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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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9 OEM Group Incorporated,  
10 Plaintiff,

No. CV-13-01822-PHX-DGC

**ORDER**

11 v.

12 Thompson Group Incorporated, et al.,  
13 Defendants.

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15 Defendants Thompson Group Incorporated and Raymon F. Thompson have filed a  
16 motion to dismiss. Doc. 9. No response has been filed. Plaintiff OEM Group, Inc. has  
17 filed a motion for leave to file a first amended complaint. Doc. 14. That motion is fully  
18 briefed. Defendants have also filed a request for summary adjudication, to which  
19 Plaintiff has responded. Docs. 15, 17. For the reasons that follow, the Court will grant  
20 the motion to amend and deny the motion to dismiss and the request for summary  
21 adjudication.

22 **I. Background.**

23 Plaintiff asserts that this litigation arises out of “Defendants’ involvement in,  
24 and/or aiding and abetting multiple torts committed by Herbert Ötzlinger and  
25 SEMSYSCO.” Doc. 1, ¶ 8. Plaintiff alleges that Defendants founded Semitool Austria  
26 GmbH in the late 1990s and that Mr. Ötzlinger was an employee of that entity. *Id.*, ¶¶ 9,  
27 12. Semitool was apparently acquired in 2009 by another entity, Applied Materials,  
28 which then sold the stock and other specified assets of Semitool to OEM in May 2011.

1 *Id.*, ¶¶ 13-14. The former Semitool became OEM Group Austria GmbH (“OEM  
2 Austria”), a subsidiary of Plaintiff. Doc. 14-1, ¶ 19. Plaintiff alleges that Mr. Ötzlinger  
3 resigned from OEM Austria on January 2, 2012 and incorporated a new entity known as  
4 SEMSYSCO on January 20, 2012. Doc. 1, ¶¶ 15-18. Plaintiff further alleges that  
5 Defendants “have an ownership interest in and control of SEMSYSCO.” *Id.*, ¶ 19.  
6 Plaintiff and Mr. Ötzlinger purportedly entered into an agreement in February 2012,  
7 releasing Mr. Ötzlinger from his employment and protecting Plaintiff’s proprietary  
8 information. *Id.*, ¶¶ 20-21. Plaintiff contends that “[w]ithin months of the February  
9 agreement, SEMSYSCO began to offer for sale semiconductor cleaning systems that  
10 were nearly identical to the tools that took Semitool Austria, Applied Materials, and  
11 OEM years to develop.” *Id.*, ¶ 22. Plaintiff also alleges that SEMSYSCO hired away  
12 several of its key employees, and has disrupted relationships with its clients and  
13 suppliers. *Id.*, ¶ 24, 27. Plaintiff filed this action on September 5, 2013, asserting claims  
14 for aiding and abetting unfair competition, conspiracy to compete unfairly, aiding and  
15 abetting tortious interference with contract or business expectancy, conspiracy to  
16 tortiously interfere with contract or business expectancy, tortious interference with  
17 contract or business expectancy, aiding and abetting misappropriation of trade secrets,  
18 and conspiracy to misappropriate trade secrets. *See id.*, ¶¶ 40-87.

19 **II. Motion for Leave to Amend.**

20 Plaintiff asks the Court for leave to amend its complaint pursuant to Rule 15(a)(2).  
21 Doc. 14 at 1. Rule 15 makes clear that the Court “should freely give leave [to amend]  
22 when justice so requires.” Fed. R. Civ. P. 15(a)(2). The policy in favor of leave to  
23 amend must not only be heeded, *see Foman v. Davis*, 371 U.S. 178, 182 (1962), it must  
24 be applied with extreme liberality, *see Owens v. Kaiser Found. Health Plan, Inc.*, 244  
25 F.3d 708, 880 (9th Cir. 2001). This liberality “is not dependent on whether the  
26 amendment will add causes of action or parties.” *DCD Programs, Ltd. v. Leighton*,  
27 833 F.2d 183, 186 (9th Cir. 1987).

28 The Court may deny a motion to amend if there is a showing of undue delay or

1 bad faith on the part of the moving party, undue prejudice to the opposing party, or  
2 futility of the proposed amendment. *See Foman*, 371 U.S. at 182. Generally, however,  
3 “this determination should be performed with all inferences in favor of granting the  
4 motion.” *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). A motion  
5 for leave to amend is futile if it can be defeated on a motion for summary judgment.  
6 *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 766 (9th Cir. 1986). “However, a  
7 proposed amendment is futile only if no set of facts can be proved under the amendment  
8 to the pleadings that would constitute a valid and sufficient claim or defense.” *Miller*,  
9 845 F.2d at 214; *see Foman*, 371 U.S. at 182 (stating that “[i]f the underlying facts or  
10 circumstances relied upon by a [movant] may be a proper subject of relief, he ought to be  
11 afforded an opportunity to test his claim on the merits”); *DCD Programs*, 833 F.2d at 186  
12 (stating that “a motion to make an ‘[a]mendment is to be liberally granted where from the  
13 underlying facts or circumstances, the plaintiff may be able to state a claim’”) (quoting  
14 *McCartin v. Norton*, 674 F.2d 1317, 1321 (9th Cir. 1982)).

