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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

JUNIPER NETWORKS, INC.,

Plaintiff,

v.

BRUNO ANDRADE, MARS  
INVESTMENT ACCELERATOR FUND  
INC., NORTHSRING CAPITAL  
PARTNERS INC., JOSMEYR ALVES  
DE OLIVEIRA, and RUBEN MARCOS  
SEIDL,

Defendants.

Case No. 20-cv-02360-BLF

**ORDER GRANTING MOTION TO  
DISMISS FOR LACK OF PERSONAL  
JURISDICTION, WITH LEAVE TO  
AMEND; AND DEFERRING MOTION  
TO DISMISS OR STAY BASED ON  
*FORUM NON CONVENIENS* AND  
COMITY**

[Re: ECF 26]

This suit arises from the acquisition of a software company, HTBase Corporation (“HTBase”), by Plaintiff Juniper Networks, Inc. (“Juniper”) through Juniper’s wholly owned subsidiary, 1187474 B.C. Unlimited Liability Company (“118 ULC”). 118 ULC entered into a Share Purchase Agreement (“SPA”) with HTBase and its shareholders (referred to as “Vendors”) for the purchase of all common and preferred shares of HTBase, with Juniper signing as guarantor of the purchase price. Juniper claims that although the Vendors represented in the SPA that all third-party technology and intellectual property incorporated into HTBase products had been disclosed, Juniper discovered after close of the transaction that HTBase’s flagship product, Juke, incorporates undisclosed open source software. Juniper sues five of the signatory Vendors for breach of the SPA: Bruno Andrade (“Andrade”), Mars Investment Accelerator Fund Inc. (“Mars”), Northspring Capital Partners Inc. (Northspring”), Josomeyr Alves De Oliveira (“Oliveira”), and Ruben Marcos Seidl (“Seidl”). Juniper also sues Andrade for fraudulent and negligent misrepresentation.

1 Defendants have filed a motion seeking multiple forms of relief. Canadian companies  
2 Mars and Northspring, and Brazilian domiciliaries Oliveira and Seidl (collectively, “Foreign  
3 Defendants”), seek dismissal of the complaint under Federal Rule of Civil Procedure 12(b)(2) for  
4 lack of personal jurisdiction. In addition, all Defendants move to dismiss the complaint or stay the  
5 action based the doctrine of *forum non conveniens* and principles of comity.

6 For the reasons discussed below, the Foreign Defendants’ motion to dismiss for lack of  
7 personal jurisdiction is GRANTED WITH LEAVE TO AMEND. The motion to dismiss or stay  
8 based on *forum non conveniens* and comity is DEFERRED.

9 **I. BACKGROUND**

10 Juniper is a California-based corporation that designs and sells networking products and  
11 services. In 2018, Juniper considered investing in HTBase, a Canadian company that “developed  
12 software that helps companies manage their storage, computing, and networking infrastructures  
13 across private data centers and cloud providers (*e.g.*, Amazon Web Services, Google Cloud  
14 Platform, Microsoft Azure, etc.)” Hutchins Decl. ¶ 6, ECF 27-4. The storage capabilities of  
15 HTBase’s Juke product was of particular interest to Juniper. *See id.* ¶ 16.

16 Juniper officers began negotiations with Andrade, HTBase’s founder and Chief Executive  
17 Officer (“CEO”), first for Juniper’s investment in HTBase and ultimately for Juniper’s acquisition  
18 of HTBase. *See* Hutchins Decl. ¶¶ 7-16. Andrade visited Juniper’s Sunnyvale, California campus  
19 numerous times between February and October of 2018. *See id.* Andrade was in regular contact  
20 with Juniper employees throughout 2018, through in-person meetings, emails, and telephone calls.  
21 *Id.* ¶ 25.

22 In October 2018, Juniper sent a Letter of Intent (“LOI”) to Andrade, setting forth a  
23 proposal for Juniper’s acquisition of HTBase. *See* Hutchins Decl. ¶ 23 and Exh. B. Andrade  
24 presented the proposal to HTBase’s Board and then sent Juniper comments regarding the proposal.  
25 *See* Sitter Decl. Exh. M, ECF 29-13. Juniper responded by sending Andrade an updated LOI,  
26 which Andrade took to the Board. *See* Sitter Decl. Exh N, ECF 29-14. After the Board accepted  
27 that offer, Andrade executed the updated LOI as “CEO – Founder” of HTBase. *See* Sitter Decl.  
28 Exh C, ECF 29-3

1           During Juniper’s due diligence review, Andrade worked with Juniper employees located in  
2 California. Hutchins Decl. ¶ 26. As part of the due diligence process, HTBase submitted source  
3 code and binary files to be scanned by Black Duck, a company specializing in determining  
4 whether a company’s software incorporates open source software. *See* Compl. ¶ 34, ECF 23;  
5 Andrade Decl. ¶ 7, ECF 21-1. Open source software is software that a developer can use,  
6 generally free of charge, subject to licensing restrictions. *See* Compl. ¶ 35. Juniper claims that  
7 Andrade personally selected which source code and binary files HTBase sent to Black Duck for  
8 scanning. *See* Compl. ¶ 40. Black Duck’s scan did not identify any open source software in  
9 HTBase’s source code or binary files. *See* Compl. ¶ 41.

