IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BLUEEARTH BIOFUELS, LLC,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. 3-08CV1779-L
	§	
HAWAIIAN ELECTRIC COMPANY, INC.	§	
MAUI ELECTRIC COMPANY, LTD,	§	
ALOHA PETROLEUM, LTD AND	§	
KARL E. STAHLKOPF, INDIVIDUALLY,	§	
	§	
Defendants.	§	

BRIEF IN SUPPORT OF DEFENDANTS HAWAIIAN ELECTRIC COMPANY, INC., MAUI ELECTRIC COMPANY, LTD. AND KARL E. STAHLKOPF'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO FRCP 12(b)(2) and 12(b)(3)

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Defendants Hawaiian Electric Company, Inc., Maui Electric Company, Ltd. and Karl E. Stahlkopf file this Brief in Support of these Defendants' Motion to Dismiss Plaintiff's First Amended Complaint, and shall show the court as follows:

I.
SUMMARY OF ARGUMENT

Plaintiff BlueEarth Biofuels, LLC ("BlueEarth"), a Nevada limited liability company, has filed its First Amended Complaint (the "Complaint") against Defendants Hawaiian Electric Company, Inc. ("HECO"), one of HECO's subsidiaries, Maui Electric Company, Ltd. ("MECO"), and one of HECO's officers, Karl E. Stahlkopf ("Stahlkopf") (collectively the "HECO Defendants") – all Hawai`i citizens – in the United States District Court for the Northern District of Texas.[1] The Complaint seeks to haul the HECO Defendants to an improper forum that bears no relation whatsoever to BlueEarth, the Defendants, or their dispute. As a result, this Court lacks personal jurisdiction over the HECO Defendants, and, even if such jurisdiction existed, this is an improper venue for the parties' dispute under 28 U.S.C. §1391(a).

In addition, even if this forum had any relationship to this matter whatsoever, BlueEarth's Complaint is completely devoid of a single allegation connecting this matter to the Northern District of Texas. No such allegations are made because the entirety of the HECO Defendants' business relations, contract negotiations and interaction with BlueEarth occurred in Hawai`i. Accordingly, the Complaint should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(3).

[1] BlueEarth has also named Aloha Petroleum, Ltd. ("Aloha") as a defendant in this lawsuit.

II.
BACKGROUND FACTS

HECO is one of Hawai`i's oldest and largest companies. For more than 100 years, HECO and its subsidiaries have provided energy to the people of Hawai`i. Declaration of Mr. Karl E. Stahlkopf (hereinafter "*Stahlkopf Declaration*") Appendix pg. 1 at ¶2. Together, these companies serve 95% of the State of Hawai`i's 1.2 million residents on the islands of O`ahu, Maui, Hawai`i Island, Lana`i and Moloka`i. *Stahlkopf Declaration* Appendix pg. 1 at ¶2. Defendant Stahlkopf is HECO's Senior Vice President for Energy Solutions and Chief Technology Officer. *Id.*

In March, 2006 BlueEarth and HECO began discussing a project to supply biodiesel for the Hawaiian Islands. *Stahlkopf Declaration* Appendix pg. 2 at ¶4. HECO's initial introduction to BlueEarth occurred in Hawai`i on or about February, 2006. *Id.* The HECO Defendants met with representatives of BlueEarth in Hawai`i on several occasions during the course of the parties' initial discussions regarding a biodiesel production facility in Hawai`i. *Id.* The parties had no meetings in Texas. *Id* at ¶10.

After months of face-to-face meetings, negotiations and discussions in Hawai`i, on September 27, 2006, HECO and MECO each signed Mutual Non-Circumvention and Non-Disclosure Agreements (the "Non-Disclosure Agreements") with BlueEarth. *Stahlkopf Declaration* Appendix pg. 2 at ¶5. The Non-Disclosure Agreements were drafted and provided to HECO and MECO by BlueEarth. *Id.* The Non-Disclosure Agreements were executed by HECO, MECO and BlueEarth in Hawai`i on September 27, 2006. *Id.*

On January 29, 2007, after further face-to-face meetings in Hawai`i, HECO, MECO and BlueEarth executed a Confidential and Proprietary Memorandum of Understanding (the "MOU") to proceed with evaluation and development of a Biodiesel Production Facility on Maui. *Stahlkopf Declaration* Appendix pg. 2 at ¶6. Like the Non-Disclosure Agreements, the terms of the MOU were exclusively negotiated in Hawai`i, the MOU was executed in Hawai`i and contemplated performance only in Hawai`i. *Id.* Moreover, the MOU states that it "shall be governed by, construed and applied in accordance with the laws of the State of Hawai`i. *Id.*

