High Court of the Republic of the Marshall Islands

Republic of the Marshall Islands *vs.* Americar Tobacco Company, Inc. (Decison 12-7-1998)

IN THE HIGH COURT

REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS,

Plaintiff,

v.

AMERICAN TOBACCO COMPANY, et al.,

Defendants.

Civil Case No. 1997-261

December 7, 1998

MEMORANDUM AND ORDER

Daniel Cadra, Chief Justice, High Court

On September 21, 1998, the motions of defendants to dismiss for lack of personal jurisdiction came before the court for hearing. The parties appeared through counsel as above stated.

The court having considered the arguments of counsel, the memoranda, exhibits, affidavits, discovery materials and other evidence submitted, GRANTS the motions of the "holding company" and "unaffiliated" defendants to dismiss for lack of personal jurisdiction and DENIES the motions of the "manufacturer" defendants to dismiss.

OUTLINE OF DECISION

MEMORANDUM AND ORDER

I. INTRODUCTORY STATEMENT

Many issues of first impression (in this jurisdiction) are raised by the instant motions to dismiss for lack of personal jurisdiction. The court is required to construe newly enacted procedural and jurisdictional statutes. The court is asked to consider legal theories not before raised in this Republic. Some of these theories are not unanimously accepted by Unite States and federal and state courts.

This case is further complicated by the sheer volume of information, evidentiary materials and legal precedents submitted for consideration. The court has reviewed the affidavits and exhibits offered by all parties. The fact that certain exhibits have not been referenced in this memorandum does not mean they have not been considered. To reference each and every exhibit, discussing each as they relate to plaintiff's evidentiary burden, would render this memorandum more lengthy and tedious than it already is.

Likewise, some of defendant's legal theories are not addressed in this memorandum because, after consideration, the court does not find them dispositive of the issues. For example, concern was raised over the Constitutionality of the retroactive application of the recently enacted jurisdictional statute and consumer protection laws. Even assuming the court were to hold that retroactive application would violate due process, other bases for statutory jurisdiction exist. The court attempts to keep this opinion brief while addressing the essential issues.

II. PROCEDURAL BACKGROUND

The relevant procedural background can be concisely stated:

On October 20, 1997, plaintiff filed its Complaint seeking damages and injunctive relief against each of the eighteen originally named defendants. All defendants filed timely motions to dismiss for lack of personal jurisdiction.

On December 11, 1997, plaintiff sought leave of court to send discovery interrogatories to defendants. Leave to propound interrogatories limited to the jurisdictional issue was granted by the court's Order of January 16, 1998. The Court subsequently entered an Order allowing plaintiff to avail itself of other forms of discovery permitted by the Marshall Islands Rules of Civil Procedure.

On May 29, 1998, plaintiff filed its First Amended Complaint. That pleading added parties and id not change the substance of the allegations against the moving defendants.

Plaintiff completed its jurisdictional discovery and defendants' motions to dismiss were heard on September 21, 1998. The court allowed supplemental citations of authorities and deemed this matter under submission as of October 21, 1998.

A. Plaintiff.

Plaintiff is the Republic of the Marshall Islands, a "fully independent sovereign nation." *Gushi Brothers Co. v. Bank of Guam*, 28 F.3d 1535 (9th Cir. 1994). Plaintiff adopted its Constitution on May 1, 1979. Plaintiff alleges that under its Constitution, it is obligated to pay for the medical, hospital, and therapeutic care of its citizens. By way of this action, plaintiff seeks, among other relief, compensation for past and future medical expenses allegedly caused by its citizens' use of cigarettes.

B. The Defendants

Defendants are all United States or United Kingdom corporations. Defendants have submitted affidavits which indicate they have never had a direct business presence in the Marshall Islands. As further discussed below, cigarettes have found their way into the Marshall Islands through non-forum based "independent" distributors.

Defendants' "Joint Memorandum" groups the defendants into three categories: the "manufacturer defendants", the "unaffiliated defendants", and the "holding company defendants." For the most part, the categorization of defendants into these three general groups is adopted by plaintiff in "Plaintiff's Memorandum In Response To Defendants' Motions To Dismiss For Lack Of Personal Jurisdiction." For ease of reference, the court will also categorize defendants generally into these three groups.

There are five "manufacturer defendants". These are the American Tobacco Company ("ATC")[1], Brown & Williamson Tobacco Corporation ("B&W")[2], Philip Morris Incorporated ("PMI")[3], Philip Morris Products, Inc. ("PMPI")[4], and R.J. Reynolds Tobacco Company ("RJRT")[5]

The so-called "unaffiliated defendants" are the Council for Tobacco Research - U.S.A., Inc. (CRT)[6], Tobacco Institute, Inc. (TI)[7], Hill & Knowlton, Inc. (H&K)[8], UST, Inc. (UST)[9], and United States Tobacco Company (USTC)[10].

The "holding company defendants" consist of Philip Morris Companies, Inc. (PMCI)[11], RJR Nabisco, Inc. (RJRN)[12], Lorillard, Inc. (LI)[13], Loews Corporation (LC)[14], B.A.T. Industries, p.l.c. (BAT)[15], Brooke Group Ltd. (BG).[16]

Additional defendants named in plaintiff's Original Complaint include Liggett Group, Inc. (LGI)[17] and Lorillard Tobacco Company (LTC)[18].

Plaintiff's First Amended Complaint added the following defendants: Philip Morris International Inc., Philip Morris Duty Free Inc., Philip Morris Management Corporation, Philip Morris Asia Incorporated; RJR Nabisco Holdings Corp., R.J. Reynolds International, Inc., British American Tobacco Company, Limited, and BATUS Holdings, Inc.

IV. THE STRUCTURAL LAW AND PLAINTIFF'S BURDEN OF PROOF

A. Plaintiff Bears The Burden Of Demonstrating Jurisdiction Is Proper In This Forum.

The law is well settled that when a defendant challenges a court's assertion of personal jurisdiction the plaintiff bears the burden of establishing that the court has personal jurisdiction. See, e.g., *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1275 (7th Cir. 1997); *Zeigler v. Indian River County*, 64 F.3d 470 (9th Cir. 1995); *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 144 (1st Cir. 1995).

B. Plaintiff's Burden Is Met By Making A "Prima Facie" Showing That Jurisdiction Is Proper.

There is an issue as to the evidentiary standard plaintiff must meet in establishing jurisdiction at this stage of the

proceedings.[19] The court reviews the applicable law.

There are three different evidentiary standards, each corresponding to a different level of analysis, which might be employed when the trial court comes to grips with a motion to dismiss for want of personal jurisdiction. Those standards are: the "prima facie" standard; the "likelihood" standard; and the "preponderance of the evidence" standard. See, e.g., *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 145-46 (1st Cir. 1995) (citing and discussing *Boit v. Gar-Tec Products*, 967 F.2d 671 (1st Cir. 1992).

When the court does not hold an evidentiary hearing but instead receives only affidavits and discovery materials, the plaintiff need only make a "prima facie" showing of jurisdictional facts through the submitted materials in order to defeat the motion to dismiss. See *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995) (citing *Omeluk Langsen Slip and Betbuggeri A/S*, 52 F.3d 267, 268 (9th Cir. 1995); see also *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1165 (5th Cir. 1985); *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977).

When the court analyzes plaintiff's proffer of jurisdictional facts by the "prima facie" standard, the court does not make findings of fact but functions as a "data collector." It the plaintiff tenders evidence supporting each element of jurisdiction, the court is not to weigh that evidence against contradictory evidence submitted by defendant or evaluate the credibility of plaintiff's evidence. The court in *Foster-Miller*, supra, explained:

> The most conventional of these methods permits the district court "to consider only whether the plaintiff has proffered evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction." *Boit*, 967 F.2d at 675. To make a prima facie showing of this calibre, the plaintiff ordinarily cannot rest upon the pleadings, but is obliged to adduce evidence of specific facts. See *id.* Withal, the district court acts not as a factfinder, but as a data collector. That is to say, the court, in a manner reminiscent of its role when a motion for summary judgment is on the table, see Fed.R.Civ.P. 56(c), must accept the plaintiff's (properly documented) evidentiary proffers as true for the purpose of determining the adequacy of the prima facie jurisdictional showing. Despite the lack of differential factfinding, this device is a useful means of screening out cases in which personal jurisdiction is obviously lacking . . . . *Foster-Miller v. Babcock & Wilcox Canada*, 46 F.3d 138, 145 (1st Cir. 1995).

To make out a "prima facie" case, plaintiff must "present sufficient evidence to create a factual dispute on each jurisdictional element which has been denied by the defendant and on which the defendant has presented evidence." *Industrial Carbon Corp. v. Equity Auto & Equip. Leasing Corp.*, 737 F.Supp. 925, 926 (W.D. Va. 1990). Courts may accept only "properly supported proffers of evidence by a plaintiff as true." *Foster-Miller*, supra, at 145 (citing *Boit v. Gar-Tec Products, Inc.*, 967 F.2d at 675). In making out a prima facie case, plaintiff is entitled to the resolution in his favor of all disputes about relevant facts. *Id.*; see also *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996); *D.J. Investments v. Metzeler Motorcycle Tires Agent Gregg*, 754 F.2d 542 (5th Cir. 1985); *Neiman v. Wolff & Co.*, 619 F.2d 1189, 1190 (7th Cir. 1980).

Defendants suggest in their Joint Reply Brief that plaintiff should be held to the higher "preponderance of the evidence" standard.[20] The "preponderance of the evidence" standard can only be properly invoked when the court has held a "full blown" evidentiary hearing. The court in *Foster-Miller*, supra, explained:

> A second option open to the court is to embark on a factfinding mission in the traditional way, taking evidence and measuring the plaintiff's jurisdictional showing against a preponderance-of-the-evidence standard . . . Virtually by definition, the preponderance standard necessitates a full blown evidentiary hearing at which the court will adjudicate the jurisdictional issue definitively before the case reaches

> trial. In that mode, the court will "consider[] all relevant evidence essential to disposition of the motion." . . . [S]ince this method contemplates a binding adjudication, the court's factual determination ordinarily will have preclusive effect, and, thus, at least in situations in which the facts pertinent to jurisdiction and the facts pertinent to the merits are identical, or nearly so, profligate use of the preponderance method can all too easily verge on the deprivation of the right to a trial by jury. *Foster-Miller v. Babcock & Wilcox-Canada*, 46 F.3d 138, 146.

Were the court to choose a standard based solely on the law and arguments set forth in the parties' briefing it is clear that the court would have to choose the "prima facie" standard. No evidentiary hearing was requested or held. If the court were to make binding factual findings on the basis of the affidavits and discovery materials submitted, plaintiff would be deprived of its right to trial by jury since many of the jurisdictional facts are intertwined with facts pertinent to the merits. A fair review of the decisional authority cited by the parties indicates that, in the absence of an evidentiary hearing, the court must apply the "prima facie" standard.

At oral argument, the parties retreated somewhat from the positions advocated in their briefs. Mr. Stone argued that, since the court had allowed plaintiff to conduct discovery, the court should hold plaintiff to a standard somewhere between the "prima facie" and "preponderance of the evidence" standards.[21] Mr. Robertson argued that plaintiff need only make a prima facie showing or jurisdiction but stated that, although *Foster-Miller*, supra, "doesn't quite explain what the difference is between the likelihood and the prima facie standard" plaintiff is "content with the likelihood standard."[22] Plaintiff's concession can hardly be characterized as a stipulation to application of the intermediate "likelihood" standard. There is no agreement as to what the "likelihood" or "intermediate" standard requires.

