F. In addition, Apical has partnered with a company in New York to develop another of its products. *Schwartz Aff.*, Exh. G. Discovery may provide other facts to show that Apical had reason to expect that any defects would have direct consequences in this State.

As for the fifth element, there is no question that Apical derives substantial revenue from interstate and international commerce, Apical describes its presence on its website as worldwide, claiming to have sold products in 120 countries around the world. *Schwartz Aff.*, Exh. B. Like the defendant in *La Maraca,* then, Apical can hardly be considered "local." And based on Apical's claims that $194,000 represents .002% of total worldwide sales, Apical's worldwide sales total $9.7 billion since 2010. This element is satisfied.

2. Due Process Requirements Require the Discovery of Facts About Apical's Indirect and Direct Efforts to Serve the New York Market

A state court may exercise jurisdiction over non-domiciliary defendants if they had "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *LaMarca***,** at 216, 713 N.Y.S.2d at 308 (quoting, *International Shoe Co. v. State of Wash.,* 326 U.S. 310, 316 (1945)). "Minimum contacts" requires that a non-domiciliary defendant may reasonably foresee the prospect of

defending a suit there based on it 'purposefully avail[ing] itself of the privilege of conducting activities within the forum State.'" *Id.* (citing *World-wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980)). Purposeful availment does not occur when a product happens to end up in the forum state based on others' actions; rather, the sale of a product "arises from the efforts of the manufacturer or distributor *to serve directly or indirectly,* the market for its product" in a state where its product causes injury. *LaMarca,* at 217, 713 N.Y.S.2d at 309 (citing *World-wide Volkswagen Corp.*)(emphasis added)(ruling that the defendant sought to serve the New York market by using a distributor selling its products in New York).

In *La Marca,* the defendant argued "that it had no contacts or purposeful affiliation with New York, asserting that 'it did not direct activities at New York residents' and that it 'performed manufacturing in Virginia for customers who paid, received title and accepted delivery in Virginia.'" The court found these facts "far from dispositive." *Id.* What the court did find dispositive was that "Pak–Mor itself forged the ties with New York" by using a New York distributor. *Id.*

The *La Marca* court also found that the exercise of jurisdiction comported with traditional notions of " 'fair play and substantial justice' based upon Pak-Mor's use of a New York distributor and its maintenance of a facility in Virginia." *Id.* at 218, 713 N.Y.S.2d at 310. The court found that, as "a United States corporation fully familiar with this country's legal system," the burden on Pak-Mor was "not great." *Id.* The court also noted that "New York has an interest in providing a convenient forum for LaMarca, a New York resident who was injured in New York and may be entitled to relief under New York law." *Id.* Last, the *LaMarca* court reasoned, that because plaintiff could sue all named defendants in New York, a "single action would promote the interstate judicial system's shared interests in obtaining the most efficient resolution of the controversy." *Id.*

As in *LaMarca*, Apical is a United States corporation fully familiar with this country's legal system. As such, the burden on Apical is not great. New York's interest in providing a convenient forum for the parents of a New York resident who died in a helicopter crash in New York will be served by proceeding here as will the interstate judicial system's shared interest in obtaining the most efficient resolution of this controversy in a single action involving all the entities involved in the crash. The exercise of jurisdiction over Apical, then, comports with traditional notions of fair play and substantial justice.

The limited information developed without the aid of discovery shows sufficient ties with New York upon which to base jurisdiction: (1) Apical has authorized Uniflight to provide services centers and Uniflight has at least one such center in Rome, New York; (2) Apical has affiliated with a product development partner in the State of New York; (3) Apical has at least $194,000 in sales to New York since 2010; and (d) Apical derives substantial revenues from interstate and international commerce. These facts alone are sufficient to deny the motion for lack of jurisdiction. To the extent the Court deems it necessary to develop the record, the Court should defer ruling on the dismissal motion and grant the cross-motion to allow for jurisdictional discovery from Apical to aide with this determination.

B. Discovery On the Issue of Personal Jurisdiction Is Warranted in This Case

If the Court does not believe Plaintiffs' showing to be sufficient, then at the very least it should defer ruling on the motion to dismiss and compel Apical to provide discovery. In responding to a motion to dismiss, New York rules provide for discovery to obtain the facts necessary to oppose that motion:

> Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive

> pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

CPLR Rule 3211(d).

