

CONSOLIDATED CAUSE NO. CV-0081158

ROSIE YANAS et al.,	§	
<i>Plaintiffs,</i>	§	
	§	
MARK MCLEOD and GAIL MCLEOD,	§	
Individually and as Next Friends of	§	
AARON KYLE MCLEOD, et al,	§	
<i>Plaintiff-Intervenors,</i>	§	IN COUNTY COURT AT LAW NO. 3
	§	
vs.	§	
	§	
DIMITRIOS PAGOURTZIS, et al,	§	
<i>Defendants.</i>	§	
_____ /	§	OF GALVESTON COUNTY, TEXAS
	§	
WILLIAM “BILLY” BEAZLEY	§	
AND SHIRLEY BEAZLEY,	§	
INDIVIDUALLY AND	§	
AS NEXT FRIENDS OF T.B., A	§	
MINOR, <i>Plaintiffs</i>	§	
	§	
vs.	§	
	§	
ANTONIOS PAGOURTZIS, et al,	§	
<i>Defendants.</i>	§	

**DEFENDANT RED STAG FULFILLMENT LLC’S SPECIAL APPEARANCE UNDER
TEXAS RULE OF CIVIL PROCEDURE 120A**

Pursuant to TEX. R CIV. P. 120a, defendant Red Stag Fulfillment, LLC (“Red Stag”) files this Special Appearance and objects to the exercise of personal jurisdiction over it. Red Stag asks the Court to sustain its Special Appearance under Rule 120a and dismiss the claims against it for lack of personal jurisdiction. Red Stag is a third-party warehouse order fulfillment company from Tennessee. Exercising personal jurisdiction over Red Stag in Texas based on allegations of fulfilling another company’s product orders at the behest of the other company, and placing those orders (from its warehouse in Tennessee) with a third-party common carrier for delivery into Texas

would be unprecedented, unconstitutional, and counter to multiple cases which have addressed this precise question.

I. SUMMARY

1. Plaintiffs' claims arise from Dimitrios Pagourtzis's criminal shooting at Santa Fe High School on May 18, 2018. Plaintiffs are victims of Pagourtzis's crimes.¹

2. This lawsuit was filed on May 24, 2018. The consolidated action includes two plaintiff groups – the “**Yanas Plaintiffs**” and the “**Beazley Plaintiffs**.”² Both plaintiff groups originally named Pagourtzis and his parents as defendants, alleging various negligence and intentional torts. On March 4, 2020, the Yanas Plaintiffs filed their Third Amended Petition and Request for Disclosure (the “**Yanas TAP**”). On April 13, 2020, the Beazley Plaintiffs filed their First Amended Petition and Request for Disclosure (the “**Beazley FAP**”). Both petitions add five Tennessee residents as defendants: (1) Luckygunner, LLC (“**LuckyGunner**”), (2) Red Stag, (3) Mollenhour Gross, LLC (“**MG**”), (4) Jordan Mollenhour, and (5) Dustin Gross (collectively, the “**Tennessee Defendants**”).

3. On May 1, 2020, before answering and without waiving any special appearance, Red Stag timely removed this case to the United States District Court for the Southern District of Texas, Galveston Division pursuant to 28 U.S.C. §§ 1331 and 1441(c). *See* Notice of Removal;

¹ As used herein, the term “**Plaintiffs**” means, collectively, the Plaintiffs and Plaintiff-Intervenors and the Plaintiffs in Case Number 18-CV-1560, filed on November 9, 2018 and consolidated into the above-captioned matter on November 13, 2019. *See* Order on Unopposed Mot. to Transfer and Consolidate. The term “**Yanas Plaintiffs**” means the claimants in the Third Amended Petition, filed on March 4, 2020 (Rosie Yanas and Christopher Stone, individually and as next friends of Christopher Jake Stone; Mark McLeod and Gail McLeod, individually and as next friend of Aaron Kyle McLeod; Pamela Stanich, individually and as next friend of Jared Conrad Black; Shanna Claussen, individually and as next friends of Christian Riley Garcia; Clayton Horn; Rhonda Hart, individually and as the representative of the estate of Kimberly Vaughan; Abdul Aziz and Farah Naz, individually and as next friends of Sabika Aziz Sheikh, and Flo Rice, even though such plaintiffs also include parties who intervened into the case). The term “**Beazley Plaintiffs**” means the claimants in the First Amended Petition filed on April 13, 2020 (William Beazley and Shirley Beazley).