Aside from *Foster-Miller*, supra, and *Boit*, supra, there appears to be a dearth of federal authority explaining plaintiff's burden under the "likelihood" standard. There are several indications in *Foster-Miller*, supra, that the court should not apply the "likelihood" standard under the facts of this case. Although liberal jurisdictional discovery was permitted, an evidentiary hearing was neither requested nor held. In *Foster-Miller* the trial court was criticized for applying the intermediate "likelihood" standard without giving prior notice to plaintiff that a standard other than the "prima facie" standard would be applied. in this case, prior notice of the standard applied was not given. Although plaintiff's counsel at oral argument stated plaintiff would be content being held to the "likelihood standard" (see Transcript, pg. 67), plaintiff doesn't inform the court of what it believes the standard requires. *Foster-Miller* does not explain exactly what that standard requires and cautions against its use. The court in *Foster-Miller*, noted:

> The short of it is that, whatever the merits in the abstract, *Boit*'s intermediate standard requires caution it its application especially where a dismissal may result. Indeed, although *Boit* does, in dictum, propose to authorize such dismissals, *it is noteworthy that apart from the opinion of the court below, there is no other reported case, Boit included, that has sanctioned a dismissal pursuant to a district courts use of the likelihood standard.* (emphasis added). *Foster-Miller v. Babock & Wilcox-Canada*, 46 F.3d 138, 148.

The federal district courts may be holding plaintiffs to an intermediate standard when jurisdictional discovery has been allowed. This court, however, ventures into uncharted waters if the "likelihood" standard is applied in this case. As noted in *Foster-Miller*, supra, there are no (or few) cases affirming a dismissal under the "likelihood" standard. Assuming a few such cases exist, this court has been unable to find them and the parties have similarly failed to cite any such case. It appears from a fair review of the caselaw that, if an evidentiary hearing is not held, the prima facie standard applies even when jurisdictional discovery has been allowed. See, e.g., *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280 (9th Cir. 1977).[23]

To the extent the court has discretion to avail itself of a variety of standards when assessing plaintiff's proffer of jurisdictional facts after discovery has been permitted, this court heeds *Foster-Miller*'s caution against applying the

intermediate "likelihood" standard. The court finds plaintiff is only required to make a "prima facie" showing that jurisdiction exists.

C. Plaintiff Must Make A "Prima Facie" Showing That There Is Both A Statutory Basis For The Assertion Of Jurisdiction And That Assertion Of Jurisdiction Comports With Due Process.

The parties agree that *Burger King v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174 (1985) sets forth the overall theory or framework for determining whether the court can properly exercise personal jurisdiction over a nonresident defendant.

Applying the appropriate evidentiary standard (discussed above) to the framework set forth by *Burger King*, plaintiff must make a "prima facie" showing that (1) a statute provides for the exercise of jurisdiction, and (2) the exercise of jurisdiction by the court comports with constitutional standards of Due Process. See also, e.g., *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 269 (9th Cir. 1995); *United Elec. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1086 (1st Cir. 1992); *Hewitt v. Hewitt*, 896 P.2d 1312, 1315 (Wa. 1995).

The court must first determine if a statutory basis for jurisdiction over each defendant exists. If a statutory basis for jurisdiction does not exist the court need not reach issues of Due Process. See, e.g., *Jobe v. ATR Marketing, Inc.*, 87 F.3d 751, 753 (5th Cir. 1996).

Assuming a statutory basis for jurisdiction, due process requires that defendant have "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." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). These "minimum contacts" must rise to a level such that the defendant should reasonably anticipate being haled into court in the forum state. See *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Analysis of the Due Process prong of the jurisdictional inquiry depends on whether "general" or "specific" jurisdiction is being asserted over a non-resident defendant.[24]

General jurisdiction permits a court to exercise power over a nonresident defendant without regard to the subject of the claim asserted, provided the defendant's activities in the forum can be characterized as "continuous and systematic." See, e.g., *Helicopteros Nationales de Columbia, S.A. v. Hall*, 466 U.S. 406, 414-20 (1984). Specific jurisdiction, on the other hand, gives a court power over a nonresident only with respect to claims arising out of the particular activities of the defendant in the forum state. See, e.g., *Burger King Corp. v. Rudzewicz*, supra, at 473 (1985); *Helicopteros Nationales de Columbia, S.A.*, supra, at 414 & n. 8; *Donatelli v. National Hockey League*, 893 F.2d 459, 462 (1st Cir. 1990).

Plaintiff concedes that general jurisdiction is lacking over defendants.[25] A discussion of general jurisdiction being unnecessary, the court examines the requirements of specific jurisdiction.

Specific jurisdiction exists when there is "a strong relationship between the quality of the defendant's forum contacts and the cause of action." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 839 (9th Cir. 1986) (citing *Burger King v. Rudzewicz*, 105 S.Ct. 2174 (1985)). To be subject to specific jurisdiction, a defendant must have "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*, supra, at 475 (quoting *Hanson v. Deckla*, 357 U.S. at 253). The purposeful availment requirement exists to assure that personal jurisdiction is not premised solely upon a defendant's "random, isolated, or fortuitous" contacts with the forum. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984).

To comport with due process, specific jurisdiction requires a showing of (1) "purposeful availment" by the non-resident defendant of the benefits and protections of the forum's laws; (2) that plaintiff's claim or cause of

action "arises out of" defendant's forum related activities; and (3) that the exercise of jurisdiction would be "reasonable." See, e.g., *Ballard v. Savage*, 65 F.3d 1495 (9th Cir. 1995) (citing *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995) and *Data Disc, Inc. v. Systems Tech. Assoc. Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977)); see also Schwarzer et al, California Practice Guide, *Federal Civil Procedure Before Trial*, Sec. 3:116.

V. PLAINTIFF HAS MADE A "PRIMA FACIE" SHOWING THAT THE COURT HAS JURISDICTION OVER THE "MANUFACTURER DEFENDANTS."

A. Statutory Jurisdiction.

27 MIRC Chpt. 2, Sec. 251(1) sets forth the statutory bases for asserting personal jurisdiction over nonresident foreign defendants. Plaintiff's complaint (see also first amended complaint) and opposition memorandum raise seven statutory bases for jurisdiction over the "manufacturer defendants." Plaintiff alleges that defendants have:

(1). transacted within the RMI, 27 MIRC, Chpt. 2 Sec. 251(1)(a);

(2). committed tortious acts within the territorial waters of the RMI, *id.*, Sec. 251(1)(d);

(3). entered into express and implied contracts with residents of the RMI, which were to be performed wholly or partly within the territorial waters of the RMI, *id.*, Sec. 251(1)(h);

(4). caused injury to persons in the RMI arising out of acts or omissions outside of the RMI, when, at the time of injury, defendants were engaged in solicitation and sales activity in the RMI, and products processed by them were used with the RMI, *id.*, Sec. 25191)(k)(i) & (ii);

(5). violated Title 20, Chpt. 4, Section 403 of the Consumer Protection Act, *id.*, Sec. 251(1)(1);

(6). manufactured products that are used in the RMI, *id.*, Sec. 251(1)(m); and

(7). committed acts of commission or omission of deceit, fraud or misrepresentation which were intended to affect and did affect, persons within the RMI, *id.*, Sec. 251(1)(n).

(See Complaint, para.s 4, 38 &39-41; Defendant's Joint Motion to Dismiss, pgs 4-5; Plaintiff's Memorandum in Response To Defendants' Motion To Dismiss, pgs. 14-15.)

It seems clear that a statutory basis for jurisdiction exists over the manufacturer defendants.

Sec. 251(1)(m) is a very broad and unqualified assertion of long arm jurisdiction over foreign residents who manufacture products which are used in the RMI. Plaintiff has submitted affidavits which establish that cigarettes manufactured by ATC, B&W, PMI, PMP and RJRT have found their way into the Marshall Islands and are consumed or "used" in this forum.[26]

The Court finds that plaintiff has made a "prima facie" showing that the manufacturer defendants' cigarettes are "consumed or used" in the RMI and that, therefore, a statutory basis for jurisdiction over these defendants exists under the very broad language of Sec. 251(1)(m).

Sec. 251(1)(k) purports to extend long arm jurisdiction over a non-resident defendant who causes injury in the Marshall Islands through conduct elsewhere. Again, subsec. (k) is an extremely broad grant of statutory jurisdiction over non-residents. Subsec. (k) allows for jurisdiction over defendant's out-of-forum acts which have in-forum-effects. The court finds plaintiff has made a "prima facie" showing that the use of cigarettes manufactured by defendants have caused injury in the Marshall Islands in the form of diseases which are related to

the use of cigarettes and which have caused the Republic to incur the expenditure of monies for health care.[27] Under the broad grant of jurisdiction of Sec. 251(1)(k), a statutory basis of jurisdiction exists over the manufacturer defendants.

As discussed at greater length herein, jurisdiction arguably exists under Sec. 251(1)(a) (transacting business in the Marshall Islands) as a prima facie showing has been made that cigarettes are advertised and sold in the Marshall Islands through the manufacturer defendants' use of distributors.

Putting due process concerns of retroactive application of jurisdictional legislation aside, jurisdiction also arguably exists under Sec. 1 (violating the newly enacted Marshall Islands Consumer Protection Act).

Plaintiff has demonstrated that there are several statutory bases for asserting jurisdiction over the manufacturer defendants. The jurisdictional inquiry, however, does not end with a finding of a statutory basis for jurisdiction. As stated above, the court must consider whether assertion of statutory jurisdiction comports with constitutional due process.

B. Constitutional Jurisdiction

Plaintiff begins its constitutional jurisdiction analysis as regards the "manufacturer defendants" with a discussion of *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559 (1980) and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026 (1987). The court will briefly discuss these cases as they relate to the three pronged "specific jurisdiction" analysis set forth above.

1. "Purposeful availment."

(a). Stream of Commerce*: Worldwide Volkswagen* and *Asahi*

The Supreme Court in W*orld-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559 (1980) reasoned that when a defendant's conduct is such that he "'purposefully avails [himself] of the privilege of conducting activities within the forum State," he is put on notice that he can be sued in that state. *Id.* at pg. 297 [62 L.Ed.2d at pg. 501]. He can "alleviate the risk" by buying insurance, passing potential litigation costs on to his customers, or curtailing his activities in the forum state. (Ibid.) Thus, "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. The forum State does not exceed its power under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at pgs. 297-298 [62 L.Ed.2d at pgs. 501-502].

In *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 94 L.Ed.2d 92, 108 S.Ct. 1026, the Supreme Court addressed the "stream of commerce" theory of jurisdiction. The O'Conner plurality was of the opinion that merely placing a product into the stream of commerce with awareness of its ultimate destination is not enough to satisfy the minimum contacts standard. Four other justices were of the opinion that jurisdiction may be upheld as against any participant in the manufacture and distribution process who is aware that the final product will be brought into the forum state. Although *Asahi* did not provide an authoritative answer to the "purposeful availment" or "stream of commerce" jurisdictional analysis, it did caution that "[t]he unique burdens place upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id.* at pg. 114.

Plaintiff relies on a "stream of commerce" theory of "purposeful availment" by defendants of the laws and protections of this forum.[28] Plaintiff has provided affidavits (and discovery materials indicate) that cigarettes manufactured by ATC, B&W, PMI, PMP, RJRT have found their way into the RMI through the international

"stream of commerce."[29]

The fact that defendants might have foreseen that their cigarettes would find their way into the Marshall Islands through the stream of commerce, however, does not constitute a prima facie showing that defendants have purposefully availed themselves of the benefits and protections of the laws of this forum sufficient for the court to assert jurisdiction.

