Cohen v. Continental Motors, Inc., 2020 NCBC Order 12.

STATE OF NORTH CAROLINA NASH COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 15 CVS 1134
FRED COHEN, Executor of the Estate of DENNIS ALAN O'NEAL, Deceased, and FRED COHEN, Executor of the Estate of DEBRA DEE O'NEAL, Deceased, Plaintiffs, v. CONTINENTAL MOTORS, INC. (f/k/a TELEDYNE CONTINENTAL MOTORS, INC. and/or TELEDYNE CONTINENTAL MOTORS); and AIRCRAFT ACCESSORIES OF OKLAHOMA, INC., Defendants.	**ORDER ON CONTINENTAL MOTORS, INC.'S 12(B)(2) MOTION TO DISMISS**

1. THIS MATTER is before the Court on Defendant Continental Motors, Inc.'s ("Continental") Motion to Dismiss for Lack of Personal Jurisdiction (the "Motion"). (ECF No. 66.) For the reasons stated below, the Court should GRANT the Motion.

A. Procedural and Factual Background

2. This litigation arises from the deaths of Debra Dee O'Neal and Dennis Alan O'Neal (the "O'Neals") during or shortly after the crash of their Lancair/Cessna LC-42 aircraft (the "Accident Aircraft") near Winston-Salem, North Carolina, on March 31, 2013. Fred Cohen ("Plaintiff"), as executor of the O'Neals' estates, and on the theory that the crash occurred due to engine failure, brings claims against

Defendants for strict liability; negligence; breach of express and implied warranties; negligent misrepresentation; fraud; recklessness, outrageousness, willful and wanton conduct; and violation of N.C.G.S. § 75-1.1.

3. Plaintiff initiated this lawsuit on March 12, 2015, in Wilson County Superior Court. (ECF No. 2.) Venue was changed to Nash County, and after some preliminary motion practice and an interlocutory appeal, on November 6, 2018, Continental filed the Motion. This case was later assigned to the undersigned as an exceptional case pursuant to Rule 2.1 of the General Rules of Practice ("Rule 2.1") on April 30, 2019.[1] (ECF No. 1.)

4. The parties fully briefed the Motion and the Court heard oral argument on September 10, 2019, at the conclusion of which the Court allowed limited supplemental discovery on Continental's contacts with North Carolina and invited supplemental briefs incorporating that discovery. After supplemental materials and briefs were submitted, the Court heard further oral argument on February 6, 2020 ("Second Hearing").

B. Findings of Fact

5. The parties have submitted affidavits, depositions, and documentary evidence in support of their respective positions. The Court considers the weight and sufficiency of the evidence presented and sits as a finder of fact solely for the purpose

[1] The parties, by agreement, have elected to utilize the electronic filing system and the North Carolina Business Court Rules, but this suit remains a Rule 2.1 exceptional case and is not otherwise subject to provisions specific to cases designated as complex business cases, including, for example, direct appeal to the North Carolina Supreme Court and N.C.G.S. § 7A-45.3's requirement for written opinions on certain motions.

of assessing the Motion. *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005) (citation omitted). After a thorough review of the record, the Court makes the following findings of fact relevant to personal jurisdiction over Continental:

(1) Continental is in the business of designing, manufacturing, and selling aircraft engines and component parts. (Aff. Michael Ward ¶ 4 ("Ward Aff."), ECF No. 66.)

(2) Continental designed and manufactured the IO-550-N2B engine, Serial No. 686258 ("Accident Engine"), (Ward Aff. ¶ 5), with an attached starter adapter, p/n 642083A10 ("Original Starter Adapter"), at its facility in Mobile, Alabama, (Ward Aff. ¶ 6).

(3) Continental sold and shipped the Accident Engine with the Original Starter Adapter to the Lancair Company ("Lancair") in Bend, Oregon, on or around March 31, 2002. (Ward Aff. ¶ 5; Ex. 3, at 62:1–4 ("Ward Dep."), ECF No. 106.)[2]

(4) The Accident Engine was installed in the Accident Aircraft after Continental sold it to Lancair. (Ward Aff. ¶ 8.)

(5) At the time Continental sold the Accident Engine to Lancair, Continental had no specific intent or knowledge that the Accident Engine would be installed in an aircraft eventually to be sold to a North Carolina buyer. (Ward Aff. ¶ 8.)

[2] The Court cites to Michael E. Ward's January 24, 2020 deposition to the extent it does not conflict with his earlier-filed October 30, 2018 affidavit.

