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5 **IN THE UNITED STATES DISTRICT COURT**  
6 **FOR THE DISTRICT OF ARIZONA**  
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|  |   |                       |
|--|---|-----------------------|
| 8 Success Is Yours, Inc., a Florida        | ) | No. CV10-0758-PHX DGC |
| 9 corporation; Charles Highers, an         | ) |                       |
| 10 individual; Lynn A. Hughes, an          | ) |                       |
| 11 individual,                             | ) |                       |
| 12   | ) |                       |
| 13 Plaintiffs,                             | ) | <b>ORDER</b>          |
| 14 vs.                                     | ) |                       |
| 15   | ) |                       |
| 16 LifeSuccess Publishing, LLC, a Nevada   | ) |                       |
| 17 limited liability company; Bob Proctor, | ) |                       |
| 18 an individual,                          | ) |                       |
| 19   | ) |                       |
| 20 Defendants.                             | ) |                       |
| 21   | ) |                       |

22 Defendant Bob Proctor moves to dismiss Plaintiffs’ claims against him for lack of  
23 personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). Doc. 18. Plaintiffs  
24 oppose and request jurisdictional discovery. Doc. 26; *id.* at 11-12. The motion is fully  
25 briefed, and the parties did not request oral argument. Docs. 18, 26, 33. The Court will deny  
26 the motion with respect to both Plaintiffs, but allow necessary jurisdictional discovery to be  
27 taken by Plaintiff Hughes.

28 **I. Background.**

Plaintiffs Success Is Yours, Inc. and Charles Highers (collectively “Success  
Plaintiffs”) are citizens of Florida; Mr. Highers is the President of Success. Doc. 1 at 2.  
Plaintiff Lynn Hughes is a citizen of North Carolina. *Id.* No relationship is alleged between  
Hughes and the Success Plaintiffs. *See* Doc. 1.

The Success Plaintiffs purchased franchise rights “to market and solicit sales of  
custom book publishing products and services” within certain territory in Florida. *Id.* at 3.

1 The franchisor was LifeSuccess Publishing, LLC (“Franchisor”), a Nevada entity with its  
2 principal place of business in Scottsdale, Arizona; Franchisor is also a defendant in this case.  
3 The Success Plaintiffs allege that Defendant Proctor – Franchisor’s chairman and a citizen  
4 of Toronto, Canada – made material misrepresentations and concealed material facts, thereby  
5 inducing them to enter into the franchise agreement with Franchisor. *Id.* at 2, 5-6; Doc. 18  
6 at 2. The Success Plaintiffs paid Franchisor an initial fee of \$250,000. Doc. 1 at 7.

7 Plaintiff Hughes purchased similar franchise rights from Franchisor, but the territory  
8 in his agreement was within North Carolina. *Id.* at 3. Hughes makes similar allegations  
9 against Defendant Proctor. Hughes paid Franchisor an initial fee of \$100,000. *Id.* at 7.

10 Plaintiffs’ complaint alleges eight counts against Defendant Proctor: (1) fraud in the  
11 inducement; (2) negligent misrepresentation and omission; (3) rescission; (4) violation of the  
12 Florida Franchise Act; (5) violation of the Florida Deceptive and Unfair Trade Practices Act;  
13 (6) violation of the Florida Sale of Business Opportunities Act; (7) violation of the North  
14 Carolina Business Opportunities Act; and (8) violation of the North Carolina Deceptive  
15 Trade Practices Act. Doc. 1. Most of the claims relate to Defendant Proctor’s alleged  
16 conduct prior to execution of Plaintiffs’ franchise agreements. *See id.*

17 The complaint does not allege that Defendant made the alleged misrepresentations in  
18 Arizona, does not allege that Defendant was a party to the franchise agreements, and does  
19 not allege the existence of a separate agreement between Plaintiffs and Defendant. *See*  
20 Doc. 1. In his motion contesting jurisdiction, Defendant asserts that he “did not meet or  
21 communicate in any fashion” with Plaintiff Hughes before the latter executed his franchise  
22 agreement. Doc. 18 at 5-6. Hughes does not counter this assertion. *See* Doc. 26. Defendant  
23 also asserts that he “did not meet with or communicate” with Plaintiff Highers about the  
24 Plaintiff’s specific franchise agreement prior to the execution of the agreement. Doc. 18 at  
25 5-6. Plaintiff Highers counters by asserting that he met with Defendant Proctor – on a cruise  
26 that departed from San Diego – approximately 3 months before the franchise agreement was  
27 signed. Doc. 26-1 at 2-3; Doc. 1 at 6. At the meeting, Defendant allegedly “oversold the  
28 prospects of success of the franchise, oversold his organization’s ability to deliver a

1 marketable product, . . . misrepresented the then-current state of the franchise opportunity,”  
2 and made other false representations. Doc. 26-1 at 2-3. Highers also alleges that discussions  
3 “continued one week later in . . . Florida.” *Id.* at 3. Highers does not allege that the  
4 discussion involved his future franchise agreement specifically. *See* Doc. 26-1. Defendant  
5 does not deny the cruise meeting, and also admits meeting with Plaintiff Highers at two  
6 seminars in Arizona within a couple of months after the franchise agreement was signed.  
7 Doc. 18 at 6. Defendant asserts, however, that he did not discuss Plaintiff’s specific  
8 franchise agreement during any of their meetings. *Id.* Plaintiff Highers does not dispute this  
9 assertion. *See* Doc. 26.

10 Plaintiffs assert that Arizona can exercise both general and specific jurisdiction over  
11 Defendant. Doc. 26. Plaintiffs note that each of their franchise agreements sets the exclusive  
12 venue for litigating disputes in Maricopa County, Arizona. *Id.* at 2. They also claim that  
13 Defendant is “the guiding spirit and driving force behind” the Franchisor, has extensive  
14 contacts with Arizona, and controlled the Franchisor’s decisions to operate in Arizona and  
15 to require Arizona as the dispute-resolution forum. *Id.* at 5, 7, 9, 11; Doc. 26-1 ¶ 3.

16 Defendant admits that he was in Arizona three times in 2006, four times in 2007, six  
17 times in 2008, thirteen times in 2009, and six days in 2010. Doc. 18 at 4. Defendant further  
18 asserts that “[o]nly a couple of these occasions was for a time period of over one week and  
19 most were for a period of a few days.” *Id.* His visits were allegedly for company as well as  
20 personal matters, but were not related to the agreements that are the subjects of this suit. *Id.*  
21 Defendant also asserts that he has never resided in Arizona, owns no real or personal  
22 property in Arizona, and has no bank accounts here. *Id.* Defendant owns a substantial  
23 ownership interest in and serves as Chairman of several Nevada Limited Liability Companies  
24 that operate and have assets in Arizona, including the Franchisor. Doc. 33 at 3-4.

## 25 **II. Discussion.**

### 26 **A. Plaintiff Bears the Burden of Proof.**

27 The plaintiff bears the burden of establishing personal jurisdiction. *See, e.g.,*  
28 *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995). A district court may allow

1 discovery to determine whether it has personal jurisdiction over a defendant. *See Data*  
2 *Disc, Inc. v. Sys. Tech. Assocs.*, 557 F.2d 1280, 1285 & n.1 (9th Cir. 1977). A court may also  
3 decide the issue on the pleadings, in which case a plaintiff need make only a *prima facie*  
4 showing of jurisdictional facts. *See Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267,  
5 268 (9th Cir. 1995). Under the *prima facie* burden of proof, the plaintiff must show facts that  
6 if true would support personal jurisdiction over the defendant. *See Ballard v. Savage*, 65  
7 F.3d 1495, 1498 (9th Cir. 1995).

8 **B. Personal Jurisdiction Generally.**

9 Plaintiffs' claim to personal jurisdiction over Defendant is Arizona's long-arm statute,  
10 Ariz. R. Civ. P. 4.2(a). Doc. 1 at 1. "Because Arizona's long-arm rule confers jurisdiction  
11 over non-resident defendants to the fullest extent permitted by the Due Process Clause, [t]he  
12 jurisdictional issue . . . hinges on federal law." *Williams v. Lakeview Co.*, 13 P.3d 280, 282  
13 (Ariz. 2000) (internal citation and quotation marks omitted).

14 The Due Process Clause requires that non-resident defendants have sufficient  
15 "minimum contacts" with the forum state such that the exercise of personal jurisdiction does  
16 not offend traditional notions of fair play and substantial justice. *See Int'l Shoe Co. v.*  
17 *Washington*, 326 U.S. 310, 316 (1945). The Due Process Clause protects a defendant's  
18 "liberty interest in not being subject to the binding judgments of a forum with which he has  
19 established no meaningful 'contacts, ties or relations.'" *Omeluk*, 52 F.3d at 269-70 (quoting  
20 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985)).

21 "In determining whether a defendant had minimum contacts with the forum state such  
22 that the exercise of jurisdiction over the defendant would not offend the Due Process Clause,  
23 courts focus on 'the relationship among the defendant, the forum, and the litigation.'" *Brink v. First Credit Resources*, 57 F. Supp. 2d 848, 860 (D. Ariz. 1999) (citing *Shaffer v.*  
24 *Heitner*, 433 U.S. 186, 204 (1977)). Personal jurisdiction over a defendant is either  
25 "general" or "specific," *see Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408,  
26 414-15 nn.8-9 (1984), and the nature of the defendant's contacts with the forum state will  
27 determine whether general or specific jurisdiction exists. *See id.*; *Ziegler*, 64 F.3d at 473.

