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,

-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 COPORATION, 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.

Index No.: 152286/2018

DEFENDANT APICAL INDUSTRIES, INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION PURSUANT TO CPLR 3211(a)(8)

PRELIMINARY STATEMENT

Defendant Apical Industries, Inc. d/b/a DART Aerospace (hereinafter "Defendant Apical" or "Apical"), by its undersigned attorneys, respectfully submits this Memorandum of Law in support of its Motion to Dismiss, pursuant to CPLR 3211(a)(8), seeking dismissal of the claims asserted against it in the First Amended Complaint ("Complaint").[1] Defendant Apical makes this Motion on the ground that this Court lacks personal jurisdiction under both CPLR 302 and the Due Process Clause of the Fourteenth Amendment and, thus, the Complaint must be dismissed.

The plaintiffs' burden in response to this Motion is to demonstrate that this Court can exercise personal jurisdiction over Apical, a non-resident corporation. Indeed plaintiffs must show that Apical's contacts with New York fall within the ambit of CPLR 302 and that the exercise of personal jurisdiction comports with Constitutional Due Process. Plaintiffs will be unable to do so because the facts relevant to determining jurisdiction do not support such a conclusion.

As will be fully addressed below, this Court lacks personal jurisdiction over this Defendant because Apical, a nonresident, has no contacts – either direct or indirect -- with New York, and could not have reasonably expected its allegedly tortious foreign act to have consequences in this forum so as to warrant the exercise of personal jurisdiction. Accordingly, because this Court lacks *in personam* jurisdiction over Apical, the claims asserted by plaintiffs should be dismissed, as a matter of law.

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[1] A true and correct copy of the Supplemental Summons and First Amended Complaint, filed March 28, 2018, is attached to the Affirmation of Eugene Massamillo, dated June 18, 2018 ("Massamillo Aff."), as Exhibit A thereto. The Supplemental Summons and First Amended Complaint were served on Defendant Apical on May 4, 2018. A true and correct copy of the Proof of Service, filed May 9, 2018, is attached to the Massamillo Aff. as Exhibit B, thereto.

FACTS RELEVANT TO THE DISPOSITION OF THE MOTION

This action was commenced by plaintiffs, Jerry Cadigan and Nancy Caton Cadigan, as the Proposed Administrators of the Estate of Trevor Norris Cadigan ("plaintiffs"), who was killed in a tragic helicopter accident in the East River, in New York City, on March 11, 2018. *See* Complaint, ¶¶ 1-3, Exhibit A. On March 28, 2018, Plaintiffs filed a wrongful death action and asserted claims against several defendants, including Defendant Apical. *See* Exhibit A. The causes of action directed at Defendant Apical are based on strict products liability, negligence and a claim for punitive damages. *See* Exhibit A, ¶¶ 344-399.

In the Complaint, plaintiffs correctly alleged that Apical is a California based corporation, and Apical was thereafter served with a Supplemental Summons and First Amended Complaint at its offices in California. *See* Exhibit A, Complaint ¶40; Exhibit B, Service of Process. Defendant Apical, which does business under the name "DART Aerospace", is a corporate entity incorporated in the State of California, with its headquarters and principal place of business in Oceanside, California. *See* Affidavit of Alain Madore, sworn June 18, 2018 ("Madore Aff."), submitted herewith, ¶¶ 2-4. Defendant Apical designs and manufactures, among other things, emergency flotation devices and evacuation equipment for helicopters and fixed wing aircraft. Madore Aff., ¶4. Defendant Apical is neither registered nor authorized to do business in New York and does not maintain any offices, manufacturing plants or any other type of business operations in New York. Madore Aff., ¶¶ 5-6.

All of its products are designed and manufactured exclusively in California and at no time did Apical enter into a sales agreement to supply the components of the aircraft float system on this helicopter to any person or entity in New York, nor were the devices installed on the helicopter in New York. Madore Aff., ¶¶ 13-14. Since 2010, Apical has derived only .002% of

its total worldwide sales from New York; approximately $194,000 over the eight year span. Madore Aff., ¶ 12.

By all accounts, Defendant Apical has absolutely no nexus with the State of New York, lacking even the most minimum of contacts required for this Court to exercise personal jurisdiction in both the federal and state realm. As clearly and unequivocally set forth in the sworn Madore Affidavit, the facts demonstrate that Apical did not purposefully avail itself of the privilege of conducting activities in New York sufficient to confer jurisdiction over it in this wrongful death action. The Madore Affidavit makes clear that there was no discernible effort by Defendant Apical to serve the market in New York, either directly or indirectly, at any time prior to the incident which gives rise to this litigation.