² *Supra* at fn. 1.

see also Antonio v. Rico Marino, S.A., 910 S.W.2d 624, 629 (Tex. App.—Houston [14th Dist.] 1995, no writ) (defendant can remove to federal court before filing its special appearance without waiver); *see also* 28 U.S.C. § 1446(b)(2)(B). On December 7, 2020, the United States District Court rendered an order remanding this case and sent a certified copy of the order to the clerk of the court. *See* Certified Copy of Remand Order. The Plaintiffs served and filed a certified copy of the remand order on December 18, 2020, making Red Stag’s deadline to answer or otherwise respond to the Yanas TAP and Beazley FAP January 4, 2021. *See* Tex. R. Civ. P. 237a (providing 15-day answer deadline for cases remanded from federal court).³

4. Red Stag objects to being haled into court in Texas and asks the Court to dismiss the claims against it for lack of personal jurisdiction. Texas courts may exercise personal jurisdiction over a nonresident *only* if “(1) the Texas long-arm statute authorizes the exercise of jurisdiction, and (2) the exercise of jurisdiction is consistent with federal and state constitutional due-process guarantees.” *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007); *Old Republic Nat’l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 558–59 (Tex. 2018).

5. The Court should grant Red Stag’s Special Appearance because:

- **Red Stag is a *non-resident* of Texas.** The Plaintiffs’ petitions allege Red Stag is a non-resident of Texas, and they do not allege facts sufficient to support personal jurisdiction over Red Stag in a Texas state court because they have not pleaded any act or omission by Red Stag – as opposed to *other* parties – that is sufficient to subject Red Stag to general or specific jurisdiction in Texas.⁴ As a result, the Plaintiffs’ have not met their initial burden.
- **Red Stag does not have minimum contacts with Texas.** Even if the Plaintiffs had pleaded adequate connections with Texas (and they did not), Red Stag submits with

³ *See also Kashan v. McLane Co.*, No. 03-11-00125-CV, 2012 WL 2076821, at *1 (Tex. App.—Austin June 7, 2012) (“Rule 237a places the burden on the plaintiff to file the remand order with the state trial court and to provide written notice to the attorneys of record for all adverse parties. This requirement serves to provide a . . . certain answer date . . .”).

⁴ LuckyGunner, an online ammunition seller, is alleged to have sold ammunition to defendant Dimitrios Pagourtzis.

this Special Appearance an affidavit negating all potential bases for personal jurisdiction over it in Texas. (*See* Affidavit of Eric McCollom, attached as Exhibit A.) As this affidavit shows, Red Stag has no connection to Texas sufficient to hale it into Texas court for purposes of general or specific personal jurisdiction.

- **Exercising jurisdiction over Red Stag would be unprecedented and unconstitutional.** Other courts (including a Texas federal court) have addressed whether third-party fulfillment and logistics companies can be haled into a foreign jurisdiction on allegations similar to those alleged against Red Stag here. Those courts have dismissed the fulfillment companies for lack of personal jurisdiction, holding that fulfilling another company's product orders at their behest does not constitute sufficient purposeful availment or minimum contacts to establish personal jurisdiction.

II. PERTINENT FACTUAL ALLEGATIONS

6. Plaintiffs sued Red Stag for negligence, negligence *per se*, and derivative claims of civil conspiracy and gross negligence. (Yanas TAP at ¶¶ 125-141, 152-165, 166-174, 185-189; Beazley FAP at ¶¶ 41-49, 50-51, 75-78, 79-80.) Plaintiffs' petitions contain the following, bare-bones allegations concerning personal jurisdiction and Red Stag's relationship with Texas: Red Stag is a Tennessee limited liability company with its home office in Knoxville, Tennessee; Red Stag does not maintain a place of business in Texas and is not amenable to service in Texas; rather, Red Stag "conducts business in the State of Texas" and the lawsuit arose from Red Stag's "performance of business in Texas." (Yanas TAP at ¶ 14; Beazley FAP ¶ 15.)

7. Plaintiffs' claims against Red Stag are predicated on the alleged conduct of another party, LuckyGunner. Plaintiffs allege LuckyGunner sold ammunition to Pagourtzis through its website. (Yanas TAP at ¶¶ 21-24, 73-78, 100, 128, 133, 153, 187; Beazley FAP ¶¶ 30-32, 45, 48.) With respect to the sales transaction, Plaintiffs allege Pagourtzis (1) went to Luckygunner.com; (2) purchased ammunition with a prepaid American Express gift card; and (3) was required to "check a box [on LuckyGunner's website] agreeing to a standard set of terms and conditions, one of which is that the purchaser [Pagourtzis] is not under 21." (Yanas TAP at ¶¶ 73, 74, 129, 130,

154, 155; *see also* Beazley FAP at ¶¶ 30-32, 45, 47, 48.) Plaintiffs then allege, “Luckygunner approved his order and sent it to Red Stag for fulfillment.” (Yanas TAP at ¶75; *see also* Beazley FAP at ¶31.)