(6) The Original Starter Adapter was replaced for the first time ("Second Starter Adapter") while the Accident Aircraft was at Lancair's facility in Bend, Oregon. (Ward Aff. ¶ 6.)

(7) In January 2013, the O'Neals brought the Accident Aircraft to former Defendant Air Care Aviation Services, Inc. ("Air Care") for service with a complaint that the Second Starter Adapter was not turning the Accident Engine over when it was engaged. (Ex. 4, at 24:4–12 ("Padgett Dep."), ECF No. 106.)

(8) Air Care, which is located at the Rocky Mount Wilson Airport in Elm City, North Carolina, (Padgett Dep. 10:18–19), installed a third, overhauled starter adapter, p/n 642087A64 ("Accident Starter Adapter"), on the Accident Engine on or around February 11, 2013, which was on the Accident Engine at the time of the crash, (Ward Aff. ¶ 7).

(9) Air Care purchased the Accident Starter Adapter on or around January 29, 2013, from Defendant Aircraft Accessories of Oklahoma, Inc. ("Aircraft Accessories"), an Oklahoma corporation. (Ward Aff. ¶ 7.)

(10) Air Care mechanic, Justin Pearson ("Pearson"), who has not yet been deposed, installed the Accident Starter Adapter on the Accident Engine. (Padgett Dep. 170:7.)

(11) Timothy Padgett ("Padgett"), the Director of Maintenance of Air Care, (Padgett Dep. 7:10–13), signed Pearson's work order and released the Accident Aircraft for return to service, (Padgett Dep. 22:8–9).

(12) On March 31, 2019, after Pearson installed the Accident Starter Adapter on the Accident Engine, the Accident Aircraft crashed approximately six miles from Smith Reynolds Airport (INT) in Winston-Salem, North Carolina. (Ex. 4, at PDF Pgs. 438–40.)

(13) Continental is a Delaware corporation with a principal place of business in Mobile, Alabama. (Ward Aff. ¶ 3.)

(14) Continental sells component aircraft parts to distributors who, in turn, sell the parts to the aviation public. (Ward Dep. 28:4–6.)

(15) Continental is not registered or licensed to do business in North Carolina, does not maintain offices, places of business, post office boxes, or telephone listings in North Carolina, and has no real estate, bank accounts, or other property interests in North Carolina. (Ward Aff. ¶¶ 3, 9.)

(16) Continental was registered with the North Carolina Secretary of State under the name "Continental Motors Aircraft Engines, Inc." from November 2013 to August 2015. (Ward Aff. ¶ 3.)

(17) From 2010 to 2013, Continental sold parts in all fifty United States as well as in other countries. (Ward Dep. 33:2–9.)

(18) Triad Aviation, located in Burlington, North Carolina (Padgett Dep. 16:1–2), operated as a distributer for Continental parts from 2010 to 2013. (Ward Dep. 30:8–16.)

(19) From May 2010 to August 2013, Continental engaged in 2,948 sales of component parts with a total value of $3,933,480.65 through Triad Aviation. (Ex. 9 at ¶ 2 ("Miska Aff."), ECF No. 106.)[3]

(20) Orders that Continental received through its distributors would either be shipped to the distributor or "drop-shipped" directly to the distributor's customer. (Ward Dep. 31:9–13.)

(21) From 2010 to 2013, Continental made no direct sales to Air Care but drop-shipped twelve orders to Air Care customers, including two starter adapters, neither of which are at issue in this lawsuit. (Ward Dep. 36:8–13; Miska Aff. ¶ 4.)

(22) Continental is the Type Certificate Holder for IO-550-N series engines such as the Accident Engine, (Ward Dep. 21:18–19), and provides continued airworthiness instructions for that engine series in compliance with Federal Aviation Administration ("FAA") regulations, (Ward Dep. 23:17–24).

[3] Michael S. Miska's affidavit, pursuant to a directive by this Court, summarizes the supplemental documentary evidence produced by Continental pertaining to specific jurisdiction.

(23) Continental maintains an online technical library from which the flying public can access service instructions and manuals. (Ward Dep. 24:6–12.)

(24) From 2010 to 2013, Continental's online technical library and the service instructions it contained were available to service centers like Air Care through a subscription to Continental's FBO Services Link. (Ward Dep. 40:5–13.)

(25) To subscribe to Continental's FBO Services Link, a subscriber would go to Continental's website to create a profile and pay a subscription fee. (Ward Dep. 56:17–57:6.)

(26) Continental posted service updates to service bulletins in its online library and notified subscribers of those updates through e-mail broadcasts. (Ward Dep. 24:25–25:3, 43:9–11.)