III.
ALLEGED JURISDICTIONAL FACTS

BlueEarth alleges broadly that this Court may exercise general jurisdiction over all of the Defendants because they each allegedly engage in "continuous and systematic contacts" with Texas and "purposefully availed itself or himself" of the privilege of conducting business in Texas. Complaint ¶ 9. More specifically, BlueEarth alleges the following bases for the assertion of general jurisdiction over HECO and MECO: (1) HECO and MECO are clients of Jim Clary and Associates ("JCA"), a Dallas-based air quality consulting company (Complaint ¶ 9a); (2) HECO is engaged in a wind energy project with Shell WindEnergy Services, Inc. ("Shell"), a Houston-based company (*Id.* ¶ 9b); (3) HECO is a client of Vignette Corporation ("Vignette"), an Austin-based computer systems and server provider *(Id.* ¶ 9c); and (4) a member of the Board of Directors for Hawaiian Electric Industries, Inc. ("HEI"), HECO's parent company and MECO's "grandparent" company, is the President and CEO of Waste Management, Inc., a Texas-based company (*Id.* ¶ 9d). BlueEarth alleges *no* specific basis for the assertion of general jurisdiction over Stahlkopf.

In fact, the HECO Defendants have no continuous or systematic contacts with Texas, and they have not sought, or enjoyed, the privilege of conducting business in Texas (*Id.*¶9. The Plaintiff's jurisdictional allegations against HECO, MECO and Stahlkopf (Complaint ¶9(a)-(d)) are either indisputably wrong or incomplete and misleading. Specifically: HECO and MECO do business with JCA in Hawai`i, not Texas, under a contract that is governed by Hawai`i law. Declaration of Joseph Viola (hereinafter "Viola Declaration") Appendix pg. 13 at ¶2. HECO, MECO, and one of HECO's subsidiaries (Renewable Hawai`i Inc.) entered agreements with Shell WindEnergy that involved potential projects in Hawai`i, not Texas. However, none of those projects have materialized. *Id. at* ¶3. HECO is a client of Vignette, but Vignette provides goods and services to HECO in Hawai`i, not Texas (*Id)*, and their agreement is governed by Hawai`i law. *Id. at* ¶2.[2] Finally, contrary to the Plaintiff's allegations (Amended Complaint ¶9(d)) a member of HEI's board (A. Maurice "Maury" Myers) is the retired – not current – Chairman, President and CEO of WMI. He worked for WMI from 1999 to 2004. *See* http://people.forbes.com/profile/a-maurice-myers/39677.[3]

BlueEarth alleges that this Court may exercise specific jurisdiction over the HECO Defendants because they engaged in numerous telephone conferences discussing the evaluation and development of the biodiesel production facility, with BlueEarth agents located in Texas, during the period from March 2006 through at least fall 2008. Complaint ¶ 10. There is no dispute that many phone calls took place when the representatives of BlueEarth were in Texas,

[2] As explained below in Section IV.A.1, the fact that Texas-based companies have customers around the nation or the world obviously does not mean that all their customers are doing business in Texas and exposing themselves to general jurisdiction in Texas' courts. The U.S. Supreme Court has made it clear that buying things from companies in Texas does not create jurisdiction there,

[3] The HECO Defendants request the court to take judicial notice of this matter under FRE 201.

by their own choice. However, s explained below, phone calls—no matter how numerous—do not support jurisdiction in Texas.

IV.
ARGUMENT & AUTHORITIES

A. The Complaint Should be Dismissed Pursuant to Federal Rule of Civil Procedure 12(b)(2)

BlueEarth has failed to allege a sufficient basis for personal jurisdiction over the HECO Defendants. BlueEarth bears the burden of establishing jurisdiction over nonresident defendants. *Johnston v. Multidata Sys. Int'l. Corp.*, 523 F.3d 602, 609 (5th Cir. 2008)(citing *Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994). Although the plaintiff's non-conclusory jurisdictional allegations must be accepted as true, such acceptance does not automatically mean that a prima facie case for personal jurisdiction has been presented. *Panda Brandywine Corp v. Potomoc Elec. Power Co.*, 253 F.3d 865, 868 (5th Cir. 2001). Establishing a prima facie case still requires the plaintiff to show the nonresident defendant's purposeful availment of the benefits and protections of and minimum contacts with the forum state. *Id.* Moreover, the prima facie case requirement does not require the court to credit conclusory allegations, even if uncontroverted. *Id.* (citing *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 34 (1st Cir. 1998) (holding the "law does not require a court to [unquestionably] credit conclusory jurisdictional allegations or draw farfetched inferences").