10           On November 16, 2018, a group of Juniper’s engineers and product managers met with  
11 HTBase representatives in Toronto to discuss HTBase’s intellectual property and products,  
12 including Juke. *See* Compl. ¶ 43. Andrade was present at the meeting and answered questions  
13 about Juke. *See* Compl. ¶ 44; Andrade Decl. ¶ 6, ECF 21-1. According to Juniper, Andrade stated  
14 that Juke’s file system was proprietary to HTBase, was HTBase’s intellectual property, and was a  
15 core component of Juke. *See* Compl. ¶ 45.

16           Juniper decided to go forward with the acquisition of HTBase, creating a Canadian  
17 subsidiary, 118 ULC, specifically for the acquisition. Hutchins Decl. ¶ 28. On November 28,  
18 2018, 118 ULC entered into the SPA with HTBase and the Vendors for the purchase of all  
19 common and preferred shares of HTBase. *See* SPA, Compl. Exh. A, ECF 23-1. Juniper signed  
20 the SPA as guarantor of the purchase price. *See id.* Paragraph 4.2 of the SPA, “Vendors’  
21 Representations and Warranties Concerning the Corporation,” states that 118 ULC entered into the  
22 SPA in reliance on the representations and warranties of the Vendors set out in Paragraph 4.2,  
23 each representation and warranty being made by each Vendor “severally as to itself, and not  
24 jointly or jointly and severally as to any other Vendor.” SPA ¶ 4.2. Each Vendor represented and  
25 warranted among other things that all third-party technology and intellectual property  
26 incorporated into HTBase products had been disclosed; all HTBase intellectual property was  
27 transferrable without restriction; and HTBase owned or had licenses to all source code in its  
28 software. *See id.*

1 Paragraph 7.2 of the SPA requires the Vendors to indemnify the other parties to the SPA  
2 for damages arising from breach of the Vendors’ representations and warranties. SPA ¶ 7.2. The  
3 Indemnified Party must submit a Claim Notice to each relevant Vendor through the “Vendors’  
4 Representative.” SPA ¶ 7.4. The Vendors’ Representative has authority to give and receive  
5 notices, settle claims, and take other action on behalf of each Vendor. SPA ¶ 12.4(2). The SPA  
6 designates Andrade as the Vendors’ Representative. SPA ¶ 12.4(1).

7 Juniper and HTBase announced the acquisition on November 29, 2018. *See Hutchins*  
8 *Decl.* ¶ 29. Juniper wired the purchase price on December 7, 2018. *See id.* ¶ 30. After the  
9 acquisition, Andrade and other HTBase employees joined Juniper. *See Compl.* ¶ 54. Juniper  
10 alleges that Andrade maintained strict control over the Juke source code, and prevented other  
11 employees from accessing it. *See Compl.* ¶ 55. Andrade resigned from Juniper effective October  
12 15, 2019. *See Compl.* ¶ 56. Juniper alleges that around that time, a Juniper product manager  
13 discovered that Juke contains copies of files from an open source code project called Lizard FS.  
14 *See Compl.* ¶¶ 61-65. Juniper removed Juke from its product catalog. *See Compl.* ¶ 68.

15 On December 5, 2019, Juniper sent a Claim Notice to Andrade as the Vendors’  
16 Representative under the SPA. *See Compl.* ¶ 69. The Claim Notice identified two alleged  
17 breaches of the SPA by Vendors: breach of representations and warranties regarding the amount  
18 of HTBase’s accounts receivable, and breach of representations and warranties regarding  
19 HTBase’s intellectual property. On the latter breach, Juniper asserted in its Claim Notice that the  
20 Vendors breached provisions of Paragraph 4.2 of the SPA by failing to disclose that Juke includes  
21 LizardFS open source software components. *See Compl.* ¶¶ 69-78.

22 On February 28, 2020, Juniper filed the present action in the Santa Clara County Superior  
23 Court, asserting a claim for breach of the SPA against Andrade, Mars, Northspring, Oliveira, and  
24 Seidl. The contract claim is based on those Vendors’ alleged breach of representations and  
25 warranties contained in the SPA. *See Compl.* ¶¶ 84-93. Juniper also asserts claims for fraudulent  
26 and negligent misrepresentation against Andrade. *See Compl.* ¶¶ 94-125. Defendants removed  
27 the action to federal district court based on diversity of citizenship. *See Notice of Removal*, ECF  
28 1.