(27) Continental generated service update e-mail lists through the subscription list to its FBO Services Link. (Ward Dep. 48:5–7.)

(28) From 2010 to 2013, Continental had fourteen North Carolina subscribers to its FBO Services Link. (Miska Aff. ¶ 3.)

(29) Air Care had a subscription to Continental's FBO Services Link from 2010 to 2013. (Ward Dep. 40:19–20.)

(30) The service instructions pertaining to the installation of the Accident Starter Adapter were in Continental's IO-550 Permold Series Engine Maintenance and Overhaul Manual, August 2011

Revision ("Service Manual"). (Padgett Dep. 28:4–13, 40:11–41:2, 161:14–25.)

(31) There is no direct evidence Pearson referenced the Service Manual when installing the Accident Starter Adapter. While Padgett states that Air Care mechanics are supposed to reference relevant service literature when conducting repairs, the Air Care work order for Pearson's work on the Accident Aircraft regarding the Accident Starter Adapter does not reference the Service Manual; rather, the related invoice only references the Service Manual with respect to "re-install[ing] engine & mounts torque I/A/W M/M/." (Padgett Dep. 34:17–22, 112:17–113:3, 191:12–192:11, 195:15–19, 197:18–198:16; Padgett Dep. Exs., at PDF Pgs. 795, 809, ECF No. 106.)

C. Legal Principles

(1) Waiver[4]

6. As an initial matter, the Court addresses Plaintiff's argument that Continental waived its right to object to personal jurisdiction by meaningfully participating in this litigation prior to filing a Rule 12(b)(2) motion to dismiss under the North Carolina Rules of Civil Procedure ("Rule(s)"). Continental contends it preserved its jurisdictional defense by denying personal jurisdiction in its Answer

[4] After the Second Hearing, the parties began engaging in substantive discovery with the Court's assurance that Continental's participation in that discovery is not evidence of waiver of its jurisdictional defense. The Court now affirms that earlier oral assurance.

and argues any subsequent participation in this litigation is not adequate to constitute waiver.

7. The Rules require a defense of lack of personal jurisdiction to be asserted either in a responsive pleading or a party's first Rule 12 motion. *See* N.C.G.S. § 1A-1, Rule 12(h)(1) ("A defense of lack of jurisdiction over the person . . . is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof[.]").

8. Here, there is no dispute that after requesting an extension of time to answer or otherwise respond to the Complaint, which does not constitute waiver in itself, *id.* at Rule 12(b), Continental filed its Answer stating an affirmative defense based on lack of personal jurisdiction. Continental did not move under Rule 12(b)(2), however, until three years later.

9. Generally, in North Carolina, "[i]f a defendant makes a general appearance in conjunction with or after a responsive pleading challenging jurisdiction pursuant to Rule 12(b), his right to challenge personal jurisdiction is preserved." *Draughon v. Harnett Cty. Bd. of Educ.*, 166 N.C. App. 449, 452, 602 S.E.2d 717, 719 (2004) (citations omitted). "When a defendant promptly alleges a jurisdictional defense as his initial step in an action, he fulfills his obligation to inform the court

and his opponent of possible jurisdictional defects." *Ryals v. Hall-Lane Moving & Storage Co.*, 122 N.C. App. 242, 247–48, 468 S.E.2d 600, 604 (1996).

10. Plaintiff argues Continental waived its jurisdictional defense through its conduct in the three years that transpired between stating that defense in its Answer and moving to dismiss for lack of personal jurisdiction, relying on the North Carolina Business Court's decision in *LendingTree, LLC v. Anderson*, 2012 NCBC LEXIS 20 (N.C. Super. Ct. Apr. 11, 2012). In *LendingTree, LLC*, recognizing that "North Carolina Court[]s have not considered whether a defense asserted in an answer, as opposed to a motion, can be waived by [subsequent] inaction," *id.* at *10, the Court consulted federal case law to determine whether the defendant had waived his venue defense through inaction after stating an objection in his responsive pleading, *id.* at *10–14. The Court ultimately held that the defendant waived his venue defense by failing to pursue the defense for three years, stipulating that venue was proper in a joint case management report, and serving interrogatories and noticing depositions. *Id.* at 12–15.