Under Federal Rules of Civil Procedure, a federal court in a diversity case may only exercise jurisdiction over a nonresident corporate defendant if such jurisdiction is permitted by state law. *Alpine View Co., Ltd. v. Atlas Copco AB*, 205 F.3d 208, 214 (5th Cir. 2000). Under Texas' long-arm statute, Texas Civil Practice & Remedies Code §17.042, a court has personal

jurisdiction over a foreign defendant to the fullest extent allowed by the federal constitution. *Alpine View Co., Ltd.*, 205 F.3d at 214. Accordingly, this Court need only consider whether exercising jurisdiction over the Defendants is consistent with the Due Process Clause of the Fourteenth Amendment. *Id.* (citing *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 335 (5th Cir. 1999).

The Due Process Clause permits the exercise of personal jurisdiction over a non-resident defendant when (1) that defendant has purposefully availed himself of the benefits and protections of the forum state by establishing minimum contacts with the forum state; and (2) the exercise of jurisdiction over that defendant does not offend traditional notions of fair play and substantial justice. *Id.* Minimum contacts must be established either through proof of contacts sufficient to establish specific jurisdiction, or proof of more extensive contacts that justify the exercise of general jurisdiction. *Lewis v. Frense*, 252 F.3d 352, 358 (5th Cir. 2001). Specific jurisdiction over a nonresident corporation is appropriate only if that corporation has purposefully directed its activities at the forum state and the litigation arises out of or relates to those activities. *Alpine View Co., Ltd.*, 205 F.3d at 215 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). General jurisdiction, on the other hand, exists when the nonresident defendant's contacts with the forum state, including those unrelated to the plaintiff's cause of action, are continuous and systematic. *Alpine View Co., Ltd.*, 205 F.3d at 215 (citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

The Supreme Court has stated that the constitutional touchstone for asserting personal jurisdiction over a nonresident defendant is whether the defendant purposefully established minimum contacts in the forum state. *Alpine View Co., Ltd.*, 205 F.3d at 215 (citing *Burger King*

Corp., 471 U.S. at 472). BlueEarth's Complaint lacks allegations sufficient to establish the HECO Defendants' purposeful minimum contacts with Texas.

1 BlueEarth has not alleged -- because it cannot allege -- sufficient contacts to establish general jurisdiction over the HECO Defendants.

General jurisdiction can be assessed by evaluating contacts of the defendant with the forum over a reasonable number of years, up to the date the suit was filed. *Alpine View Co., Ltd.*, 205 F.3d at 217 (citing *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 717 (5th Cir. 1999)). Once personal jurisdiction has been challenged, to make a prima facie showing of general jurisdiction, BlueEarth must produce evidence that affirmatively shows that Defendants' contacts with Texas, including those that are unrelated to the litigation, are sufficiently extensive to satisfy due process requirements. *Alpine View Co., Ltd.*, 205 F.3d at 217.

To meet this test, Defendants' contacts must be substantial, continuous and systematic. *Alpine View Co., Ltd.*, 205 F.3d at 217. Even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required to sustain general jurisdiction. *Johnston*, 523 F.3d at 609 (citing *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002)). In fact, the Fifth Circuit has held that random, fortuitous, or attenuated contacts are insufficient to establish jurisdiction. *Johnston*, 523 F.3d at 610 (citing *Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 481 F.3d 309, 312 (5th Cir. 2007)).

In *Helicopteros*, the Supreme Court found that the defendant's contacts with Texas were insufficient to support an exercise of general jurisdiction even when the defendant, over a six year period, purchased helicopters, spare parts and accessories worth more than $4 million from

a Texas company; sent prospective pilots to Texas to be trained; sent management to Texas for technical consultations; and received a check for over $5 million that was drawn on a Texas bank. *Helicopteros*, 466 U.S. at 418-19. Similarly, in *Central Freight Lines, Inc. v. APA Transp. Corp.*, 322 F.3d 376 (5th Cir. 2003), the Fifth Circuit found no general jurisdiction even though the defendant routinely arranged and received interline shipments to and from Texas and regularly sent sales people to Texas to develop business, negotiate contracts, and service national accounts. *Central Freight Lines*, 322 F.3d at 381. The Fifth Circuit has also held that to confer general jurisdiction, a defendant must have a business presence in Texas. *Johnston*, 523 F.3d at 611 (citing *Access Telecom*, 197 F.3d at 717). It is not enough that a corporation merely do business in Texas. *Id.*

Moreover, vague and overgeneralized assertions that give no indication as to the extent, duration, or frequency of contacts are insufficient to support general jurisdiction. *Johnston*, 523 F.3d at 610 (citing *Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 596 (5th Cir. 1999). The continuous and systematic contacts test requires extensive contacts between a defendant and a forum. *Johnston*, 523 F.3d at 609 (citing *Submersible Sys., Inc. v. Perforadora Cent., S.A.*, 249 F.3d 413, 419 (5th Cir. 2001)).

