

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

LG ELECTRONICS, INC. and LG)
ELECTRONICS U.S.A., INC.,)
)
Plaintiffs,)

v.)

Civil Action No. 12-1063-LPS

TOSHIBA SAMSUNG STORAGE)
TECHNOLOGY CORPORATION and)
TOSHIBA SAMSUNG STORAGE)
TECHNOLOGY KOREA)
CORPORATION,)
)
Defendants.)

REPORT AND RECOMMENDATION

Presently before the Court are: (1) Defendants Toshiba Samsung Storage Technology Corporation (“TSST Japan”) and Toshiba Samsung Storage Technology Korea Corporation’s (“TSST Korea”) (collectively, “Defendants”) motions to dismiss Plaintiffs LG Electronics, Inc. and LG Electronics U.S.A., Inc.’s (collectively, “Plaintiffs”) Complaint in this patent infringement case for lack of personal jurisdiction, filed pursuant to Federal Rule of Civil Procedure 12(b)(2), (D.I. 16, 20); (2) Plaintiffs’ request for jurisdictional discovery, (D.I. 26 at 23-24); and (3) Plaintiffs’ request for transfer in the event that the respective motions to dismiss are granted, (*id.* at 24-25).

For the reasons that follow, the Court recommends that TSST Korea’s motion to dismiss be DENIED, recommends that TSST Japan’s motion to dismiss be GRANTED, orders that Plaintiffs’ request for jurisdictional discovery be DENIED, and orders that Plaintiffs’ request for

transfer be DENIED AS MOOT as to TSST Korea and DENIED as to TSST Japan.¹

I. BACKGROUND

A. The Parties

LG Electronics, Inc. is a corporation organized under the laws of Korea. (D.I. 1 at ¶ 1). LG Electronics U.S.A., Inc. is a corporation organized under the laws of Delaware, and a wholly owned subsidiary of LG Electronics, Inc. (*Id.* at ¶ 2, D.I. 4). LG Electronics, Inc. asserts ownership of the various patents-in-suit in this matter: United States Patent Nos. 6,101,162 (“the ‘162 patent”), 7,380,159 (“the ‘159 patent”), 7,380,178 (“the ‘178 patent”), and 6,477,126 (“the ‘126 patent”) (collectively, “the LG patents”). (D.I. 1 at ¶¶ 8-13) LG Electronics U.S.A., Inc. markets and sells products that practice the LG patents. (*Id.* at ¶ 14)

TSST Japan is a corporation organized under the laws of Japan with a principal place of business in Tokyo, Japan. (D.I. 18 at ¶ 3) TSST Korea is a corporation organized under the laws of Korea with a principal place of business in Suwon-Si, Korea. (D.I. 22 at ¶ 3) When the complaint was filed, TSST Korea was a wholly owned subsidiary of TSST Japan. (D.I. 18 at ¶ 4; D.I. 22 at ¶ 3)² TSST Japan is owned jointly by Toshiba Corporation (“Toshiba”) and Samsung

¹ Defendants’ motion to dismiss is a dispositive motion and, for that reason, this document is titled as a “Report and Recommendation.” A request for jurisdictional discovery is a non-dispositive motion. *See Am. Gen. Life Ins. Co. v. Berger*, Civ. No. 10-3377 (WHW), 2011 WL 322649, at *1 (D.N.J. Jan. 28, 2011); *see also Forouhar v. Asa*, No. C 10-3623 SBA, 2011 WL 4080862, at *1 (N.D. Cal. Sept. 13, 2011). And as to the Court’s order regarding the request for a transfer, although there has been a split of authority in the courts on the issue, recent precedent in our Court indicates that a motion to transfer venue should be treated as a non-dispositive motion. *See Agincourt Gaming LLC v. Zynga Inc.*, Civil Action No. 11-720-RGA, 2013 WL 3936508, at *2 (D. Del. July 29, 2013).

² TSST Japan and at least one other entity, OPTIS Co., Ltd., are now the owners of TSST Korea, with each of the ownership entities owning 10% or more of TSST Korea stock. (*See* D.I. 42)

Electronics Co., Ltd. (“Samsung”), with Toshiba owning 51% of the shares and Samsung owning 49% of the shares. (D.I. 27, ex. 44)

Defendants assert that TSST Japan is merely a holding company. (D.I. 18 at ¶ 4; D.I. 22 at ¶ 3) TSST Korea produces optical disk drives (“ODD”s), including DVD writers, and Plaintiffs allege that TSST Japan is also involved in some way in the production and sale of these products. (D.I. 1 at ¶¶ 16, 21-23)

B. Procedural Background

On August 22, 2012, Plaintiffs commenced this action, asserting that TSST Japan and TSST Korea each directly and indirectly infringe certain claims of the LG patents. (*Id.* at ¶¶ 28-112) On March 4, 2013, TSST Japan and TSST Korea each filed the instant motions to dismiss, pursuant to Rule 12(b)(2). (D.I. 16; D.I. 20) In their answering brief, Plaintiffs requested jurisdictional discovery (or, failing that, transfer) in the event that the motions to dismiss were found to be well taken. (D.I. 26 at 23-25) On February 4, 2014, the motions to dismiss were referred to the Court for resolution by Chief Judge Leonard P. Stark. (D.I. 41) Both sides thereafter submitted supplemental authority regarding the motions to dismiss, (D.I. 43, 44), which the Court has considered along with the previously-filed briefing materials, (*see, e.g.*, D.I. 17-18, 20-22, 26-31, 35-36, 38-39).

C. Plaintiffs’ Allegations and Other Evidence of Record Regarding Personal Jurisdiction

In the Complaint, Plaintiffs assert four counts of direct infringement and indirect infringement of the LG patents against Defendants, asserting that Defendants’ ODDs (the “Accused Products”) are being used to infringe. (D.I. 1 at ¶¶ 37-112) In the “Jurisdiction and

Venue” and “Background” sections of the Complaint, Plaintiffs set out factual allegations relating to personal jurisdiction. (*Id.* at ¶¶ 6, 15-27) Plaintiffs also point to other evidence of record in support of personal jurisdiction, primarily declarations and attached exhibits that they submitted with their answering brief. (D.I. 28-31) Defendants also submitted declarations along with their briefs. (D.I. 18; D.I. 22; D.I. 36; D.I. 38) The Court summarizes this evidence of record below, noting where any such facts appear to be disputed.

TSST Korea manufactures and sells both external (or standalone) ODDs and internal ODDs (which are incorporated into computers), (D.I. 1 at ¶¶ 16, 21-23; D.I. 22 at ¶¶ 24, 27; D.I. 27 at ¶ 59), and there is evidence that thousands of such products have been sold in the United States and Delaware between 2011 and 2013, (D.I. 27 at ¶¶ 2-11, 14-39). It designs the products at its headquarters in Korea, and manufactures the products in the Philippines and China. (D.I. 22 at ¶¶ 22-23) Plaintiffs allege that TSST Japan is also involved in some way in the production and sale of these products, (D.I. 1 at ¶¶ 16, 21-23; D.I. 27 at ¶ 59), but TSST Japan asserts that it has not designed, developed, produced or sold any ODDs since March 2008, (D.I. 18 at ¶¶ 5, 13; D.I. 36 at ¶ 3).