11. There was no appeal in *LendingTree, LLC,* and North Carolina's appellate courts have not since had occasion to consider the issue of waiver of a jurisdictional defense through post-objection conduct. Nevertheless, existing North

Carolina precedent together with persuasive federal case law compel this Court's conclusion that Continental's post-objection conduct did not result in waiver.[5]

12. Under the Federal Rules of Civil Procedure, "[e]ven after a Rule 12(b)(2) defense has been formally raised in an answer, waiver may be implied 'by conduct and inaction, such as entering an appearance, filing motions and requesting relief, or participating in hearings or discovery.' " *In re Polyester Staple Antitrust Litig.*, No. 3:03CV1516, 2008 U.S. Dist. LEXIS 43865, at *65 (W.D.N.C. Apr. 1, 2008) (citation omitted); *see Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 60 (2d Cir. 1999) ("[A] 'delay in challenging personal jurisdiction by motion to dismiss' may result in waiver, 'even where . . . the defense was asserted in a timely answer.' " (quoting *Datskow v. Teledyne, Inc.*, 899 F.2d 1298, 1303 (2d Cir. 1990))). "[A]ctions that give 'plaintiff a reasonable expectation that [defendants] will defend the suit on the merits or must cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking' will result in a waiver of a personal jurisdiction defense." *Liesman v. Weisberg*, No. 3:17-cv-660, 2018 U.S. Dist. LEXIS 111075, at *15 (W.D.N.C. July 3, 2018) (quoting *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston Metropolex, P.A.*, 623 F. 3d 440, 443 (7th Cir. 2010)).

13. Cases in which federal courts have found waiver post-objection "have the common factors of dilatoriness and participation in, or encouragement of, judicial

[5] The Court likewise finds no basis to argue Continental is estopped from challenging jurisdiction because Plaintiff elected to dismiss a separate savings action in California, as there is nothing to suggest Continental induced this dismissal and Plaintiff dismissed before Continental filed its Answer raising a jurisdictional defense in this action. (*See* Aff. Lacey Smith, ECF No. 86.)

proceedings." *United States ex rel. Combustion Sys. Sales, Inc.*, 112 F.R.D. 685, 687 (M.D.N.C. 1986) (citing cases). "When determining whether a defendant waived its right to assert the defense, courts have generally analyzed (1) the length of time between service of process and the defendant's pursuit of the personal jurisdiction defense and (2) the extent of the objecting defendant's involvement in the suit." *Hyundai Merch. Marine Co. v. Conglobal Indus., LLC*, No. 3:15-CV-3576-G, 2016 U.S. Dist. LEXIS 53839, at *7 (N.D. Tex. Apr. 21, 2016).

14. Here, after Continental accepted service of the Complaint on March 23, 2015, (ECF No. 5), it moved for an extension of time to answer or respond to the Complaint and to respond to Plaintiff's First Request for Production of Documents on April 20, 2015, (ECF Nos. 7, 9). Continental answered the Complaint on May 22, 2015, stating a defense of lack of personal jurisdiction, (ECF No. 17), and filed two motions for admission of counsel *pro hac vice* on the same day, (ECF Nos. 18–19).

15. Aircraft Accessories moved for Rule 12(b)(2) dismissal on May 25, 2015. (ECF No. 20.) Continental served Plaintiff and Air Care with its first request for production of documents and served Plaintiff with its first set of interrogatories on November 18, 2015. (ECF No. 48.) The parties, including Continental, entered a consent discovery scheduling order on January 21, 2016. (ECF No. 53.)

16. Aircraft Accessories's Rule 12(b)(2) motion to dismiss was heard on December 14, 2015, (ECF No. 49), and subsequently denied on February 26, 2016, (ECF No. 55). Aircraft Accessories noticed appeal of the order denying its Rule 12(b)(2) motion on April 5, 2016, (ECF No. 56), and the Court stayed all proceedings

in this case pursuant to N.C.G.S. § 1-294 on June 21, 2016, (ECF No. 58). The North Carolina Court of Appeals affirmed the lower court's denial of Aircraft Accessories's Rule 12(b)(2) motion on May 2, 2017. *Cohen v. Cont'l Motors, Inc.*, No. COA16-792, 2017 N.C. App. LEXIS 353, at *12 (N.C. Ct. App. May 2, 2017). Continental moved for an extension of time to respond to Plaintiff's discovery requests on August 31, 2018, (ECF No. 63), and moved to dismiss under Rule 12(b)(2) on November 6, 2018, (ECF No. 66).

17. Plaintiff argues Continental's dilatory Motion should be contrasted with Aircraft Accessories's Rule 12(b)(2) motion, which Aircraft Accessories filed within two months of service of the Complaint. Continental responds that it could not fully assess its grounds to challenge specific personal jurisdiction until it was apprised of Plaintiff's theory of the cause of the accident, and that it filed the Motion promptly after having been so apprised by Plaintiff's response to written discovery on July 31, 2018. (Def. Continental Motors, Inc.'s Mot. Dismiss Lack Personal Jurisdiction 2 fn.1, ECF No. 66; Ex. 1, at 57:13–59:15 ("Sept. 10, 2019 Hearing Transcript"), ECF No. 106.)