1       **II.    MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

2           The Foreign Defendants – Mars, Northspring, Oliveira, and Seidl – move to dismiss the  
3 complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2).  
4 Juniper contends that dismissal is inappropriate because it has made the requisite showing that the  
5 Court has personal jurisdiction over the Foreign Defendants.

6           **A.    Legal Standard**

7           “Federal courts ordinarily follow state law in determining the bounds of their jurisdiction  
8 over persons.” *Walden v. Fiore*, 571 U.S. 277, 283 (quoting *Daimler AG v. Bauman*, 571 U.S.  
9 117, 125 (2014)). California’s long-arm statute is coextensive with federal due process  
10 requirements. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800-01 (9th Cir. 2004).  
11 “Although a nonresident’s physical presence within the territorial jurisdiction of the court is not  
12 required, the nonresident generally must have ‘certain minimum contacts . . . such that the  
13 maintenance of the suit does not offend traditional notions of fair play and substantial justice.’”  
14 *Walden*, 571 U.S. at 283 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

15           When a defendant raises a challenge to personal jurisdiction, the plaintiff bears the burden  
16 of establishing that jurisdiction is proper. *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir.  
17 2015). “Where, as here, the defendant’s motion is based on written materials rather than an  
18 evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts to  
19 withstand the motion to dismiss.” *Id.* “[T]he plaintiff cannot simply rest on the bare allegations of  
20 its complaint,” but the uncontroverted allegations in the complaint must be accepted as true.  
21 *Schwarzenegger*, 374 F.3d at 800 (quotation marks and citation omitted). Factual disputes created  
22 by conflicting affidavits must be resolved in the plaintiff’s favor. *Id.*

23           **B.    Discussion**

24           A federal district court may exercise either general or specific personal jurisdiction over a  
25 nonresident defendant. *Daimler*, 134 S. Ct. at 754. General jurisdiction exists when the  
26 defendant’s contacts “are so continuous and systematic as to render [it] essentially at home in the  
27 forum State.” *Id.* (internal quotation marks and citation omitted). Specific jurisdiction exists  
28 when the defendant’s contacts with the forum state are more limited but the plaintiff’s claims arise

1 out of or relate to those contacts. *Daimler*, 571 U.S. at 127.

2 **1. General Jurisdiction**

3 The Foreign Defendants challenge the existence of general jurisdiction, submitting  
4 declarations establishing that they do not own property or bank accounts in California, do not pay  
5 taxes in California, are not licensed or registered to do business in California, have no employees  
6 in California, do not travel to California for business, and do not have regular contacts with  
7 California or California residents as part of their normal business operations. *See* Leonard Decl.  
8 ¶¶ 2-4, ECF 21-2; Hunter Decl. ¶¶ 2-4, ECF 21-3; Oliveira Decl. ¶ 5, ECF 21-4; Seidl Decl. ¶ 4,  
9 ECF 21-5. Juniper does not attempt to rebut these declarations or to establish that the Foreign  
10 Defendants are subject to this Court’s general jurisdiction.

11 **2. Specific Jurisdiction**

12 Foreign Defendants also challenge the existence of specific jurisdiction, submitting  
13 declarations establishing that they did not have communications or other dealings directly with  
14 Juniper or any of its representatives in the United States in connection with the HTBase  
15 acquisition, and that they executed the SPA in Canada (Mars and Northspring) and Brazil  
16 (Oliveira and Seidl). *See* Leonard Decl. ¶ 5; Hunter Decl. ¶¶ 5-6; Oliveira Decl. ¶ 3; Seidl Decl. ¶  
17 3. Juniper must make a *prima facie* showing of specific personal jurisdictional to withstand this  
18 challenge. *See Ranza*, 793 F.3d at 1068.

19 The Ninth Circuit has established a three-prong test for whether a court can exercise  
20 specific personal jurisdiction: (1) the defendant must have “either purposefully availed itself of  
21 the privilege of conducting activities in California, or purposefully directed its activities toward  
22 California”; (2) the claim must arise out of or relate to the defendant’s forum-related activities;  
23 and (3) the exercise of jurisdiction must be reasonable, *i.e.* it must comport with fair play and  
24 substantial justice. *Schwarzenegger*, 374 F.3d at 802. The plaintiff bears the burden on the first  
25 two prongs. *Id.* “If the plaintiff fails to satisfy either of these prongs, personal jurisdiction is not  
26 established in the forum state.” *Id.* “If the plaintiff succeeds in satisfying both of the first two  
27 prongs, the burden then shifts to the defendant to present a compelling case that the exercise of  
28 jurisdiction would not be reasonable.” *Id.* (quotation marks and citation omitted).