TSST Korea has sales agreements with, *inter alia*, [REDACTED] a Delaware corporation, and Samsung Semiconductor, Inc. (“SSI”), a California corporation.³ (D.I. 27 at ¶¶ 62-63, 67 & exs. 50-51, 54) The latter agreement with SSI specifically grants SSI the right to purchase TSST Korea’s ODD products and the non-exclusive right to sell those

³ There is some relationship between SSI and TSST Korea, albeit with attenuation. SSI is a wholly owned subsidiary of a wholly owned subsidiary of Samsung; Samsung, as noted above, is one of two joint venture partners in TSST Japan, and TSST Korea is a subsidiary of TSST Japan. (D.I. 37 at 3)

products in the United States market, with TSST Korea to assist in advertising and brand marketing. (*Id.* ex. 54 at 2, 3) TSST Korea's Senior Manager states that title to these ODD products passes from TSST Korea to SSI at the port of landing in the United States, outside of Delaware. (D.I. 22 at ¶ 33) However, the contract between SSI and TSST Korea states that "[t]itle of PRODUCTS under this Agreement shall pass to the PURCHASER only after full payment of PRODUCTS is made[,]" (D.I. 27, ex. 54 at 3), and the agreement specifically permits payment for ODD products to be made up to and after 75 days from the date of shipment by TSST Korea, (*id.* at 4). Additionally, the agreement with SSI also requires TSST Korea and SSI to work together to set an annual target for the amount of TSST Korea ODD products that SSI will purchase, and it states that SSI will make its best efforts to reach that target. (*Id.* at 3)

TSST Korea asserts that although it also has a sales agreement with ██████ in fact "the actual sale to ██████ occurs through SSI, and other than its sales to SSI, [it] does not sell any products directly to any customer, including ██████, in the United States." (D.I. 22 at ¶ 27) SSI sells TSST Korea products to various customers in the United States, including original equipment manufacturers ("OEMs"). (*Id.* at ¶ 25) SSI also has a Delaware distributor and sales representative. (D.I. 27 at ¶ 68 & ex. 55)

Standalone TSST Korea ODDs and computers containing ODDs manufactured by TSST Korea have been sold in Delaware in numerous outlets, from at least 2011 to 2013, as well as online via Amazon.com. (*Id.* at ¶¶ 2-11, 14-39; exs. 1-8, 11-26) At least some of these standalone ODDs are sold with TSST Japan's full corporate name on the packaging, while other portions of the packaging contain a "TSST" mark that is registered to TSST Japan. (*See, e.g., id.* at ¶¶ 4-5, 9-10, 58 & exs. 2-3, 6-7, 47)

TSST Japan has a website, on which the public can download device drivers for certain CD/DVD-ROM drives. (*Id.* at ¶¶ 56-57 & ex. 45) A “Contact” link on TSST Japan’s website re-directs a user to a webpage (that itself contains a copyright date of 2008), wherein TSST Japan notes that “our products are only sold to our OEM customers such as PC manufacturers, system integrators and add-on makers not to end user[s] directly.” (*Id.* at ¶ 57 & ex. 46) TSST Japan asserts, via a declaration provided by Hiroshi Suzuki, its President and Chief Executive Officer, that these device drivers relate to obsolete products not sold since March 2008, and that these webpage references to product sales also are dated, because no such sales have occurred since 2008. (D.I. 36 at ¶¶ 2-3)

Plaintiffs have also put forward material dating to 2009 regarding Defendants’ relationships with other companies, such as Toshiba and Samsung. Toshiba alleged in a 2009 federal court filing that: (1) TSST Korea and TSST Japan were then “pass[] through” entities; (2) products manufactured by Toshiba and Samsung, respectively, passed through TSST Japan and TSST Korea, respectively, “only as bookkeeping entries” before being sold by Toshiba and Samsung sales subsidiaries; and (3) “[n]either TSST [Japan] nor [TSST Korea] maintained any inventory of products.” (*Id.*, ex. 80 at 14-16 & n.2)

There is no evidence of record that either of the Defendants: (1) have any officers, employees, or property in Delaware; (2) manufacture anything in Delaware; (3) hold bank accounts or are registered to do business in Delaware; or (4) have directly transacted business or sold products in Delaware. (*See, e.g.*, D.I. 18; D.I. 22)

II. LEGAL STANDARDS

When a defendant moves to dismiss a lawsuit for lack of personal jurisdiction, the

plaintiff bears the burden of showing the basis for jurisdiction, and must make a *prima facie* showing that personal jurisdiction exists. See *Power Integrations, Inc. v. BCD Semiconductor Corp.*, 547 F. Supp. 2d 365, 369 (D. Del. 2008); see also *Hardwire, LLC v. Zero Int'l, Inc.*, Civil Action No. 14-54-LPS-CJB, 2014 WL 5144610, at *5 (D. Del. Oct. 14, 2014). In reviewing a motion to dismiss for lack of personal jurisdiction, the Court must accept all of a plaintiff's allegations as true and construe disputed facts in its favor. *Round Rock Research LLC v. ASUSTeK Computer Inc.*, 967 F. Supp. 2d 969, 972 (D. Del. 2013); *Power Integrations*, 547 F. Supp. 2d at 369; see also *Hardwire*, 2014 WL 5144610, at *5.

In order to establish personal jurisdiction in the face of a challenge like that at issue here, a plaintiff must adduce facts sufficient to satisfy two requirements—one statutory and one constitutional.⁴ *Hardwire*, 2014 WL 5144610, at *6. In analyzing the statutory prong, the Court must consider whether the defendant's actions fall within the scope of Delaware's long-arm statute. *Id.*; *Power Integrations*, 547 F. Supp. 2d at 369. In analyzing the constitutional prong, the Court must determine whether the exercise of jurisdiction comports with the defendant's right to Due Process. *Hardwire*, 2014 WL 5144610, at *6; *Power Integrations*, 547 F. Supp. 2d at 369 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

The Court will address the relevant law with regard to each of these two prongs below, as well as the standard regarding a related issue—when a party may obtain jurisdictional discovery.

A. Statutory Prong

⁴ In a patent case like this one, with regard to the statutory inquiry, the Court applies the law of the state in which the district court is located; as to the constitutional inquiry, the Court applies the law of the United States Court of Appeals for the Federal Circuit. *Autogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 566 F.3d 1012, 1016 (Fed. Cir. 2009); *Power Integrations*, 547 F. Supp. 2d at 369.