In requesting jurisdictional discovery, "a plaintiff need not make a prima facie showing of jurisdiction, but instead must only set forth a sufficient start, and show that its position is not frivolous." *Expert Sewer & Drain, LLC v New England Mun. Equip. Co., Inc.*, 106 A.D.3d 775, 776, 964 N.Y.S.2d 597, 598 (2nd Dep't 2013). A "start" requires only that a plaintiff show "that facts exist to support the exercise of personal jurisdiction over the defendant." *Id* at 776, 964 N.Y.S.2d at 598–99. Because "the jurisdictional issue is likely to be complex," discovery "is desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits." *Id* (ruling that "the Supreme Court should have exercised its discretion pursuant to CPLR 3211(d) to deny the motion without prejudice to renewal upon the completion of discovery on that issue").

Plaintiffs have gathered information available from public sources on Apical; but because Apical is a privately held company, little information is public. As outlined below, the information available indicates that facts exist to exercise personal jurisdiction over Apical.

1. Plaintiffs Have Little Information About Apical's New York Sales or Its Method of Distribution

Apical has admitted that it has earned at least $194,000 in New York sales since 2010. *Madore Aff.*, ¶ 10. This admission, however, provides little information without knowing how Apical is classifying New York sales and without documentation. A New York court noted this problem in another case involving personal jurisdiction where the defendant used a "narrow definition of 'New York customers,'" citing as an example where the defendant classified as out of state a transaction in which a Michigan business contacted the company on behalf of a New

York resident. *Chestnut Ridge Air, Ltd. v 1260269 Ontario Inc.*, 13 Misc.3d 807, 810, 827 N.Y.S.2d 461, 465 (NY Co. Sup. Ct. 2006).

As Apical has done in this case, the *Chestnut Ridge* defendant sought to avoid jurisdiction, claiming that only 5% of its revenue came from New York clients. *Id* But the court found the defendant's contacts with New York "more than sufficient to establish continuous activity" with revenues of "$102,583 in 1999; $108,590 in 2000; $85,301 in 2001; $61,728 in 2002; $271,722 in 2003; $183,764 in 2004; $2,181 in 2005; and $84,935 thus far in 2006" and the defendant spending 14 weeks a year on New York business. *Id.; see also Energy Brands Inc. v Spiritual Brands, Inc.*, 571 F.Supp.2d 458, 472 (S.D.N.Y. 2008) (ruling that "revenue of $158.53 earned from sales in New York is sufficiently substantial" where the defendants were not "forthcoming regarding their sales in New York," providing documentation only in the form of a simple spreadsheet that was created solely for the motion); *American Network, Inc. v. Access America/Connect Atlanta, Inc.*, 975 F.Supp. 494, 498 (S.D.N.Y. 1997**)** (noting that the defendant "stated twice on its home page that it could help customers "across the U.S." [and] had signed up six New York subscribers").

Unlike the court in *Chestnut Ridge*, Plaintiffs and this Court cannot fully assess Apical's New York business and revenues without information about how that data was classified. Apical, too, may be classifying sales of products it knows to be destined for use in New York as out of state. And it failed to provide even a "simple spreadsheet" created for its motion, which the court found was deficient in *Energy Brands.* Apical is equally as reticent as the *Energy Brands* defendant to provide documentation, so Apical's sales of $194,000 should be deemed sufficiently substantial for the exercise of jurisdiction. Further, just as the defendant in *American Network* claimed that it could help customers across the U.S., Apical's website claims that Apical offers a "worldwide

support network for all your needs" and "[no] matter where you are, we ensure you get the correct support you need."

Without knowing how Apical distributes its products, or how it has classified its sales revenues, Apical's New York revenue could be vastly understated. For example, Apical may be selling products to a distributor located outside New York but who sells Apical's products in New York, with Apical's knowledge.

The defendant in *LaMarca* operated this way, as did the defendant in *Boris v. Bock Water Heaters*, 3 Misc.3d 835, 839, 775 N.Y.S.2d 452, 456 (Suffolk Co. Sup. Ct. 2004). In *Boris*, a Wisconsin manufacturer used its website to solicit New York customers and then referring them to an out-of-state distributor. The court held that, "the record clearly support[ed] the inference that [the defendant] through the use of its Internet site in conjunction with its distributor was knowingly and purposefully attempting to reach a New York market, albeit indirectly." *Id.* at 839, 775 N.Y.S.2d at 456. The discovery sought by Plaintiffs from Apical is directly relevant to the scope of its business contacts with and revenues derived from sales in, New York. See *Schwartz Aff.*, Exh. J, Requests 5, 16, 23, 34, 38, 40, 42, 49, 51, 58, 68-82, 89.

