SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

U.S. SPACE LLC,	:	
	:	Index No. 652303/2016
Plaintiff,	:	Mot. Seq. 001
	:	
- against -	:	Hon. Eileen Bransten
	:	
ORBITAL ATK, INC. and	:	IAS Part 3
ATK SPACE SYSTEMS INC.	:	
	:	ORAL ARGUMENT
Defendants.	:	REQUESTED
	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND FORUM NON CONVENIENS

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INTRODUCTION

This case belongs in Virginia, where all the parties are headquartered, and where Defendants have filed their own action seeking declaratory relief relating to the dissolution of the ViviSat joint venture that is the object of the parties' dispute. (*See* Complaint, *ATK Space Sys. Inc. and Orbital ATK, Inc. v. U.S. Space LLC* (the "Virginia Complaint"), Ex. 1 hereto).

In November 2010, Defendant ATK Space Systems Inc. ("ATK") and Plaintiff U.S. Space LLC ("US Space") formed ViviSat, LLC ("ViviSat"), a Delaware limited liability company created to secure financing and find customers for on-orbit satellite servicing technology being developed by ATK. In April 2016, after US Space had failed for more than five years to obtain financing and customer contracts for ViviSat as promised, ATK exercised its rights under the parties' agreements to dissolve ViviSat. As US Space's Complaint (the "New York Complaint") makes clear, over the nearly six-year course of the parties' dealings with respect to ViviSat, there were only a handful of insubstantial and insignificant contacts with the State of New York, and certainly none that provides a basis for the exercise of personal jurisdiction over the Defendants.

Moreover, US Space itself has been headquartered, since its formation in 2009, in Loudoun County, Virginia. US Space only registered to conduct business in New York in order to file its New York Complaint, receiving authorization to do business in New York on April 29, 2016, *the same day* it filed the New York Complaint. US Space is engaged in blatant forum shopping, aimed at increasing the burden of litigation on the Defendants. Even if there was personal jurisdiction (and there is not), all of the relevant factors in the forum non conveniens analysis weigh heavily in favor of dismissal of the New York Complaint in favor of the pending litigation in Loudoun County, Virginia.

STATEMENT OF FACTS

A. The parties

1. US Space LLC is a Delaware limited liability company with its principal place of business in Loudoun County, Virginia. (NY Compl. ¶ 6). Since its formation in 2009, US Space has maintained its headquarters in an office located on the Orbital ATK campus in Loudoun County, Virginia. (NY Compl. ¶ 6; VA Compl. ¶ 33; Wilson Aff. ¶ 12).

2. ATK Space Systems Inc., is a Delaware corporation with its principal place of business in Loudoun County, Virginia. (NY Compl. ¶ 8; VA Compl. ¶ 19). Since 2004, ATK has been a pioneer in "on-orbit satellite servicing"—the design, manufacture, and operation of spacecraft that can rendezvous and dock with geostationary satellites and extend their useful lives by many years. (Wilson Aff. ¶ 10; VA Compl. ¶ 2). ATK is a wholly owned subsidiary of Orbital ATK. (NY Compl. ¶ 8; VA Compl. ¶ 19).

3. Orbital ATK is a global leader in aerospace and defense technologies, designing, building, and delivering space, defense, and aviation-related systems. (NY Compl. ¶ 7; VA Compl. ¶ 20). Orbital ATK was formed as a result of the merger of Orbital Sciences Corporation ("Orbital Sciences") and the aerospace and defense groups of Alliant Techsystems Inc. (NY Compl. ¶ 57). Like all the parties to this action, Orbital ATK has its principal place of business in Loudoun County, Virginia. (NY Compl. ¶ 7).

4. No party to this action is a New York citizen. No party was formed under the laws of New York, and no party to this action has its principal place of business in New York.

B. The ViviSat venture

5. This matter arises out of a contract and corporate governance dispute surrounding the dissolution of ViviSat, LLC, a Delaware limited liability company also headquartered in Loudoun County, Virginia. When ViviSat was formed by ATK and US Space in 2010, the

intended roles of ATK and US Space were clearly defined: ATK was developing the technology to build and operate spacecraft—called mission extension vehicles ("MEVs")—that could deliver on-orbit servicing to geostationary satellites. (Wilson Aff. ¶ 16; VA Compl. ¶ 5). Once ATK's MEVs were designed, built, and launched, ATK would provide on-orbit satellite servicing to customers as the mission prime contractor to ViviSat. (Wilson Aff. ¶ 17; VA Compl. ¶ 5). US Space's role was to obtain: (1) financing for the ViviSat venture; and (2) customers for the on-orbit satellite service to be sold by ViviSat. (Wilson Aff. ¶ 18; VA Compl. ¶ 5).

C. US Space failed to deliver

6. For years, US Space missed target date after target date without fulfilling its responsibilities to deliver financing and customer contracts, and instead repeatedly turned to ATK for more and more cash. (Wilson Aff. ¶ 22; VA Compl. ¶ 8). In all, ATK provided more than $2,250,000 cash funding to ViviSat. (Wilson Aff. ¶ 20; VA Compl. ¶ 7). US Space, on the other hand, provided only $50 in cash funding to ViviSat. (Wilson Aff. ¶ 21; VA Compl. ¶ 7).

7. Eventually, in March 2013 ATK refused to continue to unilaterally fund ViviSat's operations unless ATK obtained certain contractual protections and enforceable deadlines. If US Space did not meet those deadlines, ATK would have the right to dissolve ViviSat and pursue the on-orbit satellite servicing business without US Space. (Wilson Aff. ¶ 23; VA Compl. ¶ 8).