Here, Blue Earth has made only conclusory allegations regarding the HECO Defendants' alleged contacts with Texas, none of which standing alone or together are sufficient to establish this Court's general jurisdiction. For example, the general allegation that "each Defendant engages in continuous and systematic contacts" with Texas and "purposefully availed itself or himself" of the privilege of conducting business in Texas (Complaint ¶ 9) is a mere legal conclusion, insufficient to support general jurisdiction over any of the HECO Defendants. *See*

Johnston, 523 F.3d at 610. BlueEarth alleges no other basis – and there is none – for the assertion of general jurisdiction over Defendant Stahlkopf.

Even Blue Earth's more "specific" jurisdictional allegations regarding HECO and MECO are vague as to the extent, duration or frequency of these defendants' contacts with Texas. The Complaint states generally, for example, that HECO and MECO are "long-time" clients of JCA, that HECO engaged in a wind energy project with Shell and that HECO is a "long-time" client of Vignette. Complaint ¶ 9a- c. BlueEarth then repeats, on "information and belief," the collective and conclusory mantra that HECO and/or MECO have "entered into contracts and transacted continuous business with [these respective companies] in Texas over multiple years." Complaint ¶ 9a, c. None of these allegations are sufficiently specific to allow the Court to evaluate whether these alleged activities constitute substantial, continuous and systematic contacts of HECO or MECO with Texas.

Moreover, even if true, the alleged jurisdictional facts are insufficient as a matter of law to support general jurisdiction. As previously stated, merely doing business in Texas is not sufficient to establish general jurisdiction. *See Johnston*, 523 F.3d at 611 (citing *Access Telecom*, 197 F.3d at 717). In this case, Defendants have not even done that.

Defendants HECO, MECO and Stahlkopf are all citizens of Hawai`i. *Stahlkopf Declaration* Appendix pgs. 3 at ¶¶9, 10. The business operations of HECO and MECO are exclusively located in Hawai`i. *Stahlkopf Declaration* Appendix pg. 3 at ¶9. Neither HECO nor MECO sells electricity or any other services in Texas. *Stahlkopf Declaration* Appendix pg. 3 at ¶11. Stahlkopf has never traveled to Texas as an employee of HECO. *Stahlkopf Declaration* Appendix pg. 3 at ¶9.

Regarding the "jurisdictional facts" alleged in the Complaint, as explained above, HECO and one of its subsidiaries do business with Shell WindEnergy, JCA and Vignette to obtain services and benefits in Hawai`i, not Texas. Under controlling Fifth Circuit authority, these contacts do not justify jurisdiction in Texas. *See Johnston*, 523 F.3d at 610 ("[t]he mere purchase of goods from a state, even at regular intervals and in amounts that were not insubstantial" was not enough to warrant assertion of general jurisdiction over a non-resident). And, there is no basis for Plaintiffs argument that jurisdiction over HECO or MECO can be founded on the former occupation of one of the directors of HECO's parent company. [4] The bottom line is that none of the HECO Defendants has any business presence in Texas. Accordingly, there is no basis for an assertion of general jurisdiction over these Defendants.

2 BlueEarth has not alleged and cannot establish facts sufficient to establish specific jurisdiction.

Specific jurisdiction over a nonresident is appropriate when that corporation has purposefully directed its activities at the forum state and the litigation results from alleged injuries arising from those activities. *Alpine View Co., Ltd.*, 205 F.3d at 215 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

BlueEarth's Complaint does not allege that any of the HECO Defendants ever purposefully directed activities at Texas or that this litigation arises from any such activities. Rather, BlueEarth attempts to invoke this Court's specific jurisdiction over the HECO Defendants solely on the basis of numerous telephone conferences that allegedly occurred when BlueEarth's agents (not any agents of HECO or MECO) were located in Texas. Complaint ¶ 10.