1           **C.     General Jurisdiction.**

2           When a corporation is subject to general jurisdiction in a State, a defendant non-  
3 resident officer or director of that corporation may also be subject to general jurisdiction in  
4 that State if the corporation is either the *alter ego* or a general agent of the defendant. *See*  
5 *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001) (discussing “*alter ego*” and  
6 “agency” as bases for deriving general jurisdiction in the parent/subsidiary corporation  
7 context); *see also Skydive Arizona, Inc. v. Quattrocchi*, 2009 WL 6597892, at \*5-6 (D. Ariz.  
8 Feb. 2, 2009) (discussing the *alter ego* analysis in the context of jurisdiction over individual  
9 officers and directors). Here, Plaintiffs stop short of alleging that the Franchisor is the *alter*  
10 *ego* or general agent of Defendant Proctor. Instead, they assert only that Defendant is the  
11 “the guiding spirit and driving force behind” the Franchisor. Doc. 26 at 5; Doc. 26-1 ¶ 3.  
12 This is not sufficient for general jurisdiction. *Davis v. Metro Productions, Inc.*, 885 F.2d  
13 515, 520-24 (9th Cir. 1989) (finding derivative specific jurisdiction, but not general  
14 jurisdiction, against two individuals who were the sole officers and shareholders of a  
15 corporation).

16           A court may also assert general jurisdiction over a defendant if his activities in the  
17 state are “substantial, continuous, and systematic” such that they “approximate physical  
18 presence” and would subject defendant to suit even for “matters not arising out of his  
19 contacts with the forum.” *See Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain*  
20 *Co. (Shivnath Rai)*, 284 F.3d 1114, 1123-24 (9th Cir. 2002). Plaintiffs fail to make a *prima*  
21 *facie* showing of general jurisdiction. Defendant owns no property in the state, and Plaintiffs  
22 have not shown that the 27 occasions during which Defendant visited Arizona during the  
23 span of nearly five years are sufficient to give Arizona general jurisdiction. *See Shivnath*  
24 *Rai*, 284 F.3d at 1125 (being merely a “visitor to the forum” is not sufficient for an assertion  
25 of general jurisdiction).

26           **D.     Specific Jurisdiction.**

27               **1.     Legal Standard.**

28           Under the Ninth Circuit’s three-part test, specific jurisdiction exists only if (1) the

1 defendant purposefully availed himself of the privileges of conducting activities in the forum,  
2 thereby invoking the benefits and protections of its laws, or purposely directed conduct at the  
3 forum that has effects in the forum; (2) the claim arises out of the defendant's forum-related  
4 activities; and (3) the exercise of jurisdiction comports with fair play and substantial justice,  
5 i.e., it is reasonable. *See, e.g., Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082,  
6 1086 (9th Cir. 2000) (citing *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 417  
7 (9th Cir. 1997)); *Burger King*, 471 U.S. at 472-76. While "a person's mere association with  
8 a corporation . . . is not sufficient in itself to permit [the corporation's] forum to assert  
9 jurisdiction over the person," jurisdiction can be derived over a fiduciary from the  
10 corporation's activities if there is a sufficient identity of interests between the corporation  
11 and the fiduciary, the corporation is alleged to have perpetrated fraud, or the fiduciary  
12 purposely directs his activities at Arizona through the corporation. *See Davis*, 885 F.2d at  
13 520-23.

14 With regard to the second element of three-part inquiry, the Ninth Circuit has adopted  
15 a "but for" test to determine whether a plaintiff's cause of action arises out of a defendant's  
16 forum-related activities. *See Omeluk*, 52 F.3d at 271. The "arising out of" requirement is  
17 satisfied if the cause of action would not have arisen but for the contacts between the  
18 defendant and the forum state. *See Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 561 (9th Cir.  
19 1995).

20 Finally, a district court presumes that its exercise of jurisdiction over a defendant is  
21 reasonable if the first two requirements of the specific jurisdiction test are met. *See Ballard*,  
22 65 F.3d at 1500. The burden of proof then shifts and the defendant must "present a  
23 compelling case that the presence of some other considerations would render jurisdiction  
24 unreasonable." *Id.* (quoting *Burger King*, 471 U.S. at 477). The Ninth Circuit considers  
25 seven factors when determining whether the exercise of specific jurisdiction over a defendant  
26 is reasonable: (1) the extent of the defendant's purposeful interjection into the forum state;  
27 (2) the burden on the defendant of litigating in the forum; (3) the extent of conflict with the  
28 sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute;

1 (5) the most efficient judicial resolution of the dispute; (6) the importance of the forum to the  
2 plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative  
3 forum. *Shivnath Rai*, 284 F.3d at 1125 (internal citations omitted).