A defendant's use of a distributor is also material in determining whether the defendant has purposefully availed itself of the privilege of conducting business in a state. (finding that the defendant "forged the ties with New York [and] took purposeful action, motivated by the entirely understandable wish to sell its products here" by using a New York distributor); *Darrow v Deutschland*, 119 A.D.3d 1142, 1144, 990 N.Y.S.2d 150 (3rd Dep't 2014) (finding a "purposeful distribution arrangement," where the nondomiciliary defendant designated a distributor to serve the New York market, and agreeing with the trial court that the "defendant sought to indirectly market its product in New York and, thus, should have reasonably expected a manufacturing defect

to have consequences in this state"); *Boris, supra*, at 838, 775 N.Y.S.2d at 455 (ruling that "[t]he utilization of an out-of-state distributor does not change [the] fact [that the defendant expected or should have expected that a defect in its product would have consequences in New York]").

2. Apical's Advertising/Marketing Campaign that Targets New York Provides a Proper Basis for Jurisdiction

A defendant who targets New York customers in its advertising demonstrates purposeful availment and the foreseeability of a defective product having direct consequences here. *See Capitol Records, LLC v. VideoEgg, Inc.*, 611 F.Supp.2d 349, 360-64 (S.D.N.Y. 2009). Even a national marketing campaign can provide a sound basis for jurisdiction. *In re New York County DES Litig.*, 202 A.D.2d 6, 10, 615 N.Y.S.2d 882, 885 (1st Dep't 1994) (ruling that a non-domiciliary defendant who participates in a national marketing campaign "should 'reasonably expect' its act of selling in the national market 'to have,' as C.P.L.R. 302 (a) (3) (ii) puts it, 'consequences in the state.'"). The discovery sought by Plaintiffs from Apical is directly relevant to its efforts to advertise and market its products in New York. See *Schwartz Aff.*, Exh. J, Requests 23, 38, 49, 90.

3. Apical's Website Clearly Serves and Addresses the New York Market

The degree of interactivity between the consumer and the website on a sliding scale determines whether the exercise of jurisdiction is proper. *Grimaldi v Guinn*, 72 A.D.3d 37, 895 N.Y.S.2d 156 (2nd Dep't 2010). On one end, a passive website that merely provides information does not provide a basis for jurisdiction. *Id.* at 48, 895 N.Y.S.2d at 165. In the middle, the exercise of jurisdiction of companies with interactive Web sites that allow a user to exchange information with the host computer "is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." *Id* at 49, 895 N.Y.S.2d at 165-166. At the opposite end, jurisdiction may properly be exercised over a defendant whose website

"permits access to e-mail communication, describes the goods or services offered, downloads a printed order form, or allows online sales with the use of a credit card, and sales are, in fact, made in this manner in the forum state." *Id.* Of course, other business activity may combine with website interactivity to alter the jurisdictional analysis. *Id.*

Here, Apical's website provides information about products and prices and allows customers to request a quote online or to contact Technical Support. *Schwartz Aff.,* Exhs. B-D. The website claims that Apical is involved with "Equipping Helicopters Worldwide" (*Schwartz Aff.*, Exh. B) and it does not exclude sales in any state, including New York. In the absence of discovery, however, the amount of revenue derived from New York customers from the use of that website and the total revenue from all customers is unknown to Plaintiffs and only available from Apical.

4. Apical's Customer Support Efforts Demonstrate That It Engaged in a Persistent Course of Business Conduct in New York

On its website, Apical claims to have a "[c]omprehensive network of Service Centers and approved third-party partners located in America, Europe and Australasia" but lists four worldwide. While Plaintiffs have uncovered one approved maintenance center in New York, there may be others. *Schwartz Aff.,* Exhs. E-F.