Plaintiffs' allegations, coupled with the factual details set forth in the Madore Affidavit, reveal that Apical's contacts with New York are legally insufficient to confer personal jurisdiction over this non-domiciliary. Plaintiffs' claims asserted against Apical in the Complaint must be dismissed, as a matter of law, in accordance with CPLR 3211(a)(8).

SUMMARY OF ARGUMENT

Whether a non-domiciliary, such as Defendant Apical, may be subject to *in personam* jurisdiction and forced to defend itself in New York is determined by a two-step jurisdictional inquiry promulgated by the United States Supreme Court and derived from the U.S. Constitution. First, this Court must determine whether New York's Long Arm Statute, CPLR 302, confers jurisdiction over Apical in light of its contacts with this State, the forum. Assuming it does, the Court must then assess whether the exercise of jurisdiction comports with Due Process under the Fourteenth Amendment. Given the absolute paucity of contacts that Defendant Apical has with the State of New York, none of the necessary predicates of this jurisdictional inquiry is capable of being satisfied.

The United States Supreme Court has repeatedly reaffirmed that in order to confer personal jurisdiction over a non-domiciliary, due process requirements under the Fourteenth Amendment must be satisfied such that the non-resident has "minimum contacts" with the forum state. *International Shoe Co. v. Washington*, 326 U.S. 310, 316-17, 66 S. Ct. 154 (1945). Although characterized as "minimum," these contacts, in fact, must be so substantial and continuous that the nonresident defendant may reasonably foresee or, even, expect to defend a suit in the forum state. Courts generally measure this "reasonable expectation" by whether the non-domiciliary purposefully availed itself of the privilege of conducting activities within the forum State. *Daimler AG v. Bauman,* 571 U.S. 122, 134 S. Ct. 746 (2014) (*citing International Shoe*, 326 U.S. at 316-17); *see also Milliken v. Meyer,* 311 U.S. 457, 463, 61 S. Ct. 339 (1941). Essentially, these contacts must be so prevalent and constant that the non-domiciliary is not surprised when it is called to answer in the forum in which it has reaped benefits from its business transactions – the proverbial *quid pro quo*. At the heart of the Constitutional inquiry

lies fairness, consistency and balance; the critical components of due process. *Daimler,* 571 U.S. at 122; *International Shoe*, 326 U.S. at 316-17.

Against this federal legal framework, Courts in New York have narrowly construed CPLR 302, the Long Arm Statute, consistently requiring an actual and substantial connection between the non-resident's contacts with the forum state and the cause of action alleged as a predicate to personal jurisdiction. If these prerequisites are satisfied under the Long Arm Statute, the Court is then required to assess whether the exercise of jurisdiction comports with federal due process safeguards in accordance with the Fourteenth Amendment. This constitutional prong ensures that the relationship between the defendant and the forum is sufficient to compel the corporation to defend the particular suit in the chosen forum. *See World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292-93, 100 S. Ct. 559 (1980). The Supreme Court has explained the rationale underlying the two step inquiry:

> [A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. . . The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And **it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system. . . The relationship between the defendant and the forum must be such that it is "reasonable. . .to require the corporation to defend the particular suit which is brought there."**

444 U.S. at 291-92 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316-17, 66 S. Ct. 154 (1945) (emphasis added)).

The burden of establishing personal jurisdiction over Defendant Apical lies with the plaintiffs. In order to survive this Rule 3211(a)(8) motion to dismiss, plaintiffs, therefore, must "make a *prima facie* showing that the defendant is subject to the personal jurisdiction of the court." *Whitcraft v. Runyon,* 123 A.D.2d 811, 812, 999 N.Y.S.2d 124, 126 (2d Dep't 2014); s*ee*

Sanchez v. Major, 289 A.D.2d 320, 321, 734 N.Y.S.2d 211, 212 (2d Dep't 2001). Thus, it is incumbent on plaintiffs to establish that the requisite contacts, sufficient to confer personal jurisdiction under the two step inquiry, exist between Defendant Apical and the forum state, New York. *International Shoe,* 326 U.S. at 316-17; *see Daimler,* 571 U.S. at 117; *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915, 131 S. Ct. 2846, 2853 (2011); *World–Wide Volkswagen Corp,* 444 U.S. at 287, 299.

