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IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

PENNY NEWMAN GRAIN COMPANY,	)	No. CV-F-06-1020 OWW/DLB
	)	
	)	MEMORANDUM DECISION GRANTING
	)	THIRD-PARTY DEFENDANT
Plaintiff,	)	NORBERG PAINTS, INC.'S
	)	MOTION TO DISMISS MIDWEST
vs.	)	PAINT SERVICES, INC.'S
	)	AMENDED THIRD PARTY
	)	COMPLAINT PURSUANT TO FED.
MIDWEST PAINT SERVICES, INC.,	)	R.CIV.P. 12(b)(2) (Doc. 33)
et al.,	)	
	)	
	)	
Defendant.	)	
	)	
	)	

Plaintiff Penny Newman Grain Co., Inc. (Penny Newman) has filed a First Amended Complaint for Breach of Contract, Negligence and Breach of Express Warranty (FAC). Named as defendants are Midwest Paint Service, Inc. (Midwest), ICI Paints (ICI), and Does 1-100. The FAC alleges that Penny Newman and Midwest entered into a Painting Contract in June 2003 under which Midwest agreed to provide the labor, supplies, insurance, equipment and tools necessary to prepare, patch and paint a storage facility consisting of concrete silos in Stockton, California (the Stockton Facility) for the sum of \$336,500; that Midwest began the process of preparing and repainting the Stockton Facility in August 2003; that Midwest finished working on the Stockton Facility in January 2004; that Midwest negligently prepared the surface of the Stockton Facility and

1 painted and/or selected a paint wholly unsuitable for the  
2 Stockton Facility; and that, as a result of Midwest's conduct,  
3 large sections of the paint failed to adhere, resulting in  
4 blistering, flaking and stripping of the paint from the surface  
5 of the Stockton Facility.

6 Midwest has filed an Amended Third Party Complaint (TPC)  
7 against Norberg Paint Services, Inc. (Norberg), alleging claims  
8 for negligent misrepresentation and indemnity and contribution.  
9 The TPC alleges that Norberg is liable to Midwest for the  
10 liability that Midwest may owe to Penny Newman because of  
11 negligent misrepresentations, contribution, equitable indemnity,  
12 and apportionment of fault. Based on information and belief, the  
13 TPC alleges that Norberg is a South Dakota corporation, with its  
14 principal place of business in Sioux Falls, South Dakota; that  
15 Norberg is a paint products retailer who sells, among other  
16 products, Devoe paint products including Devoe Hydrosealer and  
17 Devoe Hi-Build Acrylic paint; that Norberg has sold paint and  
18 paint products to Midwest which Norberg knew would be used in  
19 locations outside of South Dakota in the usual course of its  
20 business; and that Norberg either regularly shipped or arranged  
21 for shipping of paint products to be used outside South Dakota.  
22 (TPC, ¶ 6). The TPC further alleges that Midwest contracted with  
23 Penny Newman to paint the grain storage facility in Stockton,  
24 California; that Midwest consulted with Norberg about the proper  
25 type of paint for painting the grain storage facility before it  
26 undertook any work; and that this consultation included requests

1 for information as to the proper preparation products and/or  
2 procedures, and paint for painting the grain storage facility.  
3 (TPC ¶ 7). Midwest further alleges that Norberg represented to  
4 it that Devoe Hydrosealer and Devoe Hi Build Acrylic would be  
5 adequate to prepare and paint the grain storage facility; that  
6 Norberg's representations "were done with the intent of causing  
7 effects in the California [sic], and/or not done with the  
8 intention of causing effects in California, but could reasonable  
9 [sic] have been expected to do so"; that Midwest consulted with  
10 Norberg when the paint on the grain storage facility began to  
11 fail, after which Norberg made representations to Midwest that  
12 the products it had sold to Midwest were adequate and that the  
13 preparation of the job being done by Midwest was adequate. (TPC ¶  
14 8). The TPC alleges that Norberg had a duty to communicate  
15 accurate information concerning the preparation and adequacy for  
16 use of the paint products it sold to Midwest; that Norberg's  
17 representations were made without any reasonable basis for  
18 believing them to be true and with the intent to induce Midwest's  
19 reliance; that Norberg's representations to Midwest conveyed in  
20 Midwest's proposal to Penny Newman induced Penny Newman to accept  
21 Midwest's proposal; that Midwest was unaware of the falsity of  
22 Norberg's representations; and that Norberg's misrepresentations  
23 proximately caused damage to Midwest.

24 Norberg moves to dismiss the TPC pursuant to Rule 12(b)(2),  
25 Federal Rules of Civil Procedure, for lack of *in personum*  
26 jurisdiction.

1           A.    GOVERNING STANDARDS.

2           Where a defendant moves to dismiss a complaint for lack of  
3 personal jurisdiction, the plaintiff bears the burden of  
4 demonstrating that jurisdiction is appropriate. *Dole Foods Co.,*  
5 *Inc. v. Watts*, 303 F.3d 1104, 1108 (9<sup>th</sup> Cir.2002). If the motion  
6 is based on written materials rather than an evidentiary hearing,  
7 the plaintiff need only make a prima facie showing of  
8 jurisdictional facts. *Id.* In such cases, the court "only  
9 inquire[s] into whether [the plaintiff's] pleadings and  
10 affidavits make a prima facie showing of personal jurisdiction."  
11 *Caruth v. Int'l Psychoanalytical Ass'n*, 59 F.3d 126, 128 (9<sup>th</sup>  
12 Cir.1995). Although the plaintiff cannot "'simply rest on the  
13 bare allegations of its complaint,' . . . , uncontroverted  
14 allegations in the complaint must be taken as true." *Dole Foods*  
15 *Co., Inc., id.* "Conflicts between parties over statements  
16 contained in affidavits must be resolved in the plaintiff's  
17 favor." *Id.*

18           Personal jurisdiction exists if permitted by California's  
19 long-arm statute and federal due process. Pursuant to Cal. Code  
20 of Civ. P. § 410.10, California's long-arm statute reaches as far  
21 as the Due Process Clause permits. See *Panavision Int'l, L.P. v.*  
22 *Toeppen*, 141 F.3d 1316, 1320 (9<sup>th</sup> Cir.1998). For a court to  
23 exercise personal jurisdiction over a non-resident defendant,  
24 that defendant must have at least "minimum contacts" with the  
25 forum state such that the exercise of jurisdiction "does not  
26 offend traditional notions of fair play and substantial justice."