8. Red Stag’s alleged unlawful acts are tangential to its involvement with LuckyGunner. While Plaintiffs allege LuckyGunner does not verify some of its customers’ ages, Plaintiffs allege Red Stag: (1) knows that LuckyGunner does not verify the age of most of its customers [Yanas TAP at ¶¶131, 134, 157, 159; Beazley FAP at ¶ 47]; (2) mailed ammunition to Pagourtzis via FedEx without verifying Pagourtzis’s age [Yanas TAP at ¶¶75, 77, 135; Beazley FAP ¶¶47, 49 61, 63, 120, 136, 138]; and, as a result, (3) violated 18 U.S.C § 922(x)(1)(B) and aided and abetted the violation of 18 U.S.C § 922(x)(2)(B). (Yanas TAP at ¶¶140, 161; Beazley FAP ¶76.)

III. ARGUMENT AND AUTHORITIES

A. Under Rule 120a, Plaintiffs bear the initial pleading burden to establish personal jurisdiction—a burden that Plaintiffs cannot meet.

9. In a special appearance, the plaintiff carries the initial burden to allege facts that could support a Texas court’s exercise of personal jurisdiction over a defendant. *Kelly v. Gen. Interior Const., Inc.*, 301 S.W.3d 653, 658 (Tex. 2010). If the plaintiff meets its initial burden, the burden then shifts to the defendant to negate all bases of personal jurisdiction alleged by the plaintiff. *Id.* If, however, the plaintiff fails to meet its initial burden, the defendant need only prove that it is not a Texas resident to negate jurisdiction. *See id.* at 658-59.

10. Neither the Yanas TAP nor the Beazley FAP contain allegations demonstrating any tortious act or business conduct by Red Stag in Texas. *See Old Republic Nat’l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 558–59 (Tex. 2018) (the long-arm statute is satisfied when a defendant commits a tort in whole or in part in Texas); *Kelly*, 301 S.W.3d at 657–58, 660-61 (merely pleading

a defendant violated Texas law is not enough to confer personal jurisdiction in Texas without showing some relevant act by defendant occurring in Texas).

11. When, as here, a plaintiff fails to allege any act by a defendant in Texas, a defendant can sustain its burden of negating all basis of personal jurisdiction by proving it is a non-resident. *Siskind v. Villa Found. for Educ., Inc.*, 642 S.W.2d 434, 438 (Tex. 1982) (holding that in view of the plaintiff's failure to allege any act by these individuals in Texas, the defendants sustained their burden by proving nonresident status). Here, both the Yanas TAP and Beazley FAP establish Red Stag is a non-resident of Texas and, instead, is a resident of Tennessee. (Yanas TAP at ¶ 14; Beazley FAP at ¶ 15.) As a result, Plaintiffs have failed to meet their initial pleading burden and, conversely, their allegations affirm only that Red Stag is not subject to personal jurisdiction in Texas. (*Id.*)

12. Red Stag further attests that Plaintiffs cannot establish personal jurisdiction over it in Texas. To underscore this reality, Red Stag, through its President and Chief Operating Officer, Eric McCollom, submits an affidavit with this special appearance. (*See* Ex. A.) The affidavit affirms this Court's lack of personal jurisdiction, either general or specific, over Red Stag in this case.

B. Plaintiffs do not (and cannot) allege facts that establish the requisite minimum contacts between Red Stag and Texas for either "general" or "specific" personal jurisdiction.

13. Even assuming the Plaintiffs had carried their initial burden under Rule 120a (and they did not), the Plaintiffs cannot establish personal jurisdiction over Red Stag.

14. A court may have either "general" or "specific" personal jurisdiction. *Bell*, 549 S.W.3d at 559. These analyses require the Court to determine whether the defendants have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend

‘traditional notions of fair play and substantial justice.’” *Id.* (citing *Int’l Shoe Co.*, 326 U.S. at 316 and *Moki Mac River Expeditions*, 221 S.W.3d at 575).⁵ A defendant establishes minimum contacts with a state when it “purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” *Bell*, 549 S.W.3d at 559 (citing *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009)). The analytical framework for jurisdiction is well-known: (1) only the defendant’s contacts with the forum are relevant, not the unilateral activity of another party or a third person; (2) the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated; and (3) the defendant must seek some benefit, advantage or profit by availing itself of the jurisdiction. *Bell*, 549 S.W.3d at 559.