Delaware's courts have construed Delaware's long-arm statute, Del. Code Ann. tit. 10 § 3104(c) (2010 Supp.) ("Section 3104(c)", "liberally so as to provide jurisdiction to the maximum extent possible." *Boone v. Oy Partek Ab*, 724 A.2d 1150, 1157 (Del. Super. Ct. 1997) (internal citations omitted), *aff'd*, 707 A.2d 765 (Del. 1998); *see also Hercules, Inc. v. Leu Trust and Banking (Bahamas) Ltd.*, 611 A.2d 476, 480 (Del. 1992). In so doing, they have noted that "the only limit placed on [Section] 3104 is that it remain within the constraints of the Due Process Clause." *Boone*, 724 A.2d at 1157. Despite Delaware courts having interpreted the reach of the long-arm statute to extend to the limits of the Due Process Clause, the statutory inquiry must be analyzed independently from the constitutional inquiry. *Hercules*, 611 A.2d at 480-83; *see also Belden Techs., Inc. v. LS Corp.*, 829 F. Supp. 2d 260, 268-70 (D. Del. 2010) (finding no personal jurisdiction under the constitutional prong despite the plaintiff having satisfied the statutory prong).

In this case, Plaintiffs argue only that Defendants' conduct falls within the provisions of Delaware's long-arm statute under the theory of "dual jurisdiction." (D.I. 26 at 11-12) This theory arises out of a combination of two provisions under Section 3104(c): subsections (c)(1) and (c)(4). *Boone*, 724 A.2d at 1157. These two provisions provide that a Delaware court may exercise personal jurisdiction over a non-resident defendant when that non-resident either, in person or through an agent:

- (1) Transacts any business or performs any character of work or service in the State; . . . [or] (4) [c]auses tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State[.]

Del. Code Ann. tit. 10 § 3104(c).

Subsection (c)(1) is a “specific” jurisdiction provision, while subsection (c)(4) is a “general” jurisdiction provision. *See, e.g., LaNuova D & B, S.p.A. v. Bowe Co., Inc.*, 513 A.2d 764, 768 (Del. 1986); *Boone*, 724 A.2d at 1155. “Specific jurisdiction is at issue when the plaintiff’s claims arise out of acts or omissions that take place in Delaware.” *Boone*, 724 A.2d at 1155. “General jurisdiction is at issue when the plaintiff’s claims are unconnected with the nonresidents’ activities.” *Id.*

Delaware courts have developed the concept of “dual jurisdiction” in grappling with application of the long-arm statute to situations where (as Plaintiffs argue here), jurisdiction is alleged to be based on a “stream-of-commerce” theory. This dual jurisdiction concept—one that allows for jurisdiction under the long-arm statute even where the alleged facts do not fit comfortably within either subsection (c)(1) or (c)(4)⁵—originated due to a footnote in the Delaware Supreme Court’s opinion in *LaNuova D & B, S.p.A. v. Bowe Co., Inc.*, 513 A.2d 764, 768 (Del. 1986):

It is conceivable that a tort claim could enjoy a dual jurisdictional basis under (c)(1) and (c)(4) if the indicia of activity set forth under (c)(4) were sufficiently extensive to reach the transactional level of

⁵ Here it is not clearly alleged that either Defendant itself directly “[t]ransacts any business or performs any character of work or service in the State” (pursuant to the meaning of subsection (c)(1)). *See, e.g., Power Integrations*, 547 F. Supp. 2d at 371; *see also Boone*, 724 A.2d at 1156 (“When a manufacturer passes title to goods to a third party outside of Delaware it is not deemed to have performed an act in this State.”). Nor is it that alleged that general jurisdiction exists as to any Defendant (pursuant to subsection (c)(4)), since the stream-of-commerce theory is a theory of specific jurisdiction (and since there is not an allegation that a Defendant itself has done or solicited business or taken an other persistent course of conduct in Delaware, nor that there is sufficient evidence that Defendants directly generate “substantial revenue” from services, or things used or consumed in the State). *See Power Integrations*, 547 F. Supp. 2d. at 371, 374.

(c)(1) and there was a nexus between the tort claim and transaction of business or performance of work.

LaNuova, 513 A.2d at 768 n.3. The Delaware Superior Court has thereafter expounded upon this concept of dual jurisdiction, one premised on the idea that a non-resident that places its product into the marketplace may, under certain circumstances, be found to have sufficient contacts for jurisdictional purposes with Delaware if its products end up in Delaware and cause injury to the plaintiff here. See *Power Integrations*, 547 F. Supp. 2d at 371-72 (citing *Boone*, 724 A.2d at 1156-58; *Wright v. Am. Home Prods. Corp.*, 768 A.2d 518, 529-31 (Del. Super. Ct. 2000)).⁶

Under this dual jurisdiction approach:

[T]he enumerated activities in [Section 3104(c)(4)] should be analyzed to determine whether there is an intent or purpose on the part of the [non-resident] to serve the Delaware market with its product. Likewise, when analyzing [Section] 3104(c)(1), it is not important that the [non-resident] itself act in Delaware. Instead, if the intent or purpose on behalf of the [non-resident] to serve the Delaware market results in the introduction of the product to this State and plaintiff[']s cause of action arises from injuries caused by that product, this section is satisfied.

Power Integrations, 547 F. Supp. 2d at 372 (quoting *Boone*, 724 A.2d at 1158). Thus, pursuant to this authority, personal jurisdiction may be established under the Delaware long-arm statute when there is a showing of both: “(1) an intent to serve the Delaware market; and (2) that this

⁶ In their briefing, Defendants do not argue that a defendant can never be subject to personal jurisdiction pursuant to the Delaware long-arm statute under the dual jurisdiction theory; the Court thus need not address that issue here. Compare *Robert Bosch LLC v. Alberee Prods., Inc.*, — F. Supp. 3d —, 2014 WL 4949363, at *4-6 (D. Del. Sept. 29, 2014) (Stark, C.J.) (holding that the dual jurisdiction theory would be recognized by the Delaware Supreme Court as a viable means to satisfy the requirements of the long-arm statute), with *Round Rock*, 967 F. Supp. 2d at 976-77 (Andrews, J.) (coming to the opposite conclusion). Rather, Defendants argue that the facts of record here do not rise to the level necessary to support personal jurisdiction under this theory.

intent results in the introduction of the product[s] [at issue] into the market and that plaintiff's cause of action arises from injuries caused by that product." *Belden Techs.*, 626 F. Supp. 2d at 456.