1 *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

2 Two categories of jurisdiction exist: general or specific  
3 jurisdiction. See *Lake v. Lake*, 817 F.2d 1416, 1420-21 (9th Cir.  
4 1987). Midwest concedes that general jurisdiction does not  
5 exist. At issue in this motion is specific jurisdiction.

6 A court may exercise specific jurisdiction when the  
7 following requirements are met:

8 (1) the non-resident defendant must  
9 purposefully direct his activities or  
10 consummate some transaction with the forum or  
11 resident thereof; or perform some act by  
12 which he purposefully avails himself of the  
13 privileges of conducting activities in the  
14 forum, thereby invoking the benefits and  
15 protections of its laws; (2) the claim must  
16 be one that arises out of or relates to the  
17 defendant's forum-related activities; and (3)  
18 the exercise of jurisdiction must comport  
19 with fair play and substantial justice, *i.e.*,  
20 it must be reasonable.

21 *Dole Foods, supra*, 303 F.3d at 1104. The plaintiff bears the  
22 burden of satisfying the first two prongs of this test. *Sher v.*  
23 *Johnson*, 911 F.2d 1357, 1361 (9<sup>th</sup> Cir.1990). If the plaintiff  
24 fails to satisfy either of these prongs, personal jurisdiction is  
25 not established in the forum state. If the plaintiff succeeds in  
26 satisfying both of the first two prongs, the burden then shifts  
to the defendant to "present a compelling case that the exercise  
of jurisdiction would not be reasonable. *Burger King Corp. v.*  
*Rudzewicz*, 471 U.S. 462, 476-478 (1985). Courts examine the  
defendant's contacts with the forum at the time of the events  
underlying the dispute. See *Steel v. United States*, 813 F.2d  
1545, 1549 (9th Cir. 1987).

1 As explained in *Schwarzenegger v. Fred Martin Motor Co.*, 374  
2 F.3d 797, 802 (9<sup>th</sup> Cir.2004):

3 We often use the phrase 'purposeful  
4 availment,' in shorthand fashion, to include  
5 both purposeful availment and purposeful  
6 direction ..., but availment and direction  
7 are, in fact, two distinct concepts. A  
8 purposeful availment analysis is most often  
9 used in suits sounding in contract ... A  
10 purposeful direction analysis, on the other  
11 hand, is most often used in suits sounding in  
12 tort.

13 Here, because Midwest's claims against Norberg are based on  
14 negligence, the purposeful direction analysis is appropriate.

15 In *Dole Foods Co. supra*, 303 F.3d at 1111, the Ninth Circuit  
16 stated:

17 Under our precedents, the purposeful  
18 direction ... requirement is analyzed in  
19 intentional tort cases under the 'effects'  
20 test derived from *Calder v. Jones*, 465 U.S.  
21 783 ... (1984). In *Calder*, the Supreme Court  
22 determined that California courts could  
23 exercise jurisdiction over an editor and a  
24 reporter who caused a defamatory article  
25 about a California resident to be published  
26 in Florida and circulated in California, on  
the ground that the tortious conduct was  
'expressly aimed' at the forum state in which  
the harm occurred ... As we have previously  
recognized, *Calder* stands for the proposition  
that purposeful availment is satisfied even  
by a defendant 'whose only "contact" with the  
forum state is the "purposeful direction" of  
a foreign act having an effect in the forum  
state.' ... Based on these interpretations of  
*Calder*, the 'effects' test requires that the  
defendant allegedly have (1) committed an  
intentional act; (2) expressly aimed at the  
forum state, (3) causing harm that the  
defendant knows is likely to be suffered in  
the forum state ....

"The second prong of the specific jurisdiction test

1 (litigation must "arise out of or relate to those activities") is  
2 met if, "but for" the contacts between the defendant and the  
3 forum state, the cause of action would not have arisen."

4 *Terracom v. Valley Nat. Bank*, 49 F.3d 555, 561 (9th Cir. 1995)  
5 citing *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385-386 (9th  
6 Cir.1990) (citations omitted), *rev'd on other grounds*, 499 U.S.  
7 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).

8 The third prong of the test, reasonableness, is presumed  
9 once the court finds purposeful direction: "[w]e presume that an  
10 otherwise valid exercise of specific jurisdiction is reasonable."  
11 *Ballard v. Savage*, 65 F.3d 1495, 1500 (1995) citing *Sher v.*  
12 *Johnson*, 911 F.2d 1357, 1364 (9<sup>th</sup> Cir.1990) (once court finds  
13 purposeful availment, it must presume that jurisdiction would be  
14 reasonable). The burden of proving unreasonableness shifts to  
15 defendant. *Ballard*, 65 F.3d at 1500.

16 Ninth Circuit law formerly required a plaintiff to  
17 demonstrate each of the three factors to establish specific  
18 jurisdiction (see *Data Disc, Inc. v. Sys. Tech. Assoc.*, 557 F.2d  
19 1280, 1287 (9th Cir.1977)). A more flexible approach, however,  
20 has since been adopted. *Ochoa v. J.B. Martin and Sons Farms,*  
21 *Inc.*, 287 F.3d 1182, 1188 (9th Cir.2002), citing *Brand v. Menlove*  
22 *Dodge*, 796 F.2d 1070, 1074 (9th Cir.1986). "Jurisdiction may be  
23 established with a lesser showing of minimum contacts 'if  
24 considerations of reasonableness dictate.'" *Ochoa*, 287 F.3d at  
25 1189 (citing *Haisten v. Grass Valley Med. Reimbursement Fund,*  
26 *Ltd.*, 784 F.2d 1392, 1397 (9<sup>th</sup> Cir.1986); see also *Burger King*