15. General personal jurisdiction is established when a defendant’s contacts “are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.” *M & F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co., Inc.*, 512 S.W.3d 878, 885 (Tex. 2017; *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)). The inquiry requires a more demanding minimum contacts analysis with a “substantially higher threshold” demonstrating *contacts so pervasive that the defendant would be subject to jurisdiction in the state for any dispute*. *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 168 (Tex. 2007); *Searcy*, 496 S.W.3d at 72-73.

⁵ A personal jurisdiction analysis requires an examination of both state and federal law. *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 66 (Tex. 2016). The broad language of the Texas long-arm statute permits the trial court’s jurisdiction to “reach as far as the federal constitutional requirements of due process will allow.” *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575 (Tex. 2007) (internal quotation marks omitted); *see also* Tex. Civ. Prac. & Rem. Code § 17.042. However, allegations that suffice under the Texas long-arm statute—for example, an assertion that the defendant committed a tort in Texas—do not necessarily satisfy constitutional due process requirements. *See Michiana Easy Livin’ Country, Inc. v. Holten*, 168 S.W.3d 777, 788 (Tex. 2005).

16. Specific personal jurisdiction in Texas over a nonresident defendant requires (1) the defendant's purposeful availment of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws, and (2) a "substantial connection" between those purposeful activities and the operative facts of the litigation, also called "relatedness." *M & F Worldwide Corp.*, 512 S.W.3d at 890.

17. The first prong, purposeful availment, requires contacts that the defendant "purposefully directed" into the forum state. *Searcy*, 496 S.W.3d at 67 (citing *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005)). The second prong, relatedness, "lies at the heart of specific jurisdiction by defining the required nexus between the nonresident defendant, the litigation, and the forum." *Moki Mac River Expeditions*, 221 S.W.3d at 579. In other words, specific personal jurisdiction can be established if the defendant's alleged liability arises out of the activity conducted within the forum. *Id.* at 576.

i. Plaintiffs' allegations do not support "general" personal jurisdiction.

18. Plaintiffs have not alleged any contacts between Red Stag and Texas that are "continuous and systematic" so as to render it "at home" in Texas. *See Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.") (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)); *see also See Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 565 (Tex. 2018).

19. To the contrary, the Yanas TAP and Beazley FAP make clear that Red Stag is at home only in Tennessee. (Yanas TAP at ¶ 14; Beazley FAP at ¶ 15.) Further, the Beazley FAP has failed to make even a general allegation that the Court has personal jurisdiction over Red Stag.

(See Beazley FAP at ¶¶ 20-22.) Ostensibly, the Yanas Plaintiffs’ general personal jurisdictional allegations are solely that Red Stag somehow “conducts business” in Texas. (Yanas TAP at ¶ 14.) This is not enough. See *Searcy*, 496 S.W.3d at 72-73 (finding no general personal jurisdiction over foreign company where company had no bank accounts, offices, property, employees or agents in Texas, and where company’s meetings in Texas with a Texas company were not so continuous and systematic to deem it essentially at home in Texas).

20. The paradigm locations where a corporation is at home are its place of incorporation and principal place of business. *Daimler AG*, 571 U.S. at 137 (applying the same standard to a corporation and limited liability company). While a corporation may be at home in other locations “in an exceptional case,” the general jurisdiction inquiry “calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide” because “[a] corporation that operates in many places can scarcely be deemed at home in all of them.” *Id.* at 139 n.19, 20. As an illustration of these principals, FedEx Corporation (which is incorporated in Delaware and has its principal place of business in Tennessee) and FedEx Corporation Services, Inc. are not sufficiently “at home” in Texas to subject them to general jurisdiction here. *FedEx Corp. v. Contreras*, No. 04-19-00757-CV, 2020 WL 4808721, at *8 (Tex. App.—San Antonio, Aug. 19, 2020) (concluding no general or specific jurisdiction and that allegations of ownership of subsidiary freight company insufficient to establish jurisdiction).

21. Plaintiffs’ allegations against Red Stag do not demonstrate minimum contacts with Texas and are, therefore, insufficient to render Red Stag subject to general personal jurisdiction in Texas.

ii. Plaintiffs’ allegations do not support “specific” personal jurisdiction.

22. Nor can Plaintiffs support a “specific” personal jurisdiction finding in the face of

federal due process requirements. Federal due process requires both (1) minimum contact with Texas and (2) a finding that exercising personal jurisdiction would not offend “traditional notions of fair play and substantial justice.” *See Moki Mac*, 221 S.W.3d at 575.

