

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

BROOK + WHITTLE LTD,

Plaintiff,

v.

NESTLÉ USA, INC., ET AL.,

Defendants.

Case No. 2:24-CV-00735-JRG-RSP

**DEFENDANT FUJI SEAL INTERNATIONAL, INC.'S REPLY IN SUPPORT OF ITS
MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

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I. PRELIMINARY STATEMENT

Under the test set forth in *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), Defendant Fuji Seal International, Inc. ("FSI") cannot be found to have purposefully directed activities at Texas residents because FSI has ***no contacts*** with Texas. FSI does not do any business in Texas. It does not import, sell, offer to sell, or distribute the Accused Products in Texas. It does not derive any revenue from the sale of the Accused Products to Texas residents. Nor does FSI have any subsidiaries, agents, distributors, and other related entities located in Texas. Thus, FSI does not have the requisite "minimum contacts" to establish personal jurisdiction in this Court.

Plaintiff Brook + Whittle Ltd ("B+W") cherry-picks bits and pieces from almost every jurisdictional theory in the book, including alter ego, agency, and website interconnectivity, conflating them and masquerading them as a single "stream of commerce" allegation without fully addressing any single theory on its own merit (or lack thereof).

To exercise specific jurisdiction over FSI in this case, the Court would first need to ignore: (i) that this case "could have been brought" in Kentucky, where one of FSI's subsidiaries, American Fuji Seal, Inc. ("AFS"), is located and where two of FSI's employees live; (ii) that FSI ***does not*** make, use, sell, offer for sale, and/or import into the U.S. the Accused Products; and (iii) that Texas consumers cannot purchase the Accused Products from FSI's purely informational website.

The Court would then also be required to improperly impute the actions of AFS to FSI under either an alter ego or agency theory.¹ Ignoring corporate formalities, B+W argues that FSI "portrays itself as one part of an inseparable corporate whole" and relies on readily distinguishable cases to argue that FSI "acted in consort" with AFS to place the Accused Products into the

¹ Although not pleaded in its Complaint, B+W raises these theories for the first time in a single footnote. (Dkt. No. 40 at 30, n. 6.)

stream of commerce with the expectation that they will be purchased by Texas consumers. The Court should reject B+W's convoluted and unsupported attempt to bypass the personal jurisdiction requirements of the Fourteenth Amendment. As a result, FSI's Rule 12(b)(2) motion should be denied.

II. LEGAL STANDARD

"The Supreme Court has forbidden the exercise of jurisdiction over a defendant on the basis of unilateral acts of third-parties[,]" explaining that "the 'unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State' because it is essential that the defendant take actions purposefully availing him or her of the privileges and benefits of the forum state." *Celgard, LLC v. SK Innovation Co.*, 792 F.3d 1373, 1380 (Fed. Cir. 2015) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citing *Int'l Shoe*, 326 U.S. at 319)). "This purposeful-avilment requirement is tied to the principle that a defendant should be able to reasonably foresee litigation in the forum state." *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980); *Hanson*, 357 U.S. at 253)). "Indeed, the purposeful-avilment requirement ensures that a foreign defendant will not be unexpectedly 'haled into a jurisdiction solely as a result of . . . the unilateral activity of . . . a third person.'" *Id.* (quoting *Burger King*, 471 U.S. at 475).

III. EXERCISING PERSONAL JURISDICTION OVER FSI IN TEXAS IS IMPROPER

A. B+W Waived Its Ability to Rebut FSI's Rule 4(k)(2) Arguments

In its response, B+W fails to address FSI's argument that jurisdiction is not proper under Rule 4(k)(2) and thus has waived its ability to present such argument in a sur-reply. *See Lifetime Brands, Inc. v. QIMA Ltd.*, No. 2:23-CV-00216-JRG, 2024 WL 896344, at *4 (E.D. Tex. Mar. 1, 2024). Thus, because this case "could have been brought" in Kentucky, as proven in FSI's opening

brief (*see* Dkt. No. 32 at 13-14), jurisdiction in Texas cannot be found under Rule 4(k)(2).