Plaintiffs affirmatively allege that Defendant Apical is a California corporation and assert general allegations alluding to jurisdiction in the Complaint. The Madore Affidavit confirms that Apical conducts no activity whatsoever in New York and has no direct (or even indirect) contacts with this forum. As is more fully addressed below, and based on these incontrovertible facts, plaintiffs' burden of establishing that the Court has personal jurisdiction over Apical, is insurmountable. Accordingly, this Court lacks personal jurisdiction over Apical because its contacts with New York fall short of satisfying the rigorous requirements of both the Long Arm Statute and constitutional due process. Thus, the claims against Apical asserted in the Complaint must be dismissed based on lack of personal jurisdiction.

ARGUMENT

I

DEFENDANT APICAL'S CONTACTS WITH NEW YORK ARE NON-EXISTENT AND CANNOT SUPPORT THE EXERCISE OF PERSONAL JURISDICTION UNDER CPLR 302, THE LONG ARM STATUTE

The Court should dismiss Apical from this action because its activities related to the accident do not satisfy any of the jurisdictional grounds set forth in CPLR 302, New York's Long Arm Statute.[2] Plaintiffs correctly allege that Defendant Apical is a California corporation. Complaint A, ¶40. As a non-domiciliary, Apical is only amenable to suit through CPLR 302, the Long Arm Statute, which provides in pertinent part:

> As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary * * * who:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real property situated within the state.

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[2] The Supreme Court decision in *Daimler AG v. Bauman*, dramatically narrowed the scope of general jurisdiction under CPLR 301, the general jurisdiction statute. 571 U.S. at 126-28. The *Daimler* Court held that general personal jurisdiction under CPLR 301, could only be conferred if a corporate defendant was "at home" in the forum state. 571 U.S. at 117. The Court defined "at home" as where the defendant is incorporated and has its principal place of business. Because plaintiffs have alleged that Apical is incorporated in California, CPLR 301 cannot provide a basis for personal jurisdiction. *See* First Amended Complaint, ¶40. *Daimler,* 571 U.S. at 137.

McKinney's CPLR 302.

Plaintiffs' claims against Apical arise out of the design, manufacture, testing, inspection assembly, labeling, advertising, selling and distribution of an allegedly defective part. Complaint, ¶¶40-42. The only allegations related to jurisdiction state that Apical is "doing business in the State of New York," and manufactures products "for ultimate sale and/or use in the State of New York." Complaint, ¶¶40-42. Plaintiffs do not specify which subpart of 302 supposedly provides this Court with personal jurisdiction over Apical. None of the enumerated provisions of CPLR 302, however, operates to confer personal jurisdiction over it in this Court and each is addressed *seriatim*.

1. **Apical Has Not Transacted Relevant Business Within the State or Contracted to Supply Relevant Goods to New York.**

In order establish personal jurisdiction under CPLR 302(a)(1), the cause of action must arise from the defendant's transaction of business. Although a non-resident defendant may conduct some transactions in New York, personal jurisdiction under 302(a)(1) requires that those business transactions must be sufficiently related to the subject matter of the claim. *McGowan v. Smith*, 52 N.Y.2d 268, 271, 437 N.Y.S.2d 643 (1981). The nature and quality of the defendant's contacts with the state must be considered in their totality. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.* 15 N.Y.2d 443, 464, 261 N.Y.S.2d 8 (1965). The central determination is whether a defendant invoked the privileges or protections of the forum's laws. *See Ehrenfeld v. Mahfouz*, 9 N.Y.3d 501, 508, 51 N.Y.S.2d 381 (2007). It is well settled that the claims must arise out of the particular transaction and, at a minimum, there must be a "relatedness" between the transaction and the legal claim. *Licci v. Lebanese Canadian Bank*, 20 N.Y.3d 327, 339, 960 N.Y.S.2d 695 (2012).

The Court of Appeals has held that merely shipping goods into New York, whether it be by the non-resident defendant or a third party, does not constitute the transaction of business sufficient to impose *in personam* jurisdiction over a non-resident defendant. *McGowan*, 52 N.Y.2d at 271. Indeed, the Court has held:

> It is well established, however, that the long-arm authority conferred by this subdivision does not extend to nondomiciliaries who merely ship goods into the State without ever crossing its borders . . . In addition to the shipment of goods into the State, there must have been some "purposeful activities" within the State that would justify bringing the nondomiciliary defendant before the New York courts.