B. Constitutional Prong

With regard to the constitutional prong, under the Due Process Clause of the United States Constitution, a defendant is subject to the jurisdiction of a federal court if the court finds that "certain minimum contacts" exist between the non-resident and the forum state, "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316 (internal quotation marks and citations omitted). Pursuant to this analysis, a defendant is subject to the jurisdiction of a federal court only when the defendant's conduct and connections with the forum state are such that it should "reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Unless the defendant's contacts with the forum are "so constant and pervasive 'as to render [it] essentially at home in the forum State[']'" such that the Court has general jurisdiction over the defendant, then specific jurisdiction must exist. *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)) (alteration in original). "When analyzing specific personal jurisdiction over a nonresident defendant, a court considers whether: (1) the defendant purposefully directed its activities at residents of the forum state, (2) the claim arises out of or relates to the defendant's activities with the forum state, and (3) assertion of personal jurisdiction is reasonable and fair." *Grober v. Mako Prods., Inc.*, 686 F.3d 1335, 1346 (Fed. Cir. 2012) (internal quotation marks and citation omitted).

With regard to the stream-of-commerce theory of personal jurisdiction, at issue in this case, the Supreme Court of the United States has long held that a “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 they will be purchased by consumers in the forum State.” *World-Wide Volkswagen Corp.*, 444 U.S. at 297-98. Later, in *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal.*, 480 U.S. 102 (1987), the Supreme Court explicitly confronted the question of whether “mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside of the United States would reach the forum State in the stream of commerce constitutes ‘minimum contacts’ between the defendant and the forum State[.]” such that the requirements of constitutional Due Process were satisfied. *Asahi*, 480 U.S. at 105 (quoting *Int’l Shoe*, 326 U.S. at 316). Writing for one four-justice plurality, Justice O’Connor held that the substantial connection between a defendant and the forum state necessary for a finding of minimum contacts must come about “by an action of the defendant purposefully directed toward the forum State” and that “a defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.” *Id.* at 113 (emphasis omitted) (plurality opinion). Instead, Justice O’Connor wrote that there must be some “[a]dditional conduct” evidencing an intent to serve the market in a forum state, such as “designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.” *Id.* at 112. In contrast, writing for the other four-justice

plurality, Justice Brennan concluded that Due Process requires only that a foreign defendant that has placed goods into the stream of commerce be “aware that the final product is being marketed in the forum State[.]” *Id.* at 117 (Brennan, J., concurring in part).

The Supreme Court next analyzed the contours of the stream-of-commerce theory in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011). As in *Asahi*, no single formulation of the stream-of-commerce test garnered a five-justice majority. Writing for a four-justice plurality, Justice Kennedy rejected the test from the Brennan concurrence in *Asahi* as “inconsistent with the premises of lawful judicial power.” *Id.* at 2789 (plurality opinion). In rejecting the New Jersey Supreme Court's exercise of jurisdiction over a foreign defendant on Due Process grounds, the plurality held that the “defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have *targeted the forum*; as a general rule it is not enough that the defendant might have predicted that its goods will reach the forum State.” *Id.* at 2788 (emphasis added). As such, Justice Kennedy concluded that “an intent to serve the U.S. market . . . do[es] not show . . . purposeful[] avail[ment]” of a particular forum state. *Id.* at 2790.

Justice Breyer, however, joined by Justice Alito, declined to join Justice Kennedy's plurality opinion. Writing in concurrence with the *McIntyre* judgement, Justice Breyer could not, on the one hand, agree with the “strict rules” set out in Justice Kennedy's plurality opinion that “limit jurisdiction where a defendant does not ‘inten[d] to submit to the power of a sovereign’ and cannot ‘be said to have targeted the forum.’” *Id.* at 2793 (citation omitted) (Breyer, J., concurring). On the other hand, Justice Breyer also did not agree with the approach adopted by the New Jersey Supreme Court, which would subject a defendant to jurisdiction (in a products

liability action) so long as it “knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.” *Id.* (emphasis in original) (internal quotation marks and citations omitted).

Instead, Justice Breyer suggested a number of “defendant-focused” factors that might be relevant in determining whether purposeful availment in a particular forum had occurred, including how large a defendant manufacturer is, how distant the forum is, and what number of items end up in the forum at issue. *Id.* at 2793. Beyond this, however, Justice Breyer “would not go further[,]” determining that the facts of the case did not warrant issuance of an opinion revising the jurisdictional standard in this area. *Id.* at 2792-94.

In *AFTG-TG, LLC v. Nuvoton Technology Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012), the United States Court of Appeals for the Federal Circuit has since reasoned that the crux of Justice Breyer’s concurrence in *McIntyre* was that “the Supreme Court’s framework applying the stream-of-commerce theory—including the conflicting articulations of that theory in *Asahi*—had not changed, and that the defendant’s activities [in the case] failed to establish personal jurisdiction under any articulation of that theory.” *Id.* at 1363. The Federal Circuit held that because *McIntyre* did not produce a majority opinion, it “must follow the narrowest holding among the plurality opinions in that case . . . that which can be distilled from Justice Breyer’s concurrence—that the law remains the same after *McIntyre*.” *Id.*

The *AFTG-TG* Court then applied its own pre-*McIntyre* stream-of-commerce precedent set out in *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994). *AFTG-TG*, 689 F.3d at 1363-64. In *Beverly Hills Fan*, the Federal Circuit had refused to decide whether Justice O’Connor’s or Justice Brennan’s approach to the stream-of-commerce theory

was the correct one, as it did not need to in order to resolve the case. *Id.* at 1364 (citing *Beverly Hills Fan*, 21 F.3d at 1566-67). Instead, it found sufficient contacts with the forum state (there, Virginia) to support the exercise of personal jurisdiction under any articulation of the stream-of-commerce theory, where defendants were alleged to have “made ongoing and continuous shipments of the accused infringing product into Virginia and maintained an established distribution network that encompassed Virginia[.]” such that 52 of the allegedly infringing products were on sale in Virginia. *Id.* (citing *Beverly Hills Fan*, 21 F.3d at 1561, 1563-65). The Federal Circuit contrasted that with the situation in *AFTG-TG*, in which the defendant’s conduct did not satisfy any articulation of the stream-of-commerce theory, where: (1) it was alleged “at most[.] [that] one of the defendants made isolated shipments to [the forum state,] Wyoming[.], at the request of third parties”; (2) the cause of action for patent infringement did not arise out of the isolated Wyoming shipments; (3) defendants’ contacts with Wyoming were “sporadic at best[.]”; and (4) plaintiff proffered no evidence that Wyoming was “part of any defendant’s continuous, established distribution channels[.]” *Id.* (concluding that the complaint represents nothing more than a “bare formulaic accusation” that the defendants maintain sufficient contacts with Wyoming).

From the Federal Circuit’s precedent, it is thus clear that “[i]f [the defendant] is able to satisfy Justice O’Connor’s test [in *Asahi*], there [is] no need to address whether the less restrictive test proposed by Justice Brennan should be the standard under Delaware law and under the [D]ue [P]rocess clause.” *Commissariat a l’Energie Atomique v. Chi Mei Optoelectronics Corp.*, 395 F.3d 1315, 1324 (Fed. Cir. 2005); *see also Robert Bosch LLC v. Alberee Prods., Inc.*, — F. Supp. 3d —, 2014 WL 4949363, at *8 (D. Del. Sept. 29, 2014).