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**a. Purposeful Availment**

As stated above, the first prong of the *Schwarzenegger* test requires Juniper to show either purposeful availment or purposeful direction by the Foreign Defendants. “A showing that a defendant purposefully availed himself of the privilege of doing business in a forum state typically consists of evidence of the defendant’s actions in the forum, such as executing or performing a contract there.” *Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp.*, 905 F.3d 597, 605 (9th Cir. 2018) (quotation marks and citation omitted). “By contrast, [a] showing that a defendant purposefully directed his conduct toward a forum state . . . usually consists of evidence of the defendant’s actions outside the forum state that are directed at the forum, such as the distribution in the forum state of goods originating elsewhere.” *Id.* (quotation marks and citation omitted). “[A] purposeful availment analysis is most often used in suits sounding in contract, whereas a purposeful direction analysis is most often used in suits sounding in tort.” *Id.* (quotation marks and citation omitted).

A purposeful availment analysis is most appropriate here, as the Foreign Defendants are sued only for breach of contract. Juniper argues that the Foreign Defendants purposefully availed themselves of the privilege of doing business in California through Andrade, asserting that Andrade acted as the Foreign Defendants’ agent both before and after execution of the SPA. Under this agency theory, Juniper contends that Andrade’s contacts with California may be imputed to the Foreign Defendants.

The Ninth Circuit’s *Williams* decision sets forth the controlling law. *See Williams v. Yamaha Motor Co.*, 851 F.3d 1015 (9th Cir. 2017). Observing that the Supreme Court’s *Daimler* opinion “voided our agency approach for imputing contacts for the purpose of general jurisdiction,” the Ninth Circuit noted that *Daimler* “left open the question of whether an agency relationship might justify the exercise of specific jurisdiction.” *Williams*, 851 F.3d at 1023. “Assuming [ ] that some standard of agency continues to be relevant to the existence of specific jurisdiction,” the Ninth Circuit held, “[f]undamental tenets of agency theory require that an agent act on the principal’s behalf and subject to the principal’s control.” *Id.* at 1024 (quotation marks and citations omitted).

1           The *Williams* court applied this standard to the appellants’ assertion that appellee Yamaha  
2 Motor Co. Ltd. (“YMC”) was subject to specific personal jurisdiction in California based on the  
3 contacts of its subsidiary, appellee Yamaha Motor Corporation, U.S.A. (“YMUS”). *See Williams*,  
4 851 F.3d at 1024-25. The Ninth Circuit determined that the appellants “neither allege nor  
5 otherwise show that YMC had the right to control YMUS’s activities in any manner at all.” *Id.* at  
6 1025. The Ninth Circuit therefore concluded that “even assuming the validity of some  
7 formulation of agency analysis such that a subsidiary’s contacts *could* be attributed to its parent,  
8 Appellants failed to establish specific jurisdiction over YMC.” *Id.*

9           Like the appellants in *Williams*, Juniper “neither allege[s] nor otherwise show[s]” that the  
10 Foreign Defendants had the right to control Andrade’s activities. The only agency allegations in  
11 the complaint are generic. Paragraph 12 of the complaint states that “Defendants, and each of  
12 them, were partners, joint venturers, agents, employees, alter egos, and/or representatives of each  
13 other in doing the things herein alleged and, in doing so, were acting within the scope of their  
14 respective authorities as agents, employees, and representatives, and are jointly and severally  
15 liable to Juniper.” Compl. ¶ 12. Paragraph 13 states that “[t]his Court also has jurisdiction over  
16 all Defendants because, upon information and belief, they engaged in intentional conduct, either  
17 directly or through agents, directed at Juniper that caused harm to Juniper in California.” Compl.  
18 ¶ 13. In *Williams*, the Ninth Circuit disregarded similar language as “a conclusory legal statement  
19 unsupported by any factual assertion regarding YMC’s control over YMUS (or regarding any  
20 other aspect of the parent-subsiary relationship).” *Williams*, 851 F.3d at 1025 n.5.

21           Juniper’s arguments and evidence in opposition to the motion to dismiss similarly are  
22 lacking. Juniper devotes a single sentence in its opposition brief to the issue of control during the  
23 period prior to execution of the SPA, asserting that “[t]he HTBASE shareholders maintained  
24 control over Andrade insofar as they rejected Juniper’s initial acquisition structure before  
25 ultimately allowing Andrade to sign the LOI.” Pl.’s Opp. at 8, ECF 28. In support of this  
26 assertion, Juniper cites Exhibits C, M, and N to the Sitter Declaration, which are emails between  
27 Andrade and Juniper regarding the LOI. Exhibit M reflects that Juniper sent Andrade a draft LOI  
28 on October 25, 2018, which Andrade presented to HTBase’s Board. *See Sitter Decl. Exh. M, ECF*