B. FSI Has *No Contacts* with Texas—Let Alone Minimum Contacts

1. FSI Does Not Manufacture, Distribute, or Sell the Accused Products

B+W strategically conflates the actions of defendant FSI and its non-party subsidiary AFS, attempting to blur the clear delineation between the two separate corporate entities—without properly pleading or arguing an alter ego or agency theory of personal jurisdiction. When analyzing *only* FSI's actions under a pure minimum contacts analysis set forth in *Int'l Shoe*, however, it is apparent that this Court's exercise of personal jurisdiction over FSI would be wholly improper because FSI has *no contacts* with Texas. *See Int'l Shoe*, 326 U.S. at 319 ("Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which . . . *does not* contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has *no contacts, ties, or relations*."). As previously discussed (Dkt. No. 32 at 1-4, 7-9), FSI has never done any kind of business in Texas, does not import the Accused Products into Texas, does not sell or offer to sell the Accused Products in Texas, does not derive substantial revenue from selling the Accused Products to Texas residents, and does not have wholly-owned subsidiaries or agents, distributors, and other entities located in Texas (Dkt. No. 32-1, Ex. A, Takahashi Decl., ¶¶ 4, 5, 7-9). Thus, FSI does not have the requisite "minimum contacts" in Texas.

B+W all but admits FSI's lack of contacts with Texas through its failure to analyze FSI's actions independent of its subsidiaries, including AFS. Instead, B+W mischaracterizes statements FSI made about its *subsidiaries'* actions as evidence of FSI's actions and incorrectly categorizes FSI as being *a part of* the "Fuji Seal Group." (*See, e.g.*, Dkt. No. 40 at 2 ("Fuji consistently refers to itself as Fuji Seal Group"); *id.* at 3 ("Fuji portrays itself and its subsidiaries as the Fuji Seal Group"); *id.* at 9 ("The Fuji Seal Group is comprised of Fuji and its subsidiaries").

B+W's categorization of FSI is not accurate. On FSI's website, FSI lists the corporate entities included in the "Fuji Seal Group." (Dkt. No. 41-1, Ex. 1.) The Fuji Seal Group is made up of subsidiaries located in different geographical regions: (i) **Japan**: Fuji Seal, Inc.; Fuji Tack East, Inc.; Fuji Astec, Inc.; Fuji Seal West, Inc.; Fuji Seal Business Associe, Inc.; Toride Pharma K.K; (ii) **The Americas**: **American Fuji Seal, Inc.(USA)**; American Fuji Technical Services, Inc.(USA); Fuji Seal Packaging de Mexico, S.A. de C.V(Mexico); (iii) **Europe**: Fuji Seal Europe S.A.S.(France); Fuji Seal Iberia. S.L.U.(Spain); Fuji Seal Europe B.V.(The Netherlands); Fuji Seal Europe Ltd.(United Kingdom); Fuji Seal France S.A.S.(France); Fuji Seal Poland Sp.zo.o(Poland); Fuji Seal B.V.(The Netherlands); Fuji Seal Germany GmbH(Germany); Fuji Seal Italy S.r.l.(Italy); (iv) **ASEAN**: PT. Fuji Seal Indonesia(Indonesia); Fuji Seal Vietnam Co., Ltd.(Vietnam); Fuji Seal Engineering Co., Ltd.(Thailand); Fuji Seal Packaging(Thailand) Co., Ltd.(Thailand); and (v) **South Asia**: Fuji Seal India Pvt Ltd.(India). (*See id.*) Absent from the list of companies included in the Group is **Defendant Fuji Seal International, Inc.** (*See id.*)