C. Jurisdictional Discovery

As a general matter, “jurisdictional discovery should be allowed unless the plaintiff’s claim [of personal jurisdiction] is ‘clearly frivolous.’” *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n*, 107 F.3d 1026, 1042 (3d Cir. 1997) (citations omitted); *accord Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003) (“Although the plaintiff bears the burden of demonstrating facts that support personal jurisdiction . . . courts are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff’s claim is ‘clearly frivolous.’”) (citations omitted).⁷ Any such consideration “begins with the presumption in favor of allowing discovery to establish personal jurisdiction.” *Hansen v. Neumueller GmbH*, 163 F.R.D. 471, 474 (D. Del. 1995). If a plaintiff makes factual allegations that suggest the possible existence of requisite contacts between the defendant and the forum state with reasonable particularity, the court should order jurisdictional discovery. *See Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 157 (3d Cir. 2010); *Power Integrations, Inc.*, 547 F. Supp. 2d at 369.

However, a court should not permit discovery as a matter of course; before allowing jurisdictional discovery to proceed, “[t]he court must be satisfied that there is some indication that th[e] particular defendant is amenable to suit in this forum.” *Hansen*, 163 F.R.D. at 475; *accord Draper, Inc. v. MechoShade Sys., Inc.*, No. 1:10-cv-01443-SEB-TAB, 2011 WL 1258140, at *1 (S.D. Ind. Mar. 31, 2011) (“While courts have the power to grant jurisdictional

⁷ Here, the law of the Third Circuit governs whether jurisdictional discovery should be permitted. *Autogenomics, Inc.*, 566 F.3d at 1021-22 (noting that the denial of a motion for jurisdictional discovery should be reviewed for “abuse of discretion, applying the law of the regional circuit”); *see also Commissariat A L’Energie Atomique*, 395 F.3d at 1323 (citing Third Circuit law in holding that if the plaintiff makes “factual allegations [that] suggest the possible existence of requisite contacts between the defendant and the forum state with ‘reasonable particularity[,]’” then a Delaware court should order jurisdictional discovery).

discovery, a motion to dismiss for lack of personal jurisdiction does not automatically trigger a right to jurisdictional discovery.”). If a plaintiff does not come forward with “*some* competent evidence” that personal jurisdiction over the defendant might exist, a court should not permit jurisdictional discovery to proceed. *Hansen*, 163 F.R.D. at 475 (emphasis in original). Put another way, a plaintiff may not undertake a “fishing expedition based only upon bare allegations, under the guise of jurisdictional discovery.” *Eurofins Pharma*, 623 F.3d at 157; *see also Mass. Sch. of Law*, 107 F.3d at 1042 (noting that a mere “unsupported allegation” that the prerequisites for personal jurisdiction have been met would amount to a “clearly frivolous” claim, and would not warrant the grant of jurisdictional discovery) (citations omitted).

III. DISCUSSION

The Court will analyze whether Plaintiffs have sufficiently established personal jurisdiction over each Defendant by exploring the record as to each Defendant, in turn.

A. TSST Korea

With regard to TSST Korea, Plaintiffs argue that jurisdiction is proper under the long-arm statute, via a dual jurisdiction theory, based on a number of factors. Most prominently, Plaintiffs argue that the statute is satisfied because TSST Korea products are sold in Delaware in significant numbers, via TSST Korea’s sales agreement with SSI.⁸ (D.I. 26 at 14-23)

⁸ Plaintiffs also make arguments that could be construed to assert that the Court should attribute the conduct of, *inter alia*, Toshiba and Samsung to TSST Korea. (*See, e.g.*, D.I. 26 at 9-10, 19-20) Thus, it may be that Plaintiffs are attempting to utilize the alter ego theory or agency theory here in order to meet the requirements of Delaware’s long-arm statute (although Plaintiffs never say so clearly in their briefing). To the extent this is Plaintiffs’ intent, the Court agrees with Defendants that Plaintiffs have not met their burden to show that these theories are applicable. For the alter ego theory to apply, there must be a showing of fraud or inequity in order to ignore corporate boundaries between parent and subsidiary. *See Applied Biosystems, Inc. v. Cruachem, Ltd.*, 772 F. Supp. 1458, 1463 (D. Del. 1991). For the agency theory to apply,

With regard to the court's analysis under the long-arm statute, as noted above, in order to satisfy the requirements for dual jurisdiction, Plaintiffs must first sufficiently demonstrate that TSST Korea had the requisite intent to serve the Delaware market. In that regard, our Court has held that:

[A] non-resident firm's intent to serve the United States market is sufficient to establish an intent to serve the Delaware market, unless there is evidence that the firm intended to exclude from its marketing and distribution efforts some portion of the country that includes Delaware. Delaware's courts do not require evidence that Delaware itself was specifically targeted (which, given the size of this state, would presumably exist rarely if ever).

Power Integrations, 547 F. Supp. 2d at 373 (citations omitted); *see also id.* at 374 (noting that the record need not “show a specific reference to the State of Delaware on the part of [the non-resident firm]” but that “it is enough if, based on ongoing relationships with others in the stream of commerce, ‘it was reasonably foreseeable that [the] accused [products] . . . would make their way into the Delaware market.’”) (alteration in original) (internal quotation marks and citation omitted); *Belden Techs.*, 626 F. Supp. 2d at 456 n.6. Utilizing this test, Delaware courts have found that a non-resident firm intends to serve the Delaware market when it sells the products at issue to a re-selling/distributing entity (such that title to the products transfers to the reseller/distributor), knowing that the reseller/distributor will in turn solicit sales from customers throughout the United States, with no effort made to exclude sales in Delaware. *See, e.g.*,

Graphics Props. Holdings, Inc. v. ASUS Computer Int'l, — F. Supp. 3d —, 2014 WL 4949589,

the Court must examine the degree of control which the parent exercises over the subsidiary, taking into account numerous factors. *Id.* Plaintiffs do not allege any fraud or inequity, and have not attempted to make a sufficient showing as to the factors relevant to the agency theory's application. Even to the extent that one of these two theories could possibly be applicable to TSST Korea, Plaintiffs have not met their burden to demonstrate as much.

at *1-2, 5 (D. Del. Sept. 29, 2014) (finding personal jurisdiction via the dual jurisdiction theory over a foreign defendant that sold products at issue to a California-based subsidiary, which in turn sold the products to resellers for distribution across the United States, including resale outlets in Delaware); *Boone*, 724 A.2d at 1153, 1158 (explaining that the defendant's engagement of an exclusive distributor to distribute its asbestos to the United States market evidenced an intent and purpose to serve Delaware market, since "[i]mplicit in this agreement is the fact that [defendant sought to] solicit business from the Country as a whole, including Delaware").