1 *Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)). "Activity by the  
2 defendant need not physically take place in the forum state so as  
3 to constitute sufficient contact under the due process test ...  
4 The Supreme Court has consistently rejected the notion that  
5 absence of physical contacts with a forum state can defeat  
6 personal jurisdiction, '[s]o long as a commercial actor's efforts  
7 are purposefully directed toward residents of another State.'" *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784  
8 F.2d 1392, 1398 (9th Cir.1986) citing *Burger King*, 471 U.S. at  
9 475-477; see also *Calder v. Jones*, 465 U.S. at 790. On the other  
10 hand, "both [the Ninth Circuit Court of Appeals] and the courts  
11 of California have concluded that ordinarily 'use of the mails,  
12 telephone, or other international communications simply do not  
13 qualify as purposeful activity invoking the benefits and  
14 protection of the [forum] state.'" *Peterson v. Kennedy*, 771 F.2d  
15 1244, 1272 (9th Cir.1985) (finding defendant's two foreign-mailed  
16 cease and desist letters, dealing with plaintiff's potential  
17 patent infringement actions, insufficient to create personal  
18 jurisdiction in the forum state) (citing *Thos. P. Gonzalez Corp.*  
19 *v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247,  
20 1254 (9th Cir.1980); see also *Floyd J. Harkness Co. v. Amezcua*,  
21 60 Cal.App.3d 687, 692-93, (1976); *Interdyne Co. v. SYS Computer*  
22 *Corp.*, 31 Cal.App.3d 508, 511-12 (1973)).

24 "In judging minimum contacts, a court properly focuses on  
25 'the relationship among the defendant, the forum, and the  
26 litigation.'" *Calder v. Jones*, *supra*, 465 U.S. at 788-89. "The

1 plaintiff's lack of 'contacts' will not defeat otherwise proper  
2 jurisdiction." *Calder v. Jones, id.*

3 "Questions of personal jurisdiction admit of no simple  
4 solutions and that ultimately due process issues of  
5 reasonableness and fairness must be decided on a case-by-case  
6 basis." *Forsythe v. Overmyer, 576 F.2d 779, 783 (9th Cir.1978)*  
7 *citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 446*  
8 *(1952).*

9 B. FACTUAL BACKGROUND.

10 In moving for dismissal for lack of personal jurisdiction,  
11 James Norberg, co-manager and co-owner of Norberg Paints, Inc.,  
12 avers in pertinent part:

13 2. Norberg is a retailer of paint and paint  
14 products incorporated under the laws of South  
15 Dakota. Norberg's principal place of  
16 business is in Sioux Falls, South Dakota and  
has been for the entire 121 years of  
Norberg's existence.

17 3. Norberg is family-owned and operates a  
18 single store which is located at 326 East  
14<sup>th</sup> Street, Sioux Falls, South Dakota.  
Norberg employs six employees.

19 4. Norberg has never conducted business in  
20 California and has never been licensed to do  
so.

21 5. Norberg is not registered to do business  
22 in California and has not designated an agent  
for service of process in California.

23 6. Norberg does not own any property in  
24 California.

25 7. Norberg does not advertise in California,  
26 it does not conduct any business operations  
in California and it does not have any  
employees in California.

1 8. Norberg has no customers in California.

2 9. Norberg has never directly sold any paint  
3 or paint products to any customer in  
4 California.

5 10. Norberg has never actively solicited  
6 business in California.

7 11. Norberg has never developed a sales  
8 force in California.

9 12. Norberg has never retained any  
10 California-based marketing company.

11 13. Norberg has never been listed in any  
12 California telephone directory.

13 14. Norberg has no California bank accounts.

14 15. Norberg does not operate and has never  
15 operated any kind of Internet website.

16 16. The paint sale between Norberg and  
17 Midwest occurred at the Sioux Falls, South  
18 Dakota store. At the request of Midwest, the  
19 paint manufacturer - The Glidden Company, dba  
20 ICI Paints - shipped the product to Stockton,  
21 California. Norberg did not ship the paint  
22 to California.

23 17. Norberg was not a party to the Penny  
24 Newman/Midwest painting contract.

25 18. No one from Norberg ever visited  
26 California or Penny Newman's Stockton  
Facility.

19. Norberg did not participate in the Penny  
Newman paint job.

20. California is not a convenient forum for  
Norberg or its employees. Litigating this  
matter in California would impose an  
unreasonable burden on Norberg and its  
employees due to the anticipated travel time  
and cost, the disruption of Norberg's  
business operations, and the inconvenience  
for Norberg's employees who would need to  
travel to California to defend this lawsuit.

1 21. Traveling to California from Sioux  
2 Falls, South Dakota would require at least  
3 two days of travel. Because of travel time,  
4 each appearance in California would require  
5 an employee to miss a minimum of three days  
6 of work - two days for travel and a minimum  
7 of one day for the appearance. As a small  
8 business with only six employees, an  
9 employee's absence from the store  
10 substantially disrupts the day-to-day  
11 operations and creates scheduling conflicts.  
12 If these absences involve Norberg's key  
13 personnel, their absence will have an adverse  
14 effect on Norberg's paint sales and its  
15 income.

16 In opposition, Midwest submits the declarations of Craig  
17 Bower and Dennis Lingren. Bower, the founder and CEO of Midwest,  
18 avers:

19 2. MIDWEST has purchased paint products in  
20 the regular course of business directly from  
21 NORBERG ... for the at least the [sic] past  
22 15 years. NORBERG and MIDWEST had agreed to  
23 at a [sic] price schedule at the beginning of  
24 nearly every year to facilitate said  
25 purchases.

26 3. These products MIDWEST has purchased from  
27 NORBERG have been for painting jobs through  
28 out [sic] the United States including some in  
29 California, making MIDWEST a California  
30 customer of NORBERG.

31 4. I have never had any discussion with  
32 NORBERG's employees, including James Norberg,  
33 refusing to sell MIDWEST paint products for  
34 use outside South Dakota.

35 5. I am informed and believe all of  
36 MIDWEST's dealings with recommendations to  
37 cure the problems at PENNY NEWMAN's Stockton  
38 Facility had been directed to NORBERG, and  
39 NORBERG made recommendations on the curative  
40 measures to be taken.

41 Dennis Lindgren, an employee of Midwest, avers in pertinent part:

42 2. As part of my job duties at MIDWEST, I

1 ordered paint products from NORBERG ... for  
2 painting through out [sic] the United States,  
3 including more than one job in California,  
4 which included PENNY NEWMAN['s] ... Stockton  
5 facility.