Reading *Asahi*, supra, together with the requirements of *Worldwide Volkswagen*, supra, it becomes clear that Due Process requires something more than mere knowledge that the manufacturer's products will find their way into the forum state through the ordinary stream of commerce. Foreseeability alone has never been a sufficient benchmark for personal jurisdiction. See *World-Wide Volkswagen*, supra, 444 U.S. 286, 295. The foreseeability that is critical to the constitutional analysis is not the mere likelihood that a product (such as defendants' cigarettes) will find their way into the forum (i.e. the Marshall Islands) but that the defendant's conduct and connection with the forum are such that he should reasonably anticipate being sued there. *Id.* at pg. 297. If a defendant is consistently doing business in a particular forum then it should foresee being haled into a court of that forum. The focus should be on the extent to which it has purposefully availed itself of doing business in the forum. "Additional conduct of the defendant may indicate an intent or purpose to serve 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 a sales agent in the forum State." *Asahi*, supra, 94 L.Ed.2d 92, 104.

Defendants have provided affidavits that they do not distribute or sell tobacco products in the RMI but sell those products to "independent" wholesalers and/or distributors. The issue, thus, becomes whether the manufacturer defendants have "purposefully availed" themselves of the laws and protections of the Republic because "independent distributors" have disseminated their products to the Marshall Islands.[30]

(b). Defendants' use of "independent distributors" does not preclude the exercise of jurisdiction under *Asahi*.

Plaintiff argues that a nonresident manufacturer's use of an "independent distributor" so that the manufacturer is only indirectly responsible for the product reaching an injured consumer will not insulate the nonresident foreign corporation from liability. In support of that proposition, plaintiff cites *Buckey Boiler Co. v. Superior Court*, 71 Cal.2d 893, 80 Cal.Rptr. 113, 458 P.2d 57 (Ca. 1969).

Buckeye Boiler, supra, dealt with the California court's assertion of jurisdiction over an Ohio manufacturer. The case did not deal with the assertion of jurisdiction across national boundaries.[31] In *Buckeye Boiler*, supra, the court reasoned:

> A manufacturer engages in economic activity within a state as a matter of 'commercial actuality' whenever the purchase or use of its product within a state generates fortuitous or unforeseeable as to negative the intent on the manufacturer's part to bring about this result. (citations omitted) . . . A manufacturer's economic relationship with a state does not necessarily differ in substance, nor should its amenability to jurisdiction necessarily differ, depending upon whether it deals directly or indirectly with residents of the state. With the increasing specialization of commercial activity and the growing interdependence of business enterprises it is seldom that a manufacturer deals directly with consumers in other states. The fact that the benefit he derives from [their] laws is an indirect one, however, does not make [those laws] any the less essential to the conduct of his business; and it is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with [such states] to justify a requirement that he defend [there]. (citations omitted). *A manufacturer whose products pass through the hands of one or more middlemen before reaching their ultimate users cannot disclaim responsibility for the total*

> *distribution pattern of the products. If the manufacturer sells its products in circumstances such that it knows or should reasonably anticipate that they will ultimately be resold in a particular state, it should be held to have purposefully availed itself of the market for its products in that state.* (emphasis added). *Buckeye Boiler*, 71 Cal.2d 893, 901-02.

Plaintiff also cites *Kuenzle v. HTM Sport-Und Freizeitgerace AG*, 102 F.3d 453 (10th Cir. 1996), *Loral Fairchild Corp. v. Victor Company of Japan, Ltd.*, 803 F.Supp. 626 (E.D.N.Y. 1992), and *Hershey Pasta Group v. Vitelli-Elvea Co.*, 921 F.Supp. 1344 (M.D. Pa. 1996) in support of its argument that defendants' use of "independent" distributors or wholesalers does not preclude the court from exercising jurisdiction.

Defendants correctly point out that in the federal cases relief upon by plaintiff there was more contact with the forum than the mere presence of the defendants' products through "independent" distributors or wholesalers.

In *Hershey Pasta*, supra, the court upheld jurisdiction on the basis of "additional steps" the defendants took to avail themselves of the benefits and protections of the laws of the forum. In that case, defendant obtained Pennsylvania baking licenses, changed their manufacturing practices to comply with U.S. regulatory standards, labeled their products to comply with U.S. regulations, and sold a significant percentage of their products in the forum.

In *Loral Fairchild Corp.*, supra, the foreign manufacturer defendant distributed its products exclusively through subsidiaries in the United States over which significant control was exercised by the manufacturer. The court found that the defendant manufacturer was a Japanese corporation with its principle place of business in Japan. The manufacturer, however, owned 100% of the stock of "Murata America, Inc." which held 100% of the stock of its United States based distributor "Murata America." The machines manufactured by the Japanese corporation, apparently, were built to comply with United States technical requirements. I*d.* at 628 and 635. The court also found that the defendant derived "substantial economic benefit" from its sale within the forum. *Id.* at 635.

Review of other contemporary federal decisional authorities reveals that courts have been looking to other contacts than mere foreseeable presence of the product in the forum through independent wholesalers or distributors.

In *Tobin v. Astra Pharmaceutical Products, Inc.*, 91-6413 (6th Cir. April 16, 1993), the court found that the defendant could not rely on the use of an independent distributor to insulate it from liability. The court, however, examined other contacts with the forum: "Duphar did not merely sale its product on the market with no direction in mind. Duphar directly submitted a New Drug Aplication to the FDA for approval, conducted clinical studies in the United states, and sought out a United States Distributor to exploit the United States market." These additional acts within the forum were significant in determining whether the exercise of jurisdiction would be proper.

Similarly in *Poyner v. Erma Werke GMBH*, 618 F.2d 1186, 1190 (6th Cir. 1980) the defendant, although located in Germany, was a wholly owned subsidiary of an American parent corporation and used a United States based distributor to distribute its product; thus, foreseeable presence of the product in the forum through an independent distributor.

The facts relied upon by the courts to establish jurisdiction in *Hershey Pasta*, *Loral Fairchild*, and the other cases cited by plaintiff demonstrate greater contacts with the forum than does plaintiff's proffer of jurisdictional facts.

Defendants have not used forum based distributors to disseminate their products as in *Loral Fairchild*, *Poyner*, and *Tobin*, supra. Plaintiff's evidence indicates that the distributors (e.g., Ambrose and Mid-Pacific) are based outside of the Republic. There has been no tender of evidence that defendants wholly own or exert control over their distributors as in *Loral Fairchild*, supra. Defendants use "independent" distributors.

There has been no showing that defendants have sought to manufacture their products in compliance with RMI regulations or have taken "additional steps" to market their products in the RMI as in *Hersey Pasta*, supra, and the

other cases cited.

If any proposition of law can be distilled from a reconciliation of the broad statement of law in *Buckeye Boiler* with *Hershey Pasta*, *Loral Fairchild* and other federal authority cited by both plaintiff and defendants, it is (perhaps) this: when jurisdiction is sought to be asserted over foreign manufacturer defendant across national boundaries, there must be a greater showing of contacts with the forum than when jurisdiction is asserted across state line. When jurisdiction is asserted across national boundaries, there must be a showing of concrete greater than the mere foreseeable presence of the product in the forum through the use of middlemen or distributors. This statement really says nothing more than what the O'Connor plurality said in *Asahi*. Mere foreseeability of the product in the forum is not enough and the court should look at other contacts with the forum to establish purposeful availment. *Asahi* set forth a list of "additional conduct" which might indicate an intent to serve a forum's market. (See discussion above).

Although the use of a forum based distributor in *Loral Fairchild*, *Poyner*, and other cases is a significant factor in determining jurisdiction, those cases do not stand for the proposition that a forum based distributor is a requirement for an assertion of jurisdiction. It is merely another contact with the forum the court should consider. Likewise, although the court found that obtaining a baking license in the forum in *Hershey Pasta*, the compliance with United States product regulations in *Hershey Pasta* and *Tobin*, are significant factors in assessing jurisdiction, they are not requirements.

The manufacturer defendants' use of "independent distributors" should not preclude the court from exercising personal jurisdiction under the circumstances of this case. Plaintiff has submitted evidence that, if credited, establishes that the manufacturer defendants have knowingly and purposefully marketed their products (cigarettes) in the RMI through distributors who have agreed to serve as sales agents servicing this forum.[32] Although those distributors may be "independent" in the sense that they are not owned or controlled by the manufacturer defendants, they nevertheless agreed to sell and promote defendants' cigarettes in the geographical territory which includes the RMI. In light of the distributorship agreements, the manufacturer defendants cannot claim they did not "foresee" cigarettes reaching the RMI. In light of the distributorship agreements, the manufacturer defendants cannot claim they did not direct their products into this forum.

In *Buckeye Boiler*, *Loral Fairchild* and *Hershey Pasta*, supra, the courts found significant the fact that defendants derived "substantial economic benefit" from the sale and use of their products in the forum. In *Buckeye Boiler*, supra, at 904, the court stated that "[o]n the basis of these sale alone, defendant is purposefully engaging in economic activity within California as a matter of commercial actuality." The court found "substantial economic benefit" due to the fact Buckeye Boiler derived $30,000 per year in gross sales revenues in the forum. *Id.* It is unclear how much revenue must be generated within the forum before the a finding of "substantial economic benefit" and "purposeful availment" can be properly sustained.

Through distributorship agreements, the manufacturer defendants have profited from the sale of their products in the RMI. Although the profits realized by sale of cigarettes in the RMI are undoubtedly minuscule if compared with profits generated in the United States, the sales of cigarettes by defendants through their distributors is, nevertheless, evidence of continuous and deliberate exploitation of this forum's market. Although the parties may disagree whether sales within this forum constitute a "significant" of "substantial economic benefit," it is obvious that the distributors gain revenue from sales within this forum and that the manufacturer defendants gain revenue from sales to their distributors.

The manufacturer defendants, whether directly or indirectly through their distributors, have advertised and promoted cigarettes in this forum.[33] Advertising in the forum is strong evidence of "purposeful availment." See, e.g., *Cubbage v. Merchant*, 744 F.2d 665 (9th Cir. 1984). *Asahi* also counts advertising as a significant jurisdictional factor. *Asahi*, supra at 104.

The court finds that plaintiff has made a prima facie showing of "purposeful availment" by the manufacturer defendants of the benefits and protections of the laws of this forum.[34]

2. "Arising out of"

In order for a court to assert specific jurisdiction over a nonresident, the particular cause of action must "arise out of" or be connected with the defendant's forum-related activity.

California state courts and the Ninth Circuit have adopted a "but for" test to determine whether a particular claim "arises out of" form related activities. See, e.g., *Vons Companies v. Seabest Foods*, 37 Cal.App.4th 1090 (1995); see also *Ballard v. Savage*, 65 F.3d 1495, 1500; *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 271-72[35].

One test for whether the cause of action arises out of a defendant's forum-related activity is to ascertain whether the economic activity put in motion the events which ultimately gave rise to the plaintiff's cause of action. Under this test, the cause of action is "sufficiently connected" with the defendant's forum-related activity whenever there is a causal connection between the two in the sense that the cause of action would not have arisen except for the economic activity. See, e.g., *Vons Companies v. Seabest Fods*, 37 Cal.App.4th 1090 (1995).

The court has already found that plaintiff has made a prima facie showing of "purposeful availment." A prima facie showing has been made that the manufacturer defendants directed economic activity towards this forum. Plaintiff has submitted the affidavits of Allen Feingold, M.D., (Pl. Ex. 52), Dr. Masao Korean (Pl. Ex. 53) and Dr. Neal Palafox (Pl. Ex. 54) which, if credited, establish that diseases related to the use of tobacco (cigarettes) have been suffered by RMI citizens. Plaintiff has alleged it has incurred and will continue to incur expenses for the treatment of such diseases and that allegation has not been controverted by defendants.

The court finds that plaintiff has made a prima facie showing that "but for" the manufacturer defendants' economic activity directed at this forum the injury suffered by the RMI (medical expenses for tobacco related illnesses) would not have occurred and that, therefore, plaintiff's cause of action "arises out of" defendants' forum related activities.