Here, the current record demonstrates TSST Korea's intent to serve the United States market, and thus Delaware, under the meaning of the cases set out above. The record evidence indicates that TSST Korea manufactures large quantities of what are asserted here to be the Accused Products (its stand-alone ODDs and ODDs built into computers), and that those products have been regularly sold in the United States from 2011 to 2013—including ODDs incorporated into name brand computers (such as Dell, HP and Samsung computers). (D.I. 26 at 8-9; D.I. 27 at ¶¶ 2-11, 14-31, 38-39, 59-71)⁹ Additionally, the record is clear that TSST Korea

⁹ In its briefing, TSST Korea seems to suggest that in order for the dual jurisdiction theory to be satisfied, title to the products at issue would need to transfer to the reseller (here SSI) in Delaware. (D.I. 37 at 6) That argument is not only inconsistent with the outcomes in the cases cited above, *see, e.g., Graphics Props. Holdings, Inc.*, 2014 WL 4949589, at *1-2, *5; *Boone*, 724 A.2d at 1158, but would seem to be at odds with the underlying premise behind the use of the dual jurisdiction theory (because if title transferred to SSI in Delaware, jurisdiction would presumably be satisfied pursuant to subsection (c)(1) of the long-arm statute alone). In the Court's view, the issue of the locus of title transfer may be relevant in this context to the extent that it sheds light on the foreign defendant's intent to serve the United States (and thus, the Delaware) market. That is, it may be that if a foreign defendant transfers title to the products at issue to another entity outside of the United States, that fact could be relevant to whether the foreign defendant ever truly contemplated or intended that its products would later make their way to the United States (and Delaware) at all. *See Intellectual Ventures I LLC v. Ricoh Co.*,

entered into an agreement with SSI, under which SSI purchases TSST Korea's ODDs and thereafter has the non-exclusive right to resell those products in the United States. (D.I. 27, ex. 54) Indeed, pursuant to this agreement, TSST Korea is to play an active role in SSI's resale efforts, as TSST Korea is required to assist with advertising and brand marketing of the ODD products and is to help set a target number of products that SSI will purchase for distribution in the United States. (*Id.* at 2, 3) Nowhere in its briefing does TSST Korea directly dispute these facts; indeed, TSST Korea asserts that SSI is, in practice, its exclusive reseller/distributor of ODD products in the United States, and that all U.S.-based sales of its ODD products occur through sales to SSI. (D.I. 22 at ¶ 27; D.I. 37 at 5)

Next, in order to satisfy the long-arm statute's requirements via a dual jurisdiction theory, Plaintiffs must demonstrate that TSST Korea's intent to serve the United States market actually resulted in the introduction of the products at issue into the market, and that plaintiff's cause of action arises from injuries caused by those products. *Belden Techs.*, 626 F. Supp. 2d at 456. Here, satisfaction of this prong is not really disputed by the parties. Plaintiffs have put forward evidence indicating that many thousands of TSST Korea-manufactured ODDs (asserted to be Accused Products here, whose sale, offer for sale, or use allegedly caused Plaintiffs injury) were sold in Delaware over the last few years, in big-box stores, small stores, brand-specific stores

Ltd., — F. Supp 3d. —, 2014 WL 4748703, at *4 (D. Del. Sept. 12, 2014) (finding that a foreign defendant did not have the requisite intent to sell products in Delaware, such that personal jurisdiction was not available based on a dual jurisdiction theory, and noting one fact relevant in this calculus was that the foreign defendant transferred title to the products at issue to a related company in Japan, prior to importation of the products into the United States). Here, it is not clear when and where title to the Accused Products transfers from TSST Korea to SSI, though it is clear that this occurs no earlier than when the goods arrive in the United States. (D.I. 22 at ¶ 33; D.I. 27, ex. 54 at 3-4)

located in malls and via the Internet. (D.I. 26 at 15; D.I. 27 at ¶¶ 2-11, 14-39) This is sufficient to satisfy the second prong of the test for dual jurisdiction. *See, e.g., Graphics Props. Holdings*, 2014 WL 4949589, at *5 (“The evidence of sales in Delaware also satisfies the second prong of the statutory analysis, as it demonstrates that the Foreign Defendants’ intent resulted in the introduction of the accused devices in Delaware.”); *Belden Techs.*, 829 F. Supp. 2d. at 268 n.9.

The Court continues to an analysis of whether Plaintiffs have satisfied the requirements of Due Process. TSST Korea asserts that although placing the Accused Products into the United States market may satisfy the dual jurisdiction theory, Plaintiffs have not shown that the Due Process Clause is satisfied. (D.I. 37 at 8) More particularly, TSST Korea asserts that the record contains no evidence of the kind of “additional conduct” required by Justice O’Connor’s plurality opinion in *Asahi* indicating that it had purposefully availed itself of the Delaware market. (*Id.* (citing *Belden Techs.*, 829 F. Supp. 2d at 269))

Under controlling Federal Circuit precedent, the facts here are sufficient to satisfy the Due Process Clause. In *Beverly Hills Fan*, the Court explained that “[t]he allegations are that defendants purposefully shipped the accused fan into Virginia through an established distribution channel. The cause of action for patent infringement is alleged to arise out of these activities. No more is usually required to establish specific jurisdiction.” *Beverly Hills Fan*, 21 F.3d at 1565. One of those defendants, Ultec Enterprises Co., Ltd. (“Ultec”), was a Chinese company that manufactured the accused product in Taiwan and had an agreement with its co-defendant for the co-defendant to distribute the accused fan in the United States. *Id.* at 1559-60. And the Court found that the fact that 52 of Ultec’s fans bearing the co-defendant’s warranty were found to be present at a particular retailer in Virginia was sufficient evidence that both defendants had

purposefully, knowingly shipped the fans to Virginia for sale. *Id.* at 1564. In the end, the *Beverly Hills Fan* Court found that these facts clearly satisfied both articulations of the stream-of-commerce theory set out in *Asahi*, including Justice O'Connor's more stringent interpretation. *Id.* at 1567.