6 3. I also spoke with NORBERG employees on  
7 more than one occasion who made  
8 representations about the suitability of the  
9 paint products sold for painting PENNY  
10 NEWMAN's Stockton Facility.

11 4. I also spoke with NORBERG employees about  
12 the suitability of the paint products and  
13 MIDWEST's preparation efforts for the paint  
14 after MIDWEST had sent samples of the  
15 existing paint at PENNY NEWMAN's Stockton  
16 facility to NORBERG for review. During these  
17 conversations NORBERG's employees made  
18 representations on how to apply the paint as  
19 well as the appropriateness of the paint for  
20 its known applications while the work was  
21 being done in California.

22 C. MERITS OF MOTION.

23 1. Purposeful Direction.

24 Norberg argues that it's sale of paint to another South  
25 Dakota company in South Dakota satisfies the purposeful direction  
26 requirement, even accepting that Midwest advised Norberg of its  
intent to use the paint for a job in California.

Norberg relies primarily on *Brand v. Menlove Dodge*, 796 F.2d  
1070 (9<sup>th</sup> Cir.1986).

In *Brand*, Menlove Dodge, an auto dealership in Utah, bought  
a used 1979 Toyota landcruiser from another dealer and promptly  
resold it. Several months later, the purchaser returned the  
vehicle to Menlove upon discovering that the front-end assembly  
had been replaced with a front end from a 1972 model. Menlove  
then sold the vehicle to Patterson, a Utah used car dealer.

1 Patterson sold the vehicle at the Los Angeles Auto Auction to  
2 Murray Brand, a Phoenix auto dealer. Brand sold it in Arizona.  
3 Brand's customer had problems with the front end and the wheels  
4 of the vehicle broke apart. Litigation between the purchaser and  
5 Brand resulted in jury verdict against Brand. Brand then filed  
6 suit in Central District of California against Menlove,  
7 Patterson, and the Los Angeles Auto Auction. Menlove did not  
8 appear and a default judgment was entered against it on fraud and  
9 negligence claims and compensatory and punitive damages were  
10 awarded. On appeal, the Ninth Circuit held that the district  
11 court did not have personal jurisdiction over Menlove. With  
12 regard to the purposeful availment requirement, the Ninth Circuit  
13 held:

14 Central to Brand's case is his allegation  
15 that Menlove sold the Toyota to Patterson  
16 knowing it would be resold in California.  
17 The alleged conduct places this case neatly  
18 between *World-Wide Volkswagen Corp. v.*  
19 *Woodson*, 444 U.S. 286 ... (1980) and *Plant*  
20 *Food Co-op v. Wolfkill Feed & Fertilizer*, 633  
21 F.2d 155 (9<sup>th</sup> Cir.1980). In *World-Wide*  
22 *Volkswagen*, defendant auto dealer sold a  
23 defective car to New York residents in New  
24 York. The car caused injuries to plaintiffs  
25 in Oklahoma, and they sued in Oklahoma court.  
26 The Supreme Court held that Oklahoma courts  
did not have jurisdiction over the auto  
dealer or its distributor based on the sale  
of the car, even though it was foreseeable  
that the car might be driven in Oklahoma.  
444 U.S. at 296 ... The court set out the  
standards for asserting jurisdiction in  
product defect cases:

[I]f the sale of a product of a  
manufacturer or distributor ... is  
not simply an isolated occurrence,  
but arises from the efforts of the

1 manufacturer or distributor to  
2 serve, directly or indirectly, the  
3 market for its product in other  
4 States, it is not unreasonable to  
5 subject it to suit in one of those  
6 States if its allegedly defective  
7 merchandise there has been the  
8 source of injury to its owner or  
9 others. The forum State does not  
exceed its powers under the Due  
Process Clause if it asserts  
personal jurisdiction over a  
corporation that delivers its  
products into the stream of  
commerce with the expectation that  
it will be purchased by customers  
in the forum State.

10 *Id.* at 297-98 ... The court emphasized that  
11 there was no evidence that the autos sold by  
12 the distributor were sold outside the New  
York-Connecticut area. *Id.* at 298 ....

13 In *Plant Food*, a Canadian fertilizer  
14 distributor, acting on orders received from  
15 Washington middlemen, shipped defective  
16 fertilizer to the plaintiff in Montana. We  
17 found that the Montana court had jurisdiction  
18 and distinguished *World-Wide Volkswagen*  
19 because the fertilizer distributor 'engaged  
20 in affirmative conduct to deliver its product  
to Montana.' 633 F.2d at 159. Defendant's  
contact with Montana was voluntary and  
financially beneficial to it. *Id.* 'When it  
knew the fertilizer was bound for Montana,  
[the defendant] could have objected or made  
other arrangements if it found exposure to  
Montana's long-arm jurisdiction  
unacceptable.' *Id.*

21 This case falls somewhere between these  
22 precedents. Unlike the *Plant Food* defendant,  
23 Menlove took no affirmative action to send  
24 the Toyota to California; the decision to  
25 resell the vehicle in that state was the  
26 unilateral act of a third party. See *Burger  
King*, 105 S.Ct. at 2183. Moreover, it seems  
to place an unnecessarily large burden on  
local distributors to say that if Menlove  
wanted to avoid jurisdiction in California,  
it should not have sold the Toyota to

1 Patterson once he announced his intent to  
2 resell in that state. On other hand, unlike  
3 the defendants in *World-Wide Volkswagen*,  
4 Menlove allegedly had explicit knowledge that  
5 the car would be resold in California, and  
6 arguably delivered it into the stream of  
7 commerce with the expectation that it would  
8 be purchased by California consumers.

9 Because Menlove did not engage in affirmative  
10 conduct to deliver its product to California,  
11 but rather passively made a sale it allegedly  
12 knew would affect that state, we conclude  
13 that Menlove did not direct its activities  
14 purposefully at California so as to create a  
15 presumption of reasonableness of jurisdiction  
16 in the California courts. However, since  
17 Menlove did know that its activities would  
18 affect California interests to some extent,  
19 we conclude that this case falls into the  
20 category suggested in *Haisten*, where personal  
21 jurisdiction may be established on a lesser  
22 showing of minimum contacts with the state  
23 'if considerations of reasonableness  
24 dictate.' 784 F.2d at 1397.

