

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TRIMBLE INC., et al.,
Plaintiffs,

v.

PERDIEMCO, LLC,
Defendant.

Case No. [19-cv-00526-JSW](#)

**ORDER RESOLVING DEFENDANT’S
MOTION TO TRANSFER**

Re: Dkt. No. 26

Now before the Court is the motion to transfer filed by PerDiemCo., LLC (“PerDiemCo”). The Court has considered the parties’ papers, relevant legal authority, and the record in this case, and it finds the motion suitable for disposition without oral argument. *See* Civil L.R. 7-1(b). For the reasons set forth below, the Court **HEREBY DISMISSES** the complaint and **DENIES** PerDiemCo’s motion to transfer.

BACKGROUND

Trimble, LLC (“Trimble”) and its subsidiaries, including co-plaintiff Innovative Software Engineering, LLC (“ISE”), manufacture and sell positioning and navigation products. (Dkt. No. 1 (Complaint) ¶ 37.) Trimble is incorporated under Delaware law and is headquartered in Sunnydale, California. (*Id.* ¶ 13.) ISE is an Iowa limited liability company with its headquarters and principle place of business in Coralville, Iowa. (*Id.* ¶¶ 13, 16.) ISE is a wholly-owned subsidiary of Trimble. (*Id.* ¶ 16.)

PerDiemCo is a Texas limited liability company. (*Id.* ¶ 18.) PerDiemCo is the assignee of a family of eighteen patents including the patents at issue in the above-captioned lawsuit. (*Id.* ¶ 21.) PerDiemCo’s sole member, officer, and employee is Robert Babayi, who lives and works in Washington, D.C. (Dkt. No. 33-2 (Declaration of Amanda Tessar (“Tessar Decl.”)), Ex. A (Babayi

Deposition) at 5:15-17, 37:10-15, 95:23-25.) PerDiemCo rents office space in Marshall, Texas, but Mr. Babayi has never visited the office or, indeed, the Eastern District of Texas. (*Id.* at 97:4-19.) As of the filing of Trimble’s opposition brief, it did not appear that a PierDiemCo representative had visited the office in quite some time. (Tessar Decl., Ex. F.) PerDiemCo has never employed anyone in the Eastern District of Texas and has never held a corporate meeting there. (Tessar Decl., Ex. A at 7:4-10, 37:16-38:17, 42:15-44:21.) Calls to the number listed on PerDiemCo’s website are received by a mobile phone Mr. Babayi keeps on his person. (*Id.* at 66:15-67:5.)

On October 5, 2018, Mr. Babayi sent a “Notice of Infringement of PerDiemCo Patents” and a draft complaint to ISE in Iowa. (Tessar Decl., Ex. E.) The letter, which was sent from Washington, D.C., states PerDiemCo would like to “engage your company in good faith negotiations that is [sic] conducted on [a] fair, reasonable[,] and nondiscriminatory basis” and proposes a “non-exclusive license under the [PerDiemCo patents] for a lump sum fee in exchange for total patent peace.” (*Id.*)

Trimble’s intellectual property counsel responded, explaining that ISE had forwarded the letter to Trimble, its parent company, and that he would be Mr. Babayi and PierDiemCo’s contact for resolving the issue. (Tessar Decl., Ex. I.) Mr. Babayi responded by email, augmenting his original infringement allegations to include both ISE and Trimble. (Tessar Decl. Ex. I, J.) This email attached a chart purporting to demonstrate that claims of one of PerDiemCo’s patents read on to a Trimble product. (Tessar Decl. Exs. I, J.)

Over the next four months, email correspondence and telephone calls ensued. (Tessar Decl., Exs. I, J, K, L.) Mr. Babayi sent additional claim charts mapping PerDiemCo patents and Trimble products. Mr. Babayi also identified counsel that PerDiemCo was retaining in order to sue Trimble. (Tessar Decl. ¶¶ 2, 3, Exs. J, K, L.) In phone calls between Mr. Babayi and Trimble’s counsel, Mr. Babayi indicated he intended to file his lawsuit in the United States District Court for the Eastern District of Texas. (Tessar Decl. ¶ 3.)