Here, there is evidence that TSST Korea knowingly shipped ODD products to the United States through, at a minimum, its contractual agreement with United States distributor SSI. And there is not only evidence that SSI in fact has a Delaware distributor and sales representative, (D.I. 27 at ¶ 68 & ex. 55), but also that tens of thousands of TSST Korea's ODD products have been made available for sale in various stores in Delaware since at least 2011. (*Id.* at ¶¶ 37-39) This evidence appears indistinguishable from the type of "additional conduct" required by Justice O'Connor in *Asahi*, see 480 U.S. at 112 (noting that such conduct could be demonstrated by "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State"), and from that found to satisfy Due Process in *Beverly Hills Fan*. See *Graphics Props. Holdings*, 2014 WL 4949589, at *6; *Robert Bosch LLC*, 2014 WL 4949363, at *8-9.¹⁰

¹⁰ As previously noted, TSST Korea cited to this Court's decision in *Belden Technologies* in support of its assertion that Due Process is not satisfied on these facts, but the Court finds that citation inapposite. In *Belden Technologies*, the defendant at issue had entered into a distribution agreement with a distributor that would sell defendant's accused products in the United States. But there, the distribution agreement at issue specified that only certain listed territories—not including Delaware—were contemplated to be a part of the contract. *Belden Techs.*, 829 F. Supp. 2d at 269-70. Only four of the accused products were shown to have been sold (via shipment) to Delaware customers, and the *Belden Technologies* Court found that the agreement's language indicated that the defendant "did not contemplate sales in Delaware[]" and that "it is not clear from the sales agreement that [the distributor] affirmatively 'agreed to serve as the sales agent in the forum state' as contemplated by Justice O'Connor." *Id.* at 270 (quoting *Asahi*, 480 U.S. at 112). Those facts are a far cry from those at issue here, where the SSI sales agreement sets out the entirety of the United States as the target area for resale and requires TSST Korea to play an active role in "marketing in the United States market[.]" (D.I. 27, ex. 54 at 2-3), and where large numbers of the Accused Products have ended up on sale at various retailers in

For all of these reasons, Plaintiffs have sufficiently demonstrated that this Court has personal jurisdiction over TSST Korea.

B. TSST Japan

The Court next turns to Plaintiffs' arguments that the Court has personal jurisdiction over TSST Japan. First, in asserting that there is "no ascertainable public distinction between" TSST Japan and TSST Korea, Plaintiffs might be arguing that TSST Korea's contacts should be attributed to TSST Japan in some way for purposes of the jurisdictional analysis. (D.I. 26 at 17; *see also id.* at 6-7) A second line of argument is more clearly asserted by Plaintiffs: that there is evidence that TSST Japan itself is not simply a holding company, but instead an entity that produces and sells ODD products in Delaware, such that it has purposefully availed itself of the Delaware market with regard to its products. (*Id.*)

The evidence that the Court can consider in determining whether there is personal jurisdiction over TSST Japan is as follows:

- First, there is evidence that some accused standalone ODDs have been purchased by representatives of Plaintiffs in Delaware, and that the packaging of those products includes TSST Japan's corporate name (though the products also contain reference to TSST Korea, and to "Toshiba Samsung Storage Technology" more generally). (*See, e.g.*, D.I. 27, ex. 6 (ODD product packaging stating "Designed By Toshiba Samsung Storage Technology Corporation"); *id.*, ex. 7 (ODD product with previously-referenced packaging includes label identifying TSST Korea, but the label and an accompanying installation guide at times reference "Toshiba Samsung Storage Technology"); *see also id.* at ¶¶ 4-5, 9-10 & exs. 2-3)
- Second, a "TSST" logo is found on certain packaging that contains Accused Products, as well as on certain portions of TSST Korea's website (on which customers can purchase Accused Products); the "TSST" mark is

Delaware. (*Id.* at ¶¶ 2-11, 14-39)

registered to TSST Japan. (*Id.* at ¶¶ 4, 9, 40, 48-50, 58 & exs. 2, 6, 27, 36-38, 47)

- Third, there is evidence regarding TSST Japan’s website, including that it: (1) contains a link to a TSST Korea website; and (2) that it provides some customer support contact information (regarding CD/DVD ROM drive “products . . . sold to our OEM customers”), as well as a downloadable device driver for certain products. (*Id.* at ¶¶ 54-57 & exs. 42-46)
- Fourth, TSST Japan has provided declarations of Mr. Suzuki, its President and Chief Executive Officer, wherein he states that TSST Japan previously sold CD/DVD ROM drives, for which TSST Japan provided customer support on its website, until March 2008. (D.I. 36 at ¶¶ 1, 3) Since that time, he states that TSST Japan has not designed, developed, produced or sold ODD products. (*Id.*; D.I. 18 at ¶¶ 5, 13)
- Finally, Toshiba, in a court filing in another litigation, dated May 25, 2009, outlined TSST Japan’s then-relationships with Toshiba, Samsung, and TSST Korea. (D.I. 27, ex. 80) In that filing, Toshiba stated that it sold products through TSST Japan, and that Samsung sold products through TSST Korea. (*Id.* at 14-16)

With regard to Plaintiffs’ first potential line of argument, under Delaware law, there are two theories by which a parent may be responsible for the actions of a subsidiary for purposes of personal jurisdiction: the alter ego theory and the agency theory. Under the alter ego theory, courts will ignore corporate boundaries between parent and subsidiary if fraud or inequity is shown. *See Applied Biosystems*, 772 F. Supp. at 1463. With regard to application of the agency theory, a court must examine the degree of control which the parent exercises over the subsidiary, evaluating several factors such as the extent of overlap of officers and directors, methods of financing, the division of responsibility for day-to-day management, and the process by which each corporation obtains its business. *Id.*

Plaintiffs here do not allege any fraud or inequity regarding the relationship between TSST Japan and TSST Korea, and therefore, their claim that there is “no ascertainable public

distinction” between the two entities could only be meant to invoke the agency theory. Yet Plaintiffs have put forward no evidence at all regarding any of the above-referenced factors going to the question of agency. In fact, not once in their briefing do Plaintiffs even clearly reference the agency theory, nor do they ever clearly assert that they are, in fact, pursuing that theory as a means to establish personal jurisdiction over TSST Japan. At best, some of the evidence set out above (such as the presence of TSST Japan’s name and a mark registered to it on Accused Product labeling and packaging, or the linkages set out above relating to the respective companies’ websites) provides indication that TSST Japan and TSST Korea are associated with each other. But any parent and subsidiary are associated with each other in some way. What the evidence is entirely silent on is the question of what degree of corporate control TSST Japan exercises over TSST Korea.

Ultimately, Plaintiffs’ failure to reference the agency theory by name, to clearly explain how it could be said to apply, or to allege facts relevant to the essential “control” inquiry is dispositive. Any suggestion that TSST Japan exercises sufficient control over TSST Korea so as to render the latter the agent of the former would, on this record, be a guess—it would be supported by little more than speculation. And unsubstantiated speculation is an insufficient basis on which to grant jurisdictional discovery. *See LG Elecs., Inc. v. ASKO Appliances, Inc.*, Civil Action No. 08–828 (JAP), 2009 WL 1811098, at *3 (D. Del. June 3, 2009) (holding that “unsubstantiated speculation is insufficient to warrant jurisdictional discovery”); *LivePerson, Inc. v. NextCard, LLC*, C.A. No. 08-062-GMS, 2009 WL 742617, at *5-6 (D. Del. Mar. 20, 2009) (denying jurisdictional discovery where plaintiff did not “provide[] any evidence” as to all but one of the four primary factors relating to whether an agency relationship existed between the

parent and subsidiary, and as to the remaining factor—regarding the management of the subsidiary's day-to-day activities—the evidence presented amounted to a “bald and speculative assertion”).