52 N.Y.2d at 271 (citations omitted); s*ee also Halas v. Dick's Sporting Goods*, 105 A.D.3d 1411, 1412-13, 964 N.Y.S.2d 808 (4th Dep't 2013).

The second prong of CPLR 302(a)(1), which permits jurisdiction if the defendant "contracts anywhere to supply goods," requires an "articulable nexus" or "substantial relationship" between the in-state activity and the cause of action asserted. *Fernandez v. Daimler Chrysler, A.G.,* 143 A.D.3d 765, 766-67, 40 N.Y.S.3d 128, 130-31 (2d Dep't 2016); *Seaman v. Fichet Bauche, N. Am., Inc.*, 176 A.D.2d 793, 794, 575 N.Y.S.2d 122 (4th Dep't 1991)(under 302(a)(1) jurisdiction may only be conferred in product liability claims over a manufacturer who ships its products into New York pursuant to a contract with a retailer). Plaintiffs cannot satisfy either prong.

Defendant Apical never contracted to ship goods to New York, nor does it even transact business in New York. *See* Madore Aff., ¶¶ 2-4. Apical did not enter into a sales agreement to supply the components of the aircraft float system on this helicopter to any person or entity in New York, nor were the devices installed on the helicopter in New York. Madore Aff., ¶¶ 13-14. Apical is incorporated in the State of California, with its headquarters and principal place of business in Oceanside, California. *See* Madore Aff., ¶¶ 2-4. Apical designs and manufactures

emergency flotation devices and evacuation equipment for helicopters and fixed wing aircraft *in California*. Madore Aff., ¶¶ 4, 13-14. Defendant Apical is neither registered nor authorized to do business in New York and does not maintain any offices, manufacturing plants or any other type of business operations in New York. Madore Aff., ¶¶ 5-6. Thus, Apical is not subject to jurisdiction under CPLR 302(a)(1) because it has not transacted any business in New York, nor contracted to supply goods here.

Plaintiffs' First Amended Complaint asserts no allegations necessary to satisfy CPLR 302(a)(1), and, thus, precludes the exercise of long-arm jurisdiction. Accordingly, plaintiffs cannot rely on CPLR 302(a)(1) to assert jurisdiction over Apical.

2. Apical Has Not Committed a Tortious Act within the State.

Plaintiffs also have not shown that the Court can confer jurisdiction over Apical pursuant to CPLR 302(a)(2) because it has not been alleged that Apical committed a tortious act in New York. Jurisdiction under this subdivision turns on the locus of the tortious act. *Longines-Wittnauer,* 15 N.Y.2d at 464. Indeed, subdivision 302(a)(2) requires the defendant to be physically present in New York when it committed the alleged tortious act. *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 28-29 (2d Cir. 1997). Plaintiffs have made general allegations concerning design and manufacture, but have not alleged that Apical was present in New York when this tortious act occurred. And, in fact, all of Apical's products are manufactured in California. Madore Aff., ¶¶ 4, 13-14.

CPLR 302(a)(2) is clear and requires that "the tort that is the subject of the dispute must have been committed in the state." *Pilates, Inc. v. Pilates Inst., Inc.* 891 F. Supp. 175, 182 (S.D.N.Y. 1995). In products liability actions, the Court of Appeals has held that claims relating to

defective products arise where the product was manufactured, not where the product was used. *Longines-Wittnauer*, 15 N.Y.2d at 461-64. The Court expounded this point:

> The mere occurrence of the injury in this State certainly cannot serve to transmute an out-of-state tortious act into one committed here within the sense of the statutory wording. . . Any possible doubt on this score is dispelled by the fact that the draftsmen of section 302 pointedly announced that their purpose was to confer on the court "personal jurisdiction over a non-domiciliary *whose act in the state* gives rise to a cause of action" or, stated somewhat differently, "to subject non-residents to personal jurisdiction *when they commit acts within the state*".

15 N.Y.2d at 461 (citations omitted and emphasis added).

Here, the alleged tortious conduct is premised on an alleged defective product that was manufactured not in New York, but, rather, in California. See Madore Aff., ¶¶ 4-8. Thus, CPLR 302(a)(2) does not authorize this Court to exercise personal jurisdiction over Apical.

3. CPLR 302(a)(3) Does Not Provide a Basis of Jurisdiction Because Apical Does Not Regularly Do or Solicit Business in New York and Did Not Reasonably Expect its Act to Have Consequences in New York.

