UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BRADLEY J. PERKINS and BRENDA L. PERKINS,

Plaintiffs,

v. **5:14-CV-1378 (BKS/DEP)**

SUNBELT RENTALS, INC., GREAT NORTHERN EQUIPMENT DISTRIBUTING, INC/. d/b/a IRON & OAK COMMERCIAL PRODUCTS, and PMW HOLDINGS, INC.,

Defendants.

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Hon. Brenda K. Sannes, United States District Court Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

This diversity action against Defendants Sunbelt Rentals, Inc. ("Sunbelt"), Great Northern Equipment Distributing, Inc. ("Great Northern"), and PMW Holdings, Inc. ("PMW") arises from an injury Plaintiff Bradley Perkins allegedly sustained while operating a gas-powered log splitter in November 2013. (Dkt. No. 1-1). The complaint contains five causes of action: (1) negligence; (2) design defect; (3) breach of express warranty; (4) breach of implied warranty; and (5) a derivative claim for loss of consortium by Plaintiff Brenda Perkins. (Dkt. No. 1-1). Sunbelt has filed cross-claims against Defendants Great Northern and PMW for contribution and indemnification. (Dkt. No. 4).

Great Northern moves under Rules 12(b)(2), 12(b)(6) and 12(d) of the Federal Rules of Civil Procedure to dismiss the complaint for lack of personal jurisdiction and failure to state a claim. (Dkt. No. 5). PMW moves under Rules 12(b)(2) and 12(b)(6) to dismiss Plaintiffs' claims and Sunbelt's cross-claims. (Dkt. Nos. 14 and 26). Plaintiffs and Sunbelt oppose the motions to dismiss, and Plaintiffs move to amend the complaint. (Dkt. Nos. 28, 36, 45). The Court held oral argument on the parties' motions on July 27, 2015. For the following reasons, the Court grants Great Northern's motion to dismiss under Rule 12(b)(2) for lack of personal jurisdiction, and denies PMW's motions to dismiss and Plaintiffs' motion to amend without prejudice. The Court

also grants Plaintiffs' and Sunbelt's request to conduct additional discovery regarding personal jurisdiction over PMW.

II. BACKGROUND

A. Relevant Facts in Complaint[1]

Plaintiff Bradley Perkins was using a gas-powered Iron & Oak log splitter[2] on November 16, 2013, "in accordance with the manufacturer's instructions," and was:

> severely injured when the hydraulic ramming bar on the log splitter closed on his right hand, thereby lacerating and severing his index, middle and third fingers and causing a crush-type injury to his hand, despite the fact that the log splitter's handle was placed in a neutral position and the ramming bar was supposed to have been in a locked-open position.

(Dkt. No. 1-1, p. 7). Mr. Perkins had "entered into a rental agreement with Sunbelt Rentals" in North Syracuse, New York the previous day, under which he rented the log splitter for personal use. (*Id.*). Plaintiffs allege that:

> as a result of defendants' . . . negligent design, manufacturing, marketing, labeling, and a failure to warn of the risks of the subject log splitter's ramming bar moving and closing despite the handle being in a neutral position, the Plaintiff Bradley J. Perkins was caused to suffer and continues to suffer severe, permanent and disabling injuries.

(*Id.*).

According to the complaint, all three defendants were "engaged in the business of manufacturing, designing, assembling, compounding, testing, inspecting, packaging, labeling, fabricating, constructing, analyzing, distributing, servicing, merchandising, recommending, advertising, promoting, marketing, and selling" the specific model of log splitter that Mr. Perkins was using when he was injured. (*Id.*, pp. 6-7).

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[1] The facts are taken from the complaint and assumed to be true for the purposes of this motion. *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011).

[2] Model number: BHV2609, serial number: S48583.

B. Relevant Facts in Proposed Amended Complaint

The proposed amended complaint identifies Brave Products, Inc. as the company which "was engaged in the business of manufacturing, designing, assembling, compounding, testing, inspecting, packaging, labeling, fabricating, constructing, analyzing, distributing, servicing, merchandising, recommending, advertising, promoting, marketing, and selling" the Iron & Oak log splitter model at issue. (Dkt. No. 36-2, ¶ 8). Brave Products is alleged to have manufactured this log splitter or about March 5, 2012 at its facility in Streator, Illinois. (*Id.*, at ¶ 10.)[3] Brave Products and PMW are alleged to have the same address in Streator, Illinois for their principal place of business. (Dkt. No. 36-2, ¶¶ 6, 8).

The proposed amended complaint contains the following allegations regarding PMW and Great Northern:

> 9. Brave Products, Inc. was a wholly-owned subsidiary of the defendant PMW Holdings, after PMW Holdings purchased the Brave Products line of hydraulic log splitters, including the Iron & Oak log splitter, model number BHV2609, in or about April[] 2001.
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> . . .
>
> 11. On or about June 19, 2013, pursuant to an Asset Purchase Agreement, the defendant Great Northern purchased substantially all of the assets of Brave Products, Inc., including but not limited to Brave Products' (a) designs of various different types of power equipment, including log splitters; (b) trademarks including the trademark "BRAVE" and "IRON & OAK;" (c) domain names; (d) websites and telephone and facsimile numbers; and (e) brand and product names.[4]
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> 12. In addition to the purchase of substantially all of Brave Products assets, Great Northern assumed Brave Products' product warranty obligations to customers for products sold prior to the closing date of the Asset Purchase Agreement.

[3] The complaint does not allege what happened to the log splitter after it was manufactured in Illinois or how it reached Sunbelt Rentals in North Syracuse, New York.

[4] In the complaint Plaintiffs identified Great Northern as "Great Northern Equipment Distributing, Inc., d/b/a Iron & Oak Commercial Products." (Dkt. No. 1-1, p. 5). Great Northern, however, filed an affidavit in support of its motion to dismiss (Dkt. No. 5), which asserts that it has "no affiliation, legal or otherwise, with 'Iron & Oak, Inc.'" (Dkt. No. 5-2, ¶ 36), and Plaintiffs have not introduced any evidence or argument to the contrary. Iron & Oak, Inc. was dismissed from the case on June 29, 2015, by stipulation of the parties. (Dkt. Nos. 59-60).

> 13. On or about June 19, 2013, in connection with the Asset Purchase Agreement, the defendant Great Northern and Brave Products arranged for the deposit of $50,000.00 into an Escrow Fund, to be used in the event that a third party product liability claim was asserted against Great Northern arising out of the use of a product manufactured by Brave Products prior to the Asset Purchase.
>
> 14. Several months after the Asset Purchase by the defendant Great Northern of substantially all of Brave Products' assets, Brave Products filed for voluntary dissolution.
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> 15. It is alleged upon information and belief that the Asset Purchase Agreement of substantially all of Brave Products' assets, entered into by and between the defendant Great Northern and Brave Products, and the subsequent voluntary dissolution of Brave Products shortly thereafter is a *de facto* merger of the corporations and that Great Northern is a successor in interest of Brave Products, Inc.; and that pursuant to the Escrow Agreement entered into by and between both corporations, the defendant Great Northern assumed at least some of the liabilities and obligations of Brave Products, including third party product liability claims arising out of the use of a product manufactured by Brave Products prior to the Asset Purchase.

(*Id.*, pp. 2-4). Great Northern is alleged to be the "successor in interest" of Brave Products. (Dkt. 36-2, ¶¶ 48-50, 55, 57-58, 60-63, 66, 68-71).

C. Other Evidence[5]

PMW submitted an affidavit from its president, Paul Walker. (Dkt. Nos. 14-1, 26-2). Walker stated that PMW does not conduct business outside Illinois, does not conduct interstate or international business, and does not derive any revenue from interstate or international sales. (Dkt. No. 26-2, ¶¶ 8-10). He also stated that "PMW did not sell or distribute the subject log splitter or otherwise participate in the stream of commerce with respect to" the log splitter. (*Id.*, ¶ 20).

[5] When evaluating a motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), the Court may look not only to a plaintiff's complaint, but also to affidavits and other supporting materials that the plaintiff submits. *Emerald Asset Advisors, LLC v. Schaffer*, 895 F. Supp. 2d 418, 429 (E.D.N.Y. 2012) (citing *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999); *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 240 (2d Cir. 1999)).

Great Northern, Plaintiffs, and Sunbelt all submitted copies of an asset purchase agreement dated June 19, 2013, in which Great Northern purchased certain of Brave Products's assets. (Dkt. Nos. 5-3; 28-1; 36-3). Sunbelt and Plaintiffs also submitted an escrow agreement which accompanied the asset purchase agreement, (Dkt. Nos. 28-2; 36-4), and an email exchange between a representative from Great Northern and PMW President Paul Walker dated January 2014, in which Walker stated that Brave Products had "been sold and subsequently filed for dissolution." (Dkt. Nos. 28-3; 36-5). In addition, Plaintiffs and Sunbelt submitted a newsletter apparently issued by Streator Dependable Manufacturing, dated Spring 2001, which states that both Streator Dependable Manufacturing and Brave Products, along with other entities, operate "independently under the umbrella of" PMW. (Dkt. Nos. 36-6, p. 3; 45-1, p. 3).

In response to Plaintiffs' motion to amend and in further support of its motion to dismiss, Great Northern submitted a copy of the maintenance logs for the log splitter in question, which it asserts shows "that the product at issue was purchased by Sunbelt Rentals, Inc. on June 4, 2012." (Dkt. Nos. 39-1, ¶ 3; 39-2, p. 47). It also submitted a print-out from the web page of the Illinois Secretary of State, which identifies Brave Products as having "filed for voluntary dissolution on January 10, 2014." (Dkt. Nos. 39-1, ¶ 4; 39-3). The print-out indicates that PMW President Paul Walker was also president of Brave Products. (*See* Dkt. Nos. 39-3; 45-2). The address listed for Brave Products matches the address alleged to be that of PMW. (*Id.*; *see also* Dkt. Nos. 1-1, p. 6; 36-2, p. 2).

III. DISCUSSION

A. Motions to Dismiss under Rule 12(b)(2)

"A plaintiff bears the burden of demonstrating personal jurisdiction over a person or entity against whom it seeks to bring suit." *Troma Entm't, Inc. v. Centennial Pictures, Inc.*, 729

F.3d 215, 217 (2d Cir. 2013) (quoting *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2d Cir. 2010)). "The plaintiff's obligation varies . . . depending on whether the jurisdictional determination is made prior to or subsequent to discovery." *Capitol Records, LLC v. VideoEgg, Inc.*, 611 F. Supp. 2d 349, 356 (S.D.N.Y. Mar. 9, 2009) (citing *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990)). "Prior to discovery, a plaintiff can defeat a Rule 12(b)(2) motion to dismiss by pleading 'good faith, legally sufficient allegations of jurisdiction, i.e., by making a prima facie showing of jurisdiction.'" *Kiobel v. Royal Dutch Petroleum Co.*, No. 02 Civ. 7618(KMW)(HBP), 2010 WL 2507025, at *7, 2010 U.S. Dist. LEXIS 61452, at *29 (S.D.N.Y. June 21, 2010) (quoting *Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181, 184 (2d Cir. 1998)). This is in contrast to the standard that applies to a Rule 12(b)(2) motion after jurisdictional discovery has been conducted, at which point "a plaintiff's prima facie showing must be 'factually supported;' that is, it must 'include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant.'" *Id.* (quoting *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996)) (internal punctuation and footnote omitted).[6]

Even if Plaintiffs fail to make a prima facie showing of personal jurisdiction, the Court may grant Plaintiffs discovery on jurisdictional questions so long as Plaintiffs have "made a sufficient start towards establishing personal jurisdiction." *Hollins v. U.S. Tennis Ass'n*, 469 F. Supp. 2d 67, 70-71 (E.D.N.Y. 2006) (quoting *Uebler v. Boss Media*, 363 F. Supp. 2d 499, 506-507 (E.D.N.Y. 2005)). While jurisdictional discovery will not be granted on the basis of "conclusory non-fact-specific jurisdictional allegations," *Jazini*, 148 F.3d at 185, it is appropriate

[6] The discovery period in this case is ongoing. Great Northern moved to stay discovery (Dkt. No. 44), and PMW joined in that request (*see* Dkt. Nos. 47 and 48). Magistrate Judge David E. Peebles denied the motion for a stay of discovery by order dated February 24, 2015. (Dkt. No. 56). This Court heard oral argument from the parties on July 27, 2015, at which time the parties updated the Court on the status of discovery and its impact on the pending motions.

to grant such discovery when a plaintiff's allegations are "simply insufficiently developed at [the] time to permit judgment as to whether personal jurisdiction is appropriate." *Texas Int'l Magnetics, Inc. v. BASF Aktiengesellschaft*, 31 F. App'x 738, 739 (2d Cir. 2002). *See also In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 208 (2d Cir. 2003) (noting "fact-specific" nature of jurisdictional analysis, and stating: "Given the nature of this inquiry, it was premature to grant dismissal prior to allowing discovery on plaintiffs' insufficiently developed allegations regarding the relationship between SKM and its subsidiary."); *Leon v. Shmukler*, 992 F. Supp. 2d 179 (E.D.N.Y. 2014) ("It is well settled under Second Circuit law that, even where plaintiff has not made a *prima facie* showing of personal jurisdiction, a court may still order discovery, in its discretion, when it concludes that the plaintiff may be able to establish jurisdiction if given the opportunity to develop a full factual record.") (citing *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d at 208; *APWU v. Potter*, 343 F.3d 619, 627 (2d Cir. 2003); *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 866 (2d Cir. 1996)). The decision to grant jurisdictional discovery, however, is in the court's discretion. *See Stutts v. De Dietrich Grp.*, 465 F. Supp. 2d 156, 169 (E.D.N.Y. 2006) ("District courts in this circuit routinely reject requests for jurisdictional discovery where a plaintiff's allegations are insufficient to make out a *prima facie* case of jurisdiction.") (citations omitted).

"Personal jurisdiction over a defendant in a diversity action is determined by the law of the forum in which the court sits." *CutCo Indus., Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986). Thus, the Court applies New York law to determine whether Great Northern is subject to personal jurisdiction in this district.

1. Great Northern's Motion to Dismiss For Lack of Personal Jurisdiction[7]

Plaintiffs and Sunbelt argue that the allegations of successor liability against Great Northern in the proposed amended complaint are sufficient to establish personal jurisdiction and that they are entitled to further discovery on this issue.

a. Successor Liability

"It is well settled 'that when a person is found to be a successor in interest' to a person over whom the court has personal jurisdiction[8] 'the court gains personal jurisdiction over [the successor] simply as a consequence of their status as a successor in interest, without regard to whether they had any minimum contacts with the state." *Leon v. Shmukler*, 992 F. Supp. 2d 179, 190 (E.D.N.Y. 2014). Generally, however, "a corporation that purchases the assets of another corporation is not liable for the seller's torts." *Ortiz v. Green Bull, Inc.*, No. 10-CV-3747(ADS)(ETB), 2011 WL 5554522, at *5, 2011 U.S. Dist. LEXIS 131601, at *13 (E.D.N.Y. Nov. 14, 2011) (citing *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 244-45, 464 N.Y.S.2d 437, 440, 451 N.E.2d 195, 198 (1983)). Under New York common law, there are four exceptions to the general rule that an asset purchaser is not responsible for the seller's liabilities; the exceptions apply to: '(1) a buyer who formally assumes a seller's debts; (2) transactions undertaken to defraud creditors; (3) a buyer who *de facto* merged with a seller; and (4) a buyer that is a mere continuation of a seller.'" *Id.* (citing *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 45 (2d Cir. 2003)).

[7] Because the Court grants Great Northern's motion to dismiss for lack of personal jurisdiction, the Court need not consider Great Northern's motion to dismiss for failure to state a claim or its request to convert its motion to dismiss to one for summary judgment under Rule 12(d).

[8] As set forth below, Plaintiffs have failed to show that Brave Products is a "person over whom the court has jurisdiction," *see* Section III.A.2.b.i., a prerequisite to personal jurisdiction over Great Northern under a successor in interest theory. Even assuming personal jurisdiction over Brave Products, however, for the reasons discussed above, the allegations and evidence Plaintiffs have presented fail to show personal jurisdiction over Great Northern under a successor in in interest theory.

Plaintiffs and Sunbelt argue that Great Northern is subject to personal jurisdiction because (1) it formally assumed Brave Products's debts; (2) it "de facto merged with Brave Products;" (Dkt. Nos. 28-4, p. 6, 36-7, p. 15), and (3) it is a "mere continuation"[9] of Brave Products.

b. Assumption of Liability Theory

Citing the indemnification and warranty provisions of the asset purchase agreement (or "the agreement") Plaintiffs and Sunbelt argue that there is personal jurisdiction under the assumption of liability theory. (Dkt. No. 28-4, p. 6). Great Northern disagrees, arguing that the asset purchase agreement expressly excluded liability for incidents such as the one alleged here. According to the agreement, Great Northern disclaimed liability arising out of "[a]ny accident or occurrence resulting in [] real or claimed personal injury . . . arising out of or resulting from the operations of" Brave Products. (Dkt. No. 36-3, p. 4).

Plaintiffs and Sunbelt (Dkt. Nos. 28-4, pp. 6-8; 36-7, pp. 15-16) respond that the indemnification provision in the agreement shows that Brave Products agreed to indemnify Great Northern from liability for suits "arising from or related to . . . any product liability claim or negligence, strict tort or any other claim arising in connection with any product manufactured, shipped, sold or leased by, or any services provided by, Company before the Closing Date . . . ." (Dkt. No. 36-3, pp. 12-13). Great Northern placed $50,000 into an escrow account for the purpose of covering Brave Products's post-closing indemnification obligations. (*See* Dkt. Nos. 36-3, p. 3; 36-4).

[9] Although Sunbelt and Plaintiffs do not separately assert that Great Northern falls within the "mere continuation" exception, Plaintiffs allege that "[t]he voluntary dissolution of Brave Products shortly after the sale of substantially all of its assets to Defendant Great Northern certainly raises a question of fact as to whether the asset purchase was a de facto merger of the two companies . . . ." (*Id.*, p. 16). The Court construes this statement as an allegation that Great Northern falls within the "mere continuation" exception.

Neither the indemnification provision nor the deposit into escrow, however, establish that Great Northern assumed liability for Brave Products's tortious acts. As the Eastern District of Pennsylvania explained:

> [T]here are numerous reasons why a purchaser of corporate assets might seek the additional protection of an indemnification provision even if it has disavowed any assumption of the seller's liabilities. For example, even when the parties to an asset purchase agreement have agreed the purchaser does not assume the seller's liabilities, such agreement does not ensure the purchaser will not be sued by injured third parties or held liable on an alternative theory of successor liability.

Morrison v. Lindsey Lawn & Garden, No. 13 Civ. 1467, 2014 WL 831019, at *5, 2014 U.S. Dist. LEXIS 27146, at *18 (E.D. Pa. Mar. 4, 2014). *See also Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834, 840 n.4 (S.D.N.Y. 1977) ("It has been repeatedly held . . . that . . . indemnification clauses in and of themselves do not give rise to liability. In fact, the indemnification clause is indicative of the opposite.") (internal citations and quotation marks omitted). Moreover, Great Northern explained that the money placed in escrow "belonged to Brave Products following the closing," and was held only to satisfy Brave Products's indemnification obligations, which ended one year from the date of closing. (*Id.*, p. 14).

Plaintiffs also assert that Great Northern "assumed the warranties of Brave Products for products sold prior to the asset purchase." (Dkt. No. 36-7, p. 16). In the agreement, Great Northern expressly assumed Brave Product's "warranty obligations to customers for the sale prior to Closing of [Brave Product's] products related to the Purchase Assets, provided that the sum of customer refunds, the price of product repairs, and the price of replacement products under such warranty assumption shall not exceed $100,000, net of reimbursement from component suppliers." (Dkt. No. 36-3, p. 3). Great Northern expressly disclaimed, however, "any obligations with respect to such products other than as set forth in" that sentence. (*Id.*). Thus, this section does not provide a basis for finding that Great Northern's assumption of warranty

liability was a blanket assumption of all tort liability arising from products manufactured by Brave Products.

While an express disclaimer "is not enough . . . to preclude the imposition of liability on the purchaser of corporate assets if other facts and circumstances, relied upon by the plaintiff, demonstrate an intention on the part of the buyer to pay the debts of the seller," *Marenyi v. Packard Press Corp.*, NO. 90 CIV. 4439, 1994 WL 16000129, at *6, 1994 U.S. Dist. LEXIS 14190, at *22 (S.D.N.Y. June 9, 1994), *report recommendation adopted*, 1994 WL 533275, 1994 U.S. Dist. LEXIS 13923 (S.D.N.Y. Sep. 30, 1994) (citing *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834, 839 (S.D.N.Y. 1977)), as discussed above, such facts and circumstances are not present in this case. Thus, the agreement does not provide a basis for finding an assumption of liability. *See Morales v. City of New York*, 849 N.Y.S.2d 406, 409, 18 Misc. 3d 686, 689 (Sup. Ct. 2007) (on summary judgment, declining to find successor liability based on assumption of liability theory where asset purchase agreement expressly disclaimed such liability); *Beck v. Roper Whitney, Inc.*, 190 F. Supp. 2d 524, 534 (W.D.N.Y. 2001) (on summary judgment, stating that an "express disclaimer of liability warrant[ed] a finding that the first exception for finding successor liability does not apply to" a purchaser of assets). Therefore, Plaintiffs have failed to establish any basis for personal jurisdiction under an assumption of liability theory.

c. De Facto Merger and Mere Continuation Theories

"[W]hen a successor firm acquires substantially all of the predecessor's assets and carries on substantially all of the predecessor's operations, the successor may be held to have assumed its predecessor's tort liabilities, notwithstanding the traditional rule that a purchaser of corporate assets does not assume the seller's liabilities." *Nettis v. Levitt*, 241 F.3d 186, 193 (2d Cir. 2001),

overruled in non-pertinent part, Slayton v. Am. Exp. Co., 460 F.3d 215, 226-28 (2d Cir. 2006). In determining whether a transaction constituted a de facto merger, courts consider the following factors: "(1) continuity of ownership; (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible; (3) the successor's assumption of liabilities necessary for the uninterrupted continuation of the acquired corporation's business; and (4) continuity of management, personnel, physical location, assets, and general business operation." *Ortiz*, 2011 WL 5554522, at *6, 2011 U.S. Dist. LEXIS 131601, at *15 (citing *Cargo Partner AG*, 352 F.3d at 46). These factors are "weighed in a flexible manner, disregarding mere questions of form." *Gallo v. Wonderly Co., Inc.*, No. 1:12-CV-1868 (LEK/RFT), 2014 WL 36628, at *12, 2014 U.S. Dist. LEXIS 1004, at *41 (N.D.N.Y. Jan. 6, 2014) (citing *Nettis v. Levitt*, 241 F.3d 186, 194 (2d Cir. 2001); *City of Syracuse v. Loomis Armored US, LLC*, 900 F. Supp. 2d 274, 289 (N.D.N.Y. 2012)). The most important factor, however, is continuity of ownership, as "the doctrine of de facto merger cannot apply in its absence." *Ortiz*, 2011 WL 5554522, at *6, 2011 U.S. Dist. LEXIS 131601, at *15 (quoting *Priestly v. Headminder, Inc.*, 647 F.3d 409, 505-506 (2d Cir. 2011)). *See also New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 214-15 (2d Cir. 2006) (holding that, in tort actions as well as contract actions, a de facto merger will not be found "in the absence of any evidence of continuity of ownership"). "The continuity-of-ownership element is designed to identify situations where the shareholders of a seller corporation retain some ownership interest in their assets after cleansing those assets of liability." *Loomis Armored US, LLC*, 900 F. Supp. 2d at 288 (quoting *Nat'l Serv. Indus., Inc.*, 460 F.3d at 211).

The mere continuation exception is similar to the de facto merger exception. *Doktor v. Werner Co.*, 762 F. Supp. 2d 494, 498 (E.D.N.Y. Jan. 4, 2011). "Some courts have observed that the mere-continuation and de-facto-merger doctrines are so similar that they may be considered a

single exception." *Cargo Partner AG*, 352 F.3d at 45 n.3 (citations omitted). Both exceptions "consider whether 'a transaction, although not in form a merger, is in substance a consolidation or merger of seller and purchaser.'" *Doktor*, 762 F. Supp. 2d at 498 (quoting *Nat'l Serv. Indus.*, 460 F.3d at 209). "[T]he 'mere continuation' exception refers to a continuation of the selling corporation in a different form, and not merely . . . a continuation of the seller's business. It applies where a purported asset sale is in effect a form of corporate reorganization." *Alvarado v. Dreis & Krump Mfg. Co.*, 1 Misc.3d 912(A), at *3, 781 N.Y.S.2d 622 (N.Y. Sup. Ct. 2004) (internal citations omitted).[10] Thus, "it is not simply . . . the business of the original corporation that continues, but the corporate entity itself." *Id.* And like the de facto merger exception's continuity of ownership element, the mere continuation exception requires "the common identity of directors or shareholders." *Ortiz*, 2011 WL 5554522, at *11, 2011 U.S. Dist. LEXIS 131601, at *33; *see also Gallo*, 2014 WL 36628, at *12, 2014 U.S. Dist. LEXIS 1004, at *40 (evaluating de facto merger and mere continuation exceptions together, and stating that "the continuity of ownership is essential, and without it an exception to the traditional rule . . . cannot apply.") (citations omitted).

[10] The mere continuation exception only applies where the seller corporation is extinguished after the transaction. Where "'the predecessor corporation continues to exist after the transaction, in however gossamer a form, the mere continuation exception is not applicable." *Doktor*, 762 F. Supp. 2d at 498 (quoting *Desclafani v. Pave-Mark Corp.*, No. 07 Civ. 4639 (HBP), 2008 WL 3914881, at *5, 2008 U.S. Dist. LEXIS 64672, at *22 (S.D.N.Y. Aug. 22, 2008)). But a corporation need not dissolve immediately upon the closing of the sale of assets; courts have held that a mere continuation can exist even where the seller corporation does not dissolve until more than a year after the sale. *See Ortiz*, 2011 WL 5554522, at *12, 2011 U.S. Dist. LEXIS 131601, at *36 (denying purchaser's motion for summary judgment where seller made its final corporate filing four months after its assets were purchased, and officially dissolved more than a year after the purchase); *Marenyi*, 1994 WL 16000129, at *10, 1994 U.S. Dist. LEXIS 14190, at *32 (holding that mere continuation exception did not apply where the seller "continued to exist for over a year after the assets sale, albeit with very limited resources"). Here, Plaintiffs' proposed amended complaint alleges that "[s]everal months after the Asset Purchase by the defendant Great Northern of substantially all of Brave Products' assets, Brave Products filed for voluntary dissolution." (Dkt. No. 36-2, ¶ 14). The signed asset purchase agreement between Great Northern and Brave Products is dated June 19, 2013. (Dkt. No. 36-3, pp. 17-18). Great Northern asserts that, according to the Illinois Secretary of State, "Brave Products filed for voluntary dissolution on January 10, 2014 almost seven months following the purchase." (Dkt. No. 39, p. 18 n.2). Therefore, Plaintiffs appear to have met their burden of showing that Brave Products was extinguished.

The continuity of ownership element is "typically satisfied where the purchasing corporation pays for the acquired assets with shares of its own stock," *Nat'l Serv. Indus., Inc.*, 460 F.3d at 210 n.2, although it is possible to find continuity of ownership even when assets are purchased with cash. *See Ortiz*, 2011 WL 5554522, at *10, 2011 U.S. Dist. LEXIS 131601, at *31 ("[A]lthough the continuity of ownership requirement is still necessary in tort cases, it does not mean that courts might not read the standard flexibly so that 'other indicia of control over or continuing benefit from the sold assets might . . . be sufficient to satisfy the continuity of ownership factor.'" *Id.* (quoting *Nat'l Serv. Indus., Inc.*, 460 F.2d at 210 n.5)). *Cf. Gallo*, 2014 WL 36628, at *12, 2014 U.S. Dist. LEXIS 1004, at *44 (holding that there were "sufficient facts to support a continuation of ownership theory" when management was the same "for all practical purposes" under predecessor and successor companies, when the successor company had all of the predecessor company's assets, including its goodwill and name, and where successor company was "manufacturing the same draperies and spreads to the same line of customers, maintaining the same telephone number and website, and employing the same equipment and staff").

Neither the complaint nor the proposed amended complaint contain any allegations regarding continuity of ownership. The proposed amended complaint merely alleges that Great Northern's purchase of Brave Products's assets was a de facto merger, and "that Great Northern is a successor in interest of" Brave Products. (Dkt. No. 36-2, pp. 3-4). The agreement shows that Great Northern purchased Brave Products's assets for cash, not with stock.[11] There is no evidence that Brave Products and Great Northern had any owners, directors, managers or

[11] The asset purchase agreement states that "[t]he purchase price for the Purchased Assets shall be $535,162.17," with $435,162.17 to be paid in cash at closing, and with two payments of $50,000 to be transferred to two different escrow accounts to cover both parties' "post-Closing indemnification obligations" as identified in different sections of the agreement. (Dkt. No. 36-3, pp. 2-3).

shareholders in common. Great Northern has submitted the declaration of its controller, Stacy Foreman, stating that "Brave Products was not provided, and has never held any ownership interest in Great Northern." (Dkt. No. 5-2, pp. 2-3). Ms. Forman stated that the owner of Brave Products "is not an owner of Great Northern and has never been an owner of Great Northern." (*Id.*, p. 5). Ms. Forman further stated: "Following the asset purchase, Great Northern did not employ any of Brave Products' manufacturing personnel nor any of Brave Products' management personnel." (*Id.*, p. 3). Ms. Foreman also stated that Great Northern's principal place of business is in Minnesota, and that Great Northern did not purchase or utilize Brave Products' manufacturing facility in Illinois or the machinery Brave Products used to manufacture its products. (*Id.*, pp. 2-3). Thus, Plaintiffs have failed to establish any basis for personal jurisdiction over Great Northern under the de facto merger exception. *See Idearc Media LLC v. Siegel, Kelleher & Kahn LLP*, No. 09-CV-1090S, 2012 WL 5499496, at *3, 2012 U.S. Dist. LEXIS, at *7 (W.D.N.Y. Nov. 12, 2012) (granting motion to dismiss where the plaintiff's amended complaint did not contain sufficient factual allegations to infer that sole owner of seller company had any ownership interest in buyer company after the transaction). *Cf. Loomis Armored US, LLC*, 900 F. Supp. 2d at 289 (holding that the plaintiff pled sufficient facts to overcome motion to dismiss on the basis of jurisdiction where the seller corporation was sold for cash, but where the two companies had employees and management in common, operated from the same office, and where successor continued to perform obligations of and receive payment on behalf of the predecessor company). Similarly, Plaintiffs have failed to establish any basis for personal jurisdiction over Great Northern under a mere continuation theory. *See Colon v. Multi-Pak Corp.*, 477 F. Supp. 2d 620, 627 (S.D.N.Y. 2007) (rejecting mere continuation exception, at summary judgment stage, where plaintiffs did not produce "any evidence to support a finding of

a common identity of directors or shareholders in the case at bar."); *Mitchell v. Suburban Propane Gas Corp.*, 182 A.D.2d 934, 935-26, 581 N.Y.S. 2d 927, 929 (3d Dep't 1992) (holding that defendant was not a continuation of the company whose assets it purchased when "none of [the seller's] officers, directors or shareholders became officers, directors or shareholders of defendant or its subsidiary").

d. Jurisdictional Discovery

Sunbelt and Plaintiffs request permission to continue discovery on the issue of successor liability with respect to Great Northern. (Dkt. No. 28-4, p. 8; Dkt. No. 36-1, ¶ 12). At oral argument on July 27, 2015, however, counsel for both Sunbelt and Plaintiffs stated that none of their discovery to date, which included document and interrogatory discovery as well as a deposition of a Great Northern representative, revealed any facts suggesting that Brave Products and Great Northern had continuity of ownership, as required to establish successor liability under a de facto merger or mere continuation theory. *See supra* Section IV(A)(1)(c). Neither counsel were able to identify any potential discovery which could lead to evidence of continuity of ownership. Further, as stated above, Plaintiffs' and Sunbelt's assumption of liability theory fails as a matter of law. *See supra* Section IV(A)(1)(b). Therefore, as Plaintiffs and Sunbelt have failed to "demonstrate that facts supporting personal jurisdiction may exist that discovery should draw out," there is no basis for allowing additional discovery on this matter. *PST Servs., Inc. v. Larson*, 221 F.R.D. 33, 37 (N.D.N.Y. 2004) (citing *Sultanik v. Cobden Chadwick, Inc.*, 94 F.R.D. 123 (E.D.N.Y. 1982)). Accordingly, Sunbelt's and Plaintiffs' request for additional discovery is denied and Great Northern's motion to dismiss for lack of personal jurisdiction is granted.

2. PMW's Motions to Dismiss

PMW moves for dismissal of the complaint and Sunbelt's cross-claims on the basis that it is not subject to general personal jurisdiction or specific jurisdiction in New York. (Dkt. No. 14-2, p. 3; Dkt. No. 26-1, p. 2). Sunbelt and Plaintiffs oppose PMW's motion; argue that the Court has jurisdiction over PMW under New York's long arm statute, N.Y. C.P.L.R. 302(a); and request further jurisdictional discovery. (Dkt. Nos. 36-7, pp. 14-15; 45-3, p. 6). Plaintiffs argue that Brave Products was engaged in the business of manufacturing, designing and distributing the log splitter at issue, that PMW Holdings was the parent company of Brave Products on March 5, 2012, when the log-splitter at issue was manufactured and set into the stream of commerce, and that the President of PMW Holdings, Paul A. Walker, was the president of Brave Products when the company was sold to Great Northern and when the company was later dissolved. (Dkt. No. 36-7, pp. 14-15). Sunbelt argues that "all of the information available favors the conclusion that PMW was a department or agency of Brave Products on the date of manufacture[] of the subject equipment," and that PMW is therefore subject to personal jurisdiction in this Court. (Dkt. No. 45-3, pp. 7-8).

a. General Jurisdiction

PMW is not subject to general personal jurisdiction in this Court under the Supreme Court's holding in *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), as it is not headquartered or incorporated in New York and is not otherwise "at home" in the state. *See Cont'l Indus. Grp., Inc. v. Equate Petrochemical Co.*, 586 F. App'x 768, 769-70 (2d Cir. 2014); *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30, 38-39 (2d Cir. 2014); *Refco Grp. Ltd., LLC*, No. 13 Civ. 1654(RA), 2014 WL 2610608, at *8, 2014 U.S. Dist. LEXIS 79708, at *24

(S.D.N.Y. June 10, 2014). Thus, to the extent Plaintiff and Sunbelt argue that PMW is subject to general jurisdiction, their argument is without merit.

b. Specific Jurisdiction

PMW argues that it is not subject to specific jurisdiction under New York's long-arm statute, N.Y. C.P.L.R. § 302(a). (Dkt. No. 14-2, p. 5; Dkt. No. 26-1, p. 6). Section 302(a) states:

> As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2. commits a tortious act within the state . . . ; or
>
> 3. commits a tortious act without the state causing injury to person or property within the state . . . if he
>
> > (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
> >
> > (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce. . . .

N.Y. C.P.L.R. § 302(a). Plaintiffs do not allege that either PMW or Brave Products committed a tortious act in New York or transacted business in New York, as required by § 302(a)(1) and (a)(2).[12] Thus, § 302(a)(3) is the only plausible basis for personal jurisdiction over PMW. Establishing jurisdiction under § 302(a)(3)(ii):

> requires satisfaction of five elements: (1) the defendant's tortious act was committed outside New York, (2) the cause of action arose from that act, (3) the tortious act caused an injury to a person or property in New York, (4) the defendant expected or should reasonably have expected that his or her action

[12] There is no evidence in the record regarding how the log splitter at issue arrived in New York. PMW, Plaintiffs, and Sunbelt all indicated at oral argument on July 27, 2015 that Brave Products sold the log splitter in question to a Sunbelt facility in Ohio. (Dkt. No. 4, ¶ 1).

> would have consequences in New York, and (5) the defendant derives substantial revenue from interstate or international commerce.

Boyce v. Cycle Spectrum, Inc., 303 F.R.D. 182, 184 (E.D.N.Y. 2014) (quoting *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 35 (2d Cir. 2010)). If PMW was subject to jurisdiction under New York law, the Court would have to consider whether such jurisdiction would comport with the Due Process Clause of the Constitution. *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 164 (2d Cir. 2010).

PMW's President, Paul Walker, states in his affidavit that PMW "does not conduct interstate business[,] . . . does not derive any revenue from interstate or international sales[,] . . . [and] has never conducted business in the state of New York." (Dkt. No. 14-1, ¶¶ 9-10, 12). Neither Plaintiffs' complaint nor their proposed amended complaint alleges otherwise. Thus, PMW does not fall within § 302(a)(3) on its own. Plaintiffs and Sunbelt have alleged, however, that PMW is subject to personal jurisdiction on the basis that Brave Products was either an agent or a department of PMW. (Dkt. Nos. 36-7, pp. 14-15; 45-3, pp. 7-8).

i. Personal Jurisdiction over Brave Products

In order to establish jurisdiction over PMW under either an agency or department theory, Plaintiffs must first establish that this Court has personal jurisdiction over Brave Products. The record does not indicate whether Brave Products derived substantial revenue from interstate commerce. Nor is there anything in the record to indicate whether Brave Products expected or should reasonably have expected that its actions would have consequences in New York, as required by N.Y. C.P.L.R. § 302(a)(3)(ii). *See Boyce*, 303 F.R.D. at 184 (listing five elements that must be satisfied for a party to be subject to personal jurisdiction under § 302(a)(3)(ii)).

To determine whether jurisdiction over Brave Products would comport with the Due Process Clause of the Constitution, the Court must determine whether Brave Products has

"minimum contacts" with New York, and whether asking Brave Products to defend a suit in New York would be "reasonable," i.e., whether it would "comport with traditional notions of fair play and substantial justice." *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 216-17 (2000) (internal citations omitted). To establish "minimum contacts," a defendant must generally "purposefully avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *J. McIntryre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780, 2785 (2011) (plurality opinion) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Further, the Supreme Court has "held that a single sale to a customer who takes an accident-causing product to a different state (where the accident takes place) is not a sufficient basis for asserting jurisdiction." *Id.* at 2792 (Breyer, J.) (concurrence) (controlling) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)). Thus, the Supreme Court found no personal jurisdiction when "none of the facts showed a 'regular flow' or regular course' of sales in [the forum state] or 'something more.'" *Ikeda v. J. Sisters 57, Inc.*, No. 14-cv-3570 (ER), 2015 WL 4096255, at *7, 2015 U.S. Dist. LEXIS 87783, at *23 (S.D.N.Y. July 6, 2015) (quoting *Nicastro*, 131 S.Ct. at 2792 (Breyer, J.) (concurrence) (controlling)). *See also Eternal Asia Supply Chain Mgmt. (USA) Corp. v. Chen*, No. 12 Civ. 6390(JPO), 2013 WL 1775440, at *7, 2013 U.S. Dist. LEXIS 59538, at *21 (S.D.N.Y. Apr. 25, 2013) (finding that the plaintiff did not allege minimum contacts where it "ha[d] not alleged a regular course of sales in New York, nor ha[d] it alleged anything 'more' that reveals particular targeting of New York State").

Here, there are no allegations in the complaint or amended complaint which establish a basis for personal jurisdiction over Brave Products. Nor have plaintiffs established any factual basis for personal jurisdiction over Brave Products. There is no evidence indicating that Brave Products either expected or should have expected that the log splitter it manufactured would end

up in New York. Nor is there any evidence that Brave Products "purposefully availed" itself of the "privilege" of conducting activities in New York. Nevertheless, in light of the request by plaintiffs and Sunbelt to pursue jurisdictional discovery, the Court will consider their argument that, assuming there is jurisdiction over Brave Products, the Court has jurisdiction over PMW under an agency or department theory.

ii. Agency and Department Theories of Jurisdiction

Under the agency theory "a court of New York may assert jurisdiction over a foreign corporation when it affiliates itself with a New York representative entity and that New York representative renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000) (citing *Frummer v. Hilton Hotels Int'l Inc.*, 19 N.Y.2d 533, 537, 281 N.Y.S.2d 41 (1967); *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 (2d Cir. 1967)).

> To establish that an out-of-state defendant acted through an agent, Plaintiffs do not need to establish a formal agency relationship between the defendant and his agent. Plaintiffs need only convince the court that the agent engaged in purposeful activities in this State in relation to plaintiffs' transaction for the benefit of and with the knowledge and consent of the defendant[] and that [the defendant] exercised some control over the agent in the matter.

In re Sumitomo Copper Litig., 120 F. Supp. 2d 328, 336 (S.D.N.Y. 2000) (internal citations, quotation marks, and punctuation omitted). "[T]he alleged agent must have acted in the state for the benefit of, and with the knowledge and consent of the non-resident principal." *CutCo Indus., Inc. v. Naughton*, 806 F.2d 361, 366 (2d Cir. 1986) (citation and internal quotation marks omitted).

As to the department theory:

> Courts consider four factors to determine whether a subsidiary is a 'mere department' of its foreign parent: "(1) common ownership, (2) financial dependency of the subsidiary on the parent corporation, (3) the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities, and (4) the degree of control over the marketing and operational policies of the subsidiary exercised by the parent."

Havlish v. Royal Dutch Shell PLC, No. 13 Civ. 7074(GBD), 2014 WL 4828654, at *3, 2014 U.S. Dist. LEXIS 138835, at *9-10 (S.D.N.Y. Sep. 24, 2014) (quoting *Gundlach v. IBM Japan, Ltd.*, 983 F. Supp. 2d 389, 394-95 (S.D.N.Y. 2013)). "Common ownership is an essential factor," while "the other three are important, but not essential." *Tese-Milner v. De Beers Centenary A.G.*, 613 F. Supp. 2d 404, 416 (S.D.N.Y. 2009) (citing *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120-22 (2d Cir. 1984)). Common ownership alone, however, is not enough to establish jurisdiction. *Havlish*, 2014 WL 4828654, at *3, 2014 U.S. Dist. LEXIS 138835, at *11; *NewLead Holdings Ltd. v. Ironridge Global IV Ltd.*, No. 14 Civ. 3945, 2014 WL 2619588, at *4, 2014 U.S. Dist. LEXIS 80563, at *12 (S.D.N.Y. June 11, 2014). Further, "[p]arent corporations are allowed a range of normal shareholder involvement in the operations of their subsidiaries—without rendering those subsidiaries 'mere departments' for jurisdictional purposes." *In re Ski Train Fire*, 230 F. Supp. 2d at 409 (citing *Beech Aircraft*, 751 F.2d at 121).[13]

iii. Personal Jurisdiction over PMW

Even assuming that the Court has specific jurisdiction over Brave Products, that jurisdiction would only extend to PMW if Brave Products were an agent or department of PMW. Neither the complaint nor the amended complaint contain allegations of jurisdiction under an

[13] Although most cases addressing the "agency" theory deal with general jurisdiction, the theory applies to specific jurisdiction under § 302 as well. *See In re Chinese-Manufactured Drywall Products Liability Litigation*, 753 F.3d 521, 531 (5th Cir. 2014) ("*Daimler* . . . embraces the significance of a principal agency relationship to the specific-jurisdiction analysis, though it suggests that an agency relationship alone may not be dispositive.") (citing *Daimler*, 134 S.Ct. at 759). The department theory also applies to specific jurisdiction. *See Int'l Diamond Importers, Inc. v. Oriental Gemco (N.Y.), Inc.*, 64 F. Supp. 3d 494, 520 (S.D.N.Y. 2014) (applying department analysis to specific jurisdiction). *See also Jazini*, 148 F.3d at 184 (stating that agency theory and department theory are the two relevant bases for jurisdiction over a parent company in New York).

agency or department theory. Plaintiffs' amended complaint states that PMW owned Brave Products at the time it manufactured the log splitter in question, (Dkt. No. 36-2, ¶¶ 9-10), but does not allege that PMW exercised control over Brave Products or other facts which would support jurisdiction under an agency or department theory.