D. The Funding Agreement

8. US Space agreed. As a result, on March 26, 2013, ATK and US Space entered into a funding agreement ("Funding Agreement"), under which ATK agreed to provide additional funding to ViviSat. (NY Compl. ¶¶ 42-47; VA Compl. ¶¶ 9-11, 69-78). In exchange, US Space agreed to give ATK the right to take control of ViviSat and then dissolve it in the event US Space could not deliver both qualified financing and an enforceable customer contract by a specified date, originally December 1, 2013. (*Id.*). US Space's failure to deliver either

qualified financing or an enforceable customer contract by the specified date was defined as an "Amendment Trigger," and the occurrence of the Amendment Trigger would automatically provide ATK with its bargained-for rights under the Funding Agreement. (*Id.*).

9. The Funding Agreement did, however, provide certain bargained-for protections to US Space in the event of the Amendment Trigger. For example, if the Amendment Trigger occurred and ATK dissolved ViviSat, US Space would receive certain rights to share in potential economic benefits from ATK's sale of MEVs or on-orbit satellite services over the next four years. (NY Compl. ¶ 47; VA Compl. ¶¶ 10, 76-77).

E. Despite extra time and money from ATK, US Space still failed to deliver

10. Despite numerous extensions and millions of dollars from ATK, US Space continued to fail to deliver either a qualified financing or an enforceable customer contract. (Wilson Aff. ¶ 24; VA Compl. ¶¶ 12, 104, 114). A failure to obtain either one automatically results in an Amendment Trigger, and in fact neither was obtained. As a result, the Amendment Trigger occurred on September 15, 2015. (Wilson Aff. ¶ 25; VA Compl. ¶¶ 12, 114).

F. ATK exercised its rights under the Funding Agreement

11. Pursuant to its bargained-for rights under the Funding Agreement, ATK has taken control of ViviSat and a majority of the ViviSat board. (Wilson Aff. ¶ 26; VA Compl. ¶¶ 13, 123). On April 5, 2016, the ViviSat board met in Loudoun County, Virginia, and voted to dissolve the company and wind up its affairs. (Wilson Aff. ¶ 27; VA Compl. ¶¶ 13, 124).

G. US Space has refused to honor the Funding Agreement and instead sued in this Court to burden Defendants

12. Despite its failure to consummate a qualified financing or obtain an enforceable customer contract, US Space refused to acknowledge the Amendment Trigger and ATK's resulting rights. Instead, on April 29, 2016, US Space registered to do business in New York and

brought suit in this forum against ATK and Orbital ATK. Notwithstanding US Space's hyperbolic cry of a "double-cross of cosmic proportions," (NY Compl. ¶ 4), all that ATK has done is to act on its bargained-for rights under the Funding Agreement.

H. Defendants have filed suit in Virginia

13. Seeking to enforce the plain terms of the Funding Agreement, ATK and Orbital ATK have filed their own suit against US Space in Loudoun County, Virginia, the place where all the parties are headquartered and the unquestionable center of gravity of this dispute.

I. Facts relevant to jurisdiction and venue

14. All of the parties, including US Space, are headquartered in Loudoun County, Virginia. (NY Compl. ¶¶ 6-8; VA Compl ¶¶ 19-21).

15. While US Space alleges that it has an office in New York, (NY Compl. ¶ 10), the existence of any such US Space office in New York was unknown to Defendants. (Wilson Aff. ¶ 29). No agreement or formal correspondence between the parties references a US Space office in New York. (Wilson Aff. ¶ 30; NY Compl. Exs. A & D). The parties' agreements all reference US Space's Virginia headquarters. (*See, e.g.*, NY Compl. Exs. A & D). All the recent formal correspondence from US Space to the Defendants regarding this dispute likewise references US Space's Virginia address. (*See* Wilson Aff. ¶ 30). Indeed, US Space's New York Complaint states that its principal place of business is on Orbital ATK's campus: "21700 Atlantic Boulevard, Building 6, Dulles, Virginia, 20166." (NY Compl. ¶ 6.)

16. US Space was not authorized to do business in New York until April 29, 2016, the same day that it filed the New York Complaint. (N.Y. Dep't of State Entity Info., U.S. Space LLC, Ex. 2 hereto). The ViviSat joint venture entity, managed by US Space from its formation in 2010 until ATK took over this spring, has never been registered to conduct business in New York. (N.Y. Dep't of State Entity Info. search results, Ex. 3 hereto).

17. Although the New York Complaint contains 172 paragraphs spanning 40 pages, it makes only the barest reference to acts that allegedly occurred in New York. They are that:

- At some point in 2010, during negotiations that occurred before the execution of the ATK-US Space Teaming Agreement, US Space's Ed Horowitz and ATK's Tom Wilson had a meeting in New York. (NY Compl. ¶ 19).

- US Space's Mark Piegza signed the Funding Agreement on April 2, 2013, while he was in New York. (*Id.* ¶ 43).

- Seeking investment in ViviSat, US Space initiated negotiations with Melody Capital Partners ("Melody"), a New York-based investment firm, in the summer of 2014. (*Id.* ¶ 63). Sometime later, following "a productive meeting in December 2014 in New York with the Melody team, ATK's management abruptly changed course and informed US Space and Melody that ATK needed to defer any further discussions." (*Id*. ¶ 64).

- Seeking investment in ViviSat, US Space initiated negotiations with Searchlight Capital Partners ("Searchlight"), another New York-based investment firm, in the summer of 2015. (*Id.* ¶ 67).

18. Of these, only two—the 2010 meeting and 2014 meeting—are relevant to the personal jurisdiction analysis, as they are the only ones involving Defendants' conduct.

19. Although the New York Complaint alleges that Defendants are authorized to do business in New York and have appointed agents for service of process in New York, (NY Compl. ¶¶ 9-10), as addressed below, that does not support a finding of either general or specific personal jurisdiction over Defendants.

20. Moreover, as addressed below, not one of the seven causes of action in the New York Complaint arose in New York or is governed by New York law.

ARGUMENT

I. The Defendants are not subject to personal jurisdiction in New York.

US Space is the party asserting that the Court has personal jurisdiction over ATK and Orbital ATK; therefore, the burden rests on US Space to prove that jurisdiction is proper.

O'Brien v. Hackensack Univ. Med. Ctr., 760 N.Y.S.2d 425, 427 (N.Y. App. Div., 1st Dep't 2003). On the face of the New York Complaint,[1] US Space does not carry its burden.

A. US Space fails to establish general jurisdiction under CPLR § 301.

First, there is no general jurisdiction based on the allegation that Defendants "do business" in New York.[2] *See, e.g.*, *Norex Petroleum Ltd. v. Blavatnik*, 22 N.Y.S.3d 138, 2015 WL 5057693, at *20 (N.Y. Sup. Ct. 2015) (Bransten, J.) (citing *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014)). Rather, as this Court recently observed, "[t]he only kind of corporate activity that ordinarily will satisfy the general jurisdiction test is incorporation in the state or maintenance of a corporation's principal place of business in the state." *Id*.; *see also Daimler*, 134 S. Ct. at 760; *Magdalena v. Lins*, 999 N.Y.S.2d 44, 45 (N.Y. App. Div., 1st Dep't 2014) (applying *Daimler* and holding "there is no basis for general jurisdiction pursuant to CPLR 301, since [the defendant] is not incorporated in New York and does not have its principal place of business in New York").

The New York Complaint concedes, as it must, that Defendants are neither incorporated nor have their principal places of business in New York. Therefore, under *Daimler* the facts alleged in the New York Complaint do not support the exercise of general jurisdiction.

[1] A plaintiff ultimately must prove the existence of personal jurisdiction by a preponderance of the evidence. *Elm Mgmt. Corp. v. Sprung*, 823 N.Y.S.2d 187, 188 (N.Y. App. Div., 2nd Dep't 2006). Thus, if the existence of jurisdiction turns on disputed factual questions—as opposed to an absence of allegations in the complaint—a court may conduct an evidentiary hearing and require the plaintiff to establish facts supporting personal jurisdiction by a preponderance of the evidence. *Skyline Agency, Inc. v. Ambrose Coppotelli, Inc.*, 502 N.Y.S.2d 479, 484 (N.Y. App. Div., 2nd Dep't 1986). Here, however, dismissal on the initial pleading is plainly appropriate.

[2] The Complaint does not expressly reference CPLR § 301 or general jurisdiction; however, plaintiffs in other cases have sought to bootstrap a reference to Business Corporation Law § 1304 as a basis to assert a claim of general jurisdiction under CPLR § 301, and US Space's references to the Defendants' registration to conduct business and appointment of agents for service of process in New York are not related to this dispute and do not support any finding of specific jurisdiction. Accordingly, this brief starts with an explanation of why there is no general jurisdiction over the Defendants.

Norex Petroleum is instructive. There, the plaintiff conceded that the defendant was neither incorporated nor headquartered in New York, but nevertheless sought to establish general jurisdiction "based upon some sort of parent-subsidiary relation." *Id*. This Court rejected the plaintiff's attempt, holding "the facts alleged in the complaint do not support the exercise of general jurisdiction." *Id*. Here, *neither* Orbital ATK *nor* its wholly owned subsidiary, ATK, is incorporated or headquartered in New York. This is thus an easier case than *Norex Petroleum*. The result, however, is the same: Defendants are not subject to general jurisdiction in New York.

US Space may attempt to avoid this common-sense conclusion by arguing that the mere fact that ATK and Orbital ATK are registered to do business in New York and have appointed an agent to receive service of process is sufficient to avoid the *Daimler* rule. Any such attempt, however, must be firmly rejected.

"*Daimler* makes plain that it is inconsistent with principles of due process for a corporation to be subject to general jurisdiction in every place it does business." *Genuine Parts Co. v. Cepec*, 2016 WL 1569077, at *10 (Del. Apr. 18, 2016) (Strine, C.J.); *see also Daimler*, 134 S. Ct. at 762 n.20 ("A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States.").

Accordingly, in the wake of *Daimler*, a wave of decisions across the country have rejected the argument that a court has general jurisdiction over a non-resident company simply because the company has registered to do business in the state and appointed an agent for service of process. *See generally Genuine Parts Co.*, 2016 WL 1569077, at *15 n.119 (collecting cases).

The Second Circuit has likewise made clear that, under the Constitution, a non-resident corporation's registration to do business in a state and designation of an agent for service of

process is insufficient to confer general jurisdiction. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016). This follows similar earlier decisions from the New York Supreme Court, *Gliklad v. Bank Hapoalim*, 2014 WL 3899209, at *1 (N.Y. Sup. Ct. Aug. 4, 2014) (Schweitzer, J.), and the Federal District Court for the Southern District of New York, *Chatwal Hotels & Resorts LLC v. Dollywood Co*., 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015) (applying *Daimler* and holding "the mere fact of [the defendant's] being registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business").

Although it appears that neither the New York Court of Appeals nor the Appellate Division has yet to squarely address this issue, when they do, their holding cannot seriously be doubted. The reason is straightforward:

> If mere registration and the accompanying appointment of an in-state agent—without an express consent to general jurisdiction—nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief.

Lockheed Martin Corp., 814 F.3d at 640; *see also Neeley v. Wyeth LLC*, 2015 WL 1456984, at *3 (E.D. Mo. Mar. 30, 2015). ATK and Orbital ATK are neither incorporated in New York nor have their principal place of business here. The Constitution prohibits the Court from exercising general jurisdiction over them, and any contention by US Space to the contrary must be rejected.

B. US Space fails to establish specific jurisdiction under CPLR § 302.

US Space, as noted, bears the burden of proving that the Court has personal jurisdiction over Defendants. *O'Brien*, 760 N.Y.S.2d at 427. To carry its burden, US Space must prove not only that Defendants engaged in acts sufficient to satisfy New York's long-arm statute, but also that the exercise of personal jurisdiction over them comports with the Due Process Clause. *LaMarca v. Pak-Mor Mfg. Co.*, 735 N.E.2d 883, 886 (N.Y. 2000). US Space fails to do either.

Despite the New York Complaint containing 172 paragraphs covering 40 pages, it alleges a mere two passing connections with New York on the part of Defendants. Moreover, US Space provides no details about those contacts or their significance to US Space's case. This Court has consistently granted motions to dismiss in similar circumstances. *See, e.g.*, *Norex*, 2015 WL 5057693, at *21 ("Other cases that have detailed the requisite showing demanded more than the simple allegations presented by [the plaintiff] here"); *Northern Valley Partners, LLC v. Jenkins*, 885 N.Y.S.2d 712, 2009 WL 1058162, at *5 (N.Y. Sup. Ct. 2009) (Bransten, J.) (dismissing complaint because plaintiffs had "failed to allege sufficient details").

The New York Complaint alleges that US Space's relationship with ATK began in March 2010 and concluded roughly 2,250 days later in 2016. (NY Compl. ¶¶ 18, 117). Over this six-year period, the only alleged connections with New York are that:

- Defendants are registered to do business in New York. (NY Compl. ¶ 9);
- At some point before October 2010, US Space's Ed Horowitz had a "meeting with Mr. Wilson in New York." (*Id.* ¶ 19);
- On April 2, 2013, Mark Piegza of US Space signed the Funding Agreement while in New York. (*Id.* ¶ 43);
- In the summer of 2014, US Space initiated negotiations with Melody, a New York-based investment firm, seeking investment in ViviSat. (*Id.* ¶ 63). Sometime later, after "a productive meeting in December 2014 in New York with the Melody team, ATK's management abruptly changed course and informed US Space and Melody that ATK needed to defer any further discussions." (*Id*. ¶ 64).
- In the summer of 2015, US Space initiated negotiations with Searchlight, another New York-based investment firm, seeking investment in ViviSat. (*Id.* ¶ 67).

The personal jurisdiction inquiry, of course, focuses on the defendant's contacts with the forum. *Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Ltd*, 464 N.E.2d 432, 434 (N.Y. 1984). For reasons discussed below, a defendant registering to do business in New York carries no weight in establishing specific jurisdiction. Thus, only two of the five connections above—the 2010

meeting and 2014 meeting—involve Defendants' conduct and are thus relevant to the specific personal jurisdiction analysis. Under well-established case law, these two trivial contacts over a six-year period are insufficient to establish jurisdiction under New York's long-arm statute or the Due Process Clause.

1. US Space fails to allege a sufficient statutory basis for specific jurisdiction.

CPLR § 302 provides four bases for specific personal jurisdiction: (1) transacting business in the state; (2) committing a tort within the state; (3) committing a tort outside of the state that causes injury in the state; and (4) owning, using, or possessing real property located in the state. The New York Complaint contains no allegations indicating that Defendants committed a tort within New York, caused injury to US Space in New York,[3] or own, use, or possess real property in New York. Thus, the only statutory basis that US Space can point to is the "transacting business" standard of CPLR § 302(a)(1).

a. Registering to do business and designating an agent to receive service are irrelevant to the specific jurisdiction analysis.

As a threshold matter, a defendant's registering to do business in a forum and designating an agent to receive service of process does not carry any weight in establishing specific personal jurisdiction. *Cf. Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 181 (5th Cir. 1992); *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971) ("We think the application to do business and the appointment of an agent for service to fulfill a state law requirement is of no special weight."). The reason is straightforward: specific jurisdiction against a foreign corporation is authorized only if the cause of action arises out of the defendant's contacts with the forum. *See, e.g.*, *Frummer v. Hilton Hotels Int'l, Inc.*, 227 N.E.2d 851, 852 (N.Y. 1967).

[3] Moreover, both US Space and ViviSat are headquartered in Virginia, which is where any alleged injury suffered by those entities would be felt. *Cashman v. Tract Manager, Inc.*, 2007 WL 2175666, at *1 (N.Y. Sup. Ct. May 18, 2007).

Here, for instance, Defendants' registrations to conduct business in New York have no connection to their dealings with US Space or its causes of action. They are thus irrelevant.

b. Inconsequential meetings are insufficient for specific jurisdiction.

When, as here, a plaintiff seeks to establish specific personal jurisdiction "based on a meeting or meetings in [New York], the meeting or meetings must be essential to the formulation of a business relationship." *United Computer Capital Corp. v. Secure Prods., L.P.*, 218 F. Supp. 2d 273, 278 (N.D.N.Y. 2002) (citing *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.,* 956 F. Supp. 1131, 1136 (S.D.N.Y. 1997)). That is, the meetings "must have played a significant role in establishing or substantially furthering the relationship of the parties." *Eastboro Found. Charitable Trust v. Penzer*, 950 F. Supp. 2d 648, 660 (S.D.N.Y. 2013) (quotation marks and citation omitted). Here, the New York Complaint references two inconsequential meetings in New York: the first occurring sometime before October 2010, the second roughly four years later. No facts are alleged indicating that these meetings were essential to the formulation of the parties' business relationship or played any significant role in furthering their relationship.

United Computer Capital is instructive. In that case, the court granted the foreign corporation's motion to dismiss, concluding that the defendants' "few New York visits over three years" were "irrelevant" because they lacked "any substantial nexus between the business transacted and the cause of action sued on." 218 F. Supp. 2d at 278, 279. This is an easier case than *United Computer Capital*. The New York Complaint alleges that ATK made just two visits to New York over six years, neither of which was relevant to any of US Space's claims.

Similarly instructive is *Eastboro Foundation*. There, although the plaintiff asserted that it had discussed the transaction sued on with defendant in New York, the court dismissed the complaint because the plaintiff provided "no detail as to the content of the alleged discussion." *Id.* at 661; *see also Presidential Realty Corp. v. Michael Square West, Ltd.*, 376 N.E.2d 198, 199

(N.Y. 1978) (holding that conclusory allegations about meetings are insufficient). As in *Eastboro Foundation*, US Space has provided no details as to the content of ATK's two alleged meetings in New York, much less facts indicating a substantial nexus between the meetings and the cause of action sued on. Therefore, as in *United Computer Capital* and *Eastboro Foundation*, such meetings are not sufficient to establish specific jurisdiction.

The overall context of the parties' six-year relationship further reinforces the conclusion that US Space fails to allege a statutory basis for specific jurisdiction. The New York Complaint alleges that ATK first sought out US Space while attending a conference in Maryland in March 2010. (NY Compl. ¶ 18; Wilson Aff. ¶ 14). Accepting this allegation as true for purposes of the present motion, it is undisputed that ATK did not "seek out and initiate a contact with New York." *Paterno v. Laser Spine Inst.*, 23 N.E.3d 988, 992 (N.Y. 2014). And US Space cannot transform a conversation that began in Maryland into a New York transaction simply because some months later an ATK representative travelled to New York to meet with a US Space representative.

The presence of a defendant's representative in the forum does not "talismanically transform any and all business dealings into business transactions." *Presidential Realty*, 376 N.E.2d at 199. "Otherwise, every corporation whose officers or sales personnel happen to pass the time of day with a New York customer in New York runs the risk of being subjected to the personal jurisdiction of our courts." *McKee Elec. Co. v. Rauland-Borg Corp.*, 229 N.E.2d 604, 607 (N.Y. 1967).

In *McKee*, for example, the Court of Appeals found specific personal jurisdiction lacking under § 302(a)(1), even though the parties negotiated their first one-year agreement in New York, the plaintiff used defendant's goods in New York, and the defendant's employees entered

New York to assist plaintiff with a customer dispute. Noting that the contractual relationship had been formed six or seven years before the dispute, the court found these alleged contacts, "rather than being minimal, were . . . infinitesimal." *Id.* The same conclusion follows here. The parties maintained a relationship for nearly six years before this dispute arose. Two meetings in New York over a six-year period are insufficient to warrant personal jurisdiction.

Likewise, US Space cannot rely on its *own* attempt to obtain investment in ViviSat from Melody in order to assert specific jurisdiction over the Defendants. The contact was initiated by US Space to obtain investment in ViviSat. ATK only participated in the 2014 New York meeting with Melody as an owner of ViviSat, not to seek out business for itself.

In sum, other than two isolated, immaterial meetings that took place over the six-year course of the parties' relationship, Defendants have no relevant contacts with New York. They certainly cannot be said, in the context of the transaction at issue, to have engaged in anything approximating the "level of purposeful involvement in New York business sufficient to satisfy CPLR 302(a)(1)." *Northern Valley Partners*, 2009 WL 1058162, at *5.

2. The exercise of specific jurisdiction would violate the Due Process Clause.

Even if these insignificant contacts satisfied New York's long-arm statute, which they do not, the exercise of jurisdiction would offend the Due Process Clause. "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a *substantial* connection with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (emphasis added). Moreover, because due process rights are personal to the individual, "the relationship must arise out of contacts that the defendant *himself* creates with the forum State." *Id.* at 1122 (quotation marks omitted) (emphasis in original).

At the threshold, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (citation omitted). Minimum contacts alone, however, "do not satisfy due process. The prospect of defending a suit in the forum State must also comport with traditional notions of fair play and substantial justice." *LaMarca*, 735 N.E.2d at 888 (quotation marks and citations omitted). Frequently, these two prongs are referred to as the "minimum contacts" and "reasonableness" requirements of the Due Process Clause. The New York Complaint does not satisfy either.

a. Defendants lack sufficient minimum contacts with New York.

The minimum contacts analysis focuses "on the defendant's purposeful connection to the forum." *Burger King*, 471 U.S. at 481-82. To demonstrate purposeful availment, the plaintiff must show that the defendant's contacts with the forum "proximately result from actions by the defendant *himself* that create a substantial connection with the forum State." *Id*. at 475 (emphasis in original). A plaintiff does this by demonstrating acts through which "the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *McKee*, 229 N.E.2d at 607 (citation omitted); *see, e.g*., *Morgan Keegan & Co. v. Rote*, 2012 WL 6211662, at *4 (N.Y. Sup. Ct. Nov. 30, 2012) (Bransten, J.) (discussed below), *aff'd* 982 N.Y.S.2d 448 (N.Y. App. Div., 1st Dep't 2014). Under these well-established principles, US Space's attempt to manufacture jurisdiction based on a pair of isolated, inconsequential meetings must be rejected.

Morgan Keegan & Co. is instructive. There, an out-of-state petitioner sued out-of-state respondents in New York seeking to vacate an arbitration award. This Court granted the respondents' motion to dismiss, explaining that their "agreement to come into New York, at the request and for the convenience of the arbitrators, does not constitute a 'purposeful activity'—

that is, an activity by 'which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" 2012 WL 6211662, at *4. The Appellate Division affirmed, adding that "[f]orcing respondents to defend their actions in New York solely because they agreed to accommodate the arbitrators' request to hold the remaining hearings in New York . . . would also offend traditional notions of fair play and substantial justice." 982 N.Y.S.2d at 449 (quotation marks omitted).

Here, US Space attempts to manufacture jurisdiction out of two meetings, neither of which involves Defendants themselves creating contacts with New York or invoking the benefits and protections of its laws. The first meeting occurred in 2010, when ATK's Mr. Wilson met with US Space's Mr. Horowitz in the office of EdsLink, LLC. (*See* Wilson Aff. ¶ 29). US Space was a Virginia-based company; it was not registered to do business in New York and did not have a New York office. The fact that the meeting happened to occur in New York was a mere coincidence, with no other connection to New York. *Cf. Fiore*, 134 S. Ct. at 1123 ("Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State."). The second meeting occurred in 2014 with Melody and US Space. It too did not involve ATK itself seeking out any contact with New York. Rather, at the time, US Space was seeking an investment by Melody in ViviSat, and ATK agreed to accommodate US Space by meeting with Melody in New York.

Similarly instructive is *Northern Valley Partners.* There, the plaintiffs alleged that the defendants transacted business in New York because, "in seeking outside capital for their company," the defendant's agent "reached out to Monarch Capital in New York . . . and initiated and directed the discussions." 2009 WL 1058162, at *3. This Court rejected the plaintiffs'

attempt and granted the defendants' motion to dismiss, explaining "[t]here are insufficient factual allegations as to purposeful activity by any of the defendants or their purported agents in New York." *Id*. This Court elaborated:

> The only contacts with New York are the apparent location here of Monarch Capital, the fact that four of the seventeen plaintiffs happen to be located in New York, and that the Securities Purchase Agreement, which is not an agreement that the Director Defendants signed, has a New York choice-of-law and forum-selection clause.

Id. Here, none of the parties is located in New York and none of the agreements at issue has a New York choice-of-law or forum-selection clause. Thus, this is an easier case than *Northern Valley Partners*. But the result is the same: US Space has not sufficiently pleaded purposeful availment.

Further reinforcing this conclusion is the common-sense principle that "[w]here the 'center of gravity' of a transaction is outside of New York, communications and even a visit to New York are much less likely to provide the type of purposeful contact necessary to sustain jurisdiction." *Lafayette SC, LLC v. Crystal Coast Invs., Inc*., 2016 WL 1271077, at *4 (W.D.N.Y. Mar. 28, 2016); *see also Pincione v. D'Alfonso*, 506 F. App'x 22, 25 (2d Cir. 2012). Here, the center of gravity of the dispute is Virginia. That is where this case belongs.

b. Subjecting Defendants to jurisdiction in New York would be unreasonable.

US Space's attempt to establish jurisdiction over ATK and Orbital ATK must also be rejected because US Space cannot satisfy the "reasonableness" requirement of the Due Process Clause. Courts apply a five-factor analysis to assess the reasonableness of exercising jurisdiction:

> (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies.

Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996) (collecting cases); *Opticare Acquisition Corp. v. Castillo*, 806 N.Y.S.2d 84, 92 (N.Y. App. Div., 2nd Dep't 2005) (same); *see also Copp v. Ramirez*, 874 N.Y.S.2d 52, 55 (N.Y. App. Div., 1st Dep't 2009).

Here, every one of those factors points to Virginia, not New York, as the proper forum. All of the parties have their principal place of business in Virginia, not New York. The joint venture at the heart of their dispute is located in Virginia, not New York. Virginia has a paramount interest in adjudicating a dispute between three Virginia-based companies over a Virginia-based joint venture, New York does not. Indeed, New York has no practical interest in this controversy. None of the parties is based in New York, none of the causes of action arose in New York, none is governed by New York law, and no injuries are alleged to have been suffered in New York.

Copp is instructive. There, an out-of-state plaintiff sued out-of-state defendants in New York alleging that they had defamed "his tale of courage and sacrifice at Ground Zero." *Id*. at 55. The trial court dismissed and the Appellate Division affirmed, holding:

> Even if defendants had 'minimum contacts' with New York State, subjecting them to jurisdiction here would be unreasonable since they are all residents of New Mexico, they made the allegedly defamatory statements in New Mexico three years after their brief contacts with New York, and plaintiffs are not residents of New York. Moreover, since [some of the defendants] are currently defending allegations of defamation and intentional infliction of emotional distress in federal court in New Mexico based on the same underlying facts, a New York action would not promote the interstate judicial system's shared interests in obtaining the most efficient resolution of the controversy.

Id. at 59. Here, as in *Copp*, the plaintiff is not a New York resident, the defendants are not New York residents, and the alleged facts giving rise to the causes of action did not occur in New York. There is also a related case based on the same underlying facts currently pending in Virginia, where all of the parties are located and the alleged facts giving rise to the causes of

action occurred. As in *Copp*, asserting personal jurisdiction over the Defendants in New York would not comport with traditional notions of fair play and substantial justice.

Further reinforcing this conclusion is the decision in *Sherwin-Williams Co. v. C.V.*, 2016 WL 354898, at *4 (S.D.N.Y. Jan. 28, 2016). In that case, as in this one, none of the parties was a resident of New York. *Id.* The only connection arose from substantive meetings held in New York during negotiations. *Id.* The court concluded that these substantive meetings satisfied (barely) the minimum contacts requirement of the Due Process Clause. But the court found that maintaining jurisdiction in New York would be unreasonable and violate the defendant's due process rights, explaining that when "the contacts that permit the imposition of jurisdiction under a minimum contacts analysis are weak, the importance of the reasonableness factors—each of which counsels against the exercise of jurisdiction here—are enhanced." *Id.* at 7.

For the reasons above, Defendants' relevant contacts with New York are insignificant and the reasonableness factors unequivocally weigh against jurisdiction. Accordingly, even if the insignificant contacts alleged in the New York's Complaint satisfied CPLR 302, which they do not, the exercise of personal jurisdiction here would offend the Due Process Clause.

II. Alternatively, the case should be dismissed for forum non conveniens.

Even if US Space could establish that the Court has personal jurisdiction over Defendants, which US Space cannot, the case should still be dismissed on forum non conveniens grounds. The doctrine of forum non conveniens, also codified in CPLR 327, empowers the court to dismiss an action that "would be better adjudicated elsewhere." *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245, 248 (N.Y. 1984). The doctrine's purpose is to provide "a necessary antidote to the greatly expanded jurisdiction provided by 'long-arm' statutes such as CPLR 302." *Id.* at 254. Because of long-arm statutes, a plaintiff frequently has "a wide choice of forums in which to sue. Such forums often bear little relation either to the cause of action or to the parties

and are selected by the plaintiff with the purpose of unduly burdening or harassing a defendant." *Silver v. Great Am. Ins. Co.*, 278 N.E.2d 619, 621 (N.Y. 1972). The same is true here.

In evaluating whether to dismiss based on forum non conveniens grounds, a court considers several factors, including "the residency of the parties, the potential hardship to proposed witnesses, the availability of another forum, the [forum where the causes of action arose], and the burden upon the New York courts, with no one single factor controlling." *Economos v. Zizikas*, 796 N.Y.S.2d 338, 340 (N.Y. App. Div., 1st Dep't 2005); *see also Pahlavi*, 467 N.E.2d at 248 (listing factors).

Here, every factor points away from New York and toward Virginia. All of the parties reside in Virginia; none reside in New York. The vast majority of the witnesses are located in Virginia; few if any are in New York. Virginia is not merely an available forum; related litigation is already underway there. The alleged causes of action arose in Virginia and none of the causes of action are governed by New York law. The courts and people of New York have no interest in a dispute between three Virginia-based companies arguing over a Virginia-based joint venture. In short, the case belongs in Virginia.

A. All of the parties are Virginia residents; not one is a New York resident.

Not one party to this action is a New York resident. Rather, every one of the parties to this action is a Virginia-based company formed under the laws of Delaware. So too is the joint venture at the heart of this dispute, ViviSat.

Moreover, US Space did not even register to conduct business in New York until the *very day* that it filed its New York Complaint, and US Space *never* registered ViviSat to conduct business in New York. Until it decided to file suit, US Space apparently did not believe that its own business, much less that of the ViviSat joint venture it managed, was sufficiently connected to New York to require permission to lawfully conduct business in the state.

Instead, US Space appears to have registered in New York just to file suit. Courts look with strong disfavor on this sort of "blatant forum shopping." *Economos*, 796 N.Y.S.2d at 340; *see, e.g.*, *A&M Exps. Lt. v. Meridien Int'l Bank, Ltd*., 207 A.D.2d 741, 741 (N.Y. App. Div., 1st Dep't 1994) (affirming *forum non conveniens* dismissal where, as in this case, all parties were foreign corporations); *cf. Norex Petroleum Ltd. v. Blavatnik*, 22 N.Y.S.3d 138 (N.Y. Sup. Ct. 2015) (Bransten, J.) (holding that plaintiff's foreign residence weighed in favor of dismissal).

B. The majority of the witnesses and documents are in Virginia, not New York.

Not one potential witness of ATK or Orbital ATK is located in New York. (Wilson Aff. ¶¶ 31-32). Moreover, the vast majority of the potential witnesses of ATK and Orbital ATK, as well the vast bulk of the relevant documentary evidence of ATK and Orbital ATK, are located in Virginia. (Wilson Aff. ¶ 33). Likewise, given that US Space's principal place of business is in Virginia, many of US Space's witnesses and documents are also likely to be located in Virginia.

When proving a complaint's allegations depends on witnesses and documents, as in this case, the location of the witnesses and documents "becomes an important factor." *Shin-Etsu Chem. Co. v. 3033 ICICI Bank Ltd.*, 777 N.Y.S.2d 69, 74 (N.Y. App. Div., 1st Dep't 2004); *see, e.g*., *Evdokias v. Oppenheimer*, 506 N.Y.S.2d 883, 883 (N.Y. App. Div., 2nd Dep't 1986).

Evdokias is instructive. There, the court affirmed the dismissal of the complaint on forum non conveniens grounds, despite the fact that the defendants were New York residents, because "a substantial majority of the witnesses were located in another jurisdiction." *Id*. Here, the substantial majority of the witnesses are located in Virginia—and *none* of the parties is a New York resident.

C. Virginia is not simply an "available forum," but the one with the greatest interest in the case.

Although no single factor in the forum non conveniens analysis is dispositive, "the availability of an alternative forum in which the dispute may be litigated is often of paramount importance." 3 N.Y. Practice, *Commercial Litigation in New York State Courts* § 20:4 (West 2016) (collecting cases). In the words of the New York Court of Appeals, "[w]ithout doubt, the availability of another suitable forum is a *most important factor* to be considered." *Pahlavi*, 467 N.E.2d at 249 (emphasis added). Numerous decisions support this common-sense principle. *See, e.g.*, *Carroll v. Weill*, 767 N.Y.S.2d 627 (N.Y. App. Div., 1st Dep't 2003); *Hart v. Gen. Motors Corp.*, 517 N.Y.S.2d 490, 494 (N.Y. App. Div., 1st Dep't 1987).

Here, Virginia is not merely another available forum for this case—it is the forum with the greatest interest in the case and the forum in which the same parties are presently litigating the same issues. In Virginia state court, ATK and Orbital ATK have brought claims against US Space seeking a declaration that an Amendment Trigger has occurred and that their conduct, including the dissolution of the ViviSat entity, was proper. These assertions go to the heart of US Space's claims in this lawsuit, and US Space is free to assert counterclaims in the Virginia action mirroring the claims asserted in this lawsuit.

D. US Space's alleged causes of action did not arise in New York and are not governed by New York law.

Further reinforcing the conclusion that the case should be dismissed on grounds of forum non conveniens, none of the causes of action in the New York lawsuit arose in New York and none is governed by New York law. *See, e.g.*, *Pahlavi*, 467 N.E.2d at 248 (observing that one factor the court should consider is whether "the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction"); *Hormel Int'l Corp. v. Arthur Andersen & Co.*, 390 N.Y.S.2d 457, 459 (N.Y. App. Div., 2nd Dep't 1977) ("Choice of law is important consideration

on issue of *forum non conveniens*."); *Silver Lane Advisors LLC v. Bellatore LLC*, 2009 WL 2045513, at *4 (N.Y. Sup. Ct. July 6, 2009) ("The fact that the transactions out of which the cause of action arose occurred primarily in a foreign jurisdiction weighs strongly in favor of dismissal on the ground of forum non conveniens." (quotation mark and brackets omitted)).

The First and Second Causes of Action concern the ATK-US Space Teaming Agreement. The First Cause of Action alleges that ATK breached the Teaming Agreement, while the Second Cause of Action alleges that Orbital ATK tortiously interfered with the Teaming Agreement. The Teaming Agreement is governed by the substantive law of Maryland. (NY Compl. Ex. A at p. 9). The challenged conduct in these counts occurred in Virginia, not New York, as Defendants are headquartered in Virginia and all of their relevant corporate decision-making occurred there. (Wilson Aff. ¶ 8). US Space is also headquartered in Virginia, and that is where any injury it suffered would have been felt. *Cashman*, 2007 WL 2175666, at *1 ("A corporation suffers its injury where its principal place of business is located.").

The Third, Fourth, and Fifth Causes of Action likewise did not arise in New York and are not governed by New York law. The Third Cause of Action alleges that ATK breached the implied covenant of good faith and fair dealing in the Funding Agreement, the Fourth Cause of Action seeks a declaration that no Amendment Trigger has occurred under the Funding Agreement, and the Fifth Cause of Action seeks to estop Defendants from asserting an Amendment Trigger has occurred. As noted, all of Defendants' relevant corporate decision-making occurred in Virginia and any injury to US Space would have been felt in Virginia.

Additionally, the Funding Agreement amends the Operating Agreement and Management Services Agreement, both of which state that they are governed by Delaware law.[4]

The final two causes of action, the Sixth and Seventh Causes of Action, also did not arise in New York and are not governed by New York law. The Sixth Cause of Action purports to bring a derivative claim on behalf of ViviSat (despite the fact that ViviSat is not named as a party to this action) against ATK for breach of fiduciary duty, while the Seventh Cause of Action purports to bring an aiding and abetting breach of fiduciary duty claim on behalf of ViviSat against Orbital ATK. ViviSat is a limited liability company formed under the laws of Delaware. Under the "internal affairs" doctrine, the law of the state of formation applies to disputes over a corporation's internal affairs, including any fiduciary duty claims. *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

E. The courts and people of New York would be unreasonably burdened by this litigation.

Finally, this lawsuit unreasonably burdens the Court and the people of New York. None of the parties is a resident of New York, the alleged causes of action did not arise in New York, and the issues in dispute will not be governed by New York law. Yet US Space improperly asks the New York court system to carry the burden of administering this commercial litigation, thereby delaying prompt adjudication of cases actually involving New York residents, causes of action arising in New York, and issues governed by New York law. As the Court of Appeals observed, "the taxpayers of this state should not be compelled to assume the heavy financial burden attributable to the cost of administering the litigation contemplated when their interest in the suit and connection of its subject matter to the State of New York is so ephemeral." *Pahlavi*,

[4] The Funding Agreement does not itself contain a separate choice-of-law provision; instead, the Funding Agreement amends the provisions of the Operating Agreement and Management Services Agreement. (NY Compl. Ex. B at p. 6, Ex. D at p. 6).

62 N.E.2d at 483 (citation omitted). Likewise, as this Court said, "Courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York." *Nordkap Bank AG, v. Standard Chartered Bank*, 934 N.Y.S.2d 35, 2011 WL 2764279, at *3 (N.Y. Sup. Ct. May 6, 2011) (Bransten, J.) (quotation marks omitted) (quoting *Silver*, 278 N.E.2d at 621).

This case has no nexus with New York, much less a substantial one. Rather, the case concerns three Virginia-based companies in a dispute over a Virginia-based joint venture. Even if this Court had jurisdiction over the Defendants, and it does not, the Court should dismiss the case based on forum non conveniens.

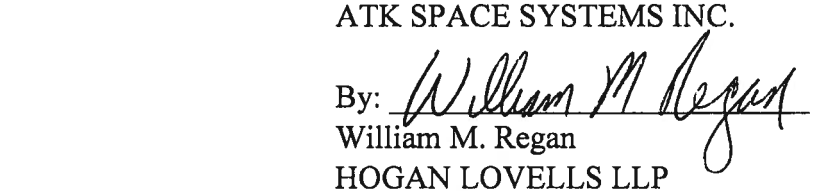
CONCLUSION

This case does not belong in New York and should be dismissed. Should US Space wish to pursue its claims, it can do so in its home state of Virginia. Because this Court lacks jurisdiction over the Defendants, and because the Virginia court is the proper forum for this dispute, this Motion to Dismiss should be granted.

Date: June 23, 2016

Respectfully submitted,

ORBITAL ATK, INC.
ATK SPACE SYSTEMS INC.

By: 

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