As to Plaintiffs' alternative argument that personal jurisdiction exists over TSST Japan via the utilization of the dual jurisdiction theory, it is apparent that Plaintiffs have not met their burden to establish a *prima facie* case for personal jurisdiction. And indeed, under this Court's precedent, the Court is not convinced that Plaintiffs have done enough to warrant jurisdictional discovery. There is simply insufficient evidence of TSST Japan's intent to serve any particular market, let alone the United States market, through sales of its own ODD products, to warrant jurisdictional discovery.

One difficulty for Plaintiffs here is that—with respect to the evidence in the record regarding Accused Product sales in the United States (and Delaware)—there is very little evidence that TSST Japan is associated with the production or sale of those products. Mr. Suzuki's declarations clearly state that TSST Japan has not developed, produced or manufactured its own ODD products since 2008. (D.I. 18 at ¶¶ 5, 13; D.I. 36 at ¶¶ 1, 3) If the materials from Toshiba's court filing muddy the clarity of that assertion at all, they still date only to 2009. (*See* D.I. 27, ex. 80 at 14-16) Thus, these facts are not particularly useful in demonstrating that TSST Japan produced or sold any of the Accused Products, referenced in Plaintiffs' materials, which were shown to have entered the United States from 2011 to 2013. (D.I. 27 ¶¶ 2-11, 14-39) As to those products, the only evidence of their connection to TSST Japan is that TSST Japan's name and/or a mark registered to it is represented on certain of the products' packaging. (*See, e.g.*, D.I.

27, exs. 2-3, 6-7)

But even assuming that this is enough to suggest that TSST Japan had a role in producing or selling these products, there are no real factual allegations that go to the nature of the “supply chain from [TSST Japan] to Delaware.” *Robert Bosch*, 2014 WL 4949363 at *10-11. In many cases where our court has granted jurisdictional discovery as to a foreign defendant, the plaintiff has at least come forward with factual allegations regarding how that defendant’s products are distributed or re-sold to other entities (such that they could end up being sold in Delaware). *See, e.g., id.* at *2, *10-11 (permitting jurisdictional discovery where plaintiff had sufficiently “detail[ed] the supply chain from [the foreign defendant] to Delaware[,]” by articulating how accused product components could have been sold by the defendant to related entities, and in turn later sold through retailers to consumers in Delaware); *Belden Techs.*, 626 F. Supp. 2d at 453, 459 (granting jurisdictional discovery where plaintiff had identified “defendants’ business relationships with specific entities and allege[d] contacts with Delaware through these relationships[.]”); *see also Eastman Chemical Co. v. AlphaPet Inc.*, Civ. Action No. 09-971-LPS-CJB, 2011 WL 6004079, at *16-17 (D. Del. Nov. 4, 2011), *report and recommendation adopted*, 2011 WL 6148637 (D. Del. Dec. 9, 2011). Here, perhaps because there is so little evidence that TSST Japan actually has produced or sold anything over these last few years, there is correspondingly no record evidence indicating how TSST Japan would be said to use particular distribution channels to move such products into the United States and Delaware (via TSST Korea, or via any other entity) in that time. And thus, there is a paucity of competent evidence to suggest that, even assuming TSST Japan does play a role in producing or selling

Accused Products, TSST Japan intends to target the United States market for those products.

Accordingly, Plaintiffs have not met the Third Circuit's requirement of presenting factual allegations that suggest with reasonable particularity that TSST Japan had an intent to serve the Delaware market with its own ODD products, under the meaning of the Delaware long-arm statute. *See Intellectual Ventures I LLC v. Nikon Corp.*, 935 F. Supp. 2d 787, 794 (D. Del. 2013) (denying request for jurisdictional discovery based on the dual jurisdiction theory where plaintiff's evidence provided "no indication [that the defendant] has the requisite intent to sell the products it manufactures to Delaware[.]"); *M2M Solutions LLC v. Simcom Wireless Solutions, Ltd.*, 935 F. Supp. 2d 740, 745-46 (D. Del. 2013) (denying request for jurisdictional discovery where plaintiff's assertions as to jurisdiction based on a stream-of-commerce theory were "completely speculative"). In light of this, the Court orders that no jurisdictional discovery be permitted and recommends that TSST Japan's motion to dismiss be granted.

C. Request for Transfer

Plaintiffs also requested that "if this Court finds that there is insufficient evidence that Delaware has personal jurisdiction over [TSST Korea] and/or [TSST Japan] (and does not order jurisdictional discovery) it should transfer this case to another jurisdiction rather than dismissing the Complaint[.]" pursuant to 28 U.S.C. § 1406(a) or 28 U.S.C. § 1631. (D.I. 26 at 24-25). Because the Court recommends that TSST Korea's motion to dismiss be denied, Plaintiffs' transfer request as to that entity is moot. As to TSST Japan, obtaining transfer under either statute referenced by Plaintiffs requires a showing that: (1) the suit could have been brought in the transferee court and (2) transfer is in the interests of justice. *See Forest Labs, Inc. v. Cobalt*

Labs. Inc., C.A. No. 08–21–GMS–LPS, 2009 WL 605745, at *12-13 (D. Del. Mar. 9, 2009), *report and recommendation adopted*, 2009 WL 2753427 (D. Del. Aug. 27, 2009). Plaintiffs have not, at a minimum, met the first of these two requirements, as they have not even identified a possible transferee court, let alone demonstrated that the suit against TSST Japan could have been brought there. (D.I. 26 at 24-25; D.I. 35 at 2 n.1) For this reason, the Court recommends that the request for transfer as to TSST Japan be denied.

III. CONCLUSION

For the foregoing reasons, the Court recommends that TSST Korea’s motion to dismiss be DENIED and TSST Japan’s Motion to Dismiss be GRANTED. The Court further orders that Plaintiffs’ request for jurisdictional discovery be DENIED, and that Plaintiffs’ request for transfer be DENIED AS MOOT as to TSST Korea and DENIED as to TSST Japan.

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1), and D. Del. LR 72.1. The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Report and Recommendation. Fed. R. Civ. P. 72(b)(2). The failure of a party to object to legal conclusions may result in the loss of the right to de novo review in the district court. *See Henderson v. Carlson*, 812 F.2d 874, 878-79 (3d Cir. 1987); *Sincavage v. Barnhart*, 171 F. App’x 924, 925 n.1 (3d Cir. 2006).

The parties are directed to the Court’s Standing Order for Objections Filed Under Fed. R. Civ. P. 72, dated October 9, 2013, a copy of which is available on the District Court’s website, located at <http://www.ded.uscourts.gov>.

Because this Report and Recommendation may contain confidential information, it has

been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version (if necessary) of the Report and Recommendation. Any such redacted version shall be submitted no later than **November 12, 2014** for review by the Court, along with an explanation as to why disclosure of any proposed redacted material would “work a clearly defined and serious injury to the party seeking closure.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Report and Recommendation.

Dated: November 5, 2014



Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE