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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WESTERN INSTITUTIONAL
REVIEW BOARD, INC., a Delaware
Corporation,

Plaintiff,

v.

CHRISTOPHER L. JENKINS, an
individual and Texas resident,

Defendant.

CASE NO. 3:17-cv-05523-BHS

ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS

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This matter comes before the Court on Defendant Christopher L. Jenkins's ("Jenkins") motion to dismiss (Dkt. 39). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

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I. BACKGROUND

Plaintiff Western Institutional Review Board, Inc. ("WIRB") is a Delaware corporation with its headquarters in Puyallup, Washington. Dkt. 1. WIRB provides biosafety consulting to private companies and institutions devoted to scientific research.

1 Jenkins was a resident of St. Louis, Missouri, when he was hired as WIRB's Director of
2 Biosafety in 2012. Dkt. 30-1 at 2. In October 2013, Jenkins's job title changed to Director
3 of Consulting and one month later, on November 4, 2013, Jenkins and WIRB executed an
4 employment agreement ("the 2013 Contract"). Dkt. 1 at 10. The 2013 Contract provided
5 for: (1) a non-compete clause lasting for two years following termination, (2) a non-
6 solicitation agreement lasting for three years following termination, and (3) designation
7 of Washington State as venue and choice of law. Dkt. 1 at 11-13.

8 In or around November 2015, Jenkins resigned from full-time employment but
9 continued his relationship with WIRB as an independent contractor. On December 11,
10 2015, the parties executed a Contracted Services Agreement ("the 2015 Contract"),
11 which included non-compete and non-solicit clauses lasting one year following
12 termination. Dkt. 23 at 14 (under "Restrictive Covenants"). In addition, the agreement
13 included an integration clause in which the terms within that contract superseded all other
14 prior oral or written understandings and agreements between WIRB and Jenkins. *Id.* at
15 15. However, unlike the 2013 Contract, the 2015 Contract did not include a choice of law
16 and venue clause.

17 In July 2016, Jenkins terminated his relationship with WIRB and relocated to
18 Texas for his new employment with the University of Texas, Austin. On November 23,
19 2016, Alan Lefkowitz, Chief Legal Officer to WIRB, released Jenkins from the non-
20 compete clause of the 2013 Contract. Dkt. 10-1 at 42. Jenkins claims the release was
21 necessary for him to assist his former employer, WIRB, in securing a contract with his
22 new employer, the University of Texas. Dkt. 10 at 9.

1 On February 6, 2017, the University of Texas notified Jenkins that his
2 employment would be terminated in the following month. On February 22, 2017, Jenkins
3 formed his own business, Clinical Biosafety Services, LLC (“CBS”). Dkt. 10-1 at 49.
4 CBS thereafter contracted with and provided service for ViroMed, a former client to
5 WIRB.

6 On May 17, 2017, WIRB filed suit against Jenkins and CBS, seeking a temporary
7 restraining order, preliminary injunction, and permanent injunction from a state trial court
8 in Travis County, Texas (“Texas Court”). Dkt. 10-2. WIRB’s complaint alleged that
9 Jenkins violated the 2015 Contract by soliciting new business from WIRB’s previous
10 clients and misappropriating WIRB’s proprietary forms. The Texas Court granted the
11 temporary restraining order but denied the request for a preliminary injunction.

12 On July 10, 2017, WIRB filed another complaint against Jenkins in this Court
13 asserting similar claims for breach of contract and misappropriation and misuse of trade
14 secrets. Dkt. 1. The only noteworthy difference between the two complaints is that WIRB
15 alleges Jenkins breached the 2015 Contract in the Texas Court and the 2013 Contract in
16 this Court. *Id.* On August 1, 2017, Jenkins moved to dismiss, or alternatively stay, on
17 grounds of the first-to-file rule, forum non conveniens, the absence doctrine, failure to
18 state a claim, and lack of personal jurisdiction. Dkt. 10. On September 26, 2017, the
19 Court denied Jenkins’s motion to dismiss but granted a stay for 90 days so that the parties
20 could seek a ruling by the Texas Court as to whether the 2015 Contract supersedes the
21 2013 Contract. Dkt. 26. The Court noted that resolving the supersession issue will
22 preserve resources for the parties and avoid “inconsistent or duplicative findings.” *Id.*

1 On January 17, 2018, the Texas Court ruled that the 2015 Contract supersedes the
2 2013 Contract. Dkt. 40-2. On February 1, 2018, Jenkins moved to dismiss: (1) WIRB's
3 breach of contract and injunctive relief claims because the 2013 Contract is not
4 enforceable, and (2) WIRB's misappropriation and misuse of trade secrets claim because
5 this Court lacks personal jurisdiction over Jenkins. Dkt. 39. On February 20, 2018, WIRB
6 filed an opposition requesting denial of Jenkins's motion to dismiss or, in the alternative,
7 a stay regarding the contract issue because WIRB planned to appeal the Texas Court's
8 ruling. Dkt. 44. On February 23, 2018, Jenkins responded to WIRB's opposition to the
9 motion to dismiss. Dkt. 45. On March 15, 2018, WIRB notified this Court that it no
10 longer seeks to appeal the Texas Court's ruling on the issue of contract supersession. Dkt.
11 46.

12 II. DISCUSSION

13 A. Breach of Contract

14 Jenkins argues that WIRB's breach of contract claim should be dismissed because
15 the 2013 Contract, which this claim is based on, has been superseded and therefore no
16 longer enforceable. Dkt. 39 at 2. In Washington, a plaintiff claiming breach of contract
17 must prove: (1) that a valid agreement existed between the parties, (2) the agreement was
18 breached, and (3) the plaintiff was damaged. *Univ. of Wash. V. Gov't Emps. Ins. Co.*, 200
19 Wn. App. 455, 467 (citing *Leher v. State, Dep't of Social & Health Servs.*, 101 Wn. App.
20 509, 516 (2000)).

21 Here, the inquiry ends at the first step because, once the Texas Court ruled that the
22 2015 Contract superseded the 2013 Contract, WIRB no longer had a valid agreement to

1 support its breach of contract claim. *See Doty v. Brunswick Corp.*, 959 F.2d 240 (9th Cir.
2 1992) (once an agreement is superseded, “it cannot form the basis for a breach of contract
3 claim”). Although the law appears abundantly clear, WIRB argues that “a subsequent
4 contract not pertaining to precisely the same subject matter will not supersede an earlier
5 contract unless the subsequent contract has definitive language indicating it revokes,
6 cancels or supersedes that specific prior contract.” *URS Corp. v. Transpo Group, Inc.*,
7 2015 WL 419021 (W.D. Wash. Jan. 30, 2015) (citations omitted). WIRB is essentially
8 requesting that the Court engage in the exact same analysis that the Texas court engaged
9 in when it determined that the 2015 Contract superseded the 2013 Contract. The Court
10 declines to reevaluate the contracts and will give deference to the state court ruling.
11 Therefore, the Court grants Jenkins’ motion and dismisses WIRB’s breach of contract
12 claim.

13 **B. Personal Jurisdiction**

14 Next, Jenkins argues that WIRB’s remaining claim of misappropriation and
15 misuse of trade secrets should also be dismissed because this Court lacks personal
16 jurisdiction over Jenkins. Conversely, WIRB argues that personal jurisdiction has been
17 established because (1) Jenkins waived his affirmative defense under Fed. R. Civ. P.
18 12(b)(2), and (2) Jenkins’s alleged contacts with Washington creates specific jurisdiction.
19 Dkt. 44 at 2.

20 First, WIRB contends that Jenkins waived his defense of personal jurisdiction by
21 filing a notice of appearance (Dkt. 6) and by failing to raise the defense in his first motion
22 to dismiss (Dkt. 10). Under Fed. R. Civ. P. 12(h)(1), “a defendant waives any personal

1 jurisdiction defense he might otherwise have if he does not raise it in a responsive
2 pleading or in a motion to dismiss that precedes the responsive pleading.” *Freeney v.*
3 *Bank of America Corporation*, 2015 WL 4366439, *19 (C.D. Cal. Jul. 16, 2015).

4 However, a defendant’s notice of appearance prior to filing a motion to dismiss does not
5 constitute a waiver of personal jurisdiction, as long as the defense is raised in an instant
6 motion to dismiss or the first responsive pleading. *See Coe v. Philips Oral Healthcare*
7 *Inc.*, No. C13–518–MJP, 2014 WL 585858, *2 (W.D. Wash. Feb. 14, 2014); *Martin v.*
8 *United States*, No. C11–01146–JSW, 2012 WL 13572, *10 (N.D. Cal. Jan. 4, 2012).

9 Jenkins clearly raised a personal jurisdiction defense in his first responsive pleading, the
10 motion to dismiss. Dkt. 10 at 16. Therefore, the Court finds that Jenkins did not waive his
11 affirmative defense based on lack of personal jurisdiction.

12 Second, WIRB argues that even if the 2015 Contract supersedes the 2013
13 Contract, Jenkins’s employment with WIRB had a substantial connection with
14 Washington “by virtue of the 2013 Contract.” Dkt. 44 at 3. WIRB specifically refers to
15 the venue clause of the 2013 Contract which designates Washington as the exclusive
16 jurisdiction for any conflict between the parties.

17 Fed. R. Civ. P. 12(b)(2) governs the dismissal of an action based on lack of
18 personal jurisdiction. When a defendant moves to dismiss a complaint for lack of
19 personal jurisdiction, the plaintiff bears the burden of proving that jurisdiction is proper.
20 *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). Although the plaintiff may
21 not “simply rest on the bare allegations of its complaint,” uncontroverted allegations in
22 the complaint must be taken as true. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d

1 797, 800 (9th Cir. 2004) (citations omitted). If the motion is based on written materials
2 rather than an evidentiary hearing, “the plaintiff need only make a prima facie showing of
3 jurisdictional facts.” *Id.*

4 Where there are no applicable federal statutes governing personal jurisdiction, the
5 district court applies the law of the state in which the district court sits. *See* Fed. R. Civ.
6 P. 4(k)(1)(A); *Schwarzenegger*, 374 F.3d at 800 (citations omitted). Because
7 Washington’s long-arm statute mirrors the federal due process requirements, the
8 jurisdictional analysis under state law and federal law are the same. RCW 4.28.185.

9 To exercise personal jurisdiction over an out-of-state defendant, due process
10 requires that the defendant must have certain minimum contacts with the forum state so
11 that the exercise of jurisdiction does not offend traditional notions of fair play and
12 substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Due
13 process is satisfied if either “general” or “specific” jurisdiction is established over the
14 defendant. *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990).

15 A state may exercise general jurisdiction over a nonresident if the defendant
16 engages in “continuous and systematic general business contacts” that approximate
17 physical presence” in the forum state. *Schwarzenegger*, 374 F.3d at 801. “This is an
18 exacting standard because a finding of general jurisdiction permits a defendant to be
19 haled into court in the forum state to answer for any of its activities anywhere in the
20 world.” *Id.*

21 In contrast, specific jurisdiction will lie “when a case arises out of or relates to the
22 defendant’s contacts with the forum state.” *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th

1 Cir. 2015). The Ninth Circuit established a three-prong test in determining whether
2 specific jurisdiction exists: (1) the defendant has performed some act or consummated
3 some transaction within the forum or otherwise purposefully availed himself of the
4 privileges of conducting activities in the forum, (2) the claim arises out of or results from
5 the defendants' forum-related activities, and (3) the exercise of jurisdiction is reasonable.
6 *Schwarzenegger*, 374 F.3d at 802.

7 The plaintiff bears the burden as to the first two prongs, but if both are established,
8 then "the defendant must come forward with a 'compelling case' that the exercise of
9 jurisdiction would not be reasonable." *Boschetto*, 539 F.3d at 1016 (quoting
10 *Schwarzenegger*, 374 F.3d at 802). However, "[i]f the plaintiff fails at the first step, the
11 jurisdictional inquiry ends and the case must be dismissed." *Id.*

12 In this case, WIRB fails to allege any facts demonstrating Jenkins's "continuous
13 and systematic" business activities in the state of Washington. In fact, WIRB does not
14 dispute that Jenkins's full-time employment from 2012 to 2015 was exclusively within
15 St. Louis, Missouri and that Jenkins's services as WIRB's independent contractor were
16 done in Austin, Texas. Thus, WIRB has failed to make a prima facie case of general
17 jurisdiction.

18 Next, WIRB argues for specific jurisdiction because the 2013 Contract that the
19 parties entered into creates a substantial connection between Jenkins and Washington.
20 However, this argument is unpersuasive because the Texas Court's ruling rendered the
21 2013 Contract unenforceable; and therefore, the venue clause which designated
22 Washington as the forum may not be asserted against Jenkins. Furthermore, WIRB does

1 not present any alternative theories or applicable tests to show how Jenkins purposefully
2 availed himself of the privilege of conducting activities within Washington.

3 Therefore, since WIRB has failed to carry its burden of establishing jurisdiction,
4 the Court must dismiss WIRB's misappropriation and misuse of trade secrets claims
5 against Jenkins as well.

6 III. CONCLUSION

7 It is hereby **ORDERED** that Defendant's motion to dismiss (Dkt. 39) is
8 **GRANTED**. The Clerk shall enter **JUDGMENT** and close this case.

9 Dated this 17th day of April, 2018.

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12 BENJAMIN H. SETTLE
13 United States District Judge
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