FSI is not a part of the Group; rather, it is the parent holding company of the Group "responsible for strategic and managerial functions as well as internal audit of the group companies." (*See id.*) As such, **FSI does not** make, use, sell, offer for sale, and/or import the Accused Products. (*See* Dkt. No. 32-1, Ex. A, Takahashi Decl., ¶ 4.) Instead, as consistently stated throughout FSI's website and publicly available documents, **only members of the Fuji Seal Group—meaning the collective of FSI's subsidiaries**—make, use, sell, offer for sale, and/or import the Accused Products. (*See, e.g.,* Dkt. No. 41-1, Ex. 1; Dkt. No. 41-6, Ex. 6.) And the corporate entity responsible for making, using, selling, and/or offering for sale, the Accused Products **in the United States** is the subsidiary in the Fuji Seal Group located in that geographical region or "global location": **AFS**. (Dkt. No. 32-1, Ex. A, Takahashi Decl., ¶ 7; Dkt. No. 41-8, Ex.

8 at 28.)

The facts here are notably distinguishable from the cases relied on by B+W in its response:

- First, in *AX Wireless*, testimony from representatives of the foreign parent defendant, Lenovo Group Limited ("LGL"), evidenced that the "Lenovo Group" included LGL's subsidiaries **and** LGL **itself** and that the "Lenovo Group," i.e., the group that "manufacture[d], [sold], and distribute[d] the Accused Products in the United States and worldwide." *AX Wireless LLC v. Lenovo Grp. Ltd.*, No. 2:22-CV-00280-RWS-RSP, 2023 WL 7105701, at *4 (E.D. Tex. Sept. 6, 2023).
- Second, in *Sportscast*, uncontroverted evidence from press releases showed that the foreign parent defendant **itself**, Sportradar Group AG ("Sportradar Group")—**not its subsidiaries**—"launched emBET (an Accused Product) in NBA's League Pass, which is 'offered for sale in every state, including Texas,'" and that Sportradar Group admitted that it "operate[d] the business and control[led] strategic decisions and day-to-day operations" of the subsidiary that was "responsible for the creation, development, maintenance, and servicing of the accused . . . products." *Sportscast Inc. v. Sportradar Grp., AG*, No. 2:23-CV-00472-JRG, 2024 WL 4219252, at *4-6 (E.D. Tex. Sept. 17, 2024) (internal quotations omitted).
- Third, in *Canon*, the Court found that, even though the supply chain operated entirely outside of the United States, the foreign parent defendants' admission that **they distributed the accused products** to their U.S. subsidiary, was, on its own, sufficient to support personal jurisdiction. *Canon, Inc. v. TCL Elecs. Holdings Ltd.*, No. 2:18-CV-00546-JRG, 2020 WL 1478356, at *3 (E.D. Tex. Mar. 25, 2020).
- Finally, in *Cardsoft*, the website of the foreign parent defendant, Shera International Ltd. ("Shera"), stated that Shera **itself—not its subsidiary**—"offer[ed] its customers a full suite of hardware devices, software systems, and service solutions for financial POS [point of sale] transactions," i.e., the accused products, and that Shera "enjoy[ed] all of the revenues from the sales of the allegedly infringing products." *Cardsoft, Inc. v. Verifone Holdings, Inc.*, No. 2-08-CV-098(TJW), 2009 WL 361069, at *1 (E.D. Tex. Feb. 10, 2009).

In contrast, here, the evidence and publicly available statements on FSI's website establish that the "Fuji Seal Group" includes **only** FSI's subsidiaries and **not** FSI **itself** and that the Group (excluding FSI) makes, uses, sells, and/or offers for sale the Accused Products. (Dkt. No. 41-1, Ex. 1.) Thus, unlike in *AX Wireless*, *Sportscast*, *Canon*, and *Cardsoft*, there is no evidence to support B+W's incorrect assertion that FSI "mak[es], us[es], sell[s], offer[s] for sale, and/or import[s] into the United States its Accused Products." (Dkt. No. 1, ¶ 40.)