25 Norberg argues that, as in *Brand*, it only passively made a  
26 sale of paint to Midwest. Midwest requested that the paint be  
shipped to California and it was the paint manufacturer, ICI, who  
shipped the paint to California.

In opposition, Midwest primarily relies on *Calder v. Jones*,  
*supra*, 465 U.S. 783.

In *Calder*, Shirley Jones, a professional entertainer who  
lived and worked in California and whose television career was  
centered in California, brought suit in California Superior  
Court, alleging that she had been libeled in an article written  
and edited by petitioners, Florida residents, in Florida and  
published in the *National Enquirer*, a national magazine having  
its largest circulation in California. The Supreme Court held:

1 The allegedly libelous story concerned the  
2 California activities of a California  
3 resident. It impugned the professionalism of  
4 an entertainer whose television career was  
5 centered in California. The article was  
6 drawn from California sources, and the brunt  
7 of the harm, in terms both of respondent's  
8 emotional distress and the injury to her  
9 professional reputation, was suffered in  
10 California. In sum, California is the focal  
11 point both of the story and of the harm  
12 suffered. Jurisdiction over petitioners is  
13 therefore proper in California based on the  
14 'effects' of their Florida conduct in  
15 California. *World-Wide Volkswagen Corp. v.*  
16 *Woodson*, 444 U.S. 286, 297-298 ....

17 Petitioners argue that they are not  
18 responsible for the circulation of the  
19 article in California. A reporter and an  
20 editor, they claim, have no direct economic  
21 stake in their employer's sales in a distant  
22 State. Nor are ordinary employees able to  
23 control their employer's marketing activity.  
24 The mere fact that they can 'foresee' that  
25 the article will be circulated and have an  
26 effect in California is not sufficient for an  
assertion of jurisdiction. *World-Wide*  
*Volkswagen Corp. v. Woodson*, *supra*, at 295  
... They do not 'in effect appoint [the  
article their] agent for service of process.'  
*World-Wide Volkswagen v. Woodson*, *supra*, at  
296. Petitioners liken themselves to a  
welder employed in Florida who works on a  
boiler that subsequently explodes in  
California. Cases which hold that  
jurisdiction will be proper over the  
manufacturer ... should not be applied to the  
welder who has no control over and derives no  
direct benefit from his employer's sales in  
that distant State.

27 Petitioner's analogy does not wash. Whatever  
28 the status of their hypothetical welder,  
29 petitioners are not charged with mere  
30 untargeted negligence. Rather, their  
31 intentional, and allegedly tortious, actions  
32 were expressly aimed at California.  
33 Petitioner South wrote and petitioner Calder  
34 edited an article that they knew would have a  
35 potentially devastating impact upon  
36

1           respondent. And they knew that the brunt of  
2           the injury would be felt by respondent in the  
3           State in which she lives and works and in  
4           which the National Enquirer has its largest  
5           circulation. Under the circumstances,  
6           petitioners must 'reasonably anticipate being  
7           haled into court there' to answer for the  
8           truth of the statements made in their  
9           article.

10          465 U.S. at 788-790.

11           Midwest argues that, like the petitioners in *Calder*,  
12           Norberg's employees "intentionally made" statements about the  
13           suitability of the paint preparation and products they knew would  
14           have an effect in California. Unlike the defendant in *Brand*,  
15           Midwest contends, Norberg took affirmative action by arranging  
16           for the paint's arrival in California for use on Penny Newman's  
17           facility and reviewed samples of the existing paint shipped to  
18           South Dakota and made affirmative misrepresentations to Midwest's  
19           employees about how to apply the paint and the appropriateness of  
20           the paint while the work was being done in California.

21           Norberg argues that *Calder* has no application to the  
22           resolution of this motion because it is used in cases involving  
23           intentional torts against international or national defendants  
24           where the brunt of the harm is felt in the forum state.

25           "Based on these interpretations of *Calder*, the 'effects'  
26           test requires that the defendant allegedly have (1) committed an  
          intentional act, (2) expressly aimed at the forum state, (3)  
          causing harm that the defendant knows is likely to be suffered in  
          the forum state." *Dole Food Co., supra*, 303 F.3d at 1111. With  
          regard to the requirement of an "intentional act", the Ninth

1 Circuit explained in *Schwarzenegger v. Fred Martin Motor Co.*,  
2 *supra*, 374 F.3d at 806:

3 ... 'Intentional act' has a specialized  
4 meaning in the context of the *Calder* effects  
5 test. We have generally applied the  
6 'intentional act' test to actions sounding in  
7 tort ... The Restatement (Second) of Torts  
8 defines 'act' as follows:

9 The word 'act' is used throughout  
10 the Restatement [] to denote an  
11 external manifestation of the  
12 actor's will and does not include  
13 any of its results, even the most  
14 direct, immediate, and intended.

15 *Id.* § 2 (1964). 'Thus, if the actor, having  
16 pointed a pistol at another, pulls the  
17 trigger, the act is the pulling of the  
18 trigger and not the impingement of the bullet  
19 upon the other's person.' *Id.* § 2 cmt. c.  
20 We construe 'intent' in the context of the  
21 'intentional act' test as referring to an  
22 intent to perform an actual, physical act in  
23 the real world, rather than an intent to  
24 accomplish a result or consequence of that  
25 act. (The result or consequence of the act  
26 is relevant, but with respect to the third  
part of the *Calder* test - 'harm suffered in  
the forum.')

Norberg argues that *Calder's* "effects" test does not apply  
because Midwest does not claim that Norberg committed an  
intentional tort and because Norberg is a small local South  
Dakota company.

Norberg further argues that, even if *Calder's* effects test  
applied, it would not create specific personal jurisdiction in  
California because of the lack of an alleged intentional act and  
the lack of any economic damage to Midwest in California. Citing  
*Dole Food Co., Inc.*, *supra*, 303 F.3d at 1113, Norberg asserts

1 that, for jurisdictional purposes, corporations like Midwest are  
2 deemed to have suffered economic harm at the location of the  
3 alleged "bad act" or the corporation's principal place of  
4 business, both of which are in South Dakota.