Apical's employees may travel to New York to train customers how to install its products or to repair Apical's products.[7] One New York court found that a defendant "engaged in a persistent course of business conduct in this state sufficient to bring it within the scope of CPLR 302 (a) (3) (1) when its employees traveled to New York to train and supervise customers, repair equipment, and inspect job sites" as well as it designating a New York distributor. *Allen v Marais,*

[7] Although Apical claims that it "does not and has never had any employees working in the State of New York," that representation, like the revenue figure, depends on the definition of "employees working." Does that statement assume permanent employment at a permanent work site? Does it omit employees working only temporarily at a customer's work site? Only Apical knows.

S.A., 307 A.D.2d 613, 614, 762 N.Y.S.2d 188 (3rd Dep't 2003) (also ruling that this activity satisfied due process).

To determine the extent of its contact with New Yorkers, Plaintiffs need the facts related to Apical's support of its customers for the installation and service of its products. Its website is unclear about those facts and only Apical can provide them through discovery.

5. Apical's Revenue From Interstate or International Commerce May Provide Additional Support for Satisfaction of the Fifth Element Under the Long-Arm Statute

Based on its worldwide presence, Apical itself has already shown that it can hardly be considered a local company. The bald assertions in Apical's affidavit lead to a calculation of $9.7 billion in worldwide sales since 2010. But annual worldwide sales in comparison with fully documented annual sales in New York are needed for a meaningful comparison. Discovery will provide that.

6. Information About the Sale of the Subject Emergency Flotation Equipment Also Supports Jurisdiction Here

About the subject emergency flotation system, Apical's CEO/President merely states that "Defendant Apical did not enter into a contract to ship the components of the aircraft float system at issue into the State of New York." *Madore Aff.*, ¶ 14. The Madore Affidavit provides no explanation as to how the Apical flotation devices came to be installed on the Liberty helicopter that crashed and caused Trevor Cadigan's death. But it could have been, and likely was, sold to Liberty Helicopters for use in New York since it was on the helicopter when it sank in the East River. This is another fact that may be uncovered in discovery.

C. The Limited Information Provided by Apical in the Affidavit of Its CEO/President Fails to Establish That a New York Court Cannot Exercise Jurisdiction Over It

The case of *Reynolds v Aircraft Leasing, Inc.*, 194 Misc.2d 550, 756 N.Y.S.2d 704 (Queens Co. Sup. Ct. 2002) demonstrates why the facts in Apical's affidavit fail to prove that this Court lacks jurisdiction over it. In *Reynolds*, Precision, a Washington State corporation, manufactured and sold fuel controls for the general aviation piston aircraft market. *Reynolds* at 552, 756 N.Y.S.2d at 796. Like Apical, it was not licensed or authorized to do business in New York, had no registered agent in New York, paid no taxes in New York, and had no bank accounts, place of business or address, owned no real estate and had no officers, directors or employees in New York. *Id.* Precision was sued in New York after a plane crashed there in which a carburetor overhauled by it had been installed. *Id.* The carburetor had been sent to it in Washington by an engine manufacturer in Pennsylvania and returned by Precision to Pennsylvania. *Id.*

The court determined that "the sole disputed element is whether Precision expected or should reasonably have had reason to expect that its tortious act (overhauling the carburetor) committed in another state (Washington), would have direct consequences in this State when in fact, the carburetor came from and was returned to Pennsylvania." *Id.* at 554, 756 N.Y.S.2d at 708 (internal citation omitted). First, the court noted that "a defendant need not foresee the specific event that produced the alleged injury; instead, the defendant need only reasonably foresee that any defect in its product would have direct consequences within the State." *Id.* The court found that the defendant had advertised in general trade magazines and maintained a worldwide website that listed distributors of its products and warranty stations in the United States and that a distributor and a warranty repair station was located in New York. *Id.* at 551, 756 N.Y.S.2d 706 Its sales to New York amounted to 2% of its total sales of $12 million. *Id.*

Because Precision manufactured and sold parts worldwide for plane engines and sold its products directly and indirectly to New York businesses, the court found that "Precision's intended

distribution activities made it foreseeable that its products would be found in New York, and that its alleged negligent overhaul and manufacture of carburetors in Washington, and sales to other states as well as New York, could have direct and expected consequences in New York." *Id.* at 555, 756 N.Y.S.2d 708. As a result, the court found the exercise of jurisdiction over Precision proper under CPLR 302(a)(3)(ii). *Id.* at 555, 756 N.Y.S.2d 709.