[4] BlueEarth does not allege personal jurisdiction under any alter ego theory. *See Freudensprung v. Offshore Technical Services, Inc.*, 379 F.3d 327, 346 (5th Cir. 2004).

Notably, none of these telephone conferences is alleged to have given rise to BlueEarth's purported injuries.

Apart from this artificial (and deficient) attempt to invoke the Court's personal jurisdiction, the Complaint describes a Maui-centric series of events. The Complaint states, for example, that BlueEarth entered into certain agreements with HECO and MECO "to jointly and exclusively develop a biodiesel production facility to be located on the island of Maui, Hawai`i (the 'Project')." Complaint ¶ 14. Indeed, BlueEarth's entire Complaint focuses on the obligations created by the parties' written Maui-centric agreements and the HECO Defendants' alleged breach of those written agreements. These allegations are insufficient to provide specific jurisdiction over the HECO Defendants in Texas, particularly because the parties' contacts started in Hawai`i[5] and all the alleged events giving rise to this lawsuit occurred in Hawai`i. *Stahlkopf Declaration* Appendix pgs. 1-5.

Merely contracting with a resident of the forum state does not establish the minimum contacts needed to sustain jurisdiction. *Moncrief Oil Int'l, Inc.*, 481 F.3d at 311 (citing *Latshaw v. Johnston*, 167 F.3d 208, 211 (5th Cir. 1999); *Hydrokinetics, Inc. v. Alaska Mech., Inc.*, 700 F.2d 1026, 1028 (5th Cir. 1983)). Similarly, an exchange of communications in the course of developing and carrying out a contract also does not, by itself, constitute the required purposeful availment of the benefits and protections of Texas law. *Moncrief Oil Int'l, Inc.*, 481 F.3d at 312 (citing *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986)). Otherwise, jurisdiction could be exercised based only on the fortuity that one of the parties happens to reside

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[5] The court should give special weight to the fact that the parties' initial contact was in Hawai`i. *See, e.g., Diamond Healthcare of Ohio, Inc. v. Humility of Mary Health Partners,* 229 F. 3d. 448, 451 (4th Cir. 2000) (contacts insufficient because plaintiff initiated relationship).

in the forum state. *Id.* Random, fortuitous or attenuated contacts are not sufficient to establish jurisdiction. *Moncrief Oil Int'l, Inc.*, 481 F.3d at 312 (citing *Burger King Corp.*, 471 U.S. at 479).

In this regard, the courts in this Circuit have repeatedly ruled that a non-resident's telephone calls – even "extensive telephonic and written communication" – into the forum state during the course of contract formation and performance are insufficient alone to support an exercise of specific jurisdiction over the non-resident. *Holt Oil & Gas Corp.*, 801 F.2d at 778; *Brammer Eng'g Inc. v. East Wright Mountain Ltd. P'ship*, 2008 WL 2079257, * 3 (W.D. La. May 15, 2008). *See also Patterson v. Dietze, Inc.*, 764 F.2d 1145, 1147 (5th Cir. 1985) (numerous telephone calls from defendant to forum during the course of performance insufficient to support specific jurisdiction). Where, as here, performance of the contract is centered outside of Texas, the defendant's telephone calls into Texas rest on nothing "but the mere fortuity that [the plaintiff] happens to be a resident of the forum." *Holt Oil & Gas Corp.*, 801 F.2d at 778 (quoting *Patterson*, 764 F.2d at 1147).

This is not a case where "the actual content of communications with a forum gives rise to intentional tort causes of action." *Lewis v. Frense*, 252 F.3d 352, 359 (Cir. 2001) (quoting *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 213 (5th Cir. 1999)). In *Lewis*, for example, the defendants allegedly committed securities fraud through a phone call and mailings to a Texas resident, the content of which contained fraudulent misrepresentations. 252 F.3d at 358-59. Here, in contrast, the phone calls involving the HECO Defendants allegedly concerned the "evaluation and development of the Project" with BlueEarth agents (Complaint ¶ 10) – *i.e.*, they were simply talks regarding the Project and related agreements. These phone conferences are

not alleged to have contained fraudulent content or to have given rise to any intentional tort. Nor can BlueEarth present prima facie evidence of such a tort. Accordingly, the alleged phone calls cannot support specific jurisdiction over the HECO Defendants.[6]

The mere fact that HECO and MECO contracted with a limited liability company that has members and agents located in Texas is woefully inadequate to establish purposeful minimum contacts. *Moncrief Oil Int'l, Inc.*, 481 F.3d at 312 (merely contracting with a resident of Texas is not enough to establish minimum contacts). Moreover, the HECO Defendants' unilateral activities and communications with BlueEarth, even if they were directed at Texas, do not constitute minimum contacts where these Defendants did not perform any obligations in Texas, the contract did not require performance in Texas, and the contract is centered outside of Texas. *Id.* Similarly, in *Hydrokinetics*, the Fifth Circuit found that defendant's two physical visits to Texas did not create jurisdiction in part because the defendant did not regularly do business in Texas, and because most of the negotiations occurred elsewhere. *Hydrokinetics*, 700 F.2d at 1028-29.

Here, the HECO Defendants never traveled to Texas for any business related to BlueEarth or the contracts at issue. *Stahlkopf Declaration* Appendix pg. 3 at ¶10. All negotiations relating to the parties' business venture and the contracts at issue occurred in Hawai`i, and all of the performance pursuant to those contracts was contemplated in Hawai`i.

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6 The Plaintiff alleges several tort claims: Tortious Interference with Contract (Amended Complaint ¶¶67-79); Misappropriation of Trade Secrets (Amended Complaint ¶¶80-82); Conversion (Amended Complaint ¶¶83-84); Breaches of Fiduciary Duty (Amended Complaint ¶¶85-90); Disparagement (against Aloha only)(Amended Complaint ¶¶91-97); and Civil Conspiracy to Commit the same torts (Amended Complaint 98-103). Nothing in the Amended Complaint hints—much less shows with particularity—that any of those claims is based upon the content of any tort-creating telephone calls to BlueEarth in Texas.

Stahlkopf Declaration Appendix pgs. 2-3 at ¶4-6. BlueEarth cannot establish that this Court has personal jurisdiction, either general or specific, over the HECO Defendants.

Moreover, even if BlueEarth could allege facts otherwise sufficient to establish personal jurisdiction, this matter should still be dismissed because expecting the HECO Defendants to defend a lawsuit in the Northern District of Texas offends traditional notions of fair play and substantial justice. BlueEarth's only basis for filing this action in the Northern District of Texas is the fact that two of its members are residents here. Otherwise, Texas has no other relation whatsoever to the parties or their dispute. There is no basis to contend that the HECO Defendants should reasonably have expected to be haled into court in the Northern District of Texas as a result of their business dealings with BlueEarth about a project in Hawai`i. Requiring these Hawai`i citizens to litigate a dispute over contracts negotiated, executed and to be performed in Hawai`i in the Northern District of Texas offends traditional notions of fair play and substantial justice. Accordingly, BlueEarth's Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2).

3 BlueEarth cannot establish personal jurisdiction through its conspiracy allegations.

To the extent that BlueEarth may seek to establish specific jurisdiction over the HECO defendants and Aloha through its conspiracy allegations, that effort will also fail. "Even with allegations of a conspiracy, the Court must still evaluate each of the Defendants' contacts separately to determine whether personal jurisdiction exists." *Weinberg v. National Football League Players Ass'n*, 2008 WL 4808920, at * 5 (N.D. Tex. Nov. 5, 2008) (citing *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995) ("[W]e decline to recognize assertion of personal jurisdiction over a nonresident defendant based solely upon the effects or consequences

of an alleged conspiracy with a resident in the forum state."); *Delta Brands, Inc. v. Danieli Corp.*, 99 Fed. Appx. 1, at *5 (5th Cir. 2004) (not selected for publication) (noting that the plaintiff had to show that the defendant, "individually, and not as part of the conspiracy, had minimum contacts with Texas"); *Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 625 (5th Cir. 1999). *See also Arthur v. Stern*, 2008 WL 2620116, *10 n.5 (S.D. Tex. June 26, 2008) (noting that "[t]he Fifth Circuit has rejected the idea that one conspirator's contacts may be automatically attributed to another").

To establish personal jurisdiction over a defendant-conspirator, the plaintiff must show that either (1) the alleged conspiracy was related to or arose out of the defendant-conspirator's contact with the forum state; or (2) the actions of the defendant-conspirator were related to or arose out of the defendant-conspirator's contacts with the forum state. *Weinberg*, 2008 WL 4808920, at * 5; *National Architectural Prods. v. Atlas-Telecom Services-USA, Inc.*, 2007 WL 2051125, * 8 (N.D. Tex. July 13, 2007) (both citing *Delta Brand*, 99 Fed. Appx. 1, at *5). Neither is present here.