5 In *Dole Food Co.*, 303 F.3d at 1112-1113, the Ninth Circuit  
6 discussed the apparent conflict in its cases concerning the test  
7 for determining the factor of causing harm in the forum state.  
8 One line of cases requires that the "brunt of the harm" be  
9 suffered in the forum state, *id.*, citing *Core-Vent Corp. v. Nobel*  
10 *Industries AB*, 11 F.3d 1482, 1486 (9<sup>th</sup> Cir.1993), while the other  
11 line of cases found jurisdiction even though the bulk of the harm  
12 occurred outside of the forum state, *id.*, citing *Keeton v.*  
13 *Hustler Magazine*, 465 U.S. 770, 780 (1984) (dissenting opinion).  
14 *Dole Food Co.* concluded that, under either test, Dole suffered  
15 sufficient economic harm in California to give rise to  
16 jurisdiction in California. *Id.* at 1113. The Ninth Circuit  
17 stated in pertinent part: "Our precedents recognize that in  
18 appropriate circumstances a corporation can suffer economic harm  
19 both where the bad acts occurred and where the corporation has  
20 its principal place of business." *Id.* In *Yahoo! v. La Ligue*  
21 *Contre le Racisme*, 433 F.3d 1199 (9<sup>th</sup> Cir.), *cert. denied*, \_\_\_  
22 U.S. \_\_\_, 126 S.Ct. 2332 (2006), the Ninth Circuit held:

23 In this circuit, we construe *Calder* to impose  
24 three requirements: 'the defendant allegedly  
25 [must] have (1) committed an intentional act,  
26 (2) expressly aimed at the forum state, (3)  
causing harm that the defendant knows is  
likely to be suffered in the forum state.'  
*Schwarzenegger*, 374 F.3d at 803 ... In some

1 of our cases, we have employed a slightly  
2 different formulation of the third  
3 requirement, specifying that the act must  
4 have 'caused harm, the brunt of which is  
5 suffered and which the defendant knows is  
6 likely to be suffered in the forum state.'  
7 *Bancroft & Masters, Inc. v. Augusta Nat'l*  
8 *Inc.*, 223 F.3d 1082, 1987 (9<sup>th</sup> Cir.2000) ...  
9 The 'brunt' of the harm formulation  
10 originated in the principal opinion in *Core-*  
11 *Vent Corp. v. Nobel Indus. AR*, 11 F.3d 1482  
12 (9<sup>th</sup> Cir.1993). That opinion required that  
13 the 'brunt' of the harm be suffered in the  
14 forum state; based on that requirement, it  
15 concluded that there was no purposeful  
16 availment by the defendant. *Id.* at 1486. A  
17 dissenting judge would have found purposeful  
18 availment. Relying on the Supreme Court's  
19 opinion in *Keeton v. Hustler Magazine*, 465  
20 U.S. 770 ... (1984), he specifically  
21 disavowed the 'brunt' of harm formulation.  
22 *Core-Vent*, 11 F.3d at 1492 (Wallace, C.J.,  
23 dissenting) ('[T]he Supreme Court has already  
24 rejected the proposition that the brunt of  
25 the harm must be suffered in the forum.').  
26 Without dissenting the disputed 'brunt' of  
the harm formulation, a concurring judge  
agreed with the dissenter that purposeful  
availment could be found. *Id.* at 1491.  
(Fernandez, J., concurring)

17 We take this opportunity to clarify our law  
18 and to state that the 'brunt' of the harm  
19 need not be suffered in the forum state. If  
20 a jurisdictionally sufficient amount of harm  
21 is suffered in the forum state, it does not  
22 matter that even more harm might have been  
23 suffered in another state. In so stating we  
24 are following *Keeton*, decided the same day as  
25 *Calder*, in which the Court sustained the  
26 exercise of personal jurisdiction in New  
Hampshire even though '[i] is undoubtedly  
true that the bulk of the harm done to  
petitioner occurred outside New Hampshire.'  
465 U.S. at 780 ....

25 This is a close question because of the evidence that  
26 Norberg, with knowledge that Midwest's job was in California,

1 affirmatively represented to Midwest that the paint was suitable  
2 for the Penny Newman job and that Norberg, after being sent a  
3 sample of the surface being painted, again advised Midwest that  
4 the paint was suitable. This evidence distinguishes the  
5 authorities relied upon by Norberg in contending that it  
6 passively sold the paint to Midwest. Norberg was told of the job  
7 location, the structure and surface to be painted, and knew that  
8 the paint was to be applied and was to cover a silo in Stockton,  
9 California. Midwest has established the purposeful direction  
10 prong of the specific personal jurisdiction test.

11 2. "But For" Factor.

12 Midwest argues that this factor is satisfied because Midwest  
13 would not have suffered the loss alleged by Penny Newman "but  
14 for" Norberg's misrepresentations about the suitability of the  
15 paint for the job that were made after the start of the project  
16 when Midwest re-contacted Norberg about the paint problems  
17 experienced in California and sent Norberg a piece of failed  
18 paint.

19 Norberg relies primarily on *Scott v. Breeland*, 792 F.2d 925  
20 (9<sup>th</sup> Cir.1986) in arguing that this factor is not satisfied.  
21 In *Scott v. Breeland*, a flight attendant was allegedly assaulted  
22 by a member of a music group, the Oak Ridge Boys, on board the  
23 airplane. She and her husband sued the Oak Ridge Boys and the  
24 band member who had committed the assault in the Central District  
25 of California. The District Court dismissed the action for lack  
26 of personal jurisdiction and the Ninth Circuit affirmed, holding

1 that the fact that some members of the Oak Ridge Boys changed  
2 planes in San Francisco on the date of the alleged assault was  
3 insufficient to support the exercise of specific jurisdiction  
4 over the Oak Ridge Boys. The Ninth Circuit held in pertinent  
5 part:

6 ... [F]or specific jurisdiction to lie, the  
7 Scotts' cause of action must arise out of or  
8 result from the defendants' California  
9 activities. The Scotts' claims against The  
10 Oak Ridge Boyes, Inc., alleging negligence in  
11 employing Breeland and ratification of  
12 Breeland's acts, do not 'arise[] out of or  
13 result[] from' the plane-changing in  
14 California by some members of the group or  
15 sale of records in California.