3. "Reasonableness" of exercise of jurisdiction.

The final inquiry the court must take is whether the assertion of jurisdiction would be reasonable and comport with "traditional principles of fair play and substantial justice." Because purposeful availment has been established under the first prong, there arises a presumption that the exercise of jurisdiction is reasonable. See *Haisten v. Grass vAlley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986). "The burden thus shifts to the defendant to present a compelling case that jurisdiction would be unreasonable." See *Core-Vent v. Nobel Industries, AB*, 11 F.3d 1482, 1487 (9th Cir. 1993) (quoting *Burger King Corp. v. Rudzewitz*, 471 U.S. 462, 468 (1985); see also *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 386 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991); *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1198 (9th Cir. 1988).

Core-Vent, *Ballard*, and a bushel of other cases have identified several factors the court should consider when assessing whether the exercise of jurisdiction would be reasonable. The court addresses these factors separately.

(a). "The extent of purposeful availment."

The court must consider the extent of defendants' purposeful contacts with the forum state. See *Core-Vent v. Nobel Industries, AB*, 11 F.3d 1482, 1488 (9th Cir. 1993) (attenuated contacts of defendants with California weighed in their favor but not heavily in light of assumption that contacts were sufficient to meet "purposeful availment" prong).

The affidavits submitted by the manufacturer defendants indicate that no defendant has ever had a "direct" business presence in the Republic of the Marshall Islands (RMI). None of the defendants have ever been licensed or qualified to do business in the RMI. None of the defendants have maintained offices, agents, employees, officers, distributors, servants, brokers, wholesalers, or other representatives in the RMI. No defendant has ever possessed, used, owned or had any interest in personal or real property in the RMI. No defendant has ever maintained a bank account or telephone listing in the RMI. None of the defendants have ever paid taxes, of any kind, to the RMI. None of the defendants have ever appointed any agent for service of process in the RMI. There being no direct physical or business presence in the RMI, the court must characterize defendants' contacts or "purposeful availment" of the benfits and protections of the laws of this forum as "attenuated."

Although plaintiff has made a prima facie showing that the manufacturer defendants' contacts with this forum meet the "purposeful availment" prong, those contacts can only be characterized as indirect. The manufacturer defendants distribute their products through independent distributors/wholesalers. As "independent" wholesalers or distributors, it must be assumed that the ultimate decision to market cigarettes in the Marshall Islands is one made by the distributor. Although distributorship agreements may encompass the geographic territory which includes the Marshall Islands and permit the sale of defendants' products in the RMI, those agreements do not specifically require distributors to market cigarettes in the RMI. (See, e.g., Pl. Ex. s 12 and 13). The right to market a product in a given geographical area does not mean the right has to be exercised. That is a choice apparently left to the distributor.

In light of the evidence, it is clear that the manufacturer defendants contacts must be imputed through the actions of their "independent distributors" or third parties. These defendants' contacts are, therefore, attenuated and this factor weighs slightly in favor of defendants.

(b). "The forum state's interest."

In *Core-Vent*, supra, at 1489, the court noted that "California maintains a strong interest in providing an effective means of redress for its residents [who have been] tortiously injured." The court must consider the RMI's interest in pursuing this case in an RMI court.

Relying on *Core-Vent*, supra, the court in *Caruth v. International Psychoanalytical Assn*, 93-56256 (9th Cir. July 6, 1995) implied that a forum state's passage of legislation to provide protection for its residents is evidence of the forum's interest in providing relief for its citizens. The court stated: "[s]pecifically, California expressed its interest in protecting its citizens against the behavior alleged by Caruth when it passed the Unruh Act. This factor weighs in Caruth's favor." *Id.*

As in *Caruth*, supra, there is evidence that the Nitijela has expressed interest in providing protection for the Republic by passing legislation enabling the pursuit of this action in this forum. "No doctorate in astrophysics is required to deduce that trying a case where one lives almost always a plaintiff's preference." *Roth*, 942 F.2d at 624. It, likewise, doesn't take a rocket scientist the obvious interest of the Republic of the Marshall Islands in litigating its claims in its courts before a jury of its citizens.

This factor weighs heavily in favor in plaintiff.

(c). "Conflict with the sovereignty of defendants' domicile."

This factor concerns the extent to which the RMI's exercise of jurisdiction would conflict with the sovereignty of defendants' corporate domiciles (i.e. the United States and the United Kingdom).

"[T]he foreign-acts-with-foreign effects jurisdiction principal must be applied with caution, particularly in an international context." *Core-Vent*, 11 F.3d at 1489; see also *Asahi*, supra, at pg. 114. In determining how much weight to give this factor, the court is to look to the presence of absence of connections to the forum generally. *Id.*

The presence of affiliates, subsidiaries, or agents in the forum is a significant consideration in evaluating sovereignty concerns. See *Caruth*, supra, see also *Core-Vent*, 11 F.3d at 1489 (citing *FDIC*, 828 F.2d at 1444).

The manufacturer defendants have never maintained a direct business presence in the RMI. These defendants have never had any affiliates, subsidiaries, agents or employees present in this forum. The only connection or contact the manufacturer defendants have had with the RMI have been through "independent wholesaler/distributors" which are located outside of the Republic. Under *Caruth*, supra, the absence of such contacts implicate sovereignty concerns vis-a-vis the United States and the United Kingdom.

In addressing sovereignty concerns, defendants argue that "litigating this case in a legal system without a developed body of precedent poses a risk of substantive and procedural rulings that may conflict with the judgments of numerous courts in the United States that are presently considering the same issues under United States precedents."[36]

In response to this argument the court notes, first, that the bench and bar of the RMI have historically relied heavily upon american jurisprudence. Second, the same developed body of precedent relied upon by United States courts can also be made available and relied upon by the courts of the RMI (as is evidenced by the submission of copies of U.S. cases cited by counsel in support of their respective positions on this motion). In other words, the developed body of procedural and substantive law which United States courts are applying in similar tobacco litigation is equally applicable in the RMI.

Given the absence of any direct contacts with this forum, the court finds that this factor weighs slightly in favor of defendants.

(d). "Burden on defendants."

This factor weighs heavily against asserting jurisdiction because defendants' burden is the primary concern in an assessment of reasonableness. See *Caruth*, supra, citing *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1444 (9th Cir. 1987). However, "despite its strong weight, this factor alone is not dispositive." *Id.* quoting *Core-Vent*, supra, at 1489. "Unless such inconvenience is so great as to constitute a deprivation of due process, it will not overcome clear justifications for the exercise of jurisdiction." *Id.* (citing *Roth v. Garci Marquez*, 942 F.2d 617, 623 (9th Cir. 1991) and quoting *Hirsche v. Blue Shield*, 800 F.2d 1474, 1478 (9th Cir. 1986)).

It is indisputable that a great burden will be imposed on defendants by litigating in this forum. All of the defendants are citizens of the United States or the United Kingdom. There is no physical business presence and none of the defendants transact business anywhere near the RMI. All of defendants' fact and expert witnesses reside and work in the United States or the United Kingdom. It will be expensive and time consuming to transport these witnesses to and from Majuro. There are allegedly "tens of millions of pages of documents" at issue in this litigation. It will be expensive and time consuming to produce these documents in the Marshall Islands. There is also the burden of translating documents and testimony from English into Marshallese. Without a doubt, defendants will be burdened by litigating in this forum.

The court cannot find, however, the burden and inconvenience of litigating in the Marshall Islands is so great as to constitute a deprivation of due process.

(e). "Efficient and convenient forum."

This forum concerns the efficiency of the forum, particularly where the witnesses and evidence are likely to be located. Recently, this factor has been discounted since "modern advances in communications and transportation have significantly reduced the burden of litigating in another country." *Caruth*, supra, quoting *Sinatra v. National Enquirer*, 854 F.2d 1191, 1199 (9th Cir. 1988).

Again, it would appear that the vast majority of witnesses, documentary and other evidence is located outside of the Republic of the Marshall Islands. The modern technology available to the Marshall Islands in the form of telecommunication services, the Internet, and flights into and out of the Republic twice a week alleviate somewhat the burden on defendants in litigating in this forum. The United States Postal Service is also available. As noted in *Caruth*, supra, modern advances in technology alleviate defendant's burden of litigating in this forum. Given the modern technology available in the Marshall Islands, this factor weighs only slightly in favor of defendants.

(f). "Availability of alternative forum."

The Ninth Circuit has placed the burden on the plaintiff of proving the unavailability of an alternative forum. See, e.g., *Caruth*, supra (citing *FDIC v. British-American ins. Co.*, 828 F.2d at 1445).

Plaintiff has not made any showing that it would be precluded from suing the manufacturer defendants in another form or that its claims could not be effectively remedied in another jurisdiction. This factor slightly favors defendants.

(g). Balance of factors.

Balancing the so-called "gestalt" factors of *Core-Vent* and *Ballard*, the court finds that the exercise of jurisdiction would be reasonable and comply with traditional principles of "fair play and substantial justice." The obvious and substantial burden on defendants (and the presumed availability of an alternate and, perhaps, more convenient forum) does not rise to the level where due process would be violated by litigating this case in the RMI.

C. Conclusion.

The court concludes that plaintiff has made a "prima facie" showing of jurisdiction over the manufacturer defendants (ATC, B&W, PMI, PMPI, and RJRTC).

VI. PLAINTIFF HAS FAILED TO MAKE A "PRIMA FACIE" SHOWING OF JURISDICTION OVER THE "HOLDING COMPANY" DEFENDANTS UNDER THE "SUCCESSOR CORPORATION" DOCTRINE.

A. The "Successor Corporation" Doctrine.

Plaintiff seeks to establish jurisdiction over PMC "and potentially the other holding company defendants" under the "successor corporation" doctrine. See *Plaintiff's Memorandum in Opposition*, pgs. 25-36.

The corporate law doctrine of "successor liability" comprises a set of exceptions to the general rule that a corporation purchasing the assets of another is not liable for the debts of the seller corporation. The case of *Dayton v. Peck, Stow & Wilcox*, 739 F.2d 690, 692 (1st Cir. 1984) sets forth the general rule and the exceptions[37]:

> The general rule in the majority of American jurisdictions . . . is that a "company which purchases the assets of another company is not liable for the debts and liabilities of the transferror." The general rule is subject to four well recognized exceptions permitting liability to be imposed on the purchasing corporation: (1) when the purchasing corporation expressly or impliedly agreed to assume the selling corporations liability; (2) when the transaction amounts to a consolidation or merger of the purchaser and seller corporations; (3) when the purchaser corporation is merely a continuation of the seller corporation; or (4) when the transaction is entered into fraudulently to escape liability for such obligations.

The second exception noted in *Dayton*, supra, to the general rule of non-liability is also known as the "de facto merger doctrine." The third exception is also known as the "mere continuation doctrine." See, e.g., *Carreiro v.*

Rhodes, Gill & Co., L.t.d., 68 F.3d 1443 (1st Cir. 1995). The fourth exception might be referred to as the "fraudulent purpose" or "escape of liability" exception.

The above noted exceptions to the general rule of successor corporation non-liability can be relied upon to establish jurisdiction. Corporate formalisms are more readily ignored when the inquiry is into jurisdiction and not liability. "[T]he imposition of liability involves a more stringent test [for ignoring corporate formalisms] than their assertion of jurisdiction." See discussion in *Plaintiff's Memorandum in Response*, V-A, pg.s 26-28 quoting Philip I. Blumberg, *The Law of Corporate Groups: Procedural Law*, Sec. 3.07, pg. 74 (1983).