23. The only alleged business conducted by Red Stag for the purposes of specific personal jurisdiction are Red Stag’s business dealings with LuckyGunner—a separate Tennessee limited liability company. (Yanas TAP at ¶¶ 62, 75, 76; *see also id.* at ¶ 13; Beazley FAP at ¶ 33, 79.)⁶ LuckyGunner – not Red Stag – is alleged to have had purposeful contact with Texas or a Texas resident:

- Pagourtzis visited defendant LuckyGunner’s website where he ordered and purchased ammunition [Yanas TAP at ¶¶ 21-24, 100; Beazley FAP at ¶¶ 30-32];
- LuckyGunner approved the order and sold the ammunition to Pagourtzis [Yanas TAP at ¶¶ 73-78, 128, 133, 153, 187; FAP 45, 48];
- LuckyGunner then sent the order for fulfillment and mailing by Red Stag [Yanas TAP at ¶¶ 62, 75, 76; FAP at ¶33];
- Red Stag mailed the order via FedEx to Pagourtzis [Yanas TAP at ¶¶ 41, 75-77, 131, 134, 156, 63; FAP at ¶ 33];
- Pagourtzis used the ammunition “sold” and “shipped” or “provided” to him by LuckyGunner to perpetrate his crimes. (Yanas TAP at ¶ 80; Beazley FAP at ¶ 34.)

Missing from the petitions is any allegation that Red Stag had contact with Pagourtzis or anyone in Texas, let alone that it somehow had Texas-specific involvement in the alleged transaction between LuckyGunner and Pagourtzis.

24. Red Stag’s alleged fulfillment of a product order to a Texas resident at the behest of another company cannot form the basis of the requisite purposeful availment or minimum

⁶ The only plausible inference from two Tennessee companies doing business with each other is that the business was conducted in Tennessee.

contacts with Texas. The Texas Supreme Court has expressly rejected the act of shipping a product into the State, alone, as a basis for establishing personal jurisdiction. *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 788 (Tex. 2005) (denying personal jurisdiction over Indiana seller who knew the product he sold was going to Texas because “[i]f a seller of chattels is subject to suit wherever a customer requests delivery, then the chattel has become its agent for service of process—a conclusion the United States Supreme Court has [also] expressly rejected.”).

25. Absent an allegation of “any act *purposefully directed* toward selling or distributing” a product in Texas, foreseeability that the product will enter Texas alone “cannot create minimum contacts between [Red Stag] and Texas.” See *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996) (emphasis added) (finding no purposeful availment by foreign seller of asbestos even after shipping hundreds of tons of raw asbestos to Houston where there was no evidence that the seller participated in the decision to send it there); *11500 Space Ctr., L.L.C. v. Private Capital Grp., Inc.*, 577 S.W.3d 322, 335 (Tex. App.—Houston [1st Dist.] 2019) (finding Utah loan servicer’s fulfillment of its obligations to Utah lender who financed a Texas business did not indicate the servicer chose to enter the state of Texas and conduct business there and, thus, did not purposefully avail itself of Texas courts).

26. Indeed, courts around the country (including the District Court for the Southern District of Texas) have rejected personal jurisdiction based on similar conduct as alleged here against Red Stag. For example, in *US LED, Ltd. v. Nu Power Assocs., Inc.*, No. CIV.A H-07-0783, 2008 WL 4838851 (S.D. Tex. Nov. 5, 2008), the plaintiff filed suit in Texas against a manufacturer of power supply units for alleged defects in the units. *Id.* at *1. The plaintiff also sued RSI (a Nevada corporation), which was the Nevada-based warehouse operator that shipped the units to the plaintiff. *Id.* The court held it did not have personal jurisdiction over RSI because RSI had

not purposefully availed itself of Texas. *Id.* The court found the relationship between the manufacturer and the plaintiff did not involve RSI because the manufacturer had sent the units to RSI's Nevada warehouse and directed RSI to ship the units to the plaintiff. *Id.* at **1, 4-5. RSI's shipping of the units to a Texas resident at the behest of a third party did not support a finding of purposeful availment of Texas. *Id.* at **4-5.