18. In most federal cases, the courts have required more than the passage of time and participation in limited discovery to find waiver. In circumstances where waiver is found, the defendant has usually fully participated in the merits of the litigation or sought affirmative relief from the court. *See, e.g.*, *Cont'l Bank, N.A. v. Meyer*, 10 F.3d 1293, 1297 (7th Cir. 1993) (finding waiver where "the defendants fully participated in litigation of the merits for over two-and-a-half years without actively

contesting personal jurisdiction [by] . . . participat[ing] in lengthy discovery, fil[ing] various motions and oppos[ing] a number of motions filed"); *Yeldell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990) (finding defendants waived personal jurisdiction post-objection where they "participated in discovery, filed various motions, participated in a five-day trial, and filed post-trial motions," and did not raise the issue of personal jurisdiction until appeal); *Axxon Int'l, LLC v. GC Equip., LLC*, No. 3:17-CV-429-DCK, 2018 U.S. Dist. LEXIS 112761, at *27 (W.D.N.C. July 6, 2018) (finding waiver of jurisdiction because the Court found "it difficult to reconcile how [the defendant] could consent to Magistrate Judge jurisdiction, file a Rule 26 Report, and engage in discovery without objection, all the while believing that th[e] Court lacked personal jurisdiction"); *see also In re Polyester Staple Antitrust Litig.*, 2008 U.S. Dist. LEXIS 43865, at *75–76 (finding waiver where defendant delayed 12(b)(2) motion by two years and engaged in substantial discovery together with several subsidiary defendants but stating that, if the Court had assessed the defendant's involvement in the lawsuit in isolation from other defendants, it "would [have been] hard-pressed to find waiver").

19. While three or more years is a considerable delay, the significance of that delay is mitigated by the stay of this litigation for almost a year while Aircraft Accessories's Rule 12(b)(2) motion was on appeal and the fact that this case remains in its infancy. *See Brokerwood Prods. Int'l (U.S.), Inc. v. Cuisine Crotone, Inc.*, 104 F. App'x 376, 381 (5th Cir. 2004) (stating that dormancy of the case contributed to its finding that defendant had not waived jurisdiction). Furthermore, Continental has

participated only in limited written discovery bearing on matters related to specific jurisdiction and has requested no affirmative relief from the Court, which is "the cornerstone of waiver[.]" *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 443–44 (3d Cir. 1999) (finding waiver where defendant raised defense in answer but asked court for affirmative relief by moving for summary judgment before moving on jurisdictional defense).

20. Acknowledging that North Carolina's appellate courts have not addressed at length the issue of post-objection waiver and following a review of the record and persuasive case law, the Court concludes, in the sound exercise of its discretion, that Continental has not waived its Rule 12(b)(2) defense. *See Ryals*, 122 N.C. App. at 247–48, 468 S.E.2d at 604 (holding that the defendants did not waive personal jurisdiction by participating in discovery after stating a jurisdictional defense in their answer).

(2) Personal Jurisdiction

21. Plaintiff has the burden of demonstrating that this Court has personal jurisdiction over Continental by a preponderance of the evidence. *Esoterix Genetic Labs., LLC v. McKey*, 2011 NCBC LEXIS 33, at *3 (N.C. Super. Ct. Aug. 22, 2011) (citing *Deer Corp. v. Carter*, 177 N.C. App. 314, 322, 629 S.E.2d 159, 166 (2006)).

22. Personal jurisdiction is traditionally assessed under a two-step analysis. "First, jurisdiction over the defendant must be authorized by N.C.G.S. § 1-75.4—North Carolina's long-arm statute. Second, if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process

Clause of the Fourteenth Amendment to the U.S. Constitution." *Beem USA LLLP v. Grax Consulting LLC*, No. 360A18, 2020 N.C. LEXIS 89, at *9 (N.C. Feb. 28, 2020) (internal citations and quotation marks omitted).

23. Here, the Court collapses its personal jurisdiction analysis into the due process inquiry because North Carolina's long-arm statute was written to be coextensive with the limits of due process, *id.* at *10 (citation omitted), and Continental has not challenged this Court's authority under that statute, *see JCG & Assocs., LLC v. Disaster Am. USA, LLC*, 2019 NCBC LEXIS 112, at *6–7 (N.C. Super. Ct. Dec. 19, 2019) (addressing only the due process prong where the defendant did not challenge the Court's statutory authority).

