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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF ALASKA**
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8 **WILD WEST GUNS, LLC, and**
9 **ALASKA NATIONAL INSURANCE**
10 **COMPANY,**

11 **Plaintiffs,**

12 **vs.**

13 **SUPERIOR AMMUNITION, INC. and**
14 **LARRY BARNETT,**

15 **Defendants.**

16 **3:18-CV-00043 JWS**

17 **ORDER AND OPINION**

18 **[Re: Motion at docket 26]**

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22 **I. MOTION PRESENTED**

23 At docket 26 Defendant Larry Barnett (“Barnett”) moves to dismiss all claims
24 asserted against him under Rule 12(b)(2) for lack of personal jurisdiction and under
25 Rule 12(b)(6) for failure to state a claim. At docket 39, Plaintiff Wild West Guns, LLC
26 (“Wild West”) opposes the motion. Barnett replies at docket 45. Oral argument was not
27 requested and would not assist the court.
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II. BACKGROUND

29 Wild West’s complaint alleges that Defendant Superior Ammunition, Inc.
30 (“Superior Ammunition”), a business corporation organized under the law of South
31 Dakota, sold defective ammunition to Anchorage resident Ernest Meinhardt
32 (“Meinhardt”). The complaint alleges that the ammunition was custom-made for
33 Meinhardt’s rifle. It alleges that the defective ammunition resulted in personal injury to
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1 Mr. Brian Swanda (“Swanda”), an employee of Wild West, who had been test firing the
2 rifle, which was loaded with the custom ammunition, in conjunction with work Wild West
3 was doing on Meinhardt’s rifle.

4 The complaint alleges that Barnett either owned and/or operated Superior
5 Ammunition at the time the ammunition was sold. It alleges that Barnett, as the
6 representative and/or agent of Superior Ammunition, made various representations to
7 Meinhardt about the characteristics, quality, and safety of Superior Ammunition’s
8 custom ammunition and represented that it could manufacture ammunition suitable and
9 safe for use in Meinhardt’s rifle. It alleges that Superior Ammunition agreed to sell
10 Meinhardt custom-made ammunition for use in Meinhardt’s rifle and then manufactured
11 and shipped that ammunition to Meinhardt in Alaska.

12 After the incident with Swanda, Wild West paid Meinhardt for the firearm and
13 took an assignment of his claims related to the ammunition. Wild West then filed its
14 complaint against Superior Ammunition and Barnett in Alaska state court. Superior
15 Ammunition removed the case to federal court, and Barnett now moves to dismiss all
16 claims against him.

17 At docket 8, the court directed the parties to meet before filing a Rule 12(b)
18 motion. The purpose of such an order is to prompt the parties to consider whether an
19 amendment could cure any alleged pleading deficiencies and thereby avoid
20 unnecessary motion practice. Any Rule 12(b) motion had to be accompanied by a
21 certification that the parties met as directed or risk being stricken by the court. Barnett
22 failed to file the requisite certification with his motion and admitted that he did not confer
23 with Plaintiff as to whether the asserted defects could be cured by an amended
24 pleading. A meeting to consider Barnett’s Rule 12(b)(6) argument—that Plaintiff failed
25 to plead facts that state an independent claim against him or pierce the corporate
26 veil—could have served the purpose of the court’s directive and prompted the Plaintiff to
27 attempt to cure the alleged defect. However, Barnett’s Rule 12(b)(2) argument—that
28 the court cannot exercise personal jurisdiction over him—is not curable by amendment

1 and a meeting between the parties would have been futile in saving the court and
2 parties time and effort. Therefore, the court will consider the motion at docket 26, but
3 only to the extent it challenges personal jurisdiction.