The court then analyzed whether the exercise of jurisdiction was proper under due process standards. Concluding that it was indeed proper, the court noted that, based on Precision's "efforts to forge ties with New York resulting in numerous sales of its products," it "had every reason to foresee that there could be the prospect of being haled into court here if its defective products caused injury. *Id.* at 556, 756 N.Y.S.2d 709-710.

As to traditional notions of fair play and substantial justice, the court considered "the burden on the defendant, the interests of the forum State and the plaintiff's interests in obtaining relief" as well as "the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Id.* (citing *LaMarca*). The court concluded that "[t]he burden on Precision is not great, as it is a United States corporation fully familiar with the country's legal system, and it took advantage of the New York market for its products." *Id.* It also reasoned that "New York has a strong interest in providing a forum for the plaintiffs, as the injuries occurred here as a result of the allegedly defective carburetor, and the New York plaintiffs have a strong interest in bringing Precision into a New York court." *Id.* Noting that "both the accident and investigation into the accident occurred in New York," the court found that the exercise of jurisdiction "comports with due process." *Id.*

To be subject to the jurisdiction of a court in New York, Apical need not pay taxes, own property, design or manufacture its products, have a registered agent, maintain bank accounts or facilities, or be registered or authorized to do business in New York. Apical has an approved service center in New York and a website that provides product, pricing, and service information as well as an ability to contact Apical for technical support or to request a quote. And, as discussed herein, the revenue figure for New York provided by Apical fails to support its position with no definition of "New York sales" and no documentation.

The exercise of jurisdiction also satisfies traditional notions of fair play and substantial justice. As a United States corporation fully familiar with the country's legal system, Apical's burden of defending a suit here is not great. Allowing this case to proceed here satisfies New York's strong interest in providing a forum for the Plaintiffs, as Trevor Cadigan, a resident of New York, drowned as a result of the defective flotation system. And because plaintiffs could sue all named defendants in New York, a single action would promote the interstate judicial system's shared interests in obtaining the most efficient resolution of the controversy.

In addition to the facts not supporting Apical's position, the law cited by Apical does not support its position. For example, *Carrs v Avco Corp.*, 124 A.D.3d 710, 2 N.Y.S.3d 533 (2nd Dep't 2015)[8] involved different facts than those currently known here. In Carrs, the trial court held that "the singular sale or shipment of [the defendant's] product into New York (if said product was even shipped to New York, rather the evidence indicates it was first shipped to Connecticut)" was insufficient for the exercise of jurisdiction. *Carrs v. AVCO Corp.*, 2013 WL 10723184 (N.Y. Sup. Ct.) (Trial Order). But here, there is at least $194,000 in Apical sales since 2010 -- more than a "singular sale." And there are contacts in New York through an approved service center and a

[8] The italicized language in Apical's motion is quoted from the second Westlaw headnote, not the case.

business partner. And that is based only on the meager information available on a privately-owned company. Discovery may reveal other facts further distinguishing *Carrs* from this case.

As for due process requirements, discovery is needed to determine whether general or specific jurisdiction applies here. If discovery reveals that Apical sold the emergency flotation system to Liberty Helicopters for use in New York – a likely result since the subject New York tour helicopter was equipped with an Apical emergency flotation system and specific jurisdiction will apply. And if Apical engages a distributor outside of New York to sell its products in New York, general jurisdiction may well apply.

More facts are needed to conclusively determine whether Apical has minimum contacts with New York to comport with due process standards under either general or specific jurisdiction. Discovery will provide that.

III. CONCLUSION

The facts provided by Apical fail to prove that this court has no jurisdiction over it. To the contrary, the limited information available shows that the Apical flotation device contributed to the sinking of the helicopter and the drowning of Trevor Norris Cadigan, and that Apical has had substantial sales in New York, that it has a service center here, and that it has partnered with other businesses to develop products in New York and that it derives substantial revenues from interstate and international commerce. This is a sufficient basis for jurisdiction over Apical. To the extent the Court deems it insufficient, further, additional information through discovery about efforts to directly or indirectly serve the market here and the subject product is required. Those facts will help this Court reach the correct determination.

WHEREFORE, for the above-stated reasons, Plaintiffs respectfully request that this Court deny Apical's motion to dismiss the complaint for lack of personal jurisdiction. In the alternative, the Court should defer ruling on the motion and compel Apical to submit to jurisdictional discovery and that the Court grant such other and further relief as it deems just and proper.

Dated: New York, New York
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