24. "The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). Jurisdiction may only be exercised over a defendant that "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–75 (1985). Purposeful availment occurs through "certain minimum contacts" within or directed to the forum state by the defendant "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal citation marks omitted). Relevant contacts must be made by the defendant, not the plaintiff or a third party. *Walden v. Fiore*, 571 U.S. 277, 284–85 (2014).

25. A defendant may be subject to either general or specific jurisdiction. *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1779–80 (2017). Plaintiff admits Continental is not subject to general jurisdiction in North Carolina and therefore limits its argument and this Court's analysis to specific jurisdiction. (Sept. 10, 2019 Hearing Transcript, 13:12–15.)

26. "To determine whether it may assert specific jurisdiction over a defendant, the court considers '(1) the extent to which the defendant "purposefully availed" itself of the privilege of conducting activities in the State; (2) whether the plaintiff['s] claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally "reasonable." ' " *Havey v. Valentine*, 172 N.C. App. 812, 815, 616 S.E.2d 642, 647 (2005) (quoting *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002)).

27. In asserting there is specific jurisdiction over Continental, Plaintiff contends that once it shows a nexus between Continental's product or action and the accident, Plaintiff may then resort to Continental's broader contacts with North Carolina to meet its burden of showing purposeful availment. Continental contends, in contrast, that the contacts Plaintiff's claims relate to or arise from are the only contacts relevant to the purposeful availment inquiry. While Continental's broader contacts with North Carolina may be pertinent to the final question of whether exercising personal jurisdiction would be reasonable, the Court concludes that Continental's characterization of the purposeful availment inquiry is consistent with

controlling case law, including the most recent pronouncements of the United States Supreme Court and the North Carolina Supreme Court.

28. "The United State[s] Supreme Court has emphasized that 'specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.' " *Beem USA LLLP*, 2020 N.C. LEXIS 89, at *12 (quoting *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780). "In order for a state court to exercise specific jurisdiction, 'the *suit*' must 'arise[e] out of or relat[e] to the defendant's contacts with the *forum*.' " *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)); *see JCG & Assocs., LLC*, 2019 NCBC LEXIS 112, at *7 ("[T]he pertinent question is whether the claims at issue arise out of the defendant's conduct within or directed to the forum State.").

29. Plaintiff's claims against Continental are predicated upon two theories of liability—that the Accident Starter Adapter was subject to a design defect, and that the Service Manual upon which Air Care allegedly relied when installing the Accident Starter Adapter was defective. Plaintiff argues Continental's dissemination of the Service Manual through its FBO Services Link serves as the nexus between Continental and the litigation and, with this nexus, urges the Court to consider all of Continental's contacts with North Carolina to find purposeful availment. (Pl.'s Suppl. Br. Opp'n Def. Continental Motors, Inc.'s Mot. Dismiss 13, ECF No. 100.)

30. The Court concludes that these broader contacts unrelated to the accident itself do not satisfy the three-pronged connection that serves as the relevant inquiry—"the relationship among the defendant, the forum, and the litigation."

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984) ("Respondent's regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action *based on the contents of the magazine*." (emphasis added)); *see Calder v. Jones*, 465 U.S. 783, 789–90 (1984) (finding personal jurisdiction over out-of-state newspaper defendants in libel suit by California actress because defendants relied on California sources, wrote the story about actress's activities in California, and her injury was suffered in that state); *Walden*, 571 U.S. at 287–88 ("[In *Calder*], the reputational injury caused by the defendants' story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens."); *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1783 (rejecting the respondents' contention that the fact that the defendant pharmaceutical company contracted with a California distributor to distribute a drug nationally could support specific jurisdiction where there was no evidence that the defendant "engaged in relevant acts" with the distributor in California, and the respondents cited "no evidence to show how or by whom the [drug] they took was distributed to the pharmacies that dispensed it to them").

31. First, even if the Court assumes without deciding that Continental's distributor relationships and sales in North Carolina are purposeful contacts with the State adequate to satisfy specific jurisdiction over claims arising from those contacts,[6] those contacts are unrelated to Plaintiff's claims against Continental in