The successor corporation doctrine was explained in *Celotex Corp. v. Owens-Illinois, Inc.*, 124 F.3d 619, 628 (4th Cir. 1997):

> [P]ersonal jurisdiction [may sometimes be had] under the successor corporation liability theory. Under that theory, a non-resident defendant corporation not otherwise subject to personal jurisdiction becomes so by virtue of succeeding to a corporation that was subject to personal jurisdiction in the forum state.

The court now considers whether plaintiff has made a prima facie showing that the successor corporation doctrine would allow the assertion of jurisdiction over various holding company defendants.

B. Plaintiff Has Failed To Make A Prima Facie Showing That BAT Industries Is A Successor Corporation To BATCo.

Plaintiff argues BAT is subject to the court's jurisdiction as a successor corporation to BATCo. Plaintiff's tender of jurisdictional facts over BAT is essentially as follows: In 1976, BAT became the parent of BATCo and the indirect parent of ATC and B&W by a "reverse takeover" whereby BAT acquired 100% of BATCo's stock and compensated BATCo's shareholders by issuing BAT shares to them.[38]

Plaintiff's legal theory is that one way to become a successor corporation is to acquire 100% of the predecessor's stock (the so-called Blumberg principle[39]) and another way is to issue one's own shares of stock as a means of acquiring the predecessor (the so-called Mertens principle[40]). Applying the Blumberg and Mertens principles to plaintiff's tender of facts, plaintiff concludes BAT is subject to jurisdiction as a successor corporation to BATCo. The court cannot concur in plaintiff's conclusion.

The Blumberg and Mertens principles are not complete statements of the law regarding successor corporation liability. Because the "de facto merger" and "mere continuation" doctrines are exceptions to the general rule of non-liability following an asset purchase, they necessarily presuppose a sale or other transfer of assets from one corporation to its alleged successor. See, e.g., *Carreiro v. Rhodes, Gill & Co., L.t.d.*, supra. It is not logical that the "de facto merger" and/or "mere continuation" exceptions should have a broader scope than the rule to which they relate. *Id.* A corporation's purchase f 100% of another corporation's stock does not make the purchasing corporation." See *City and County of San Francisco v. Philip Morris*, 1998 U.S. Dist.LEXIS 3056 (N.D.Cal.March 3, 1998) (No successor liability where, *inter alia*, "no assets, only stock were purchased and BATCo continued to exist as a separate corporate entity after the transaction); *Arch v. American Tobacco Co.*, 984 F.Supp. 830, 839 (E.E.Pa. 1997); *Parra v. Production Mach. Co.*, 611 F.Supp. 221, 224 (E.D.N.Y. 1985).

It is clear from the above cited authority that, unless there has been a transfer of assets, the exceptions to the rule of nonliability do not apply. It would follow that, in the absence of an asset transfer, the exceptions can not be relied upon to establish jurisdiction.

Plaintiff's tender of facts shows only that there was a stock transfer. Plaintiff has made no showing that there was a transfer of assets. Absent a showing that assets were transferred, plaintiff can not rely on the "de facto merger,"

"mere continuation" and/or exceptions to establish jurisdiction.

Defendant BAT has alleged facts which demonstrate that BAT Industries became the parent of BATCo in 1976 when the stock, not the assets, of BATCo was acquired; BAT Industries did not assume the liabilities of BATCo. See *Clarke Reply Affidavit*, para. 3-7; Wilson Affidavit, para. 4-7. BAT Industries is not and cold not be BATCo's successor because BATCo has no successor, BATCo has been in existence as a separate company continuously since 1902. See *Clarke Reply Affidavit*, para. 4-5.

Plaintiff has failed to make a showing of jurisdiction over BAT Industries on a successor corporation theory.

C. Plaintiff Has Failed To Make A Prima Facie Showing That RJRN Is The Successor Corporation To RJRT.

Plaintiff's tender of jurisdictional facts as to RJRN is simply that RJRN was incorporated in 1970 and in that year acquired "100% of the stock" of cigarette company RJRT.[41] Again, plaintiff relys on the Blumberg principle to establish jurisdiction. See *Plaintiff's Memorandum in Response*, pg. 31.

As discussed above, a corporation does not succeed to another's liability simply by acquiring 100% of the other's stock. See also, *Smith Land & Improv. Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) ("Changes in ownership of a corporation's stock will not affect the rights and obligations of the company itself. The corporation survives as an entity separate and distinct from its shareholders even if all the stock is purchased by another corporation").

Regardless of whether plaintiff is held to a "prima facie" or "likelihood" standard, plaintiff has failed to demonstrate facts which would justify assertion of jurisdiction over RJRN on a successor corporation theory.

D. Plaintiff Has Failed To Make A Prima Facie Showing That PMC Is The Successor Corporation Of PMI.

Plaintiff argues that successor corporation liability or jurisdiction exists over PMI under the "mere continuation" or "escape of liability" exceptions to the general rule of nonliability.

Again, plaintiff's tender of jurisdictional facts does not indicate that a transfer of assets was made between PMI and PMC. Under the law as it presently exists, plaintiff can not avail itself of a theory of successor corporation jurisdiction absent a showing that assets were transferred. (See discussion above). Nevertheless, the court considers plaintiff's theory of jurisdiction under the "mere continuation" and "fraudulent purpose" exceptions.

Plaintiff has adduced facts that there was a 1985 "exchange" of stock whereby PMI would become a wholly owned subsidiary of the newly formed parent PMC[42], that PMC's "consolidated financial position was identical to PMI's" after the exchange[43], that PMC's address and telephone number were the same as PMI's[44], and the top executives of both corporations were the same[45]. From these facts plaintiff concludes that PMC was a "mere continuation" of PMI.

Plaintiff's factual tender does not allow a finding that PMC is a mere continuation is the existence of only one corporation after the sale of assets. 15 Wm. Meade Fletcher, et al, *Fletcher Cyclopedia of Corporations*, sec. 7124.10, at 291 (rev. ed. 1990) cited at pg. 7 of PMC's Reply Brief. "Even when the same persons are officers or directors of the two corporations, [successorship] liability is not imposed on the acquiring corporation when recourse to the debtor corporation is available and the two corporations have separate identities." *Beatrice Co. v. State Board of Equalization*, 6 Cal.4th 767, 778 (Ca.1993); see also *Phillips v. Cooper Lab, Inc.*, 215 Cal.App.3d 1648, 1660 (Ca. 1989) ("Nor was [the acquiring company] a mere continuation of [the acquired company]. While [both companies] had several common officers and directors, [the acquired company] continued as a separate corporation after its acquisition.").

Plaintiff has failed to show that PMI and PMC do not have separate identities and/or that PMI is not answerable for its own debts and tort liabilities. The mere allegation that there is a "strong possibility that PMI and PMP will not be able to satisfy any judgment against them" does not satisfy the requirement that plaintiff produce facts in support of its prima facie showing. It also appears that PMI has existed continuously since well before the exchange in 1985. PMI and PMC are engaged in different businesses. PMI manufactures cigarettes. PMC is a holding company. Because PMC has not continued in PMI's business it can not be deemed a "mere continuation" of PMI. See *Fletcher Cyclopedia*, sec. 7124.10 at 291 ("continuation of the seller's business" is a significant factor in "mere continuation" analysis).

There is no evidence the 1985 exchange was for the purpose of enabling PMI to avoid its creditors or that PMI lacks sufficient funds to meet the claims of its creditors. In the absence of such a showing, the "fraudulent purpose" rule does not apply. See *Beatrice*, 6 cal.4th at 778-79.

Plaintiff has failed to adduce facts sufficient to make a prima facie showing of jurisdiction over PMC on a "mere continuation" or "fraudulent purpose" theory.

VII. PLAINTIFF CANNOT ESTABLISH JURISDICTION UNDER THE "BEST FOODS" PRINCIPLE OF DIRECT LIABILITY.

Plaintiff relies on the recent case of *United States v. Best Foods*, 118 S.Ct. 1876 (June 8, 1998) to establish jurisdiction over the holding company defendants (BAT, PMC, RJRN).

Analogizing environmental pollution and liability under CERCLA to "cigarette-and-fraud" pollution in the instant case, plaintiff argues that under the "direct liability" principle of *Best Foods*, BAT, PMC and RJRN are "liable to those they have injured through their own 'management, direction, or conduct of operations specifically related to cigarettes' as well as those injured through their own 'decisions about compliance with governmental health regulations' respecting cigarettes." Plaintiff then concludes that "a fortiori, they are subject to the jurisdiction of any court examining allegations of harm stemming from those activities." See *Plaintiff's Memorandum In Response*, pg. 39.

Interpreting the *Best Foods* liability principle as a jurisdictional principle, plaintiff then makes an impressive tender of facts of the holding companys' involvement in the management and control of the cigarette manufacturer subsidiaries and involvement in decision making regarding compliance with health regulations. See *Plaintiff's Memorandum In Response*, pgs. 40-70.

Before evaluating plaintiff's tender of facts under the direct liability principle of *Best Foods*, the court considers whether *Best Foods* even applies to the jurisdictional inquiry.

Best Foods announced a "liability principle", not a "jurisdiction principle." Best Foods addressed the limited question of whether "on the facts of the case" a parent corporation could be held liable under CRCLA as an operator of a polluting facility owned by its subsidiary. *Id.* at 1887. The Supreme Court held that the corporate parent could be found to be a CERCLA "operator" (a) if the corporate veil could be pierced and the parent then held derivatively liable for the subsidiary's conduct, *id.* at 1884-86, or (b) if the corporate parent actively participated in, and exercised control over, the operations of the facility, and thus was held directly liable for its own actions, *id.* at 1886-87. Nowhere in *Best Foods* did the court address the issue of personal jurisdiction.

Being a recent case, this court is unaware of any decisional authority construing *Best Foods*' "liability principle" to establish jurisdiction over a nonresident, foreign defendant. The parties have cited none. *Best Foods* should be interpreted in light of long standing precedent regarding jurisdiction.

The use of "liability" principles to obtain jurisdiction over non-resident defendants has been consistently rejected. The Ninth Circuit in *American Tel. & Tel. Co. v. Compagnie Bruxellas Lambert*, 94 F.3d 586 (9th Cir. 1996) held:

> Even if [the parent corporation] would be liable under CERCLA, [the plaintiff] *may not use liability as a substitute for personal jurisdiction*. Even if the requirement of personal jurisdiction allows a parent corporation to avoid liability, and thus undercut CRCLA's sweeping purpose . . . , liability is not to be conflated with amenability to suit in a particular forum. Personal jurisdiction has Constitutional dimensions, and regardless of policy goals, Congress cannot override the due process clause, the source of protection for nonresident defendants. *American Tel. & Tel.*, 94 F.3d at 591.

In *Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990) the Ninth Circuit noted "[l]iability and jurisdiction are independent" and, even if defendants were jointly liable, each individual defendant's contacts with the forum must be assessed individually. The court explained:

> Liability depends on the relationship between the plaintiff and the defendants and between the individual defendants; jurisdiction depends only upon each defendant's relationship with the forum. See *Shaffer v. Heitner*, 433 U.S. 186, 204 & n. 19, 97 S.Ct. 2569, 2579 n. 19, 53 L.Ed.2d 683 (1977). *Regardless of their joint liability, jurisdiction over each defendant must be established individually*. This is the rule of *Rush v. Savchuk*, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980) . . . The Minnesota Supreme Court aggregated the contacts of the "defending parties" and therefore found sufficient contacts to establish jurisdiction over Rush. The United States Supreme Court reversed, holding that "[s]uch a result is plainly unconstitutional . . . The requirements of *International Shoe* must be met as to each defendant." *Id.* at 331-32, 100 S.Ct. at 578-79. That State Farm and Rush were both potentially liable did not allow the imputation of jurisdictional contacts from one to the other. The partners here stand in relation to the partnership exactly as State farm stood relative to Rush: *they have potential liability, but they are independent for jurisdictional purposes. Sher*, 911 F.3d at 1365 (emphasis added).