1 29-13. After the Board meeting, Andrade responded to Juniper with comments that resulted from  
2 the Board meeting. *See id.* Exhibit N shows that Juniper thereafter sent Andrade an updated LOI.  
3 Sitter Decl. Exh. N, ECF 29-14. Finally, Exhibit C is Andrade’s email to Juniper stating that  
4 HTBase’s Board accepted the offer set forth in the updated LOI. *See* Sitter Decl. Exh. C, ECF 29-  
5 3. Andrade attached the executed updated LOI, as well as an exclusivity agreement, which he  
6 signed as “CEO – Founder” of HTBase. *See id.* Nothing in this evidence suggests that Andrade  
7 was acting as an agent for, and subject to the control of, Foreign Defendants Mars, Northspring,  
8 Oliveira and Seidl. To the contrary, it appears that Andrade was acting in his role as CEO of  
9 HTBase, on behalf of and subject to the control of HTBase’s Board. *See Colt Studio, Inc. v.*  
10 *Badpuppy Enter.*, 75 F. Supp. 2d 1104, 1111 (C.D. Cal. 1999) (“For jurisdictional purposes, the  
11 acts of corporate officers and directors in their official capacities are the acts of the corporation  
12 exclusively.”).

13 With respect to the period after execution of the SPA, Juniper argues that Andrade’s  
14 contacts with California may be imputed to the Vendors in light of the SPA’s express designation  
15 of Andrade as the Vendor’s Representative. Juniper points out that Andrade took actions in his  
16 role as Vendors’ Representative between the execution of the SPA on November 28, 2018, and the  
17 close of the transaction on December 7, 2018, when the purchase price was paid. At the hearing,  
18 the Court indicated that it agreed with Juniper that Andrade qualified as the Vendors’ agent as of  
19 the execution of the SPA, but it questioned whether Juniper’s claim for breach of contract arose  
20 out of any post-execution actions taken by Andrade. As discussed below, the Court concludes that  
21 Juniper has failed to show that its contract claim against the Foreign Defendants arose out of any  
22 conduct by Andrade after execution of the SPA. Moreover, after further review of the SPA in light  
23 of the parties’ arguments, the Court is not persuaded that the SPA’s designation of Andrade as the  
24 Vendors’ Representative satisfies the *Williams* requirements for agency.

25 Under *Williams*, specific jurisdiction may be based on an agent’s contacts with the forum  
26 state only where the “agent act[s] on the principal’s behalf *and* subject to the principal’s control.”  
27 *Williams*, 851 F.3d at 1024 (quotation marks and citations omitted, emphasis added). While the  
28 SPA certainly establishes that Andrade acted on the Vendors’ behalf in his role as Vendors’

1 Representative, it does not establish that Andrade was subject to the Vendors’ control. To the  
2 contrary, the SPA grants Andrade “the full and unconditional authority, on behalf of each Vendor,  
3 to give and receive notices, to settle claims or disputes and to take or omit to take, on behalf of  
4 each Vendor, such action as the Vendors’ Representative deems necessary or appropriate with  
5 respect to this Agreement.” SPA ¶ 12.4(2). Further, the SPA provides that “[a]ll decisions and  
6 actions taken by the Vendors’ Representative shall be binding upon all Vendors, *and no Vendor*  
7 *shall have the right to object, dissent, protest or otherwise contest the same.*” *Id.* (emphasis  
8 added). Absent some evidence that the Vendors nonetheless did exercise control over the manner  
9 in which Andrade fulfilled his obligations as Vendors’ Representative, the Court concludes that  
10 Juniper has not demonstrated that Andrade’s contacts with California may be imputed to the  
11 Foreign Defendants.

12 Juniper’s reliance on cases that pre-date *Daimler* and *Williams* is misplaced. As the  
13 Foreign Defendants point out in their reply brief, *Daimler* and *Williams* altered the standard for  
14 exercising personal jurisdiction based on contacts of agents. Thus, citation to earlier cases that do  
15 not address the control issue are unhelpful to the analysis required here.

16 At the hearing, a dispute arose between counsel as to whether HTBase moved its  
17 headquarters from Canada to California prior to the close of the transaction. Juniper’s counsel  
18 pointed to evidence that the move was made, while Defendant’s counsel pointed to evidence that it  
19 was not. Juniper’s counsel argued, correctly, that on a Rule 12(b)(2) motion all factual disputes  
20 created by conflicting affidavits must be resolved in the plaintiff’s favor. *See Schwarzenegger*,  
21 374 F.3d at 800. Whether HTBase moved its headquarters to California has no bearing on the  
22 issue of agency, which is the only basis upon which Juniper has asserted personal jurisdiction over  
23 the Foreign Defendants.

24 For the reasons discussed above, Juniper has not alleged or otherwise demonstrated that  
25 Andrade’s contacts with California may be imputed to the Foreign Defendants under an agency  
26 theory, as governed by *Williams*. Accordingly, Juniper has failed to meet its burden of showing  
27 that the Foreign Defendants purposefully availed themselves of the privilege of doing business in  
28 California as required under the first prong of the *Schwarzenegger* test.

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**b. Arising Out Of**

In determining whether a plaintiff’s claim arises out of or relates to the defendant’s forum-related activities, “the Ninth Circuit follows the ‘but for’ test.” *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007) (internal quotation marks and citation omitted). Under this test, Juniper must show that it would not have suffered an injury “but for” the Foreign Defendants’ California-related conduct.

Juniper sues the Foreign Defendants for breaching representations and warranties that *they themselves* made in the SPA. Each of the Foreign Defendants signed the SPA on its own behalf. The SPA provides that the representations and warranties therein were made by each Vendor “severally as to itself, and not jointly or jointly and severally as to any other Vendor.” SPA ¶ 4.2. Accordingly, it appears from the face of the complaint and the SPA attached thereto that Juniper’s breach of contract claims against the Foreign Defendants arise from the Foreign Defendants’ own representations and warranties in the SPA, which was executed on November 28, 2018.

Given the nature of Juniper’s contract claim, it is unclear how the claim arises from or relates to Andrade’s conduct. At the hearing, Juniper’s counsel pointed to language in the SPA requiring that the representations and warranties of the Vendors be true at the time of closing. Although the SPA was executed on November 28, 2018, the transaction did not close until December 7, 2018. Juniper attaches great significance to Andrade’s performance of duties as the Vendors’ Representative during the period between November 28, 2018 and December 7, 2018, arguing that Andrade’s contacts with California during that period may be imputed to the Foreign Defendants. Counsel recited Andrade’s acts in finalizing the purchase price, providing the closing statement, and providing the closing spreadsheet after the SPA was executed and before the transaction closed. But as Defendants’ counsel pointed out at the hearing, Juniper’s contract claim does not allege breaches relating to the purchase price or closing spreadsheets. Juniper’s claim is for breach of the representations and warranties made in the SPA, none of which were made after the date the SPA was signed.

The Court finds that Juniper has failed to show that its contract claim arises from or relates to Andrade’s conduct under the “but for” test applicable to the second prong of *Schwarzenegger*.

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**c. Reasonableness**

Because Juniper has failed to satisfy its burden with respect to the first two prongs, the burden does not shift to the Foreign Defendants to satisfy the third prong of the *Schwarzenegger* test. *See Schwarzenegger*, 374 F.3d at 802 (burden shifts to the defendant to show that exercise of personal jurisdiction would not be reasonable only if the plaintiff satisfies both of the first two prongs).

**d. Juniper’s Evidentiary Objections to Reply Evidence**

Juniper objects to the Supplemental Andrade Declaration and the Elliott Declaration submitted with Defendants’ reply brief. According to Juniper, submission of those declarations is an improper attempt to introduce new evidence in the reply. *See Rivera v. Saul Chevrolet, Inc.*, No. 16-CV-05966-LHK, 2017 WL 3267540, at \*6 (N.D. Cal. July 31, 2017) (“[T]he Court need not consider this evidence because the submission of new facts in a reply brief is improper.”). Juniper also raises specific objections to portions of the declarations based on foundation, hearsay, and relevance. The Court need not address Juniper’s evidentiary objections because it did not rely on the Supplemental Andrade Declaration or the Elliott Declaration in evaluating the Foreign Defendants’ motion for dismissal for lack of personal jurisdiction.

**e. Conclusion**

In light of the foregoing, the Court concludes that Juniper has failed to make a *prima facie* showing that the Foreign Defendants are subject to this Court’s specific personal jurisdiction under California’s long-arm statute. The Foreign Defendants are entitled to dismissal on this basis.

The allegations of Juniper’s complaint do not satisfy the agency requirements set forth in *Williams*, which is understandable given that the complaint was filed in state court. While Juniper’s opposition to the motion to dismiss likewise fails to make a *prima facie* showing of personal jurisdiction based on agency, it may be that Juniper could make such a showing consistent with the guidance provided in this order, particularly if jurisdictional discovery is permitted. Juniper requests that, in the event the Court grants the Foreign Defendants’ motion to dismiss for lack of personal jurisdiction, the Court permit Juniper to take jurisdictional discovery

1 regarding the asserted agency relationship between Andrade and the Foreign Defendants. *See*  
2 Pl.'s Opp. at 14, ECF 28. While the Court would be amenable to allowing appropriate  
3 jurisdictional discovery in this case, Juniper's request is so vague that it cannot be granted as  
4 framed. Juniper's discovery request is denied without prejudice to a renewed request that sets  
5 forth a reasonable plan for limited jurisdictional discovery targeted to the asserted agency  
6 relationship.

7 Accordingly, the Court finds that dismissal for lack of personal jurisdiction with leave to  
8 amend is appropriate. In order to afford Juniper time to file a renewed request for jurisdictional  
9 discovery and/or to amend the complaint with additional jurisdictional facts that may be in  
10 Juniper's possession, the Court will grant Juniper ninety days to amend its complaint. The Court  
11 grants a more generous period for amendment than ordinarily would be afforded in light of the  
12 COVID-19 pandemic and the fact that trial in this case is not set to commence until February  
13 2023.