On January 29, 2019, Trimble and ISE filed a declaratory judgment action for non-infringement in the United States District Court for the Northern District of California. On April

5, 2019, PerDiemCo filed a motion to transfer this case to the Eastern District of Texas.

The Court will address additional facts as necessary below.

ANALYSIS

1. Applicable Legal Standards.

PerDiemCo styles its motion as a motion to transfer, but in effect, and as an aside, PerDiemCo asks this Court first to dismiss the complaint. (*See* Dkt. No. 26 (Motion to Transfer) p. 13.) In a motion to dismiss, the plaintiff bears the burden of making a prima facie showing of general or specific personal jurisdiction over each defendant it has sued. *See Calder v. Jones*, 465 U.S. 783, 790 (1984). Although the plaintiff cannot “simply rest on the bare allegations of its complaint,” *Amba Mktg. Sys., Inc. v. Jobar Int’l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977), uncontroverted allegations in the complaint must be taken as true. *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996). In determining whether a plaintiff has made the requisite showing, the court construes the pleadings (and any affidavits) in the light most favorable to the plaintiff. *Graphic Controls Corp. v. Utah Med. Prods., Inc.*, 149 F.3d 1382, 1383 n.1 (Fed. Cir. 1998).

When considering a motion to transfer under 28 U.S.C. § 1631, a court must determine, first, whether it lacks jurisdiction and, second, whether transfer is in the interest of justice. *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990); *see also Cruz-Aguilera v. I.N.S.*, 245 F.3d 1070, 1074 (9th Cir. 2001) (examining whether: (i) transferring court lacks jurisdiction, (ii) transferee court could have exercised jurisdiction at time action filed, and (iii) transfer in interest of justice). The moving party bears the burden of showing that transfer under § 1631 is appropriate. *See Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

Transfer may also be effected by a motion under 28 U.S.C. § 1404: a court may transfer “any civil action to any other district or division where it might have been brought” “[f]or the convenience of parties and witnesses” and “in the interest of justice.” Under § 1404, the moving party bears the burden of showing that transfer is appropriate. *Eureka Inventions, LLC v. Bestway (USA), Inc.*, No. 15-cv-701-JSW, 2015 WL 3429105, at *1 (N.D. Cal. May 27, 2015). The court must weigh several factors when making this interpretation, including (i) the plaintiff’s choice of

forum, (ii) the convenience of parties and witnesses, (iii) the familiarity of the forum with the applicable law, (iv) the ease of access to evidence, and (v) the relative court congestion and time of trial in each forum. *Id.*

2. Personal Jurisdiction.

The law of the Federal Circuit controls personal jurisdiction analysis for patent cases. *See Breckenridge Pharms., Inc. v. Metabolife Labs., Inc.*, 444 F.3d 1356, 1363 (Fed. Cir. 2006) (citations omitted); *see also ASUSTeK Computer Inc. v. AFTG-TG LLC*, No. 11-cv-192-CJD, 2011 WL 6845791, at *4 (N.D. Cal. Dec. 29, 2011) (noting that Ninth Circuit and Federal Circuit personal jurisdiction analysis are both based on *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)). In analyzing personal jurisdiction, a court must first engage in a two-step inquiry. The court examines (i) whether the forum state’s long-arm statute extends to the defendant and (ii) whether the assertion of personal jurisdiction would violate due process. *Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1359 (Fed. Cir. 2001). California’s long-arm jurisdiction statute is “coextensive with the limits of due process.” *Id.* at 1360; *see* Cal. Civ. Proc. § 410.10. Therefore, a California court only need ask whether exercising jurisdiction over an out-of-state defendant comports with due process. *Id.*

Due process requires a defendant have “certain minimum contacts with [California] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Minimum contacts are present where the defendant “deliberately has engaged in significant activities within the [s]tate, or *has created continuing obligations between himself and residents of the forum.*” *Akro Corp. v. Luker*, 45 F.3d 1541, 1545 (Fed. Cir. 1995) (emphasis in original). Random, fortuitous, or attenuated connections with the forum state do not meet the minimum contacts threshold. *Burger King*, 471 U.S. at 475.