15 Defendants argue that Plaintiff’s proposed amendments would be futile. Doc. 20  
16 at 2. Defendants contend that they do not have sufficient minimum contacts with  
17 Arizona to allow the Court to exercise personal jurisdiction. Doc. 20 at 2. The Ninth  
18 Circuit has established a three-part inquiry for specific jurisdiction: (1) has the defendant  
19 purposefully directed his activities at the forum or a resident thereof or performed some  
20 act by which he purposefully availed himself of the privileges of conducting activities in  
21 the forum, (2) do the claims arise out of or relate to the defendant’s forum-related  
22 activities, and (3) is the exercise of jurisdiction reasonable? *See Schwarzenegger v. Fred*  
23 *Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (citation omitted). In tort cases,  
24 courts analyze “whether a defendant purposefully direct[ed] his activities at the forum  
25 state,” and apply an “effects test that focuses on the forum in which the defendant’s  
26 actions were felt, whether or not the actions themselves occurred in the forum.” *Yahoo!*  
27 *Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir.  
28 2006) (citing *Schwarzenegger*, 374 F.3d at 803) (internal quotation marks omitted). A

1 defendant purposefully directs conduct at forum where he has “(1) committed an  
2 intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm . . .  
3 which is suffered and which the defendant knows is likely to be suffered in the forum  
4 state.” *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1077 (9th Cir. 2011)  
5 (quoting *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir.  
6 2010)); *see also Yahoo! Inc.*, 433 F.3d at 1207 (clarifying that the “‘brunt’ of the harm  
7 need not be suffered in the forum state”). Although Plaintiff specifically alleges in its  
8 proposed amended complaint that tortious acts were directed at Arizona (Doc. 14-1, ¶ 6),  
9 Defendants’ response does not address the issues of purposeful direction or express  
10 aiming. Accordingly, the Court cannot conclude on the basis of Defendants’ arguments  
11 that Plaintiff’s amendment would be futile.

12 Defendants also contend that Plaintiff’s amendments would be futile based on the  
13 doctrine of *forum non conveniens*, which they assert requires dismissal of this case.  
14 Doc. 20 at 3-4. “To prevail on a motion to dismiss based upon *forum non conveniens*, a  
15 defendant bears the burden of demonstrating an adequate alternative forum, and that the  
16 private and public interest factors favor dismissal.” *Carijano v. Occidental Petroleum*  
17 *Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011) (citing *Dole Food Co. v. Watts*, 303 F.3d  
18 1104, 1118 (9th Cir. 2002)). An alternative forum is adequate if: “(1) the defendant is  
19 amenable to process there; and (2) the other jurisdiction offers a satisfactory remedy.”  
20 *Carijano*, 643 F.3d at 1225 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22  
21 (1981)). Although Defendants have stated that “they would consent to jurisdiction in  
22 Austria if Plaintiff filed these claims in that jurisdiction” (Doc. 20 at 4), they have not  
23 presented any arguments or evidence on the issue of whether Austria would offer a  
24 satisfactory remedy. Defendants therefore have failed to show that Plaintiff’s amended  
25 complaint would be dismissed on *forum non conveniens* grounds. The Court will grant  
26 Plaintiff leave to amend.

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1     **III. Motion to Dismiss and Request for Summary Adjudication.**

2             The Court will also deny Defendants’ motion to dismiss and deny as moot its  
3 accompanying request for summary adjudication. Defendants’ motion to dismiss seeks  
4 dismissal on the basis of lack of personal jurisdiction, *forum non conveniens*, and lack of  
5 standing. *See* Doc. 9. Defendants’ *forum non conveniens* argument fails for the reasons  
6 outlined above, namely that Defendants have not demonstrated that Austria is an  
7 adequate alternative forum.

8             Defendants’ personal jurisdiction argument fails in light of Plaintiff’s proposed  
9 amendments. Plaintiff has alleged that Defendants conspired with Mr. Ötzlinger “to  
10 intentionally harm” both Plaintiff and its Austrian subsidiary. Doc. 14-1, ¶ 19. Plaintiff  
11 further alleges that Mr. Ötzlinger attempted to disrupt Plaintiff’s relationships with  
12 customers, suppliers, and business partners (*id.*, ¶ 34), and that Defendants knew these  
13 “intentional acts would affect [Plaintiff] in Arizona” (*id.*, ¶ 6). Plaintiff has thus alleged  
14 that Defendants’ tortious conduct targeted it in Arizona. As noted above, Defendants  
15 have not addressed the Ninth Circuit’s purposeful direction standard.

16             With regard to the issue of standing, Plaintiff alleges in its amended complaint  
17 that it has suffered harm separate from that suffered by its subsidiary (Doc. 21 at 2, citing  
18 Doc. 14-1, ¶¶ 19, 34, 59) and that it is the assignee of any claims against Defendants  
19 belonging to its subsidiary (Doc. 14-1, ¶ 55). These allegations are sufficient for  
20 standing. The Court must therefore deny Defendants’ motion to dismiss.

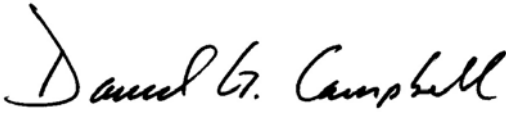
21             The Court will deny the request for summary adjudication because Plaintiff’s  
22 motion to amend sufficiently addressed the issues raised in Defendants’ motion to  
23 dismiss.

24             **IT IS ORDERED:**

- 25             1. Defendants motion to dismiss (Doc. 9) is **denied**.
- 26             2. Plaintiff’s motion for leave to file a first amended complaint (Doc. 14) is  
27 **granted**. Plaintiff shall file its amended complaint on or before  
28 **March 13, 2014**.

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3. Defendants' request for summary adjudication (Doc. 15) is **denied** as moot.  
Dated this 6th day of March, 2014.



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David G. Campbell  
United States District Judge