4 **III. STANDARD OF REVIEW**

5 “Where a defendant moves to dismiss a complaint pursuant to Federal Rule of
6 Civil Procedure 12(b)(2), for lack of personal jurisdiction, the plaintiff bears the burden of
7 establishing that a court has personal jurisdiction over a defendant.”¹ Where the motion
8 is based only upon written materials, rather than an evidentiary hearing, the plaintiff is
9 required only to make a prima facie showing of personal jurisdiction.² Uncontroverted
10 allegations in the complaint are taken as true, and conflicts between parties over
11 statements contained in affidavits are resolved in favor of the plaintiff.³

12 “Where, as here, there is no applicable federal statute governing personal
13 jurisdiction, the district court applies the law of the state in which the district court sits.”⁴
14 Alaska’s long-arm statute authorizes the exercise of jurisdiction to the extent permitted
15 by federal due process requirements.⁵ Due process requires that the defendant “have
16 certain minimum contacts with [the forum] such that the maintenance of the suit does
17 not offend traditional notions of fair play and substantial justice.”⁶

18 **IV. DISCUSSION**

19 The parties agree that the court does not have general personal jurisdiction over
20 Barnett. Indeed, based on Barnett’s uncontroverted affidavit, he does not have
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22 ¹*Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

23 ²*Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002).

24 ³*Brayton Purcell LLP v. Recordon & Recordon*, 575 F.3d 981, 985 (9th Cir. 2009).

25 ⁴*Fred Martin Motor Co.*, 374 F.3d at 800.

26 ⁵*Volkswagenwerk, A.G. v. Klippen, GmbH*, 611 P.2d 498, 500 (Alaska 1980).

27 ⁶*Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted).

1 “substantial, continuous, and systematic” contacts with the state of Alaska.⁷ The
2 parties’ dispute is focused on whether the court may exercise specific personal
3 jurisdiction over Barnett—that is, jurisdiction with respect to the claims at issue in this
4 case. Wild West’s basis for jurisdiction rests primarily on Alaska’s long-arm statute
5 AS 09.05.015, which provides several specific grounds for jurisdiction. Wild West
6 argues that AS 09.05.015(a)(4) is applicable here. That subsection gives the court
7 jurisdiction over a defendant in a personal injury lawsuit where the injury arose out of an
8 act or omission by the defendant out of state, as long as at the time of the injury the
9 defendant either engaged in solicitation or service activities in state or manufactured
10 products that were used in state in the ordinary course of trade. Wild West also argues
11 that AS 09.05.015(a)(5) is applicable here because it gives the court jurisdiction over a
12 defendant in an action that arises out of a promise made by the defendant to deliver
13 goods in state or an action that relates to goods received by the plaintiff in state from
14 the defendant. Wild West argues that its complaint alleges Barnett made
15 representations and provided advice to a resident of Alaska about Superior
16 Ammunition’s goods and that those goods were shipped to Alaska and received by
17 Meinhardt in Alaska and eventually caused injury due to their allegedly defective nature.
18 Wild West concludes “[s]ince the courts of the State of Alaska had personal jurisdiction
19 over . . . Barnett [under the state statute], the United States District Court for the District
20 of Alaska also has personal jurisdiction over . . . Barnett.”⁸

21 Wild West’s argument is misplaced. While AS 09.05.015 provides several
22 specific grounds for jurisdiction that fit the factual basis for this lawsuit, the court’s
23 exercise of jurisdiction over Barnett is nonetheless constrained by federal due process.
24 That is, the statute sets forth situations where the court has jurisdiction over an out-of-

26 ⁷*Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199 1205
27 (9th Cir. 2006).

28 ⁸Doc. 39 at p. 17.

1 state defendant, but only “to the maximum extent permitted by due process under the
2 federal constitution.”⁹ “Thus, ‘the statutory and constitutional requirements merge into a
3 single due process test,’ such that an analysis of [Barnett’s] jurisdictional argument
4 under the federal Due Process Clause is dispositive.”¹⁰

5 The Ninth Circuit uses a three-part test to determine whether a defendant has
6 sufficient contacts to be subject to specific personal jurisdiction:

7 (1) The non-resident defendant must purposefully direct his activities or
8 consummate some transaction with the forum or resident thereof; or perform
9 some act by which he purposefully avails himself of the privilege of
conducting activities in the forum, thereby invoking the benefits and
protections of its laws;

10 (2) the claim must be one which arises out of or relates to the defendant’s
11 forum-related activities; and

12 (3) the exercise of jurisdiction must comport with fair play and substantial
justice, i.e., it must be reasonable.¹¹