Nowhere in the *Best Foods* decision does the Supreme Court intimate that its long standing precedents of *Shaffer v. Heitner*, supra, *Rush v. Savchuk*, supra, *Keeton v. Hustler Magazine*, supra, and *International Shoe*, supra, all of which require that each defendant's forum contacts be assessed individually, were being discarded or overruled.

Quite simply, *Best Foods* did not deal with jurisdiction and, in no way, altered the fundamental rule that each particular defendant must have the requisite "minimum contacts" with the forum before jurisdiction can be asserted consistent with the Constitution. The court, therefore, does not analyze plaintiff's tender of facts under the *Best Foods* direct liability principle. (Those facts, however, must be considered as they relate to plaintiff's other theories of jurisdiction -- specifically, plaintiff's theory of "piercing veil.").

VIII. PLAINTIFF HAS FAILED TO MAKE A PRIMA FACIE SHOWING OF JURISDICTION UNDER AN "ALTER EGO" OR "PIERCING THE CORPORATE VEIL" THEORY.

Plaintiff seeks to establish jurisdiction over BAT, PMC, and RJRN under the "derivative liability" principle of "piercing the corporate veil." (See *Plaintiff's Memorandum in Response*, pgs. 70 through 74).

A wholly owned subsidiary's contacts with a forum typically do not subject its nonresident parent corporation to the forum's long-arm jurisdiction. See *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586 at 591 (9th Cir. 1995); *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (9th Cir. 1995). Nevertheless, if a subsidiary is a mere instrumentality or alter ego of the parent, a court may "pierce the corporate veil" and impute the contacts of the subsidiary to the parent. See, e.g., *Certified Building Products Inc. v. NLRB*, 528 F.2d 968, 969 (9th Cir. 1976).

Courts are reluctant to disregard the separate existence of related corporations by piercing the corporate veil, and have consistently given substantial weight to the "presumption of separateness." See, e.g., *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980)[46]; see also, *Crown Central Petroleum v. Cosmopolitan Shpg. Co.*, 602 F.2d 474, 477 (2nd Cir. 1979)[47]; *Kashfi v. Phibro-Salomon, Inc.*, 628 F.Supp. 727, 732-33

(S.D.N.Y. 1986).

In order to pierce the corporate veil, plaintiff must successfully advance a two step argument. The plaintiff must show (1) that the subsidiary is a "mere instrumentality" of the parent; and (2) that the subsidiary is being used by the parent in order to commit or conceal a fraud. See, e.g., *Williams v. McAllister Brothers, Inc.*, 534 F.2d 19, 21 (2nd Cir. 1976).

To meet the first requirement ("mere instrumentality"), plaintiff must show that the subsidiary was controlled and dominated to such an extent that it had no existence of its own. The control exerted by the parent corporation must be extensive. It is not enough that related corporations have the same officers and directors, (see *Coastal States v. Zenith*, 446 F.Supp. at 337), or that the parent corporation owns all its subsidiary's stock see *Williams v. McAllister*, 534 F.2d at 21), or even that a parent and subsidiary hold themselves out as being a single integrated operation, controlled and managed from the parents offices (see *Fidenas A.G. v. Honeyell, Inc.*, 501 F.Supp. 1029, 1035-38 (S.D.N.Y. 1980). In order to pierce the corporate veil, the parent corporation must dominate the finances, policies, and business practices of the subsidiary corporation to such an extent that the subsidiary has no separate existence of its own. See, e.g., *Dalton v. R&W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990); *Coastal States v . Zenith*, 446 F.Supp. at 337 (citing *Pisser v. International Bank*, 282 F.2d 231, 238 (2nd Cir. 1960); *Kashfi v. Phibro-Salomon, Inc.*, 628 F.Supp. 727, 732-34 (S.D.N.Y. 1986).

Plaintiff has failed to make a prima facie showing that the parent corporations (BAT, PMC, and RJRN) have so dominated the finances, policies and business practices of their respective subsidiaries that each subsidiary is a "mere shell" or "mere instrumentality" of its parent.

Plaintiff uses the same facts to support its "piercing the corporate veil" argument as its "Best Foods" direct liability/jurisdiction argument. (See *Plaintiff's Memorandum In Response*, pg. 73 "The factual details set forth in Sections V-C and VI above show that 'each of these parents has repeatedly used its cigarette-manufacturing subsidiaries for its own ends.'"). The court now considers whether plaintiff has made a prima facie showing of the elements necessary to pierce the corporate veil and, thereby, subject the holding company defendants to jurisdiction.

A. BAT

Plaintiff's tender of jurisdictional facts as to BAT is essentially as follows: BAT owns B&W. B&W in turn owns ATC. BAT was a successor to BATCo. BAT was formed in 1976 to take over the role of BATCo. Prior to 1976, BATCo. "as the tope company controlled its subsidiaries' cigarette marketing strategies, their activities related to the avoidance of and success in tobacco litigation, and their decisions about compliance with governmental health regulations." Plaintiff cites to a July 4, 1963 letter from BATCo. to B&W (Pl. Ex. 27) allegedly instructing B&W not to cooperate with governmental health policy. David Wilson testified that BAT runs its vast empire through a Chief Executive's Committee consisting of BAT's "chief executive, finance director, and the managing director of tobacco." (Pl. Ex. 26). Ex. 26 acknowledges that BAT cannot manage the day to day affairs of its subsidiaries, that BAT's subsidiaries run their affairs on a day to day basis but that major decisions require prior reference to the Chief Executives Committee. (Pl. Ex. 26, pgs. 25-26). BAT has held annual conferences at which CEOs of BAT's subsidiaries meet to discuss subjects such as smoking and health. (Pl. Ex. 26, Ex. 28). Plaintiff references a document (Pl. Ex. 28) where one of the meetings "endorsed the responsibility delegated by BAT Industries to BATCo. to develop, agree, and co-ordinate the key strategies for its tobacco activities, and agreed [to] the exchange of information necessary to achieve this." From this latter exhibit, plaintiff urges the conclusion that BAT has been using BATCo. "as its instrumentality for cigarette research, for promoting and marketing cigarettes, and for defending tobacco against its critics and attackers" and that everything done by BATCo. should be viewed as the direct action of BAT. Pl. Ex. 39 is offered to demonstrate that BAT considers itself a cigarette manufacturer -- i.e. that BAT is not really separate from its manufacturing subsidiaries. Bramley calls BAT "one of the world's leading international tobacco manufacturers", " . . . with factories in more than 50 countries," and one of the four

dominant cigarette companies in the world." Although BAT claims to have only 185 employees, Bramley claims it has more than 200,000. Ex. 39 is also submitted as evidence of BAT marketing cigarettes in Australasia. Exhibits 36, 37 and 38 are offered to show BAT's day-to-day involvement with health issues.

Even accepting the above tender of facts as true, plaintiff has failed to make a prima facie shwoing that B&W, ATC and BATCo. are "mere shells" or "mere instrumentalities" of BAT, having no separate existence of their own.

Collaborative activity between related corporations does not, of itself, present adequate grounds for piercing the corporate veil. See *Kashfi v. Phibro-Salomon, Inc.*, 628 F.Supp. 727 (S.D.N.Y. 1986). The meetings held with BAT and the CEOs of its subsidiaries nothing more than collaborative activity between related corporations having similar business interests. This collaborative activity as to research, marketing and litigation strategy does not allow a finding that these subsidiary corporations have no existence separate and apart from BAT.

Likewise, BAT's involvement in "decisions about compliance with governmental regulations" or involvement in marketing strategies "with particular emphasis on Australasia" is not evidence of BAT's day-to-day control of its subsidiaries. While it may be true that BAT does exert some control over major decisions of its subsidiaries, there is no evidence that BAT is running those corporations on a day to day basis. Courts have consistently held that "[e]ven where a parent owns 100% of a subsidiary and their board of directors overlap, the foreign parent is not subject to jurisdiction absent a showing that the parent controls the internal affairs of the subsidiary and determines how the company will be operated on a day to day basis. See, e.g., *In Re MDC Holdings Sec. Litig.*, 754 F.Supp. 785, 793-94 (S.D. Ca. 1990) (quoting *Williams v. Canon, Inc.*, 432 F.Supp. 376, 380 (C.D. Ca. 1977). Indeed, it has been recognized that parents of wholly owned subsidiaries necessarily control, direct, and supervise their subsidiaries to some extent. See, e.g., *Williams*, supra, at 380; see also *IDS Life Ins. Co. v. Sun America Life Ins. Co*, 136 F.3d 537, 540-41 (7th Cir. 1998) (General oversight of a subsidiary by a parent corporation does not warrant the court's assertion of jurisdiction).

Even disregarding the "Stoughbaugh" affidavit offered by defendant, the court finds that plaintiff has failed to make a prima facie showing that an alter ego relationship exists between BAT and its subsidiaries. There is, therefore, no basis for piercing the corporate veil and haling BAT into this forum for the acts of B&W and ATC.

B. PMC

Plaintiff argues that PMC is the later ego of PMI and is, therefore, subject to this court's jurisdiction. Again, plaintiff relies on the same set of facts relied upon to establish jurisdiction under the direct liability principle of *Best Foods*.

Plaintiff's relies on the following tender of facts to establish that PMC is the alter ego of its subsidiary, PMI.

In 1984 two researchers for Philip Morris, Victor DeNoble and Paul Mele, were fired. In 1986, PMC allegedly learned they were planning to disseminate certain research within the scientific community. On PMC letterhead, PMC's Assistant General Counsel wrote to Dr.s DeNoble and Mele threatening them with legal action. (Pl. Ex. 42 & 43).

Despite plaintiff's assertions, this single incident of the use of PMC letterhead in no way suggests PMC is so dominating the day-to-day operations of PMI which would justify piercing the corporate veil. The mere sharing of legal counsel by a parent subsidiary is consistent with the typical parent-subsidiary relationship and does not "indicate any degree of control whatsoever" by the parent over the subsidiary. See, e.g., *King v. Johnson Wax Assoc.s*, 565 F.Supp. 711, 719 (D.Md. 1983); *Environmental Dynamics, Inc. v. Robert Tyer & Assocs.*, 929 F.Supp. 1212, 1240-41 & fn.14 (N.D.Iowa 1996); (and other cases cited at pg. 27 of PMC's Reply Memorandum).

Dr. Sharon Byose's account of a 1988 meeting in London at which "Philip Morris presented to the U.K. [tobacco] industry their global strategy on environmental tobacco smoke" (Pl. ex. 44) falls far short of making a prima facie

showing that PMC is so involved in the day to day operations of its subsidiary PMI that PMI is the alter ego of PMC. This exhibit does not even indicate whether the person making the presentation was a representative of PMC, PMI or some other Philip Morris entity. Even if made on behalf of PMC, there is no indication that PMC is running the day-to-day operations of PMI.

Dr. Houghton's speech (Pl. Ex. 46), likewise, does not establish that PMC so dominates the day-to-day operations of PMI that an alter ego relationship exists. PMC's attempts to influence government policy (Pl. Ex. s 46 and 47) provides no basis for piercing the corporate veil because it does not evidence any day-to-day control of PMI by PMC. Even without the expertise offered by the Ball affidavit, it would seem consistent with PMC's role as a holding company to lobby the government on issue that might affect its investment in its subsidiary. The Dobbs Affidavit (Pl. Ex. 50) and testimony in the Minnesota tobacco litigation (Pl. Ex. 51) similarly fail to shed light on any alter ego relationship between PMC and PMI.

Considering the entire tender of facts by plaintiff, the court finds that there are insufficient facts put forward to make even a prima facie showing that PMI is the alter ego of PMC and which would justify an assertion of jurisdiction by piercing the corporate veil.