There are two types of personal jurisdiction: general and specific. General personal jurisdiction exists where a defendant maintains continuous and systematic contacts with the forum state. Specific personal jurisdiction exists where the cause of action arises out of or relates to a defendant’s contacts with the forum state. Trimble does not argue that California may exercise

1 general personal jurisdiction over PerDiemCo. Accordingly, the Court confines its analysis to
2 specific personal jurisdiction.

3 A court considers three factors in determining whether the exercise of specific personal
4 jurisdiction over an out-of-state defendant comports with due process. The court asks whether: (i)
5 the defendant “purposefully directed” its activities at residents of the forum¹; (ii) the claim “arises
6 out of or relates to” the defendant’s activities; and (iii) whether the exercise of jurisdiction is
7 “reasonable and fair.” *Akro*, 45 F.3d at 1545-46. The first two components of this consideration
8 concern minimum contacts; the third concerns constitutional reasonableness or “fair play and
9 substantial justice.” *Inamed*, 249 F.3d at 1360.

10 If the plaintiff succeeds in satisfying each of the first two prongs, the burden shifts to the
11 defendant to present a compelling case that the exercise of jurisdiction would not be
12 constitutionally reasonable. *Breckenridge*, 444 F.3d at 1363. The reasonableness prong is
13 generally, but not always, satisfied by a showing of minimum contacts. *See Burger King*, 471
14 U.S. at 477. Five considerations are relevant to analysis of constitutional reasonableness: (i) the
15 burden on the defendant, (ii) the forum state’s interest in adjudicating the dispute, (iii) the
16 plaintiffs’ interest in obtaining convenient and effective relief, (iv) the judicial system’s interest in
17 obtaining the most efficient resolution of controversies, and (v) the shared interest of the several
18 states in furthering fundamental substantive social policies. *Id.* “All considerations must be
19 weighed, not in isolation, but together, in deciding whether the forum can, and should, entertain
20 the suit.” *Avocent Huntsville Corp. v. Aten Int’l Co.*, 552 F.3d 1324, 1343-44 (Fed. Cir. 2008).

21 The parties’ principal disagreement is whether, under Federal Circuit law, the sending of
22 cease and desist letters into a forum state can give rise to specific personal jurisdiction. The
23 Federal Circuit explicitly addressed the jurisdictional effect of cease-and-desist letters in *Red Wing*
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25 ¹Analysis under the first prong differs slightly depending on whether the action involves tortious
26 conduct or contractual obligations. If tortious conduct is at issue, the court examines a defendant’s
27 “purposeful direction;” if contractual obligations are at issue, the court examines whether the
28 defendant has “purposefully availed” itself of the forum. *See Ziegler v. Indian River Country*, 64
F.3d 470, 473 (9th Cir. 1995). As acts of infringement are more similar to torts than to contractual
concerns, *see Brown v. McCain*, 612 F. Supp. 2d 1118, 1123 (C.D. Cal. 2009), the Court focuses
solely on the purposeful direction test.

1 *Shoe Co. Inc. v. Hockerson-Halberstadt Inc.*, 148 F.3d 1355 (Fed. Cir. 1998). In *Red Wing Shoe*,
 2 defendant Hockerson-Halberstadt, Inc. (“HHI”) was a non-practicing entity that licensed and
 3 enforced two patents it owned. *Id.* at 1357. HHI, a Louisiana corporation with its principal place
 4 of business in New Mexico, sent a cease-and-desist letter to Red Wing Shoe Co., Inc. (“RWS”) *Id.*
 5 asserting infringement of one of its patents and offering to negotiate a non-exclusive license. *Id.*
 6 RWS volleyed back, rebutting the infringement analysis, HHI responded in kind, and the
 7 correspondence continued until RWS filed an action for declaratory judgment alleging
 8 noninfringement, invalidity, and unforceability of the asserted patent. *Id.*

9 HHI moved to dismiss for lack of personal jurisdiction. *Id.* In its opposition, RWS “relied
 10 heavily” on HHI’s three cease-and-desist letters to show that HHI had sufficient minimum
 11 contacts with the forum state. *Id.* RWS pointed out that these letters not only sought to inform it
 12 of infringement, but also solicited business in the forum state because the letters discussed
 13 licensing and negotiation of the same. *Id.*² The district court ruled that it lacked personal
 14 jurisdiction over HHI, and RWS appealed. *Id.* at 1358.

15 In its opinion affirming the district court’s decision, the Federal Circuit explained that
 16 infringement notice letters can give rise to a declaratory judgment action because such letters
 17 create a situation where a plaintiff “may have little recourse other than a declaratory judgment
 18 action” to halt overzealous or incorrect patentees. *Id.* at 1360. “In those instances,” the court
 19 wrote, “the cease-and-desist letters *are the cause of the entanglement* and at least partially give
 20 rise to the plaintiff’s action.” *Id.* (emphasis added).

21 The Federal Circuit noted that it had before held that cease-and-desist letters alone were
 22 insufficient to satisfy personal jurisdiction due process. *Id.* at 1360 (citing *Genetic Implant Sys.*
 23 *Inc. v. Core-Vent Corp.*, 123 F.3d 1455, 1458 (Fed. Cir. 1997)).³ The court then clarified that the

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 25 ² RWS also pointed out that HHI had thirty-four licensees who sold products in the forum state
 26 and that six of those licensees maintained their own stores in the forum state or were registered to
 27 do business there. *Id.* at 1357-58. The Federal Circuit did not incorporate these additional
 28 contacts into its analysis concerning constitutional reasonableness of cease-and-desist letters.

³ There is some tension between *Red Wing Shoe*’s holding that cease-and-desist letters do not give
 rise to constitutional reasonableness, the third prong of due process analysis, and the long-standing
 rule that once a plaintiff satisfies minimum contacts analysis, the burden shifts to the defendant to

1 due process deficiency of relying solely upon cease-and-desist letters was not one of minimum
 2 contacts, but of constitutional reasonableness. The court explained that “cease-and-desist letters
 3 alone *are often*⁴ substantially related to the cause of action (*thus providing minimum contacts*)”
 4 but underscored that “[p]rinciples of fair play and substantial justice afford a patentee sufficient
 5 latitude to inform others of its patent rights without subjecting itself to jurisdiction in a foreign
 6 forum. . . . Grounding personal jurisdiction on such contacts alone *would not comport with*
 7 *principles of fairness.*” *Id.* at 1361 (emphasis added). The court emphasized: “[cease-and-desist]
 8 letters *cannot satisfy* the [constitutional reasonableness] prong of the Due Process inquiry.” *Id.* at
 9 1361 (emphasis added).

10 Federal Circuit opinions applying *Red Wing Shoe* have done so fairly consistently. *See,*
 11 *e.g., Breckenridge*, 444 F.3d at 1363 (“. . . this court’s law [is] that personal jurisdiction may not
 12 be exercised constitutionally when the defendant’s contact with the forum state is limited to cease
 13 and desist letters. . .” (citing *Red Wing Shoe*, 148 F.3d at 1360)). Trimble contends that a
 14 relatively recent case, *Jack Henry & Assoc. Inc. v. Plano Encryption Techs. LLC*, 910 F.3d 1199
 15 (Fed. Cir. 2018) upends *Red Wing Shoe* and stands for the proposition that cease-and-desist letters
 16 alone can give rise to specific personal jurisdiction. The Court disagrees with Trimble’s
 17 assessment of *Jack Henry*. *Jack Henry* doesn’t overturn *Red Wing Shoe*: rather, *Jack Henry*
 18 applies *Red Wing Shoe* and comes to a different result based on the facts of the case.

19 In *Jack Henry*, the defendant (“PET”) was a company established and registered to do
 20 business in Plano, located in the Eastern District of Texas. 910 F.3d at 1201. The plaintiffs
 21 (collectively, “JHS”) all had principal offices, branches, or customers in the Northern District of
 22 Texas. *Id.* PET was a non-practicing entity that generated profit by “enforce[ing] its intellectual
 23 property.” *Id.* Accordingly, when PET believed JHS were infringing its patents, PET sent cease-

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 25 show that being subject to personal jurisdiction in the forum would be unfair and unreasonable.
 26 The Court notes that *Red Wing Shoe* does not address the five factors courts typically examine
 when ascertaining whether a defendant has met its burden. *See Burger King*, 471 U.S. at 477.

27 ⁴ *Red Wing Shoe* does not go as far as Trimble would have it: the opinion stops short of saying that
 28 cease-and-desist letters always satisfy minimum contacts. *Id.* at 1360 (letters “are often”
 substantially related to claim and provide minimum contacts).

1 and-desist letters to individual plaintiffs, accusing each of infringement, and offering to enter into
 2 non-exclusive licenses with each plaintiff. *Id.* at 1201-03. After some correspondence between
 3 PET and JHS, JHS filed a declaratory judgment action in the United States District Court for the
 4 Northern District of Texas. *Id.* at 1203. PET moved to dismiss based on improper venue, and the
 5 district court granted PET’s motion for dismissal. *Id.*

6 Observing that venue is “dominated” by the same due process considerations at issue in
 7 determining whether personal jurisdiction exists, and noting that the parties agreed that the cease-
 8 and-desist letters PET sent JHS satisfied minimum contacts⁵, the Federal Circuit concluded that
 9 PET had not met its burden to show that jurisdiction in the Northern District was “inconvenient,
 10 unreasonable, or unfair.” *Id.* at 1204-05. Of particular note to the Federal Circuit was the fact that
 11 PET was subject to general personal jurisdiction in Texas because it was registered to do business
 12 and operated there. *Id.* at 1205.

13 Asking whether it is constitutionally unreasonable to subject a defendant to the jurisdiction
 14 of a venue in a state *where it is subject to general personal jurisdiction* is quite a different
 15 question from asking whether it is constitutionally unreasonable to subject a defendant to personal
 16 jurisdiction in a forum state where his sole contact is through cease-and-desist letters and related
 17 communications. In the instance of the former, this Court has difficulty imagining a circumstance
 18 where it would conclude that exercising personal jurisdiction over such a defendant would be
 19 inconvenient, unfair, or unreasonable, or offend notions of fair play and substantial justice. In the
 20 instance of the latter, the Court has clear Federal Circuit precedent to apply.

21 The Court holds that PerDiemCo’s cease-and-desist letters and subsequent
 22 communications were purposefully directed at Trimble, a California resident because PerDiemCo
 23 addressed its letters and communications to one of Trimble’s subsidiaries, then to Trimble’s
 24 intellectual property counsel.⁶ *See Inamed*, 249 F.3d at 1362 (minimum contacts satisfied by

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 26 ⁵Further, under 28 U.S.C. § 1391, corporate defendants are deemed to reside in any district in a
 27 state “within which its contacts would be sufficient to subject it to personal jurisdiction if that
 28 district were a separate State.”

⁶ To the extent PerDiemCo suggests that because Trimble’s counsel was located in Colorado,
 correspondence PerDiemCo sent to Trimble was not directed to a California resident, PerDiem is

1 cease-and-desist letter and negotiation efforts culminating in a license). Trimble’s declaratory
 2 judgment action of non-infringement was in response to PerDiemCo’s communications to it and
 3 PerDiemCo’s insistence upon a licensing program or a lawsuit. Trimble did not believe its
 4 products infringed PerDiemCo’s patents, leading Trimble to file the above-captioned lawsuit. *See*
 5 *Inamed*, 249 F.3d at 1362 (“The central purpose of a declaratory action is often to ‘clear the air of
 6 infringement charges.’” (quoting *Red Wing*, 158 F.3d at 1360)). Therefore, the Court also holds
 7 that Trimble’s claim “arises out of or relates to” PerDiemCo’s activities. *See Avocent*, 552 F.3d at
 8 1336 (observing that declaratory judgment claim arises out of patentee contact with forum if
 9 contacts “relate in some material way to the enforcement or the defense of the patent”). Trimble
 10 has therefore shown that PerDiemCo had the requisite minimum contacts with California.

11 However, the Court holds that exercising specific personal jurisdiction over PerDiemCo
 12 would be constitutionally unreasonable. PerDiemCo’s only contacts with California are its cease-
 13 and-desist letters and emails and phone calls to Trimble’s counsel. Under *Red Wing Shoe* and its
 14 progeny, without more, this is insufficient to comport with “fair play and substantial justice.” *Red*
 15 *Wing Shoe*, 148 F.3d at 1361; *e.g.*, *Xilinx, Inc. v. Papst Licensing GmbH & Co. KG*, 848 F.3d
 16 1346, 1354 (Fed. Cir. 2017) (holding personal jurisdiction existed where defendant sent cease-
 17 and-desist letters, traveled to the forum state to negotiate a license, and engaged in prior in-forum
 18 litigation); *Hildebrand v. Steck Mfg. Co.*, 279 F.3d 1351, 1356 (Fed. Cir. 2002) (holding no
 19 personal jurisdiction where only in-forum acts were cease-and-desist letters and attempt to
 20 negotiate license agreement: “[a]ll of the contacts were for the purpose of warning against
 21 infringement or negotiating license agreements, and [defendant] lacked a binding obligation in the
 22 forum.”). Accordingly, as Trimble cannot meet its burden, the Court holds that PerDiemCo is not
 23 subject to specific personal jurisdiction in California.

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 25 _____
 26 incorrect. *See Akro*, 45 F.3d at 1546 (location of attorney irrelevant for purposes of minimum
 27 contacts); *see also Elecs. for Imaging, Inc. v. RAH Color Techs. LLC*, No. 18-CV-01612-WHO,
 28 2018 WL 5304838, at *5–8 (N.D. Cal. Oct. 24, 2018) (“... the happenstance location of Xerox’s
 counsel (in California) cannot be pinned to an affirmative choice by RAH to conduct business in
 California or benefit from California law.”).

2. Transfer.

Nonetheless, PerDiemCo fails to show that transferring this matter to the Eastern District of Texas is in the interest of justice. PerDiemCo's cease-and-desist letters were sent from Washington, D.C. where Mr. Babyi, the patent prosecutor, CEO, and sole employee of PerDiemCo, evidently works. Trimble has submitted evidence that demonstrates that PerDiemCo's presence in Texas is confined to an unoccupied rental space that amounts to little more than a façade—accomplishing PerDiemCo's pretextual if not actual presence in the Eastern District. *See In re Microsoft Corp.*, 620 F.3d 1361, 1364-65 (Fed. Cir. 2011) (offices that “staffed no employees, were recent, ephemeral, and a construct for litigation and appeared to exist for no other purpose than to manipulate venue” does not factor into transfer analysis).

Further, the Court is not persuaded that transferring to the Eastern District of Texas is in the interest of judicial efficiency. As Trimble correctly notes, Judge Gilstrap's load of patent cases (over 6500) suggests that the historical litigation for this patent family is, at best, only marginally useful. (*See Tassar Decl., Ex. M.*) Moreover, while some litigation involving related patents progressed through expert reports and claim construction only to settle on the eve of trial, litigation involving the specific three patents at issue here ended well before claim construction. Finally, PerDiemCo has not shown any affirmative reason based on location of evidence, witnesses, court congestion, or similar factors to justify transferring this case to the Eastern District of Texas. *See In re Genentech*, 566 F.3d 1338, 1345 (Fed. Cir. 2009) (“In patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer.” (citation omitted).) For similar reasons, PerDiemCo also fails to meet its burden for a motion to transfer under § 1404.

CONCLUSION


For the foregoing reasons, the Court hereby GRANTS PerDiemCo's motion to dismiss for lack of personal jurisdiction and DENIES PerDiemCo's motion to transfer. The Court does not afford Trimble leave to file an amended complaint, because, in light of the nature of the allegations, Trimble's arguments, and the additional evidence Trimble submitted in support of its opposition to the motion to transfer, the Court concludes no additional factual allegations could

1 rectify the jurisdictional deficits identified above. *See* Fed. R. Civ. P. 15(a)(2). The Court
2 therefore dismisses the Complaint without prejudice to Trimble's refile in a proper venue where
3 PerDiemCo is subject to personal jurisdiction.

4 The Court will enter a separate judgment, and the Clerk shall close this file.

5 **IS SO ORDERED**

6 Dated: July 8, 2019

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8 JEFFREY S. WHITE
9 United States District Judge
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