13 “The plaintiff bears the burden of satisfying the first two prongs of the test. If the plaintiff
14 fails to satisfy either of these prongs, personal jurisdiction is not established in the forum
15 state.”¹² If the plaintiff succeeds, the burden shifts to the defendant to make a
16 compelling case that exercising jurisdiction over him would be unreasonable.¹³

17 Under the first prong of the test, the court engages in either a “purposeful
18 availment” analysis for contract and negligence cases or a “purposeful direction”
19 analysis for intentional tort cases.¹⁴ Here, Barnett is not alleged to have engaged in any

21 ⁹*Harper v. BioLife Energy Systems, Inc.*, 426 P.3d 1067, 1071 (internal quotation marks
22 omitted).

23 ¹⁰*Samson Tug & Barge Co., Inc. v. Koziol*, 869 F. Supp. 2d 1001, 1008 (D. Alaska 2012)
(quoting *Ins. Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1269 (9th Cir. 1981)).

24 ¹¹*Morrill v. Scott Fin. Corp.*, 873 F.3d 1136, 1142 (9th Cir. 2017) (quotation omitted).

25 ¹²*Id.* (quotation omitted).

26 ¹³*Id.*

27 ¹⁴*See Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 460 (9th Cir. 2007)
28 (rejecting the plaintiff’s request to apply the purposeful direction analysis—referred to as the

1 intentional tortious conduct. Wild West’s complaint alleges negligence claims, a
2 contract-based claim, and a UTPA claim. Accordingly, the court must apply the
3 “purposeful avilment” analysis.¹⁵

4 The purposeful avilment analysis requires the court to look at whether the non-
5 resident defendant “performed some type of affirmative conduct which allows or
6 promotes the transaction of business within the forum state.”¹⁶ Typically, this requires
7 evidence of a defendant’s actions that occurred in the forum state, such as executing or
8 performing a contract there.¹⁷ The focus must be on the “actions by the defendant
9 *himself* that create a substantial connection with the forum State.”¹⁸ The defendant’s
10 actions in and connections with the forum State must be of a nature that “he should
11 reasonably anticipate being haled into court there.”¹⁹

12 Barnett’s connections to Alaska are minimal. He came to the state twice for
13 recreational purposes. He did not engage in business activities while here. The only
14 business contacts alleged are telephone conversations between Barnett and Meinhardt
15 while Barnett was in South Dakota and Meinhardt was in Alaska. The complaint alleges
16 Meinhardt talked to Barnett in his role as representative or agent of Superior
17 Ammunition about an ammunition order. Barnett acknowledges that in his capacity as a
18 representative of Superior Ammunition he took phone calls and processed orders over
19 the phone. He acknowledges that Meinhardt called Superior Ammunition and placed an

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21 *Calder* effects test– “because it is well established that the *Calder* test applies only to intentional
22 torts, not to the breach of contract and negligence claims presented here.”).

23 ¹⁵The court agrees with and adopts Barnett’s further reasoning as to why the purposeful
24 avilment analysis applies over the purposeful direction analysis. Doc. 26 at p. 12, n.6.

25 ¹⁶*Boschetto v. Hansing*, 539 F.3d 1011,1016 (9th Cir. 2008) (quotation omitted).

26 ¹⁷*Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

27 ¹⁸*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (internal quotation marks
28 omitted).

¹⁹*World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

1 order for ammunition that is the subject of the litigation. He acknowledges that he may
2 have been the representative who took the phone call and communicated with
3 Meinhardt about the order. Telephone conversations, even those involving business
4 negotiations, “simply do not qualify as purposeful activity invoking the benefits and
5 protection of the [forum] state.”²⁰ Moreover, Barnett states that any communications
6 would have originally been initiated by Meinhardt. Wild West does not contradict this
7 assertion.