16 792 F.2d at 928-929.

17 Relying on *Scott*, Norberg argues that Midwest's claims arise  
18 out of and relate only to Norberg's activities outside  
19 California:

20 Midwest's claims cannot arise from Norberg's  
21 California-related activities because none  
22 exist. Not only does Norberg conduct no  
23 business in California, Norberg was not a  
24 party to the contract between Penny Newman  
25 and Midwest, never sent any employees to  
26 California or to the Stockton Facility, and  
did not participate in the subject paint job.

Midwest argues that Norberg's reliance on *Scott* "is  
misguided and makes no sense." Midwest contends:

Here the underlying action 'arose out of'  
NORBERG's sale of the wrong paint and its  
related misrepresentations to MIDWEST about  
the suitability of that paint. NORBERG does  
not dispute that it knew the paint products  
MIDWEST purchased were for use in California,  
nor can it do so given it was responsible for  
arranging delivery of the paint for their  
arrival at the California job site. And any

1 doubt as to its knowledge is eliminated by  
2 the facts showing that it was later contacted  
3 with respect to giving further advice when  
4 problems later arose in California and it  
5 received a sample of the failed paint from  
6 California. Notwithstanding the fact that  
NORBERG's misconduct arguably occurred  
outside of California, it is undisputed that  
the consequences of its actions were felt and  
suffered within California by PENNY NEWMAN  
and MIDWEST.

7 In reply, Norberg contends that this factor is not satisfied  
8 because the factor is premised on some conduct by the defendant  
9 that occurs in the forum state:

10 In situations where a defendant *has* engaged  
11 in forum-related activity but the alleged  
12 harm does not arise directly from these  
13 activities, the Ninth Circuit has adopted a  
14 'but for' test to analyze whether a causal  
15 connection exists between those activities  
16 and the eventual harm. *Shute v. Carnival*  
17 *Cruise Lines*, 897 F.2d 377 (9<sup>th</sup> Cir.1990),  
18 rev'd on other grounds 499 U.S. 585 (1991).  
19 Although the 'but for' test allows for a more  
20 attenuated causal chain, it expressly  
21 'preserves the requirement that there be some  
22 nexus between the cause of action and the  
23 defendant's activities in the forum." *Shute*,  
24 at 385 (emphasis added). Here, Midwest  
25 concedes that Norberg's alleged 'misconduct'  
26 occurred outside of California ... Thus, the  
test is inapplicable because there is no  
California-related starting point for  
analysis of whether Midwest's harm would not  
have occurred 'but for' Norberg's these  
activities [sic].

27 Again, this is a close question. However, the evidence  
28 presented by Midwest indicates that all of Norberg's alleged  
29 misrepresentations were made to Midwest in South Dakota. Norberg  
30 did nothing in California. Norberg did not ship the paint to  
31 California and never traveled to California. Midwest sent the

1 samples of the existing paint to Norberg in South Dakota and from  
2 there Norberg allegedly made representations to Midwest about the  
3 appropriateness and proper application of the paint.

4 Nonetheless, Midwest's claim against Norberg arises out of  
5 Norberg's forum-related activities, i.e., its sale of paint to  
6 Midwest for a job Norberg knew was in California and the alleged  
7 misrepresentations by Norberg made during that job about the  
8 suitability of the paint for the application in California and  
9 the proper method to use the paint. Midwest has established the  
10 "but for" prong of the specific jurisdiction test.

11 3. Exercise of Jurisdiction Unreasonable.

12 The third factor is whether the exercise of specific  
13 jurisdiction over the defendant would be unreasonable.

14 "For jurisdiction to be reasonable, it must comport with  
15 'fair play and substantial justice.' ... '[W]here a defendant who  
16 purposefully had directed his activities at forum residents seeks  
17 to defeat jurisdiction, he must present a compelling case that  
18 the presence of some other considerations would render  
19 jurisdiction unreasonable.'" *Panavision Intern., L.P. v. Toepfen,*  
20 *141 F.3d 1316, 1322 (9<sup>th</sup> Cir.1998).* In addressing the  
21 reasonableness of the exercise of jurisdiction, seven factors are  
22 considered:

23 (1) the extent of a defendant's purposeful  
24 interjection; (2) the burden on the defendant  
25 in defending in the forum; (3) the extent of  
26 conflict with the sovereignty of the  
defendant's state; (4) the forum state's  
interest in adjudicating the dispute; (5) the  
most efficient judicial resolution of the

1 controversy; (6) the importance of the forum  
2 to the plaintiff's interest in convenient and  
3 effective relief; and (7) the existence of an  
4 alternative forum.

5 *Id.* No one factor is dispositive; a court must balance all  
6 seven. *Id.*

7 a. Degree of Interjection

8 "'Even if there is sufficient "interjection" into the state  
9 to satisfy the purposeful availment prong, the degree of  
10 interjection is a factor to be weighed in assessing the overall  
11 reasonableness of jurisdiction under the reasonableness prong.'" *Panavision*, 141 F.3d at 1323.

12 Norberg argues that its degree of purposeful interjection in  
13 California is "nil." It was not a party to the Penny Newman  
14 contract, it never visited California or the Stockton Facility  
15 and did not participate in the painting job. Despite its  
16 knowledge that the paint was to be used in California, it had no  
17 continuing obligations or operations in California, does not do  
18 business there and owns no property there.

19 Midwest argues that Norberg's purposeful interjection  
20 through the effects of its actions on Penny Newman and Midwest  
21 has been established. The fact that Norberg was not a party to  
22 the painting contract is misplaced because of Midwest's  
23 allegations of negligent misrepresentation. That Norberg did not  
24 visit California is irrelevant because Norberg had its agent, a  
25 Glidden paint representative, arrive at the Stockton Facility.  
26 *See Ochoa v. J.B. Martin and Sons Farms, Inc.*, 287 F.3d 1182,

1 1189 (9<sup>th</sup> Cir.2002) ("If Ramey was acting as Martin Farms' agent  
2 in [directing its recruiting activities towards Arizona], Ramey's  
3 activities suffice to provide specific jurisdiction over Martin  
4 Farms.").