As a threshold matter, there are no specific facts alleged supporting a conspiracy between or among the HECO Defendants and Aloha. BlueEarth pleads generally that private meetings occurred without BlueEarth's participation (Complaint ¶ 101), but does not identify the participants, time, place or specific content of these alleged meetings, and does not specifically link them to any unlawful purpose. *See Weinberg*, 2008 WL 4808920, at * 6 ("bare allegations of conspiracy without factual support do not suffice to establish minimum contacts for personal jurisdiction purposes") (citing *American Realty Trust, Inc. v. Hamilton Lane Advisors, Inc.*, 115 Fed. Appx. 662, 666 n. 16 (5th Cir. 2004)). To the extent that BlueEarth is permitted to rely on a

conspiracy-based theory of personal jurisdiction, it must at least make a threshold evidentiary showing that a conspiracy existed and that the HECO Defendants participated in it. *See Lolavar v. DeSantibanes*, 430 F.3d 221, 229 (4th Cir. 2005). Defendants have not met – and cannot meet – that burden.

Moreover, even if BlueEarth could show that a conspiracy existed, it still cannot establish each of the HECO Defendants' minimum contacts with Texas, *i.e.*, that the alleged conspiracy arose out of their respective contacts with Texas. *See Weinberg*, 2008 WL 4808920, at * 6 ("[the plaintiff] has not alleged that the conspiracy arose out of Kaplan's contacts with Texas"). Here, BlueEarth does not plead that the alleged conspiratorial meetings or discussions between the HECO Defendants and Aloha occurred in Texas, and there is no evidence to support such a theory. *See Thomas v. Kadish*, 748 F.2d 276, 282 (5th Cir. 1984) (finding that the conclusory allegations of conspiracy by California defendants based upon their acts in California, even with alleged effects in Texas, were insufficient to establish minimum contacts); *National Architectural Prods.*, 2007 WL 2051125, at * 8 (rejecting personal jurisdiction where "all that the plaintiff has alleged is that a conspiracy existed among the defendants and that the effect of that conspiracy was felt in Texas").

The acts of alleged co-conspirators cannot be imputed to the respective HECO defendants for jurisdictional purposes. *See Weinberg*, 2008 WL 4808920, at * 6. BlueEarth has not established that any of the HECO Defendants purposefully availed themselves of the privilege of doing business in Texas sufficiently to confer personal jurisdiction over them.

B. The Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(3).

Federal Rule of Civil Procedure 12(b)(3) states that a party may move the court to dismiss an action for "improper venue." Fed.R.Civ.P. 12(b)(3). When a case is filed in the wrong division or district, the district court "shall dismiss, or if it be in the interest of justice, transfer such a case to any district or division in which it could have been brought." *TIG Inc. Co. v. NAFCO Ins. Co., Ltd.*, 177 F.Supp.2d 561, 567 (N.D.Tex. 2001). When a defendant raises the issue of proper venue, the plaintiff must identify facts that would establish venue in the district in which the action is pending. *CIT Group/Comm. Servs., Inc. v. Romansa Apparel, Inc.*, Civ. No. 02-CV-1954, 2003 WL 169208 *2 (N.D.Tex. Jan. 21, 2003) (citing *Advanced Dynamics Corp. v. Mitech Corp.*, 729 F.Supp. 519 (N.D.Tex. 1990)).

BlueEarth seeks to invoke this Court's subject-matter jurisdiction based solely on alleged diversity of citizenship. *Complaint* at ¶8. In such cases, venue is proper in (1) a judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought. *Cit Group*, 2008 WL 169208 at *2 (citing 28 U.S.C. §1391(a)).

BlueEarth asserts that venue is proper in the Northern District of Texas because: (1) a substantial part of the events or omissions giving rise to the claims occurred within this District; and (2) the parties agreed to this venue. *Complaint* at ¶11. BlueEarth is wrong on both counts.

First, BlueEarth has not alleged that a single act, event or omission—let alone a substantial part of the events or omissions—related to its claims occurred in this District. Importantly, "substantially" is intended to preserve the element of fairness so that a defendant is not haled into a remote district that has no real relationship to the dispute. *Cit Group*, 2008 WL 169208 at *3 (citing *Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 294 (3rd Cir. 1994)). Since BlueEarth has failed to allege even a single act or event in Texas, it is certainly true that no substantial part of the events giving rise to its claims occurred in Texas. In contrast, BlueEarth cannot deny that virtually all of the alleged events and omissions giving rise to this litigation occurred in Hawai`i, and that, therefore, venue is proper in the District of Hawai`i pursuant to 28 U.S.C. §1391(a)(2).