CPLR 302(a)(3) provides that "a court may exercise personal jurisdiction over any non-domiciliary...who in person or through an agent....commits a tortious act without the state...causing injury within the state...if he (i) regularly does or solicits business..., or (ii) expects or reasonably should expect the act to have consequences in the state..."

Defendant Apical does not dispute that the situs of the injury occurred in New York. However, CPLR 302(a)(3) is inapplicable because plaintiffs cannot make the additional showing required under subparts (i) or (ii) to satisfy the Statute because Apical has no contacts with this forum and, considering the strict standards promulgated by federal due process, discussed *infra,* jurisdiction cannot be imposed under this provision. CPLR 302(a)(3)'s jurisdiction extends only to those "who have sufficient contacts with this state so that it is not unfair to require them to answer in this state for injuries they cause here by acts done elsewhere. Thus, the

subdivision necessitates some ongoing activity *within New York State. See Allen v. Canadian Gen. Elec. Co.*, 65 A.D.2d 39, 40, 41, 410 N.Y.S.2d 707 (3d Dep't 1978).

New York courts have consistently applied the factors delineated by the Supreme Court in assessing constitutional due process and evaluating sufficient minimum contacts. For example, in *Schaadt v. T.W. Kutter, Inc*, 169 A.D.2d 969, 970-71, 564 N.Y.S.2d 865 (3rd Dep't 1991), an employee who injured her hand when she caught it in a meat packaging machine filed a personal injury action against the German manufacturer of the machine and a Massachusetts corporation which sold the machine in the United States. The German manufacturer argued that jurisdiction was improper because it had no contacts with New York other than the fact that the machine was present in New York at the time of the accident.

Relying on 302(a)(3), plaintiff argued that jurisdiction was proper because defendant should have reasonably expected its allegedly tortious foreign act to have New York consequences. The Court held that the non-resident manufacturer had no direct contacts with New York and, therefore, could not have reasonably expected its allegedly tortious out of state act to have New York consequences so as to warrant exercise of personal jurisdiction. In dismissing the plaintiffs arguments, the Court relied on the United States Supreme Court's decision in *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287, 299, 100 S. Ct. 559 (1980), stating:

> It is settled that the mere presence of the allegedly defective product in this State is not, in and of itself, sufficient to establish jurisdiction. . . Moreover, it is not enough that a defendant foresaw the possibility that its product would find its way here; foreseeability must be coupled with evidence of a purposeful New York affiliation, for example, a discernible effort to directly or indirectly serve the New York market…

See 169 A.D. 2d at 970.

New York Courts have conformed with the Supreme Court's recent and more narrow interpretation of what constitutes "doing business or transacting business" for purposes of establishing personal jurisdiction over a non-domiciliary. For example, in *Carrs v. Avco Corp.*, 2013 WL 10723184, at *2 (Westchester County Sup. Ct. Jan. 9, 2013), *aff'd,* 124 A.D.3d 710, 2 N.Y.S.3d 533 (2d Dep't 2015), an action arising out of an aircraft accident, the defendant, a Texas corporation, moved to dismiss the complaint on the grounds that the Court lacked personal jurisdiction based on an absence of contacts with New York. Plaintiff asserted jurisdiction under various provisions of the Long Arm Statute, arguing that the contacts were sufficient and the Court disagreed.

The Court granted the motion relying on the fact that the defendant was incorporated in the State of Texas with its principal place of business in Texas. Moreover, the Court noted that plaintiff had failed to show that defendant engaged in any systematic or continuous conduct in New York. Significantly, the Court noted that defendant's "lack of physical presence in New York, coupled with its relatively small percentage of sales received from New York domiciliaries, supports a finding that its contacts with the State of New York are *de minimis."* *See* 2013 Westlaw 10723184, at *1-2.