4 The Court concludes that the Success Plaintiffs have shown sufficient facts to  
5 establish a *prima facie* case of specific jurisdiction over Defendant Proctor. Defendant owns  
6 a substantial interest in the Franchisor and acts as its Chairman. The Franchisor's principal  
7 place of business is Arizona. Defendant frequently visits Arizona to conduct the business  
8 of the Franchisor, to conduct other business, and for personal reasons. Defendant personally  
9 spoke with Plaintiff Highers on several occasions and encouraged him, allegedly through  
10 false representations, to enter into a franchise relationship. Defendant knew that any such  
11 relationship would include a franchise agreement with the Arizona operation of Franchisor.  
12 The actual franchise agreement required that the Success Plaintiffs litigate any disputes with  
13 the Franchisor in Arizona.

14 These facts, if proved as true, will show that Defendant Proctor purposefully availed  
15 himself of the privileges of conducting business and personal activities in Arizona, thereby  
16 invoking the benefits and protections of its laws, and purposely engaged in communications  
17 with the Success Plaintiffs that had the effect of directing them to the Arizona office of the  
18 Franchisor. The claims asserted by Success Plaintiffs arose out of Defendant's  
19 communications with Highers, and but for those communications the Success Plaintiffs  
20 would have no claim against Defendant Proctor. Moreover, Defendant has not shown that  
21 requiring him to litigate in Arizona – a state where he does business and visits frequently –  
22 would be unreasonable. Accordingly, the Success Plaintiffs have made a *prima facie* case  
23 for personal jurisdiction over Defendant in Arizona.

24 Plaintiff Hughes does not clearly set forth facts showing that his claims arise out of  
25 Defendant's forum-related activities. He has not provided evidence, as has Highers, of  
26 specific communications with Defendant Proctor regarding a possible franchise relationship.  
27 The Court cannot conclude that Hughes has made a *prima facie* showing of personal  
28 jurisdiction.

1                                   **2.       Jurisdictional Discovery in This Case.**

2           A district court has broad discretion to “permit discovery to aid in determining  
3 whether it has in personam jurisdiction.” *Data Disc*, 557 F.2d at 1285 n.1 (citing *Wells Fargo*  
4 *& Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977)). A court should  
5 allow a party to conduct discovery “where pertinent facts bearing on the question of  
6 jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.”  
7 *Wells Fargo*, 556 F.2d at 430 n.24 (citation and alteration omitted). Denying jurisdictional  
8 discovery where further discovery might demonstrate a basis for jurisdiction is an abuse of  
9 discretion. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122,  
10 1135 (9th Cir. 2003) (concluding that the district court abused its discretion in denying  
11 plaintiff’s motion for jurisdictional discovery and remanding the case to allow plaintiff the  
12 opportunity to develop the record and make a *prima facie* showing of jurisdictional facts).

13           Plaintiff Hughes has requested jurisdictional discovery to make a more satisfactory  
14 showing. Doc. 26 at 11-12. Accordingly, limited discovery is granted as stated below.

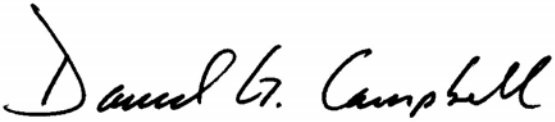
15                                   **IT IS ORDERED:**

- 16           1.       Defendant Proctor’s motion to dismiss (Doc. 18) is **denied** with respect to the  
17                   Success Plaintiffs and **denied without prejudice** with respect to Plaintiff  
18                   Hughes.
- 19           2.       Plaintiff Hughes’ request for jurisdictional discovery (Doc. 26 at 11-12) is  
20                   **granted**. This discovery shall be limited to 7 requests for production of  
21                   documents, 10 interrogatories, and 2 depositions.
- 22           3.       By **December 8, 2010**, Plaintiff Hughes shall file a memorandum, not to  
23                   exceed 10 pages in length, setting forth the factual basis for personal  
24                   jurisdiction over Defendant Proctor. Defendant shall file a response, also  
25                   limited to 10 pages, by **December 17, 2010**. No reply shall be filed. The  
26                   parties shall contact the Court’s chambers and advise it when the briefing is  
27                   completed.
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4. The Court will set a case management conference by separate order.  
DATED this 21st day of October, 2010.

  
\_\_\_\_\_  
David G. Campbell  
United States District Judge