C. RJRN and RJRN Holdings

RJRN was incorporated as a holding company in 1970 and has owned 100% of the stock of RJRT since that time.[48] In 1988, RJRN Holdings Corp. was formed and in 1989 it acquired 100% of the stock of RJRN. RJRN and RJRN Holdings Corp. share the same Chairman and CEO, Steven Goldstone. As discussed above, mere ownership of even 100% of the stock of a subsidiary by a parent does not establish an alter ego relationship or otherwise justify piercing the corporate veil. The fact RJRN and RJRN Hodlings Corp. may share the same Chair and CEO is, likewise, insufficient to justify piercing the corporate veil. Plaintiff's "suspicion" that "each of these parents was formulated to acquire 100% ownership of a cigarette company as a means of insulating the corporate family's assets against judgments imposing liabilities for tobacco-related activities"[49] is not sufficient to justify piercing the corporate veil.

Plaintiff's burden is to adduce facts overcoming the strong presumption of corporate separateness. Plaintiff has failed to meet that burden. The court finds that plaintiff has failed to make a prima facie showing that RJRN and/or RJRN Holdings so dominates the day-to-day operations of RJRT that an alter ego relationship exists which would justify an assertion of jurisdiction on a "piercing the corporate veil" theory.

IX. PLAINTIFF CANNOT MAKING A SHOWING OF JURISDICTION UNDER A "CONSPIRACY THEORY."

Plaintiff seeks to hold all defendants (the manufacturer defendants, holding company defendants and unaffiliated defendants) amenable to jurisdiction on the basis of an alleged "conspiracy to mislead the World's consumers, governments and health care providers about the health dangers and addictiveness of cigarettes." See *Plaintiff's Memorandum in Response*, pgs. 74-93.

There is a split of authority as to whether personal jurisdiction can be obtained over a nonresident defendant on the basis of an alleged conspiracy with a defendant who is subject to the jurisdiction of the forum. Plaintiff cites many cases which have recognized the theory.[50] Defendants contend the theory is disfavored by American courts and should be rejected on Constitutional grounds.[51] This presents another issue of first impression for the RMI Courts.

The fundamental tenant of jurisdictional analysis is that "each defendant's contacts with the forum must be assessed individually." *Calder v. Jones*, 465 U.S. 783, 790, 104 S.Ct. 1482, 1487 (1984). Since each defendant's contacts must be assessed individually, "merely belonging to a civil conspiracy does not make a member subject to the jurisdiction of every other member's forum." *Massachusetts School of Law at Andover, Inc. v. American Bar*

Association, 846 F.Supp. 374, 379 (E.D. Pa. 1994), *aff'd* 107 F.3d 1026 (3rd Cir.), *cert denied* 118 S.Ct. 264 (1997); see also *H.L. Moore Drug Exchange, Inc. v. Smith, Kline & French Laboratories*, 384 F.2d 97, 98 (2nd Cir. 1967) ("the presence of one co-conspirator within the jurisdiction does not give jurisdiction over all who are alleged to be co-conspirators").

Plaintiff must demonstrate that each alleged co-conspirator has contacts with this forum and that "substantial acts" in furtherance of the conspiracy were performed in the Republic of the Marshall Islands. Mere effects of the conspiracy in the Marshall Islands do not suffice.

> Co-conspirator jurisdiction is not a separate basis of jurisdiction apart from general or specific jurisdiction. Rather, it is based on the same contacts within the forum analysis just discussed. The difference is that a court looks not only at the defendant's form contacts, but at those of the defendant's "resident" co-conspirators. The court imputes the contacts of the "resident" co-conspirator over who it has jurisdiction to the "foreign" co-conspirator to see if there are sufficient contacts to exercise jurisdiction over the latter. See *Ethanol Partners v. Wiener, Zuckerbrot, Weiss & Brecher*, 635 F.Supp. 15, 18 (E.D.Pa. 1985); *In re Arthur Treacher's Franchise Litig.*, 92 F.R.D. 398, 411 (E.D.Pa. 1981) . . . To be sure, MSL has alleged that the effects of the conspiracy were felt nationwide and therefore by law schools in Pennsylvania, but this is not the same as alleging that substantial acts to further the conspiracy took place in Pennsylvania. Therefore, I find that the individual defendants are not subject to the exercise of jurisdiction in Pennsylvania on the basis of co-conspirator jurisdiction. *Massachusetts School of Law v. American Bar Association*, 846 F.Supp. 374, 379 (E.D.Pa. 1994).

See also, *Bennett Waites Corp. v. Piedmont Aviation, Inc.*, 563 F.Supp. 810 (D.Colo. 1983) ("'substantial acts' committed in the forum state in furtherance of the conspiracy are necessary to subject the alleged co-conspirator to the forum court's personal jurisdiction"); *Jungquist v. Sheikh Sultan bin Khalifa Al Nabyan*, 115 F.3d 1020, 1031 (D.C. Cir. 1977) (plaintiff must plead "with particularly . . . the overt acts within the forum taken in furtherance of the conspiracy"); *Mandelkorn v. Patrick*, 359 F.Supp. 692 (D.D.C. 1973) (Court required plaintiff to allege specific overt acts in the forum state that furthered the conspiracy); *Gemeni Enterprises, Inc. v. WFMY Television Corp.*, 470 F.Supp. 559 (M.D.N.C. 1979) (Jurisdiction can only be exercised "where substantial acts in furtherance of the conspiracy were performed in the forum state and the co-conspirator knew or should have known that the acts would be performed in the forum state").

In order to establish personal jurisdiction under a conspiracy theory, plaintiff must establish: "(1) that a conspiracy to deprive plaintiff of his rights existed; (2) that the out of [forum] defendants . . were parties to the conspiracy with in [forum] defendants . . . ; and (3) that substantial acts in furtherance of the conspiracy, of which [the out of forum defendants] were aware or should have been aware, took place in [the forum]." *Catrone v. Ogden Suffolk Downs, Inc.*, 647 F.Supp. 850, 860 (D. Mass. 1986).

Plaintiff has submitted many documents, affidavits and exhibits which would allow a finding, under either the "prima facie" or "likelihood" standard, that misleading information about the safety of cigarettes was disseminated to the consumer public. Even assuming, however, that the Tobacco defendants conspired amongst themselves to mislead the governments and the entire population of the world as to the safety of cigarettes, there has been no evidence submitted by plaintiff which would allow a finding that any acts (much less substantial acts) in furtherance of the conspiracy were performed in the Republic of the Marshall Islands. Even though the Republic (or entire world) may have felt the effects of the conspiracy, that fact alone is insufficient to allow the court to assert jurisdiction over defendants.

Having failed to make the requisite showing of "substantial acts in furtherance of the conspiracy performed in the forum", the court finds plaintiff cannot establish jurisdiction over defendants under a "conspiracy theory."

X. CONCLUSION AND ORDER

For the reasons set forth above, the court GRANTS the motions of the "holding company" and "unaffiliated" defendants to dismiss and, therefore, ORDERS plaintiff's First Amended Complaint DISMISSED as to these defendants.

The court DENIES the motions of the "manufacturer" defendants (American Tobacco Company, Brown & Williamson Tobacco Corporation, Philip Morris Incorporated, Philip Morris Products, Inc. and R.J. Reynolds Tobacco Company) to dismiss.

REFERENCES

1 American Tobacco Company (ATC) is part of Brown & Williamson (B&W). See fn. 3.

2 Defendant Brown & Williamson Tobacco Company (B&W) is incorporated under the laws of the state of Delaware and has its principal place of business and principal offices in the State of Kentucky. Brown & Williamson includes the American Tobacco Company (ATC). See *Affidavit of Dale A. Linder, District Sales Manager*, dated December 6, 1997.

3 Philip Morris Incorporated (PMI), also known by its trade name "Philip Morris-U.S.A.", is incorporated in Virginia with its principal office and place of business in New York. PMI manufactures and sells tobacco products to independent wholesalers and/or distributors. Except for sporadic sales to certain persons with military post office boxes, PMI has never sold cigarettes in the RMI. PMI has never had a physical business presence in the RMI. See *Affidavit of Brian Schuyler, Vice President*, dated December 5, 1997.

4 Philip Morris Products Inc. (PMPI) is incorporated and has its principal place of business in Virginia. PMPI sells its products to independent wholesalers and/or distributors. It does not sell its products to any distributor or wholesaler in the RMI. PMPI has never had a business presence in the RMI. See *Affidavit of A. Stephen Robert, Vice Presidents*, dated December 5, 1997.

5 Defendant R.J. Reynolds Tobacco Company (RJRTC) is incorporated in the State of New Jersey with its principal place of business and principal office in the State of North Carolina. RJRTC manufactures and sells "cigarette products" to distributors and/or wholesalers who are "independent contractors." It has no direct contact with the Republic of the Marshall islands as it does not manufacture or sell its products within the territorial boundaries of the Marshall Islands, has never entered into any contracts for the sale of its products within the Marshall Islands, has never had a physical business presence, or maintained any office, employees, agents, representatives, and/or telephone listings here, has never owned, leased rented, used or possessed any real or personal property, maintained any bank accounts in the Marshall islands, and has never registered to do business or paid any taxes to the Republic of Marshall Islands. See *Affidavit of Charles A. Blixt, Senior Vice President, General Counsel and Secretary*, dated December 5, 1997.

6 The Council for Tobacco Research (CTR) is a not-for-profit corporation incorporated in 1971 when it took over the functions of The Council for Tobacco Research (TIRC). CTR is not a tobacco company and has never sold or distributed cigarettes. It has never had a business presence in the Marshall Islands. See *Affidavit of Harmon McAllister, Ph.D.*, dated December 1, 1997.

7 Defendant The Tobacco Institute, Inc. (TI) is a not-for-profit trade association for the tobacco industry incorporated under the laws of the State of New York. TI does not manufacture, distribute, advertise, or sell cigarettes. TI has never maintained an office and has never been registered to do business in the Marshall Islands. It has never owned, used, rented, possessed, or maintained an interest in property in the Marshall Islands. See *Affidavit of William A. Adams, Senior Vice President*, dated December 3, 1997.

8 Hill & Knowlton, Inc. (H&K) is incorporated under the laws of Delaware with its principal place of business in New York. H&K is engaged in the business or public relations. H&K has never engaged in the manufacture, sale or distribution of tobacco products anywhere in the world. See *Affidavit of Mark Thorne, Executive Vice President*, dated December 4, 1887.

9 UST, Inc., is a holding company incorporated under the laws of the State of Delaware with its sole place of business in Connecticut. United States Tobacco Company is a subsidiary of UST, Inc. UST has never maintained any business presence in the Marshall Islands. See *Affidavits of Debra A. Baker, Senior Vice President and Secretary*, dated December 3, 1997.

10 United States Tobacco Corporation (USTC) is incorporated under the laws of Delaware and has its principal place of business in Connecticut. In 1985, USTC discontinued manufacturing cigarettes. In 1970, USTC stopped advertising cigarettes and subsequently abandoned or discontinued use of all its cigarette trademarks. USTC sold its cigarettes to independent distributors and/or wholesalers. None of those distributor/wholesalers were located in the Marshall Islands. USTC has never had a business presence in the Republic, has never owned any property, had any agents, distributors, servants, employees, officers, directors, wholesalers, or other representatives in the Republic, has had no bank accounts, books, records or telephone listings in the Republic. See Affidavit of *Richard C. Cutler, Vice President*, dated December 3, 1997.