14 Accordingly, the Foreign Defendants' motion to dismiss for lack of personal jurisdiction is  
15 GRANTED WITH LEAVE TO AMEND. Juniper's request for leave to take jurisdictional  
16 discovery is DENIED WITHOUT PREJUDICE to a renewed request submitted as an  
17 administrative motion under Civil Local Rule 7-11. The deadline to respond to such motion shall  
18 be extended to seven days. No reply shall be permitted.

19 **III. MOTION TO DISMISS BASED ON *FORUM NON CONVENIENS* AND COMITY**

20 All Defendants move to dismiss or stay this action based on the doctrine of *forum non*  
21 *conveniens* and principles of comity. Defendants assert that Canada is the proper forum for  
22 resolving this litigation, and that this action either should be dismissed so that Juniper may file its  
23 claims there, or should be stayed pending resolution of a parallel lawsuit regarding the SPA that  
24 currently is proceeding in Canada. In opposition, Juniper contends that California is a proper  
25 forum for this litigation, and that Defendants have not met their heavy burden to establish that it is  
26 appropriate to dismiss or stay this litigation.

27 For the reasons discussed below, the Court finds it appropriate to defer consideration of  
28 Defendants' motion to dismiss or stay on these grounds.

1           **A.     Legal Standard**

2                   **1.     Forum Non Conveniens**

3           “Federal district courts have discretion to dismiss an action under the doctrine of *forum*  
4 *non conveniens*.” *Ayco Farms, Inc. v. Ochoa*, 862 F.3d 945, 948 (9th Cir. 2017). “Dismissal is  
5 appropriate only if the defendant establishes (1) the existence of an adequate alternative forum,  
6 and (2) that the balance of private and public interest factors favors dismissal.” *Id.* (quotation  
7 marks and citation omitted). “[A] plaintiff is generally entitled to deference in its choice of forum,  
8 especially if the plaintiff is a U.S. citizen or resident *Id.* at 949-50. “For a U.S. citizen’s choice of  
9 forum to be rejected, the private and public interest factors must strongly favor trial in a foreign  
10 country.” *Id.* (quotation marks and citation omitted).

11           “The private interest factors are: (1) the residence of the parties and the witnesses; (2) the  
12 forum’s convenience to the litigants; (3) access to physical evidence and other sources of proof;  
13 (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to  
14 trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a  
15 case easy, expeditious and inexpensive.” *Ayco Farms*, 862 F.3d at 950 (quotation marks and  
16 citation omitted). “The public interest factors are (1) [the] local interest of [the] lawsuit; (2) the  
17 court’s familiarity with governing law; (3) [the] burden on local courts and juries; (4) [the amount  
18 of] congestion in the court; and (5) the costs of resolving a dispute unrelated to [the] forum.” *Id.*  
19 (quotation marks and citation omitted, alterations in original).

20           District courts within the Ninth Circuit have found that a balancing of the *forum non*  
21 *conveniens* factors may warrant a stay of litigation rather than dismissal. *See, e.g., MGA Entm’t*  
22 *Inc. v. Deutsche Bank AG*, No. CV 11-4932-GW(RZX), 2012 WL 12892902, at \*9 (C.D. Cal. Feb.  
23 27, 2012) (finding that dismissal or stay was appropriate on *forum non conveniens* grounds);  
24 *Ministry of Health, Province of Ontario, Canada v. Shiley Inc.*, 858 F. Supp. 1426, 1442 (C.D.  
25 Cal. 1994) (staying action on *forum non conveniens* grounds).

26                   **2.     Comity**

27           “International comity is a doctrine of prudential abstention, one that counsels voluntary  
28 forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second

1 sovereign also has a legitimate claim to jurisdiction under principles of international law.” *Mujica*  
 2 *v. AirScan Inc.*, 771 F.3d 580, 598 (9th Cir. 2014) (quotation marks and citation omitted). The  
 3 aspect of the doctrine referred to as “comity among courts” or “adjudicatory comity,” is “viewed  
 4 as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case  
 5 properly adjudicated in a foreign state.” *Id.* (quotation marks and citation omitted). “[C]ourts  
 6 have struggled to apply a consistent set of factors in their comity analyses.” *Id.* at 603.

7 The Ninth Circuit has found the following factors to be a useful starting point: (1) the  
 8 strength of the United States’ interest in using a foreign forum, (2) the strength of the foreign  
 9 governments’ interests, and (3) the adequacy of the alternative forum. *Mujica*, 771 F.3d at 603.  
 10 “The (nonexclusive) factors we should consider when assessing U.S. interests include (1) the  
 11 location of the conduct in question, (2) the nationality of the parties, (3) the character of the  
 12 conduct in question, (4) the foreign policy interests of the United States, and (5) any public policy  
 13 interests.” *Id.* at 604. “The proper analysis of foreign interests essentially mirrors the  
 14 consideration of U.S. interests.” *Id.* at 607.