27. Multiple similar cases are illustrative:

- *LG Corp. v. Huang Xiaowen*, No. 16-CV-1162 JLS (NLS), 2017 WL 2504949, **4-5 (S.D. Cal. June 8, 2017) (rejecting personal jurisdiction over a New Jersey fulfillment company, N&K, because it did not target anyone known to be a California resident; it did not make any independent decisions to ship the product to any buyer in California; the client seller of the product sent N&K a communication directing it to ship the product to a California address; N&K did not operate a website or otherwise market or sell any products to California consumers; rather, it merely fulfilled shipments to different states based on consumer purchases from other websites)
- *C & A Int'l, LLC v. S. Bay Distribution*, No. 12-CV-180-JED-FHM, 2013 WL 5937432, *4 (N.D. Okla. Nov. 5, 2013) (rejecting personal jurisdiction over a California third-party logistics company (South Bay) and holding, "South Bay cannot be said to have reached out into Oklahoma and purposefully availed itself of the benefit of doing business in Oklahoma. Indeed, the business efforts of South Bay have been directed to its warehouse in California, where [the plaintiff's] products were stored and from which [the plaintiff's] products were distributed." And, like Red Stag in this case, South Bay did not purposefully avail itself of the forum state because "[a]ny such shipments to Oklahoma [by South Bay] were the result of the activities of third parties; namely, [the plaintiff's] customers. The unilateral activity of a third party cannot constitute purposeful availment.")
- *Posada v. Big Lots, Inc.*, No. 10-CV-5693 DMC MF, 2011 WL 4550158, *3 (D.N.J. Sept. 29, 2011) (rejecting personal jurisdiction over a Pennsylvania distribution center and finding defendant's operation of a "distribution center that serves as a drop off/pick up location for interstate deliveries is not a basis for finding that [the defendant] purposefully availed itself of the laws and benefits of the states where those deliveries were made.")

28. Like the defendants in these cases who are involved in third-party logistics and distribution of other companies' products, Red Stag's alleged contact with Texas is that it mailed or shipped a product order to Texas at the behest of LuckyGunner, *i.e.*, after (1) Pagourtzis purchased the product from LuckyGunner, (2) LuckyGunner approved the order, and (3) LuckyGunner sent the order to Red Stag's Tennessee warehouse for fulfillment. (Yanas TAP at ¶¶ 21-24, 62, 73-78, 100, 128, 133, 153, 187; Beazley FAP at ¶¶ 30-34, 45, 48.) Plaintiffs have not alleged Red Stag purposefully availed itself of the laws of Texas. The result with respect to Red Stag in this case should be no different than the results outlined above: no specific or general jurisdiction and dismissal for the lack of personal jurisdiction.

C. Red Stag's affidavit negates all bases for personal jurisdiction in Texas.

29. Assuming, *arguendo*, Plaintiffs' jurisdictional allegations could satisfy their initial burden (they cannot), Red Stag's affidavit rebuts and eliminates any contention that Texas courts can exercise either general or specific personal jurisdiction over it.

30. With respect to the lack of general personal jurisdiction, the affidavit of Red Stag's President and Chief Operating Officer affirms that general jurisdiction does not exist in Texas:

- Red Stag is a warehouse order fulfillment company, organized under the laws of Tennessee, and headquartered in Knoxville, Tennessee. (Ex. A at ¶¶ 3-4.)
- Red Stag is also registered as a foreign limited liability company in the State of Utah because its only non-Tennessee facility is located in Salt Lake City, Utah. (*Id.* at ¶ 5.)
- All of Red Stag's employees are located in Tennessee or Utah, with one employee located in Georgia. (*Id.* at ¶ 6.)
- Red Stag stores, picks, and packs goods owned by clients of Red Stag for delivery to those clients' end-customers. (*Id.* at ¶¶ 7, 10-17.)
- Red Stag does not currently, and has never conducted business in Texas. (*Id.* at ¶ 18.)

- Red Stag is not currently, and has never been registered to do business in Texas. (*Id.* at ¶ 19.)
- Red Stag does not currently, and has never paid taxes in Texas including franchise taxes. (*Id.* at ¶ 22.)
- Red Stag does not currently, and has never maintained a bank account in Texas. (*Id.* at ¶ 23.)
- Red Stag does not currently, and has never maintained any property interests in Texas. (*Id.* at ¶ 24.)
- No Red Stag employee or agent has ever visited Texas to conduct business as a representative of Red Stag. (*Id.* at ¶ 25.)
- Red Stag has never maintained a website from which Texas consumers can purchase products. (*Id.* at ¶ 26.)

Red Stag is *not* at home in Texas—rather, it conducts business from its home in Tennessee, or its warehouse in Utah.