[6] *Compare Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 944–45 (4th Cir. 1994) (adopting stream-of-commerce plus test), *with Padron v. Bentley Marine Grp., LLC*, 822 S.E.2d 494, 499 (N.C. Ct. App. 2018) ("To be sure, there will exist sufficient minimum contacts to permit a forum state to exercise personal jurisdiction over a corporation where that corporation has

this litigation. *See Fidrych v. Marriott Int'l, Inc.*, No. 18-2030, 2020 U.S. App. LEXIS 6477, at *29 (4th Cir. Mar. 2, 2020) (holding that Marriott's significant business activity in South Carolina was irrelevant to the purposeful availment inquiry because the plaintiff's claims stemming from an injury in an affiliated hotel in Milan did "not in any sense arise out of or relate to Marriott's connections to the hotels located in South Carolina." (internal quotation marks omitted)); *Olympic Air, Inc. v. Helicopter Tech. Co.*, No. 2:17-CV-1257-RSL, 2019 U.S. Dist. LEXIS 89887, at *10 (W.D. Wash. May 29, 2019) (stating that evidence of authorized dealers and service centers in the forum state were "irrelevant to whether the Court ha[d] specific jurisdiction over" the defendant helicopter-part manufacturer where the plaintiffs' "claim [did] not arise out of [the defendant's] sale of products and replacement parts in the State"); *compare Beem USA LLLP*, 2020 N.C. LEXIS 89, at *16–17 (finding specific jurisdiction over the defendant where his contacts with North Carolina all related to his status as a partner of the plaintiff because the "litigation [wa]s concerned exclusively with the acts and omissions of [the defendant] in connection with [the plaintiff]'s affairs"), *with Bell v. Mozley*, 216 N.C. App. 540, 546, 716 S.E.2d 868, 873 (2011) (holding that there was no specific jurisdiction over a defendant whose contacts with North Carolina were "strictly related to defendant's employment. . . . [because his] contacts [were] clearly

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'deliver[ed] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.' " (citation omitted)), *and Cox v. Hozelock, Ltd.*, 105 N.C. App. 52, 58, 411 S.E.2d 640, 644 (1992) ("We hold the sole act of a manufacturer's intentional injection of his product into the stream of commerce provides sufficient grounds for a forum state's exercise of personal jurisdiction over the foreign manufacturer defendant.").

not the source and [were] in no way related to plaintiff's claims for alienation of affection and criminal conversation").

32. Second, the Court agrees with Continental that the specific acts connected to the accident upon which Plaintiff relies do not support a finding that Continental purposely availed itself of doing business in North Carolina regarding those acts. Specifically, Plaintiff relies on Continental's Service Manual and the FBO Services Link through which the Service Manual was made available to Air Care. The foundational law governing specific jurisdiction based on internet contacts is well-defined by our appellate courts:

> [A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received.

Dailey v. Popma, 191 N.C. App. 64, 70, 662 S.E.2d 12, 17 (2008) (quoting *ALS Scan, Inc.*, 293 F.3d at 714).

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and

> commercial nature of the exchange of information that occurs on the Web site.

N.C. Bd. of Pharmacy v. Najarian, No. COA12-1140, 2013 N.C. App. LEXIS 976, at *13–14 (N.C. Ct. App. Sept. 17, 2013) (quoting *ALS Scan, Inc.*, 293 F.3d at 714).

33. Plaintiff argues Continental's contact with North Carolina was direct and purposeful considering the interactive nature of the FBO Services Link and the fact that Continental sent e-mail blasts regarding service instruction updates directly to North Carolina subscribers. Continental challenges whether Plaintiff has, in the first instance, adequately demonstrated that Pearson consulted Continental's Service Manual.[7] Continental argues further that, even if the record included proof that Pearson relied on the Service Manual, Continental's dissemination of continued airworthiness instructions through its FBO Services Link and related e-mail blasts do not support specific jurisdiction because Air Care's use of the Service Manual "would only amount to a unilateral act of a third party that is insufficient to prove purposeful availment by Continental." (Continental Motor, Inc.'s Suppl. Br. Supp. Mot. Dismiss Lack Personal Jurisdiction 9, ECF No. 101); *see Walden*, 571 U.S. at 291 ("Respondents' Nevada attorney contacted petitioner in Georgia, but that is

[7] While not determinative of personal jurisdiction, a review of the current record reveals less than conclusive evidence that Pearson relied on Continental's Service Manual when installing the Accident Starter Adapter. (*See* Padgett Dep. 34:17–22, 112:17–113:3, 191:12–192:11, 195:15–19, 197:18–198:16; Padgett Dep. Exs., at PDF Pgs. 795, 809, ECF No. 106 (showing that the Air Care work order does not reference the Service Manual, that the related invoice only references the Service Manual with respect to "re-install[ing] engine & mounts torque I/A/W M/M/[,]" and that mechanics were expected to reference service instructions but Padgett could neither confirm nor deny that Pearson had referenced the Service Manual when installing the Accident Starter Adapter).)

precisely the sort of 'unilateral activity' of a third party that 'cannot satisfy the requirement of contact with the forum State.' " (citation omitted)).