15 **B. Discussion**

16 As set forth above, the propriety of dismissing or staying an action under either the  
 17 doctrine of *forum non conveniens* or principles of comity turns on (1) whether there is an adequate  
 18 alternative forum and (2) the Court’s balancing of multiple factors relating to the private interests  
 19 of the parties and the public interests of the alternative fora.

20 There is no dispute that Ontario, Canada, is an adequate alternative forum. The SPA  
 21 provides that “[e]ach Party agrees (a) that any Legal Proceeding relating to this Agreement may  
 22 (but need not) be brought in any court of competent jurisdiction in the Province of Ontario.” SPA  
 23 ¶ 12.12. The SPA also provides that “[t]his Agreement shall be governed by and construed in  
 24 accordance with the laws of the Province of Ontario and the laws of Canada applicable in such  
 25 Province and this Agreement shall be treated, in all respects, as an Ontario contract.” SPA ¶  
 26 12.13. Defendants argue expressly that Canada is an adequate forum, and Juniper concedes that  
 27 point in its opposition brief. *See* Defs.’ Motion at 12-13, ECF 26; Pl.’s Opp. at 15, ECF 28.

28 The Court’s ruling on Defendants’ motion to dismiss or stay thus depends on the balancing

1 of the relevant private and public interest factors. That balancing will be significantly impacted by  
2 the Court’s ultimate determination whether it has personal jurisdiction over the Foreign  
3 Defendants. For example, the weight given to private interest factors relevant to a *forum non*  
4 *conveniens* analysis may be substantially different if the Court is considering only the claims  
5 against Andrade or the claims against all Defendants. In the former circumstance, the interests of  
6 one resident party, Juniper, would be weighed against the interests of one nonresident party,  
7 Andrade, who spent a great deal of time in California during the period in which the facts giving  
8 rise to this suit occurred. In the latter circumstance, Juniper’s interests would be weighed against  
9 those of multiple non-resident parties.

10 Similarly, the public interest factors relevant to both *forum non conveniens* and comity  
11 principles may be substantially different if there are multiple nonresident defendants or only one.  
12 Under a *forum non conveniens* analysis, the Court must weigh the local interest in the suit, which  
13 the Ninth Circuit has characterized as the “local interest in having localized controversies decided  
14 at home.” *See Ranza*, 793 F.3d at 1078 (quotation marks and citation omitted). Under a comity  
15 analysis, the Court must weigh the interests of both the United States and Canada. *See Mujica*,  
16 771 F.3d at 603. The interests of the United States and California in having the litigation decided  
17 here would be fairly strong if the Court were considering only the claims of a local plaintiff  
18 against a single foreign defendant arising out of numerous in-person contacts with the forum.  
19 However, those interests likely would be less strong if the Court were considering the claims of a  
20 local plaintiff against multiple foreign defendants, especially taking into account the parties’  
21 choice of Canada law.

22 The Court therefore concludes that the most sensible course is to defer Defendants’ motion  
23 to dismiss or stay based on *forum non conveniens* and comity pending resolution of whether this  
24 Court has personal jurisdiction over the Foreign Defendants. Other courts in this district have  
25 deferred consideration of *forum non conveniens* pending a determination on personal jurisdiction.  
26 *See Facebook, Inc. v. Studivz Ltd.*, No. C 08-3468 JF (HRL), 2009 WL 1190802, at \*2 (N.D. Cal.  
27 May 4, 2009) (“[T]he Court will defer ruling on *forum non conveniens* until the issue of personal  
28 jurisdiction is ripe for consideration.”).



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Accordingly, a ruling on Defendants’ motion to dismiss and stay on grounds of *forum non conveniens* and comity is DEFERRED pending resolution of the Court’s personal jurisdiction over the Foreign Defendants. The motion to dismiss and stay is TERMINATED WITHOUT PREJUDICE to renewal, if appropriate, upon disposition of the personal jurisdiction issues.

**IV. ORDER**

(1) The Foreign Defendants’ motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) is GRANTED WITH LEAVE TO AMEND. Any amended complaint shall be filed on or before December 21, 2020. Leave to amend is limited to factual allegations relating to personal jurisdiction. Juniper may not add new claims or parties without obtaining express leave of the Court.

(2) Defendants’ motion to dismiss or stay based on *forum non conveniens* and comity is DEFERRED pending resolution of the Court’s personal jurisdiction over the Foreign Defendants. The motion to dismiss and stay is TERMINATED WITHOUT PREJUDICE to renewal, if appropriate, upon disposition of the personal jurisdiction issues.

(3) This order terminates ECF 26.

Dated: September 21, 2020

  
BETH LABSON FREEMAN  
United States District Judge