31. With respect to specific personal jurisdiction, Red Stag’s affidavit, again, affirms it did not purposefully avail itself of the privilege of conducting business in Texas based on the facts at issue in this case:

- Red Stag does not operate (and has never operated) a website that sells or markets its clients’ products to Texas consumers. (Ex. A at ¶ 26.)
- Red Stag is paid by its clients (not its clients’ end-customers) for fulfilling orders pursuant to service agreements with its clients. (*Id.* at ¶ 16.)
- Red Stag does not own or hold title in the products it stores, picks and packs on behalf of its clients. (*Id.* at ¶ 10.)
- Red stag does not ship products other than as directed by its clients, based on the end-customer’s address submitted by the client. Nor does Red Stag make independent decisions to ship products other than as directed by its clients. (*Id.* at ¶¶ 10-11, 14-15.)
- All of the above facts are true with respect to the LuckyGunner ammunition orders at issue in this case. (*Id.* at ¶ 17.)

This activity does not support a finding that Red Stag purposefully availed itself of Texas, and it does not vest this court with specific personal jurisdiction over Red Stag in this case. *US LED, Ltd.*, 2008 WL 4838851, **1, 4-5; *LG Corp.*, 2017 WL 2504949, at **4-5; *S. Bay Distribution*, 2013 WL 5937432, at *1; *Posada*, 2011 WL 4550158, at *3.

32. A finding of specific personal jurisdiction based on the act of fulfilling a retailer client’s product orders and placing those orders with a third-party carrier (directed by the client) for delivery into Texas would be unprecedented and unconstitutional. Because the Court cannot exercise either general or specific personal jurisdiction over Red Stag, this Court should dismiss Plaintiffs’ claims against Red Stag for lack of personal jurisdiction.⁷

D. The Court should deny leave to conduct jurisdictional discovery against Red Stag.

33. Jurisdictional discovery would not add any facts significant enough to change the personal jurisdiction analysis with respect to Red Stag. Furthermore, Plaintiffs have not alleged any facts sufficient to hale Red Stag into Texas court. Allowing jurisdictional discovery under these circumstances would permit an improper fishing expedition. *In re Deutsche Bank Sec. Inc.*, No. 03-14-00744-CV, 2015 WL 4079280, *9 (Tex. App.—Austin, July 3, 2015) (“Requiring a foreign defendant to respond to the types of extensive personal-jurisdiction requests at issue in this case when the plaintiff has made no allegation that the defendant has the type of minimum contacts

⁷ Plaintiffs’ “civil conspiracy” allegations are irrelevant to personal jurisdiction. Texas does not recognize an alleged conspiracy as a basis to exercise personal jurisdiction over non-resident defendants. *Nat’l Indus. Sand Ass’n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995) (“[W]e decline to recognize the assertion of personal jurisdiction over a nonresident defendant based solely upon the effects or consequences of an alleged conspiracy with a resident in the forum state. Instead, we restrict our inquiry to whether [the defendant] itself purposefully established minimum contacts such that it would satisfy due process[.]”).

in the forum needed to satisfy due-process concerns would allow for improper fishing expeditions”).

34. The Texas Supreme Court has held that such fishing expeditions are impermissible where the “information sought does not appear reasonably calculated to lead to the discovery of evidence that has a tendency ‘to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.’” *In re Nat’l Lloyds Ins. Co.*, 449 S.W.3d 486, 489 (Tex. 2014). Further, “special-appearance depositions are justified only when the plaintiff can identify some additional, non-cumulative information that is relevant to the jurisdictional inquiry which the deposition is likely to produce.” *In re Miscavige*, 436 S.W.3d 430, 439 (Tex. App.—Austin, 2014) (citing *Moncrief Oil International, Inc. v. OAO Gazprom*, 414 S.W.3d 142, 157–58 (Tex.2013)). Plaintiffs have not alleged, nor can they identify further information relevant to the jurisdictional inquiry.

35. As detailed above, Plaintiffs have not alleged facts to support personal jurisdiction over Red Stag under a general or specific analysis. Furthermore, Plaintiffs cannot—no matter what facts in discovery they seek—overcome the attested facts in Red Stag’s affidavit, which negate all bases for finding personal jurisdiction in this case.

36. Further discovery in an attempt conjure facts that would not lead to relevant information would cause undue burden to Red Stag, unnecessary expense, harassment, annoyance, and invasion of its personal, constitutional, and property rights. *See* Tex. R. Civ. P. 192.6. Accordingly, jurisdictional discovery would be improper in this case, and the Court should sustain Red Stag’s Special Appearance.

37. Red Stag reserves the right to amend its Special Appearance and/or file additional papers in support thereof, if and as necessary, in accordance with the Texas Rules of Civil Procedure.

IV. CONCLUSION

38. Plaintiffs' Petitions fail to allege or establish that personal jurisdiction exists in Texas over Red Stag. To remove any doubt, Red Stag submits its affidavit negating all possible bases for personal jurisdiction over it. Therefore, Red Stag respectfully requests (1) that its Special Appearance be set for hearing on notice to Plaintiffs, (2) that upon such hearing this Special Appearance be sustained, and (3) that the entire proceeding against it be dismissed.