Moreover, unlike in *Cardsoft*, FSI does not receive **any** revenue from selling the Accused

Products—let alone *all* of the revenues from the sales of the Accused Products. (Dkt. No. 32-1, Ex. A, Takahashi Decl., ¶ 4.) B+W points to certain integrated reports that FSI publishes and other financial statements that FSI makes on its website for the proposition that FSI earns revenues from the Accused Products. (Dkt. No. 41-3, Ex. 3; Dkt. No. 41-4, Ex. 4; Dkt. No. 41-5, Ex. 5; Dkt. No. 41-6, Ex. 6.) Those integrated reports and other financial statements, however, are created by FSI from performing its internal auditing function as a foreign parent company to its subsidiaries that are a part of the Fuji Seal Group. (*See id.*) Thus, those integrated reports and other financial statements neither reflect the revenues of FSI nor remotely suggest that those revenues are even related to the Accused Products. (*See id.*)

2. Texans Cannot Purchase the Accused Products from FSI's Website

B+W's arguments regarding FSI's website are factually incorrect and not supported by the case law. Specifically, B+W argues that FSI's "conduct[ing] business" with Texas consumers through FSI's website "alone is sufficient for finding personal jurisdiction." (Dkt. No. 40 at 20.) In *AX Wireless*, however, the Court did not find that the foreign parent defendant's business dealings with customers through its website *alone* was sufficient to find personal jurisdiction. 2023 WL 7105701, at *4. B+W omits the critical portion of the website interactivity theory on which B+W relies: "LGL . . . conducts business with customers through Lenovo.com, *which allows customers to purchase the Accused Products and obtain technical support.*" *Id.* Thus, in *AX Wireless*, Texas consumers could directly purchase the Accused Products from the foreign parent defendant's website. Here, FSI does not sell or offer to sell any products or services on its website, including the Accused Products or any services related to those products. (Dkt. No. 32-1, Ex. A, Takahashi Decl., ¶ 5.) As such, FSI does not "clearly [do] business over the internet." *Loyalty Conversion Sys. Corp. v. Am. Airlines, Inc.*, 66 F. Supp. 3d 813, 826 (E.D. Tex. 2014) (quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

Similarly, in *Orange*, the foreign parent defendant's website was found to be interactive enough for the Court to conclude that personal jurisdiction exists where: (i) the foreign parent corporation sold the manufactured accused products to its U.S. subsidiary that imported the accused products into the U.S. and sold the accused products to retailers that were located in Texas; and (ii) the foreign parent defendant's website provided locations of said retailers where consumers could purchase the accused products. *Orange Elec. Co. v. Autel Intelligent Tech. Corp.*, No. 2:21-CV-00240-JRG, 2022 WL 4368160, at *1, *5 (E.D. Tex. Sept. 21, 2022). Retailers that sell the Accused Products include stores such as Walmart. (Dkt. 1, Ex. D.) Unlike in *Orange*, nowhere on FSI's website does it provide locations of retailers. Instead, as explained above, FSI's website is passive, merely providing information accessible to the public. Thus, FSI's website falls on "the other end of the spectrum" where FSI "has simply posted information" that customers can access. *Loyalty*, 66 F. Supp. 3d at 826 (quoting *Zippo*, 952 F. Supp. at 1124).

3. B+W Waived Its Ability to Argue Alter Ego or Agency Theories

Numerous facts contained in FSI's opening brief and supporting declaration weigh against imputing the actions of AFS to FSI under either an alter ego or agency theory. (See Dkt. No. 32 at 2-4; Dkt. No. 32-1, Takahashi Decl., ¶¶ 8, 9, 13-16); *see also Wapp Tech Ltd. P'ship v. Micro Focus Int'l, PLC*, 406 F. Supp. 3d 585, 595 (E.D. Tex. 2019)). But B+W fails to plead or address either theory head-on in its response, merely making a passing mention of the theories in a footnote on the last page of the brief in connection with jurisdictional discovery. (Dkt. No. 40 at 30, n. 6.) As a result, B+W has waived any argument based on those theories. *See Lifetime Brands*, 2024 WL 896344, at *8 (finding any additional arguments raised in a sur-reply brief waived when conclusory and bare arguments were mentioned only in a footnote and conclusion section of a response brief).

4. FSI Did Not Place the Accused Products into the Stream of Commerce

Here, the stream of commerce facts can be summarized as follows: (i) the Accused Products are manufactured by AFS located in Kentucky; (ii) AFS sells the Accused Products to NUSA located in Virginia; (iii) NUSA sells the Accused Products to retailers located throughout the U.S., including in Texas; and (iv) retailers sell the Accused Products to consumers. These facts are different from the facts of the cases on which B+W relies:

- *AX Wireless*: (i) consumers could **purchase** the accused products directly from the foreign parent corporation's website: *Lenovo.com*; and (ii) U.S. subsidiaries were the **established distribution channel** for the accused products throughout the U.S., including Texas. 2023 WL 7105701, at *4.
- *Nuance*: (i) foreign parent corporation **imported** the manufactured accused products into the U.S. by shipping them to its U.S. subsidiary located in California; (ii) U.S. subsidiary was the foreign parent corporation's **established distribution chain**, which made the accused products available for sale. *Nuance Commc'ns, Inc. v. Abby Software House*, 626 F.3d 1222, 1233-34 (Fed. Cir. 2010).
- *Orange*: (i) foreign parent corporation **sold** the manufactured accused products to U.S. subsidiary that was located in New York; (ii) U.S. subsidiary **imported** the accused products into the U.S.; (iii) U.S. subsidiary **sold** the accused products to retailers that were located in Texas; and (iv) retailers sold the accused products to consumers. 2022 WL 4368160, at *1, *3.
- *Canon*: (i) foreign parent and sister corporations operated the supply chain for the accused products entirely outside the U.S.; (ii) foreign parent and sister corporations **distributed** the accused products to the U.S. subsidiary, which was the **exclusive distributor** of the accused products in a "**vertically integrated supply chain**" model; and (iii) U.S. subsidiary sold the accused products directly to consumers in Texas online and sold the accused products to retailers that sold the accused products to consumers. 2020 WL 1478356, at *2-3.
- *Universal Connectivity and Eireog*: (i) U.S. subsidiaries either **manufactured or imported** the manufactured accused products into the U.S.; (ii) U.S. subsidiaries that were located in North Carolina but **registered to do business in Texas** **sold** the accused products to authorized sellers and sales representatives; and (iii) authorized sellers and sales representatives sold or offered to sell the accused products in Texas. Additionally, the foreign parent corporation submitted a **declaration from an employee of one of its subsidiaries** on behalf of the foreign parent corporation to opine on the relationship between the two companies, and the **foreign parent corporation had employees living in Texas**. *Universal Connectivity Techs. Inc. v. Lenovo Grp. Ltd.*, No. 2:23-CV-00449-JRG, 2024 WL 4519760, at *2-4 (E.D. Tex. Oct. 17, 2024)); *Eireog Innovations Ltd. v. Lenovo Grp. Ltd.*, No. 2:24-CV-00239-JRG, 2024 WL 4519763, at *2-4 (E.D. Tex. Oct. 17, 2024).

Here, unlike in *AX Wireless*, *Nuance*, *Orange*, and *Canon*, FSI's U.S. subsidiary AFS is not the established distribution channel for the Accused Products, but, rather AFS manufactures

the Accused Products and then sells them to third parties, such as NUSA, which in turn sells them to retailers to distribute the Accused Products.² And, unlike in *AX Wireless*, consumers cannot purchase the Accused Products directly from the foreign parent corporation FSI's website. (Dkt. No. 32-1, Ex. A, Takahashi Decl., ¶ 5.) Moreover, unlike in *Nuance*, *Orange*, or *Canon*, FSI does not sell, import, or distribute the Accused Products. (*Id.* at ¶ 4).

Finally, unlike in *Universal Connectivity* and *Eireog*: (i) FSI's U.S. subsidiary AFS is not registered to do business in Texas; (ii) FSI did not submit a declaration from an employee of AFS on behalf of FSI to opine on the relationship between the two companies; and (iii) ***FSI does not*** have employees living in Texas. B+W once again attempts to impute action of AFS onto FSI by arguing that the ***FSI*** appears to hire employees and has an employee living in Texas (Dkt. No. 40 at 18)—despite the employee working for ***AFS*** (Dkt. No. 41-24, Ex. 4 (stating that J. Boteler is a "Field Services Engineer at ***American Fuji Seal***" located in "Maypearl, Texas").)³ Because B+W's cases are distinguishable, B+W has failed to prove that FSI "acted in consort" with AFS to place the Accused Products into the stream of commerce with the expectation that they will be purchased by Texas consumers. Thus, the Court should reject B+W's attempt to bypass the personal jurisdiction requirements.

C. B+W's Claim Must Arise Out of or Relate to FSI's Contacts with Texas

The second prong of the specific jurisdiction analysis is not "that this suit arises out of the

² B+W relies on an unrelated bankruptcy case for support of an alleged existence of an "established distribution channel into the forum." But such case merely shows that AFS—not FSI—previously had a customer of non-Accused Products that was located in Texas. (Dkt. No. 40 at 18 (citing *Dean Foods Co. v. American Fuji Seal, Inc.*, No. 19-36313-DRJ, Dkt. 1 (Bankr. S.D. Tex. Apr. 29, 2021).) Thus, the "significant factor" when evaluating the strength of a non-movant's stream of commerce theory is still lacking. *Beverly Hills Fan*, 21 F.3d at 1565, n.15.

³ The Court should not impute AFS's actions to FSI under either an alter ego or agency theory without B+W's making a proper prima facie showing. See *Wapp Tech*, 406 F. Supp. 3d at 595.

sale of the Accused Products in Texas," as B+W implies. (Dkt. No. 40 at 8.) Instead, B+W's claim must arise out of or relate to FSI's activities purposefully directed at Texas residents involving the Accused Products. *Nuance*, 626 F.3d at 1231. Because FSI has not engaged in *any* activities purposefully directed at Texas residents, let alone those involving the Accused Products, there are no contacts for B+W's claim against FSI to arise out of or relate to.

D. Exercising Personal Jurisdiction over FSI Is Not Reasonable and Fair

In addition to the reasons stated in FSI's opening brief (*see* Dkt. No. 32 at 12-13), the fourth *Synthes* factor further supports that exercising personal jurisdiction over FSI in Texas is not reasonable or fair. *See Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com de Equip. Medico*, 563 F.3d 1285, 1299 (Fed. Cir. 2009). The interstate judicial system's interest in obtaining the most efficient resolution of controversies is best satisfied here by either: (1) dismissing the complaint against FSI—an entity that has nothing to do with the dispute between B+W and AFS—for lack of personal jurisdiction in Texas and allowing a single lawsuit (AFS's declaratory judgment action) to proceed in Delaware between the two direct competitors in their state of incorporation; or (2) transfer this action to Kentucky, where personal jurisdiction is proper over FSI and where two of FSI's employees, and likely witnesses, reside.

E. B+W Has Not Met Its Burden of Demonstrating the Necessity of Discovery

B+W's request for jurisdictional discovery is conclusory and bare (Dkt. No. 40 at 30, n. 6), and thus B+W has not met its burden. *See Lifetime Brands*, 2024 WL 896344, at *8. B+W also has waived its ability to raise any additional arguments about the necessity of the discovery in its sur-reply. *See id.*

IV. CONCLUSION

For all the foregoing reasons, the Court should grant FSI's motion to dismiss.

Dated: January 17, 2025

Respectfully submitted,

/s/ Amy E. LaValle

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing document, DEFENDANT FUJI SEAL INTERNATIONAL, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION, via the Court's CM/ECF system per Local Rule CV-5(a)(3).

Dated: January 17, 2025

/s/ Amy E. LaValle

Amy E. LaValle