34. Several courts have held that where a defendant Type Certificate Holder is obligated to make service manuals and safety bulletins available to certified repair stations and FBOs wherever they are located under FAA regulations, as Continental is required to do here, *see* 14 C.F.R. § 21.50(b), compliance with that regulation does not result in a purposeful contact with a specific forum. *See, e.g.*, *Olympic Air, Inc.*, 2019 U.S. Dist. LEXIS 89887, at *13–15 (agreeing with defendant that status as a Type Certificate Holder required to provide continued airworthiness instructions under FAA regulations is " 'geographically agnostic' and 'jurisdictionally irrelevant' "). A recent Tenth Circuit decision concerning specific jurisdiction over Continental is particularly instructive as the Court concluded that Continental's subscription-access FBO Services Link was not a purposeful contact with Colorado. *Old Republic Ins. Co. v. Cont'l Motors, Inc.*, 877 F.3d 895, 917 (10th Cir. 2017) (holding Colorado did not have specific jurisdiction over Continental "[b]ecause the FAA mandate obligates [Continental] to make service manuals available to any FBO subject to federal regulation, [and] Continental Motors needed to target its manuals' content at an audience broader than only Colorado FBOs to comply with this requirement").

35. Plaintiff has tendered no persuasive argument supporting a different outcome than those reached in *Olympic Air, Inc.* and *Old Republic Ins. Co.* The Court finds the reasoning of those cases persuasive and therefore concludes that Continental's promotion of continued airworthiness instructions through its FBO

Services Link, though interactive, was not a purposeful contact with North Carolina. *See Fidrych*, 2020 U.S. App. LEXIS 6477, at *34–35 (holding that hotel's interactive website was not a purposeful contact with South Carolina because "[i]nstead of targeting any particular state, the website ma[de] itself available to any one [sic] who s[ought] it out, regardless of where they live[d]").

36. Neither may Plaintiff cobble together a basis for specific jurisdiction by amalgamating Continental's attenuated or unrelated contacts with the State. In *Bristol-Myers Squibb*, the Supreme Court made clear that specific jurisdiction does not create a back door where a defendant's unrelated contacts with the forum state are insufficient to support a finding of general jurisdiction. The Supreme Court rejected the California Supreme Court's "sliding scale approach" to specific jurisdiction, which relaxed the necessary "strength of the requisite connection between the forum and the specific claims at issue . . . [because] the defendant ha[d] extensive forum contacts that [were] unrelated to those claims[,]" as it resembled "a loose and spurious form of general jurisdiction." *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781; *see Cohen*, 2017 N.C. App. LEXIS 353, at *5 (affirming exercise of personal jurisdiction over Aircraft Accessories in this litigation because its "distinct contact[] to North Carolina[] through goods being sold and shipped here. . . . [is] causally related to the deaths of two North Carolina residents in North Carolina").

37. The Court acknowledges public policy favors giving resident-plaintiffs of this State access to North Carolina courts for redressing wrongs, *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 367, 348 S.E.2d 782, 787 (1986) (citing *Burger*

King Corp., 471 U.S. at 478–79), but that policy must yield in this instance. This Court may not exercise specific jurisdiction over Continental because the connection between Plaintiff's claims, Continental, and the State is too attenuated to comport with due process. *See World-Wide Volkswagen Corp.*, 444 U.S. at 294 ("Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient for litigation, the Due Process Clause, acting as an interest of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." (citation omitted)); *Havey*, 172 N.C. App. at 818, 616 S.E.2d at 648–49 (finding no personal jurisdiction over third-party defendant furniture manufacturer where plaintiff sued defendant shipping company for injuries suffered during delivery because furniture was ordered in Vermont and a passive website and making shipping arrangements "did not reveal a substantial connection [between the furniture manufacturer and] the State").

D. Conclusions of Law

38. Based on the foregoing, the Court concludes:

a. Continental has not waived its defense to personal jurisdiction and is not estopped from asserting it;

b. Plaintiff has not demonstrated that the exercise of specific jurisdiction over Continental is appropriate by a preponderance of evidence; and

c. Plaintiff has not demonstrated that the exercise of general jurisdiction over Continental is appropriate by a preponderance of evidence.

39. WHEREFORE, for the reasons stated above, the Court hereby GRANTS Continental's Motion to Dismiss for lack of personal jurisdiction.

SO ORDERED, this the 12th day of March 2020.

/s/ James L. Gale

James L. Gale
Judge Presiding