Respectfully submitted,

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**ATTORNEYS FOR RED STAG
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was duly furnished to the following counsel of record via email and eFileTexas on this 23rd day of December, 2020, in accordance with the Texas Rules of Civil Procedure:

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/s/ A.M. “Andy” Landry III

A.M. “Andy” Landry III

EXHIBIT A

Affidavit of Eric McCollom on behalf of
Red Stag Fulfillment, LLC

**AFFIDAVIT OF ERIC MCCOLLOM IN SUPPORT OF
RED STAG FULFILLMENT, LLC'S SPECIAL APPEARANCE**

I, Eric McCollom, being duly sworn on oath, depose and state as follows:

1. I am over eighteen and am competent to make the following statements based upon my personal knowledge.
2. I am President and Chief Operating Officer of Red Stag Fulfillment, LLC ("Red Stag"), and I am familiar with Red Stag's business activities.
3. Red Stag is a warehouse order fulfillment company headquartered in Knoxville, Tennessee, with its principal place of business at 5502 Island River Drive, Knoxville, TN 37914.
4. Red Stag is a limited liability company organized under the laws of the State of Tennessee.
5. Red Stag is registered as a foreign limited liability company in the State of Utah because Red Stag's only non-Tennessee facility is in Salt Lake City, Utah.
6. Red Stag currently employs approximately 214 employees, all but one of whom are located in Tennessee and Utah. The lone other employee is located in Georgia.
7. Red Stag stores, picks, and packs goods owned by clients of Red Stag for delivery to those clients' end-customers.
8. Red Stag currently services over 100 clients, predominantly composed of ecommerce retailers across a wide variety of product categories, including for example, furniture, bicycles, pet food, home goods, and consumer electronics. Red Stag does not hold an ownership interest in any of its clients.
9. Red Stag has received multiple awards recognizing its status in the warehouse fulfillment industry, including: Entrepreneur Magazine "Top Entrepreneurial Companies in

America, #89" (2017); PCMag.com "Best Ecommerce Fulfillment Services" (2018, 2019, 2020); and Multichannel Merchant "Top 3PL Providers" (2018, 2019, 2020).

10. Red Stag does not own or hold title in the products it stores, picks, and packs on behalf of its clients.

11. When a client's end-customer orders a product from a client of Red Stag, the client sends Red Stag an electronic communication directing Red Stag to pick, pack, and ship the product to the client's end-customer.

12. The general process to pick, pack, and ship the product is as follows:

- a. A Red Stag worker picks the product from its storage location, where the product is already in the client's packaging;
- b. The product is transported to a packing station;
- c. At the packing station, the product receives additional shipping packaging (if necessary), and a shipping label is affixed;
- d. After a shipping label is affixed, the product is placed on the truck of the delivery carrier, such as Federal Express.

13. All of the activity outlined in Paragraph 12 takes place only within the walls of Red Stag's warehouses located in Tennessee and Utah.

14. Red Stag does not ship products other than as directed by its clients, based on the end-customer's address submitted by the client.

15. Red Stag does not make independent decisions to ship products other than as directed by its clients, based on the end-customer's address submitted by the client.

16. Red Stag is paid by its clients (not its clients' end-customers) for fulfilling orders pursuant to service agreements with its clients.

17. All of the above is true with respect to the ammunition orders sold by LuckyGunner, LLC to Dimitrios Pagourtzis in March 2018.

18. Red Stag does not currently, and has never, conducted business in Texas.

19. Red Stag does not currently, and has never, registered to do business in Texas.

20. Red Stag does not currently, and has never, maintained an office or other physical facility in Texas.

21. Red Stag does not currently, and has never, employed any employees in Texas.

22. Red Stag does not currently, and has never, paid any taxes in Texas including franchise taxes.

23. Red Stag does not currently, and has never, maintained any bank accounts in Texas.

24. Red Stag does not currently, and has never, maintained any property interests in Texas.

25. No Red Stag employee or agent has ever visited Texas to conduct business.

26. Red Stag does not currently, and has never, maintained a website from which Texas consumers can purchase products.

FURTHER AFFIANT SAYETH NOT.



Eric McCollom,
on behalf of Red Stag Fulfillment, LLC

I, Misty Crisp, a notary public of Blount County, Tennessee, certify that Eric McCollom, whose name is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of this instrument, he executed the same voluntarily for and as the act of said corporation.

Subscribed and sworn before me on December 22, 2020.

Misty Crisp
Notary Public, State of Tennessee