Second, and contrary to BlueEarth's assertion, no written agreement identifies this Court as the proper venue. Rather, BlueEarth relies upon a single ambiguous sentence in the Non-Disclosure Agreements to justify laying venue in this District. That sentence states: "This agreement is hereto enforceable in any United States court as the exclusive venue." Complaint Exhibit "A," pg. 3. This sentence, however, is a far cry from an agreement of the parties that the Northern District of Texas is a proper venue for the parties' dispute over the Non-Disclosure Agreements. This lone passive provision fails to identify any venue for this dispute whatsoever, and it is surely not an enforceable agreement to identify this District as the proper venue based upon some reasonable relationship to the parties' dealings with each other.

BlueEarth's reliance on a single sentence in the Non-Disclosure Agreements as the basis for venue in the Northern District of Texas is misplaced. That single sentence is an unenforceable forum selection clause because the selected forum(s) are seriously inconvenient

for the HECO Defendants. *See, e.g., M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972). The Supreme Court noted in *Bremen* that the serious inconvenience of the contractually-specified forum to one or both of the parties might carry a greater weight in determining the reasonableness of the forum clause. *Id.* at 17. The remoteness of the forum might suggest that the agreement was an adhesive one, or that the parties did not have the particular controversy in mind when they made their agreement. *Id.*

Here, there can be no question that the HECO Defendants never contemplated that this controversy over contracts negotiated, executed, and wholly performed, and allegedly breached, in Hawai`i, would be litigated in Texas. *Stahlkopf Declaration* Appendix pg. 4 at ¶12, 13. This is particularly true in the case of the MOU which specifically states that the laws of the State of Hawai`i shall govern the parties' agreement. *Stahlkopf Declaration* Appendix pg. 2 at ¶6. Accordingly, the forum-selection clause is unenforceable because the inconvenience and unfairness of requiring the HECO Defendants to litigate this dispute in Texas effectively deprives them of their day in court. The entirety of the evidence, negotiations, performance and alleged breach occurred in the District of Hawai`i. All of the Defendants are citizens of Hawai`i.

Litigating this dispute in Texas will require Defendants to spend an inordinate amount of time and money. This is particularly true because the parties never identified the Northern District of Texas as a suitable place for trial and this dispute has no relationship whatsoever to Texas. Accordingly, litigating in Texas, is a monumental inconvenience for the Defendants and is fundamentally unfair, where, as here, the Defendants clearly never had any reasonable cause to contemplate or consider they would be haled to Texas to litigate over matters that arose exclusively in Hawai`i. *Stahlkopf Declaration* Appendix pg. 4 at ¶13. Moreover, Defendants

interpreted the provision upon which BlueEarth relies to mean that the parties' dispute, if any, would be heard in federal court, not that venue would be proper in every federal court in the country. *Stahlkopf Declaration* Appendix pg. 4 at ¶13. Further, the sentence upon which BlueEarth relies, if applied as BlueEarth requests would permit BlueEarth to sue Defendants in any United States court, regardless of the forum's connection to the dispute. Such a result is the exact reason why the Fifth Circuit has recognized certain grounds upon which a forum-selection clause may be held invalid. Accordingly, this Court should disregard the asserted forum selection clause and evaluate venue pursuant to the venue rules of 28 U.S.C. §1391(a).

All Defendants in this matter, including Aloha Petroleum, are citizens of the State of Hawai`i. *Complaint* at ¶¶4-7. Thus, under §1391(a)(1) venue would be proper in the District of Hawai`i but it is unquestionably improper in this District. Venue is also proper in the District of Hawai`i pursuant to §1391(a)(3) because the District of Hawai`i has personal jurisdiction over all the Defendants and, as discussed in detail above, this Court does not have personal jurisdiction over the HECO Defendants.

Accordingly, venue in the Northern District of Texas is improper pursuant to 28 U.S.C. §1391 and BlueEarth's Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(3) or transferred the District of Hawai`i where venue is proper.

V.
CONCLUSION

There can be no question that the HECO Defendants have never purposefully availed themselves of the laws and benefits of doing business in Texas. The HECO Defendants are all citizens of Hawai`i and their business dealings with BlueEarth have no relation to Texas

whatsoever. It is also beyond dispute that there is no basis for venue or personal jurisdiction in the Northern District of Texas and this matter should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2) and 12(b)(3).

Dated January 12, 2009.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Brief in Support of Defendants' Motion to Dismiss was served this 12th day of January, 2009 on all counsel of record via ECF.

/s/ C. Michael Moore
C. Michael Moore