5 The degree of interjection is slight. As discussed, all of  
6 Norberg's actions took place in South Dakota. That Glidden, the  
7 paint manufacturer, traveled to California to inspect the job,  
8 does not undermine this fact, especially when there is no  
9 evidence that Glidden was the agent of Norberg.

10 b. Burden on Norberg.

11 Norberg asserts that the burden on it will be extreme. It  
12 only has six employees, depositions and hearings in California  
13 will disrupt the day to day operations of the store and create  
14 scheduling conflicts, appearances in California will require at  
15 least two days of travel, and the absence of key employees will  
16 have an adverse effect on Norberg's sales and income.

17 Midwest argues that "[t]his era of modern transportation,  
18 email, fax machines, and discount air travel has made it much  
19 less burdensome for a party to defend itself in a different forum  
20 and it will not be unfair to subject it to the burdens of  
21 litigating in a different forum for disputes relating to the  
22 foreign forum's business activity. Midwest contends that  
23 depositions of Norberg employees may be taken by telephone or  
24 other remote electronic means by stipulation. Further, Midwest  
25 contends, the burden on Norberg is minimized by the fact "despite  
26 the apparent conflict of interest", Norberg is represented by

1 that same counsel representing Glidden.

2 The burden on Norberg, a small corporation, in litigating  
3 this action in California outweighs the availability of  
4 electronic communication. The fact that Norberg is represented  
5 by the same attorney representing Glidden does not diminish the  
6 burden on Norberg.

7 c. Conflict with South Dakota Law.

8 Neither party discusses this factor. This factor is neutral  
9 in resolving whether the exercise of personal jurisdiction over  
10 Norberg is reasonable.

11 d. California's Interest.

12 Norberg argues that California has no interest in the  
13 resolution of Midwest's claims against Norberg: "Norberg and  
14 Midwest are South Dakota companies, the allegations against  
15 Norberg stem from events that occurred in South Dakota and the  
16 potential harm Midwest may face will also occur in South Dakota."  
17 The fact that Midwest is not a California resident, Norberg  
18 contends, only heightens the unreasonableness of imposing  
19 jurisdiction over Norberg.

20 Midwest argues that California has a definite interest in  
21 protecting the property and persons from harm caused by negligent  
22 misrepresentations. While California has a interest in the  
23 dispute between Penny Newman and Midwest, it has little interest  
24 in the indemnity dispute between Midwest and Norberg, neither of  
25 which is a California resident.

26 e. Most Efficient Forum, Importance of Forum and

1 Existence of Alternative Forum.

2 Norberg argues that South Dakota is the most efficient forum  
3 for resolving Midwest's claims against it, noting that both  
4 Norberg and Midwest are from South Dakota and that South Dakota  
5 recognizes the tort of negligent misrepresentation and has a  
6 statute covering contribution.

7 Midwest responds that California is the most efficient  
8 forum, arguing that resolution in this forum will result in full  
9 and complete resolution of this matter and will avoid the  
10 possibility of inconsistent verdicts.

11 At the hearing, the Court was informed that Norberg has  
12 filed a collection action against Midwest arising from this paint  
13 sale in the South Dakota state court and that Midwest has filed a  
14 cross-complaint in that action against Norberg alleging the same  
15 allegations set forth in this federal action. This pending  
16 parallel action renders hollow Midwest's concerns about  
17 inconsistent verdicts if personal jurisdiction over Norberg is  
18 not found. Further, Penny Newman, who is the only California  
19 resident in this action, has not sued Norberg.

20 These factors weigh against the exercise of personal  
21 jurisdiction. Norberg has carried its burden of establishing  
22 that the exercise of personal jurisdiction over it will be  
23 unreasonable.<sup>1</sup>

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24  
25 <sup>1</sup>Midwest, citing *Data Disc, Inc. v. Systems Technology*  
26 *Assocs., Inc.*, 557 F.2d 1280, 1285 n. 2 (9<sup>th</sup> Cir.1977), argues that  
resolution of personal jurisdiction over Norberg should be deferred  
until resolution of the action on the merits. Midwest asserts:

1 CONCLUSION

2 For the reasons set forth above:

3 1. Third-Party Defendant Norberg Paints, Inc's motion to  
4 dismiss Midwest Paint Services, Inc.'s Amended Third Party  
5 Complaint pursuant to Rule 12(b)(2), Federal Rules of Civil  
6 Procedure is GRANTED.

7 2. Counsel for Norberg Paints, Inc. shall prepare and lodge  
8 a form of order setting forth the ruling in this Memorandum  
9 Decision within five (5) court days following the date of service  
10 of this decision.

11 \_\_\_\_\_  
12 The nature and extent of NORBERG's  
13 involvement, namely the representations made  
14 to MIDWEST and others about the paint  
15 products, are key to the underlying merits of  
16 the negligent misrepresentation cause of  
17 action. The parties have not undergone  
18 initial disclosure under Federal Rule of Civil  
19 Procedure, Rule 26, nor have they conducted  
20 any discovery in this case. At the very  
21 least, MIDWEST would request that this Court  
22 would defer ruling on this motion with  
intertwines both procedural and substantive  
issues so as to allow the merits of the case  
to be developed through discovery. MIDWEST  
discovery will involve the method of NORBERG's  
paint sales, the volume of sales to California  
or from other California customers besides  
MIDWEST, and other points it believes will  
establish the merits of the case as they are  
enmeshed with the jurisdictional arguments  
raised by NORBERG.

23 However, Midwest concedes that there is no basis for general  
24 personal jurisdiction in California. Midwest's proposed discovery  
25 will not assist the court in determining whether specific personal  
26 jurisdiction exists. Further, unlike *Data Disc*, where there were  
conflicts in the declarations, here the basic averments are not  
disputed and do not demonstrate that the jurisdictional facts are  
enmeshed with the facts underlying Midwest's claim for negligent  
misrepresentation.

1 IT IS SO ORDERED.

2 **Dated:** December 18, 2007

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE

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