11 Philip Morris Companies, Inc., (PMCI) is a holding company incorporated under the laws of Virginia with its principal offices and place of business in New York. PMCI holds Philip Morris Incorporated (PMI) and Philip Morris International Inc., of which Philip Morris Products Inc, is a wholly owned, separate and distinct subsidiary. PMCI and PMI keep separate books and bank accounts and are managed by separate executive officers and Boards of Directors. PMCI has never manufactured or sold any tobacco products anywhere in the world. PMCI has never had a business presence in the Marshall Islands. See *Affidavits of Colleen O. Flinn, Assistant Secretary*, dated December 5, 1997.

12 RJR Nabisco (RJRN) is a holding company incorporated under the laws of the state of Delaware with its principal place of business in New York, RJRN owns 100% of R.J. Reynolds Tobacco Company (RJRTC), a New Jersey corporation. RJRN and RJRT keep separate books, bank accounts, and are managed by separate executive officers and Boards of Directors. RJRN has never manufacturer, designed, advertised, sold, etc. any products including tobacco products. RJRN has never had a business presence in the Marshall Islands, never maintained offices, bank accounts, etc. within the Republic. See *Affidavit of Suzanne P. Jenny, Assistant Secretary*, dated December 4, 1997.

13 Lorillard, Inc. (LI) was dismissed by plaintiff on September 11, 1998.

14 Loews Corporation (LC) is no longer a party having been dismissed by plaintiff on September 11, 1998.

15 BAT Industries p.l.c. is a diversified holding company incorporated under the laws of England. B&W is an "indirectly owned" subsidiary of BAT Industries, p.l.c. BATCo. is also by B.A.T. Industries, p.l.c. has never manufactured, sold or distributed tobacco products. See *Affidavit of David Wilson, Company Secretary*, dated December 9, 1997.

16 Brooke Group, Ltd. is a Delaware Corporation with its principle place of business in North Carolina. It is the parent and sole shareholder of Liggett Group, Inc.

17 LI is wholly owned by Brooke Group.

18 Lorillard Tobacco Corp. is no longer a party having been dismissed by plaintiff on September 11, 1998.

19 Plaintiff, in its opposition memorandum, argues that it need only make a "prima facie" showing that jurisdiction exists. (See Plaintiff's Memorandum in Response to Defendants' Motions to Dismiss for Lack of Personal Jurisdiction, pgs. 8-14). At oral argument, plaintiff's counsel suggested plaintiff would be content being held to the "likelihood" standard. (See transcript, pg. 66). Defendants have suggested in their Reply Memoranda at oral argument that plaintiff should be held to the higher standard of "preponderance of the evidence." (See, e.g., Specially Appearing Defendants' Joint Reply Brief in Support of Their Special Motions to Dismiss for Lack of Personal Jurisdiction, pg. 7, fn. 9).

20 See Specially Appearing Defendants' Joint Reply Brief In Support Of their Special Motion To Dismiss For Lack of Personal Jurisdiction, pg. 7, fn. 9.

21 See transcript, pgs. 8-9.

22 See transcript, pgs. 65-67.

23 *Data Disc* contemplates application of the prima facie standard even where plaintiff has had access to discovery. The court noted: "If the court determines that it will receive only affidavits or affidavits *plus discovery materials*, these very limitations dictate that a plaintiff must make only a prima facie showing . . ." *Data Disc* at 1285.

24 Personal jurisdiction may be broken down into two categories: a general and special jurisdiction. See, e.g., *Reebok Int'l Ltd. v. McLaughlin*, 49 F.3d 1387, 1391 (9th Cir. 1995); *United States Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1088 (1st Cir. 1992). Each form of jurisdiction requires different showings.

25 See *Plaintiff's Memorandum In Response To Defendant's Motions To Dismiss For Lack Of Personal Jurisdiction*, pg. 5.

26 See Pl.Ex. 9, 10, 11, 12. See also ATC/B&W's Responses to Interrogatories 5-3 and 5-5. Prominent ATC/B&W brands which have been used or consumed in the Marshall Islands include Kool, Lucky Strike, Pall Mall, and Richland. Prominent Philip Morris brands present in the Marshall Islands include Benson & Hedges and Marlboro. Prominent RJR brands present in this forum include Camel, Salem and Winston.

27 See affidavits of Neil Palafox, etc.

28 Plaintiff argues that "[d]efendants ATC, B&W, PMI, PMP and RJRT all admit that they have 'directly or indirectly' served the Marshall Islands with cigarettes. All of them advertise and promote their cigarettes in the Marshall Islands. None of them has made any effort to show that its cigarettes got to the Marshall Islands by way of some isolated occurrence.' The World-Wide Volkswagen language fits them as neatly as does the language fits them as neatly as does the language of 27 MIRC Ch. 2, Sec. 251(a)(a) and establishes that these defendants have 'purposefully availed' themselves of the forum for purposes of that element of the constitutional jurisdiction inquiry." See, Opposition Memorandum, pg. 17.

29

30 See Opposition Memorandum, pg. 17-19.

31 The court in *Buckeye Boiler* cited the case of *Regie Nationale Renault v. Superior Court*, 208 Cal.App.2d 702, 25 Cal.Rptr. 530 where the court affirmed an assertion of jurisdiction over a French corporation which did not directly sell its product in California. The court noted that the "chain of sales" was through a "wholly owned American subsidiary" and independently owned distributorships. A fair review of the caselaw seems to indicate that there is a greater need for contacts with the forum when jurisdiction is asserted in the international context.

32 See, e.g., Pl. Ex. 12, Letter Agreement dated March 1, 1970 between Philip Morris, Inc. and Mid-Pacific Liquor Distributing Corporation, Agana, Guam. PMI appointed Mid-Pacific as "exclusive distributor, Mid-Pacific was to "make every effort to sell and promote the sale of tobacco . . . in the territory." PMI also agreed to pay a "promotional allowance" to Mid-Pacific. PMI's cigarettes to be distributed or sold in the Trust Territory included Marlboro, Benson & Hedges, Paxton, and Virginia Slims (Appendix to Letter agreement). These brands were indeed marketed in the Marshall Islands. (See Affidavits of Glrina Harris, Pl. Ex. 9 and Amram Mejbon, Pl. Ex. 19). Pl. Ex. 11 indicates that PMP distributes PMI's cigarettes internationally. Philip Morris cigarette brands have been sold and advertised in the Marshall Islands.

RJRT admits that a distributor in Guam sells RJRT cigarettes in the RMI (RJRT's responses to interrogatories 3-3 and 3-6). RJRT brads sold in the RMI include Camel, Salem and Winston. Whether directly by RJRT or through an independent distributor/wholesaler., RJRT brands have been advertised, promoted and sold in the RMI. (See affidavits of Glorina Harris, P. Ex. 9, Amram Enos, Pl. Ex. 10, Copy of Winston advertisement in Marshall Islands Journal, Pl. Ex. 15)

ATC merged with B&W in 1994. Ambrose Inc. is B&W's exclusive distributor of cigarettes in the RMI. (See ATC/B&W's Responses to Interrogatories No. 5-3 and 5-5). Prominent ATC/B&W brands in the RMI include Kool, Lucky Strike, Pall Mall, and Richland. ATC/B&W cigarette brands have been sold, promoted and advertised in the RMI. (See Affidavits of Glorina Harris, Pl. Ex. 9 and Amram Enos, Pl. Ex. 10).

33 See Pl. Ex.s 14 [Marlboro and Benson & Hedges (PMPI) advertisement] and Ex. 15 [Winston advertisement]; see also affidavits of Glorina Harris, Pl. Ex. 9, para. 7 and Amran Mejbon, Pl. Ex. 10, para 8.

34 Although there is a split of authority within the federal circuits, it has been suggested that different tests for purposeful availment apply in tort and contract cases. The three elements of "purposeful availment" in a tort case are: (1) intentional action; (2) aimed at the forum state; and (3) causing harm that the defendant should have anticipated would be suffered in the forum state. See, e.g., *Core Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993). Regardless of which test is applied, the court finds a prima facie showing has been made.

35 *Omeluk*, supra, and *Vons Companies*, supra, both recognize the "but for" test may be of questionable vitality. The *Omeluk* court stated: "The authority of our decision in *Shute* is questionable. The Supreme Court reversed our decision in *Carnival Cruise Lines v. Shute*, 499 U.S. 585, ... The Supreme Court did not reach the issue of whether the 'but for' test was appropriate in *Carnival Cruise Lines*. But neither did the Court expressly note that the jurisdiction issue was not before it, or limit its grant of certiorari to a separable issue. Because of the reversal of *Shute*, it is not clear whether the 'but for' test survives." *Omeluk*, supra, at 271-272. Irrespective of whether the "but for" test will remain good federal or state law, this court finds the test useful in determining whether plaintiff's cause of action "arises out of" defendant's forum related activities.

36 See Joint Reply Brief, pg. 28.

37 Plaintiff cites *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 94 S.Ct. 414 (1973). *Dayton*, supra, merely adds the fourth element which plaintiff recognizes at pg. 32 of its opposition memorandum.

38 See, *Plaintiff's Memorandum in Opposition*, pgs. 29-31, relying on David Wilson's affidavit, para. 5, and Plaintiff's Ex. 26, pgs. 68-69 (testimony of David Wilson in Minnesota Tobacco litigation).

39 Plaintiff refers to Philip I. Blumberg, *the Law of Corporate Groups: Substantive Law*, sec. 13.05.1, pg. 278 91987).

40 Plaintiff cites Jacob Mertens, Law of Federal Income Taxation, Sec. 53.18 (1993).

41 RJRN's responses to Interrogatories, 2-2, 2-10, 2-12 as supplemented by counsel's April 17, 1998 correspondence.

42 See Hamish Maxwell "Dear Stockholder" letter and Proxy Statement, Pl. Ex. 17.

43 Id. 3rd pg.

44 Id. 7th page, Ex. 18, 3rd page.

45 See Plaintiff's Memorandum in Response, pg. 34, fn. 65 analyzing Pl. Ex. s. 17 and 19.

46 "The mere fact that a subsidiary company does business within a state does not confer jurisdiction over its nonresidents parent, even if the parent is sole owner of the subsidiary. *Cannon Manufacturing v. Cudahy Packing Co.*, 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 634 (1925); *Blount v. Peerless Chemicals (P.R.) Inc.*, 316 F.2d 695 92nd Cir.); cert. denied sub nom., *Colber v. Peerless Chemicals (P.R.)*, 375 U.S. 831, 84 S.Ct. 76, 11 L.Ed.2d 62 91963) . . . There is a presumption of corporate separateness that must be overcome by clear evidence that the parent in fact controls the activities of the subsidiary. *Bendix Home Systems, Inc. v. Hurston Enterprises*, 566 F.2d 1039 (5th Cir. 1039 (5th Cir. 1978); *Blount v. Peerless, Chemicals (P.R.) Inc.*, supra . . . . [T]he requirement for piercing the corporate veil is that 'strong and robust evidence' be produced showing the parent to have that degree of control over the subsidiary as to render the latter a mere shell for the former. (citation omitted). 'Jurisdiction a mere shell for the former. (citation omitted). Jurisdiction over the parent therefore becomes unfair to the extent that the independence of the local subsidiary is a reality.'" *Id.*

47 " . . . [A] corporation, absent findings of fraud or bad faith, is entitled to a presumption of separateness from a sister corporation even though both are owned and controlled by the same persons." *Id.*

48 RJRN's answers to Interrogatories 2-1 and 2-10; see *Plaintiff's Memorandum in Response*, pgs. 62-70 for plaintiff's tender of facts against RJRN.

49 See, *Plaintiff's Memorandum in Response*, pg. 73-74.

50 See, e.g., Plaintiff's Memorandum in Response, pgs. 74-76, fn. 169, 170, 171.

51 See, e.g., Joint Reply Brief, pgs. 9-13.

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High Court of the Republic of the Marshall Islands (1998) Republic of the Marshall Islands *vs*. American Tobacco Company, Inc. (Decison 12-7-1998)
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