Nor have Plaintiffs identified any facts in the record presently before the Court that would support jurisdiction over PMW under an agency or department theory. There is no evidence, for example, that PMW knew of and consented to Brave Products's actions or exercised control over Brave Products with respect to the sale of the subject log splitter. While Sunbelt points out that "(1) both PMW and Brave Products were owned by Paul Walker and (2) both companies had the same physical address," (Dkt. No. 45-3, p. 7), neither of these facts establishes that PMW exercised control over Brave Products. The failure to allege control defeats any claim of personal jurisdiction under an agency theory. *CutCo Indus., Inc.*, 806 F.2d at 366. And while there is evidence that PMW and Brave Products shared common ownership, Plaintiffs have not alleged or established facts that would satisfy the other three factors of the "mere department" test. *See Jazini*, 148 F.3d at 185. Thus, at this stage in the case, there is no basis for finding that the department theory is applicable. *See Havlish*, 2014 WL 4828654, at *3, 2014 U.S. Dist. LEXIS 138835, at *11; *NewLead Holdings Ltd.*, No. 14cv3945, 2014 WL 2619588, at *4, 2014 U.S. Dist. LEXIS 80563, at *12. *See also Gallelli v. Crown Imports, LLC*, 701 F. Supp. 2d 263, 268 (E.D.N.Y. 2010) (evaluating a parent-subsidiary relationship in the context of § 301, and stating: "[T]he subsidiary of a holding company carries on its business as an *investment* of the holding company, and not as an *agent* of the holding company.") (citations omitted); *Porter v. LSB Indus.*, 192 A.D.2d 205, 213, 600 N.Y.S.2d 867 (4th Dep't 1993) (concluding that parent company's control over subsidiary was "not so pervasive as to render [the subsidiary] a mere

department of [the parent]" when the subsidiary was not financially dependent on parent, and where "it appear[ed] that the parent, as a holding company in the business of acquiring other entities for investment purposes, [was] financially dependent on its subsidiaries").

c. Jurisdictional Discovery

Both Plaintiffs and Sunbelt request leave to conduct discovery into the Court's personal jurisdiction over PMW. (*See* Dkt. No. 36-7, p. 17; Dkt. No. 45-3, p. 8). Courts have discretion to grant leave for jurisdictional discovery when plaintiffs have "made a sufficient start toward establishing jurisdiction, and have shown that their position is not frivolous." *PST Servs., Inc.*, 221 F.R.D. at 37. Here, Plaintiffs and Sunbelt have made a sufficient start toward establishing specific jurisdiction under CPLR § 302(a) by asserting that PMW and Brave Products shared the same address and the same president, Paul Walker. Counsel for Plaintiffs and Sunbelt stated at oral argument on July 27, 2015 that they will be deposing Paul Walker, and that they expect his deposition to yield additional facts on the issues regarding personal jurisdiction over PMW. Because Plaintiffs may be able to establish specific jurisdiction under an agency or department theory following additional discovery, the Court will allow them to continue discovery. Accordingly, PMW's motion to dismiss for lack of personal jurisdiction under Rule12(b)(2) is denied without prejudice to refiling following additional discovery.

B. PMW's Motions to Dismiss under Rule 12(b)(6)

As other courts in this circuit have held, it would be inappropriate for the Court to address the adequacy of Plaintiffs' pleadings without having resolved the threshold issue of personal jurisdiction. *See Tese-Milner v. De Beers Centenary A.G.*, 613 F. Supp. 2d 404, 418 (S.D.N.Y. 2009) ("Jurisdictional issues, once raised, must be addressed before delving into substantive issues."); *Sokolow v. Palestine Liberation Organization*, 583 F. Supp. 2d 451, 460

n.9 (S.D.N.Y. 2008) ("It is inappropriate for the Court to address the adequacy of pleadings until the threshold issue of personal jurisdiction is determined."); *see also New York v. Mountain Tobacco*, 55 F. Supp. 3d 301, 314-15 (E.D.N.Y. 2014) (declining to rule on 12(b)(6) motion pending additional jurisdictional discovery). Thus, PMW's motion to dismiss for failure to state a claim under Rule 12(b)(6), is denied without prejudice to refiling after additional discovery.

C. Plaintiffs' Motion to Amend

The Court likewise denies Plaintiffs' motion to amend without prejudice. As stated above, the Court declines to address the merits of Plaintiffs' claims until it has resolved whether PMW is subject to personal jurisdiction. The Court notes, however, that "[u]nder New York law, a corporate parent is not automatically liable for the acts of its wholly owned subsidiary, even where the parent and subsidiary corporations have interlocking directorates." *IMG Fragrance Brands, LLC v. Houbigant, Inc.*, 679 F. Supp. 2d 395, 403 (S.D.N.Y. Dec. 18, 2009). *See Henneberry v. Sumitomo Corp. of Am.*, No. 04 Civ. 2128(PKL), 2005 WL 1036260, at *3, 2005 U.S. Dist. LEXIS 8023, at *7-8 (S.D.N.Y. May 3, 2005) (holding that the plaintiff's "asserted derivative claims against [the parent] lack any factual foundation that would allow plaintiff to impute [the subsidiary]'s alleged wrongdoing to the parent company" where complaint made only conclusory statements that parent had direction and control over subsidiary); *Lipton v. Unumprovident Corp.*, 10 A.D.3d 703, 705, 783 N.Y.S.2d 601, 603 (2d Dep't 2004) (affirming dismissal of complaint against parent company where the plaintiff did not allege facts indicating that the parent exercised dominion and control over its subsidiary). *See also United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries.") (internal quotation marks and citations omitted); *Potash v. Port Auth.*, 279 A.D.2d

562, 562 (2d Dep't 2001) ("A parent corporation will not be held liable for the torts or obligations of a subsidiary unless it can be shown that the parent exercised complete dominion and control over the subsidiary.") (citations omitted). Thus, any proposed amended complaint must allege specific facts showing that PMW exercised dominion and control over Brave Products.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that Defendant Great Northern's motion to dismiss under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction (Dkt. No. 5) is **GRANTED**; and it is further

ORDERED that Defendant Great Northern is **DISMISSED** from this case; and it is further

ORDERED that Defendant PMW's motions to dismiss (Dkt. Nos. 14 and 26) are **DENIED** without prejudice; and it is further

ORDERED that Plaintiffs' motion to amend (Dkt. No. 36) is **DENIED** without prejudice.

IT IS SO ORDERED.

August 13, 2015
Syracuse, New York

Brenda K. Sannes
U.S. District Judge