Specifically, in discussing CPLR 302(a)(3), the Court held that jurisdiction was improper, recognizing that New York Courts are authorized to exercise *in personam* jurisdiction over a non-domiciliary only if the cause of action at issue arose out of the transaction of business within the State. The Court went on to caution that:

> **[A]lthough it has been demonstrated that defendant transacted some business within the State, there has been no proof to establish either that [defendant] was engaged in a "systematic course of 'doing business"' in New York or that the business actually transacted here, i.e. the singular sale or shipment of its product into New York** (if said product was even shipped to New York, rather the evidence indicates it was first shipped to

> Connecticut), was sufficiently related to the subject matter of the lawsuit to justify the exercise of in personam jurisdiction under CPLR §302(a)(1). Plaintiff additionally alleges that [defendant] committed a tortious act outside the State of New York causing injury to the plaintiff herein thus submitting [defendant] to this Court's jurisdiction pursuant to CPLR §302(a)(3). **As stated above this Court does not find that [defendant] regularly solicits business in New York, nor does it derive substantial revenue from this State to support a finding of jurisdiction** pursuant to CPLR §302(a)(3)(i).

See 2013 Westlaw 10723184, at *2.

The Appellate Division thereafter affirmed the trial court's determination relying on the Supreme Court decision in *Daimler,* 571 U.S. 122. In so doing, the Court reiterated that that the lower court lacked personal jurisdiction over the non-domiciliary defendant corporation because *plaintiffs failed to show that the activities of the corporation subjected it to jurisdiction in New York by regularly conducting or soliciting business within the state of New York.* 124 A.D.3d 710, 711 (2d Dep't 2015).

In assessing what contacts comport with due process requirements, the United States Supreme Court has distinguished cases in which manufacturers purposefully direct their products into the forum State as opposed to those products that are present in the state through some indirect means and consequently do not expect to be subject to suit here. The Court has stated:

> if the sale of a product of a manufacturer or distributor * * * is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor **to serve directly or indirectly,** the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

World-Wide Volkswagen, 444 U.S. at 297 (emphasis added). Thus, in accordance with the stringent due process requirements, the jurisdictional determination will rest on whether a defendant's "conduct and connection with the forum State" are such that it should reasonably be subject to jurisdiction because its contacts are both continuous and systematic and if "it

purposefully avails itself of the privilege of conducting activities within the forum State. *See LaMarca v. Pak-Mor, Mfg.*, 95 N.Y.2d 210, 216, 713 N.Y.S.2d 304 (2000) (*quoting World–Wide Volkswagen,* 444 U.S. at 297). However, isolated allegations concerning an alleged defective product, *alone*, do not serve to establish personal jurisdiction under the Long Arm Statute. Indeed, "[i]t is settled that the mere presence of the allegedly defective product in this state is not, in and of itself, sufficient to establish jurisdiction." *Schaadt*, 169 A.D.2d at 970-71; *see World–Wide Volkswagen Corp,* 444 U.S. at 287, 299.

Courts are in accord that, "it is not enough that a defendant foresaw the possibility that its product would find its way here; foreseeability must be coupled with evidence of a purposeful New York affiliation, for example, a discernible effort to directly or indirectly serve the New York market." *Schaadt*, 169 A.D.2d at 970-71*; Martinez v. American Std.*, 91 A.D.2d 652, 653-654, 457 N.Y.S.2d. 97 (2d Dep't 1982), *aff'd*, 60 N.Y.2d 873, 470 N.Y.S.2d 367 (1983).

The Madore Affidavit confirms that subpart (i), which requires that the defendant "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state," is not applicable. Defendant Apical does not regularly do or solicit business, engage in any persistent course of conduct, or derive substantial revenue from goods used in New York. Madore Aff., ¶¶ 2-4, 10-14. Moreover, Apical does not have any offices, employees, distributors or pay taxes in New York. Madore Aff., ¶¶ 2-4, 10-14. Apical certainly does not engage in a persistent course of conduct or derive substantial revenue from goods used in New York. Since 2010, Apical has derived a mere .002% of its total worldwide sales from New York; approximately $194,000 over the eight year span. Madore Aff., ¶ 12. Thus, plaintiffs will not be

able to demonstrate that this provision has been satisfied and certainly have not asserted sufficient allegations to support jurisdiction under subpart (i).

The key issue in determining whether subpart (ii) is operative is whether, based on Apical's purported "contacts," that it should have reasonably expected the act of manufacturing and designing a product in California to have consequences in New York. Given that Apical and New York are completely devoid of any "contacts," as illustrated above, this Court must find that it was not reasonable for Apical to expect to be sued in New York on a product defect claim arising out of a product manufactured and designed in California. This is especially true because Apical did not at any time enter into contracts for the sale or transport of goods to New York. Madore Aff., ¶¶ 2-6; *Ingraham v. Carroll*, 90 N.Y.2d 592, 598, 665 N.Y.S.2d 10 (1997).