8 As noted above, the Court can only consider the contact that Barnett *himself*
9 created with the forum. That is, Superior Ammunition’s contacts with Alaska cannot be
10 attributed or imputed to Barnett.²¹ Barnett avers that he did not execute a contract with
11 Meinhardt, manufacture the ammunition, or ship the ammunition.²² Wild West does not
12 contend otherwise. Nor does Wild West contend that Barnett himself made any
13 solicitations or initiated any contact with Meinhardt. Barnett’s contacts are simply
14 insufficient to constitute purposeful availment, and consequently the court’s exercise of
15 jurisdiction over Barnett would deprive him of due process of law.²³

16 Even if Wild West had somehow been able to show purposeful availment and the
17 proper connection between Barnett’s forum-related activities and the claims, the court
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19 ²⁰*Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985); see also *Hunt v. Erie Ins.*
20 *Grp.*, 728 F.2d 1244 (9th Cir. 1984) (“The mere fact that [defendant] communicated with
21 [plaintiff] in the state, and may have committed a tort in the exchange of correspondence, does
22 not show that [defendant] purposefully availed itself of the privilege of conducting business in
23 California.”); *Green Country Crude, Inc. v. Avant Petroleum, Inc.*, 648 F. Supp. 1443, 1451 (D.
24 Kan. 1986) (“The mere negotiation of a sales transaction, or placement of an order for goods,
25 over the telephone with person residing in [the forum state] does not invoke the benefits and
26 projections of the law of [the] state.”).

27 ²¹*Calder v. Jones*, 465 U.S. 783, 790 (1984) (stating that for individuals who acted in a
28 corporate setting, each defendant’s contacts with the state must be assessed individually).

²²The declaration asserts that at the request of Meinhardt, Superior Ammunition shipped
the subject ammunition to an address in the State of Washington. Doc. 27 at p. 3 at para. 16.

²³*Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006) (noting that if the
plaintiff fails to show the first prong of the test, the court need not address the other prongs).

1 agrees with Barnett’s assessment that the court’s exercise of specific jurisdiction here
2 would be unreasonable.²⁴

3 Wild West alternatively asks the court to deny Barnett’s motion because he
4 voluntarily submitted to jurisdiction in the state or waived his ability to challenge
5 personal jurisdiction. Wild West relies on *In re Estate of Fields*²⁵ for the proposition that
6 Barnett consented to the court’s jurisdiction when he filed an entry of appearance that
7 was not limited. For the reasons articulated in Barnett’s reply at docket 45, which the
8 court adopts herein, *In re Estate of Fields* is inapposite. Unlike that case, the party
9 challenging jurisdiction is the defendant, and he did not appear without challenging
10 jurisdiction.

11 Wild West argues that Barnett waived any challenge to personal jurisdiction by
12 participating in the litigation—issuing a subpoena, giving and receiving mandatory initial
13 disclosures, and giving and receiving preliminary witness lists. A defendant abandons a
14 personal jurisdiction defense when he fails to raise the issue in either a responsive
15 pleading or a Rule 12 motion.²⁶ Barnett raised the defense in his answer. However,
16 even if a defendant preserves the defense by reciting it in an answer, it may
17 nonetheless be forfeited if the defendant thereafter substantially participates in the
18 litigation without actively pursuing his Rule 12(b)(2) defense.²⁷ While the court notes that
19 Barnett did not indicate his intent to file a motion challenging jurisdiction in the
20 scheduling and planning order and filed the motion more than six months after the case
21 was removed , it nonetheless finds that Barnett may pursue his constitutional defense
22 given that the case has not proceeded to the merits.

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24 ²⁴See doc. 26 at pp. 17-18.

25 ²⁵219 P.3d 995 (Alaska 2009).

26 ²⁶Fed. R. Civ. P. 12(h)(1)

27 ²⁷See *Enters. Int’l, Inc. v. Pasaban, S.A.*, 2012 WL 2576359, at * 3(W.D. Wash. July 3,
28 2012); 5C Wright & Miller, Federal Practice & Procedure, § 1391 (3d ed.).

1 **V. CONCLUSION**

2 Based on the preceding discussion, Barnett's motion at docket 26 is GRANTED.
3 Barnett is dismissed from this case.

4 DATED this 23rd day of February 2019.

5
6 /s/ JOHN W. SEDWICK
7 SENIOR JUDGE, UNITED STATES DISTRICT COURT
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