The clear and unequivocal language of CPLR 302(a)(3), contemplates some purposeful and ongoing commercial activity within New York State – activity which is conspicuously absent here. It is manifestly clear that Apical does not have a presence - commercial or otherwise - in New York sufficient to satisfy the necessary prerequisites of New York's Long Arm Statute to confer jurisdiction over Apical. The Long Arm Statute obviously assumes purposeful, continuous commercial activity as a prerequisite to the exercise of personal jurisdiction over a nonresident defendant, such as Apical. Apical has not a single New York affiliation and certainly not a purposeful one.

4. **Apical Has Not and Does Not Own Any Real or Personal Property in New York.**

Finally, in regard to subdivision 4, plaintiffs do not allege and Apical does not and has never owned any real or personal property in the State of New York and, therefore, this subdivision cannot be applicable. Madore Aff., ¶7.

Plaintiffs have not alleged a basis for personal jurisdiction over Apical in this action. Rather, Plaintiffs simply allege that Apical is a California corporation and assert claims based on an allegedly defective product sounding in strict products liability, negligence and punitive damages. *See* Exhibit A, ¶¶ 40, 344-399. As detailed in the Madore Affidavit, Apical has never attempted to serve the New York market. Thus, any suggestion that Apical has a corporate presence here sufficient to confer personal jurisdiction is based on nothing more than surmise and baseless assumption.

Given the foregoing, it is difficult to imagine a scenario in which this Court could confer personal jurisdiction over Defendant Apical *vis-à-vis* the Long Arm Statute. Thus, this Motion should be granted in all respects.

II

CONSTITUTIONAL DUE PROCESS REQUIREMENTS HAVE NOT BEEN SATISFIED AND, THEREFORE, THIS COURT MAY NOT CONFER PERSONAL JURISDICTION OVER THE DEFENDANT APICAL

Assuming, *arguendo,* that plaintiffs manage to satisfy the Long Arm Statute's jurisdictional requirements, this Court must still consider whether Apical's contacts with the forum state comport with the limits imposed by federal due process under the Fourteenth Amendment. Clearly, and considering Apical's clear lack of contacts with New York, this federal hurdle simply cannot be overcome.

Due process under the Fourteenth Amendment is not satisfied unless a non-domiciliary has "minimum contacts" with the forum state. The United States Supreme Court consistently has held that a State may constitutionally exercise jurisdiction over non-domiciliary defendants, provided they have "certain minimum contacts with the forum such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe,* 326 U.S. at 316; *see also Milliken v. Meyer,* 311 U.S. 457, 463, 61 S. Ct. 339 (1941). "Following *International Shoe,* 'the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.'" *Daimler,* 571 U.S. at 126; *Shaffer v. Heitner,* 433 U.S. 186, 204, 97 S. Ct. 2569 (1977).[3] The test has come to rest on whether a defendant's "conduct and connection with the forum State" are such that it "should reasonably anticipate being haled into court there" because its contacts are both continuous and systematic. *See LaMarca,* 95 N.Y.2d at 216 (*quoting World–Wide Volkswagen,*

[3] In the seminal case addressing *in personam* jurisdiction, *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565 (1878), the Supreme Court held that a "tribunal's jurisdiction over persons was necessarily limited by the geographic bounds of the forum." This strict territorial focus eventually was replaced by the Court's landmark decision in *International Shoe Co. v. Washington,* 326 U.S. 310.

444 U.S. at 297; *see Kulko v. Superior Ct. of Cal.,* 436 U.S. 84, 97–98, 98 S. Ct. 1690 (1978). A non-domiciliary is considered to have "minimum contacts" with the forum State and may reasonably foresee the prospect of defending a suit there – "if it purposefully avails itself of the privilege of conducting activities within the forum State." *World–Wide Volkswagen,* 444 U.S. at 297 (quoting *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S. Ct. 1228 (1958)); *see also Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S. Ct. 2174 (1985).

In formulating the safeguards of the federal inquiry, the Supreme Court has refined the due process analysis and recognized two personal jurisdiction categories: specific and general jurisdiction, both of which are dependent of a prerequisite showing of "continuous and systematic" in-state activity by the non-resident defendant. The first category, "specific jurisdiction," encompasses cases in which the suit "arise[s] out of or relate[s] to the defendant's contacts with the forum." *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915, 922-23, 131 S. Ct. 2846 (2011); *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414, n. 8, 104 S. Ct. 1868 (1984). The *Daimler* Court recognized that the words "continuous and systematic" were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate, acknowledging that these in-state activities must also be the source "of the liabilities sued on." 571 U.S. at 138-39; *International Shoe*, 326 U.S. at 317. These predicate "continuous and systematic" contacts are also germane to state long arm/specific jurisdiction and must comport with its federal counterpart. [4]

[4] The Supreme Court's decision in *Daimler* seriously casts doubt as to the constitutionality of CPLR 302(a)(3). The *Daimler* decision reaffirmed that *International Shoe* required "continuous and systematic" in-state activities, not only for the conferral of general jurisdiction, but also as a condition for specific jurisdiction. CPLR 302(a)(3)(ii), which invokes the Court's specific jurisdiction, requires that there be a showing that a non-resident "expects or should reasonably expect [its] act to have consequences in the state." The provision does not require a showing of continuous and systematic in-state activity and, for this reason, is inherently in conflict with what *Daimler* demands

The second category is known as "general jurisdiction," exercisable when a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 326 U.S. at 318. Where the analysis falls within the "general" jurisdiction category, the inquiry has been narrowed even further:

> Accordingly, the proper inquiry, this Court has explained, is whether a foreign corporation's "affiliations with the State in which suit is brought are so constant and pervasive, "as to render [it] essentially at home in the forum State."

Daimler, 571 U.S. at 122 (*quoting Goodyear,* 564 U.S. at 923); s*ee also Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 331 (2d Cir. 2016). The Court identified paradigm bases for identifying whether a non-resident corporation is "at home" sufficient to confer general jurisdiction. *Goodyear,* 564 U.S. at 923. With respect to a corporation, the place of incorporation and principal place of business are "paradig[m] ... bases for general jurisdiction." 571 U.S. at 137.[5] The Court also explained that establishing general jurisdiction is difficult because it the "continuous corporate operations within a state [must be] so substantial and of such a nature as to justify suit ... on causes of action arising from dealings entirely distinct from those activities." 326 U.S. at 316-18. Accordingly, the proper inquiry, the Supreme Court has explained, is whether a foreign corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Goodyear,* 564 U.S. at 919.

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to satisfy federal due process. Essentially, CPLR 302(a)(3)(ii) perilously rests on an objective view of what is considered to be a "reasonable expectation" without any consideration of whether the non-resident defendant conducts any in-state activities, in derogation of the Supreme Court's mandate. Based on the recent clarification of *Daimler* it is doubtful that CPLR 302 (a)(3)(ii) will pass Constitutional muster.

[5] For these reasons and because Apical is incorporated in the State of California, New York's general jurisdiction statute is not applicable here, nor can the federal counterpart be satisfied. Defendant Apical is not "at home" in New York because it is incorporated and has its principal place of business in California. *See* footnote 2, infra, .

Plaintiffs have not identified which category they will rely on to establish personal jurisdiction over Apical, general or specific. However, based on the allegations in the Complaint and the Madore Affidavit, neither can be satisfied. Indeed, plaintiffs' allegations fall short of establishing that Apical has engaged in a continuous or systematic course of doing business in New York such that it can be deemed present within the forum. Defendant Apical cannot be said to have purposefully directed its activities to the forum state such that it must now defend suit here. The allegations also fail to demonstrate that Apical's contacts with New York are constant and pervasive. Apical is organized under the laws of California, and maintains its principal place of business in California. Defendant Apical also has no employees, registered agents, offices, bank accounts, or other property in New York, nor does it market, advertise or pay taxes in the state. Accordingly, the Court cannot exercise jurisdiction over Apical because this non domiciliary does not even meet the minimum threshold to impose jurisdiction. *See, e.g., Fernandez,* 143 A.D.3d at 766; *Carrs* ,2013 WL 10723184, at *2; *see, e.g., Chatwal Hotels & Resorts, LLC v. Dollywood Co.,* 90 F. Supp. 3d 97, 104 (S.D.N.Y. 2015).

Inasmuch as the Due Process Clause "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," the Motion to Dismiss should be granted.

CONCLUSION

Based on the foregoing and in accordance with pursuant to CPLR 3211(a)(8), Defendant Apical submits that this Motion should be granted because this Court lacks personal jurisdiction under both CPLR 302 and the Due Process Clause of the Fourteenth Amendment and, thus, the claims must be dismissed.

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June 18, 2018

Respectfully submitted,

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