

Breakaway Courier Corp. v Bershire Hathaway Inc.

2019 NY Slip Op 32521(U)

August 26, 2019

Supreme Court, New York County

Docket Number: 654806/2016

Judge: Marcy Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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BREAKAWAY COURIER CORPORATION d/b/a
BREAKAWAY COURIER SYSTEMS

Plaintiff,

Index No.: 654806/2016

-- against --

DECISION/ORDER

BERKSHIRE HATHAWAY INC. et al.,

Motion Seq. Nos. 001, 006

Defendants.

CURRENT LIGHTING & ELECTRIC, INC. et al.

Index No.: 652316/2017

Plaintiffs,

DECISION/ORDER

-against-

Motion Seq. Nos. 001, 005

BERKSHIRE HATHAWAY INC. et al.,

Defendants.

ALTERNATIVE FUELS TRANSPORTATION, INC.

Index No.: 652702/2017

Plaintiff,

DECISION/ORDER

-against-

Motion Seq. Nos. 001, 004

BERKSHIRE HATHAWAY INC. et al.,

Defendants.

These are three separate actions, all related, in which plaintiffs claim that defendants engaged in a scheme, in violation of the New York Insurance Law, to induce plaintiffs to enter into a Reinsurance Participation Agreement (RPA) as a condition of issuance to plaintiffs of workers' compensation insurance policies. (See Breakaway First Am. Compl., at 2-4; Current

Lighting First Am. Compl., at 2-4; Alternative Fuels First Am. Compl., at 2-4.)¹ The defendants in the actions are Berkshire Hathaway Inc. (BHI) and BHI-affiliated companies—namely, California Insurance Company (California Insurance); Commercial General Indemnity Inc. (Commercial Indemnity); Applied Underwriters, Inc. (AUI); Applied Risk Services, Inc.; Applied Risk Services of New York, Inc.; ARS Insurance Agency, Inc.; North American Casualty Company; Continental Indemnity Company (Continental Indemnity); Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA); and AU Holding Company, Inc. (collectively, the Applied Defendants).

In all three actions, BHI moves to dismiss the first amended complaints against it, pursuant to CPLR 3211 (a) (8), for lack of personal jurisdiction.² (Breakaway, Mot. Seq. No. 006; Current Lighting, Mot. Seq. No. 005; Alternative Fuels, Mot. Seq. No. 004.) Plaintiffs oppose the motions. In the Breakaway Action, plaintiff seeks jurisdictional discovery in the event BHI's motion is not denied. In the Current Lighting and Alternative Fuels Actions, plaintiffs formally cross-move for an order compelling BHI to produce jurisdictional discovery,

¹ The action brought by Breakaway Courier Corporation (Index No. 654806/2016) is referred to in this decision as the Breakaway Action. The action brought by Current Lighting & Electric, Inc., MAS Electrical Maintenance, LLC, and First Quality Maintenance II, LLC (Index No. 652316/2017) is referred to as the Current Lighting Action. The action brought by Alternative Fuels Transportation, Inc. (Index No. 652702/2017) is referred to as the Alternative Fuels Action. In the three actions, plaintiffs are all represented by the same counsel, the Applied Defendants are all represented by the same counsel, and BHI is represented by separate counsel.

² In the Breakaway Action, by decision and order dated July 17, 2017, the court ordered AUI, AUCRA and Commercial Indemnity to post a bond, based on the finding that these defendants were not licensed in New York and that plaintiffs had sufficiently pleaded that these defendants were engaged in acts subjecting them to the bond requirements of Insurance Law § 1213 (c). (See Breakaway Courier Corp. v Berkshire Hathaway Inc., 2017 NY Slip Op 32751 [U], 2017 WL 3084991 [Sup Ct, NY County, July 19, 2017] [the 2017 Breakaway decision].) In the Current Lighting and Alternative Fuels Actions, which were jointly briefed, the court ordered the same relief. (Current Light. & Elec. Inc. v Berkshire Hathaway Inc., 2017 NY Slip Op 31796 [U], 2017 WL 3638317 [Sup Ct, NY County, Aug 24, 2017] [the 2017 Current Lighting decision].) In these prior decisions, the court severed and held in abeyance, pending the court's determination of whether this court has jurisdiction over BHI or whether jurisdictional discovery should be ordered, the branch of the motions for an order requiring BHI to post a bond before appearing in these actions. (Mot. Seq. No. 1 in the three actions.)

pursuant to CPLR 3211 (d) and Article 31 of the CPLR, in the event BHI's motion to dismiss is not denied. The actions are consolidated for the purpose of determination of these motions.³

Discussion

As alleged in the complaint, Berkshire Hathaway Inc. is a Delaware corporation with its "primary" place of business in Omaha, Nebraska. (Breakaway First Am. Compl., ¶ 10.) The complaint alleges jurisdiction over BHI, pursuant to CPLR 302 (a) (1), (2), and (3.) (Id., ¶¶ 13, 17, 18.)

In claiming that the court lacks long-arm jurisdiction over it, Berkshire Hathaway Inc. submits the affidavit of Daniel J. Jaksich, a Vice President and Controller at the company. Jaksich attests that BHI "is a holding company" that "does not conduct, transact, or solicit business in New York. It is not registered to do business in New York and does not have a registered agent for service of process in New York. It does not maintain any offices for conducting business in the State of New York. . . ." (Jaksich Aff., ¶¶ 2-3 [Breakaway Action, NYSCEF Doc. No. 239].) Jaksich further states that BHI's employees were not "in any way involved in the insurance and reinsurance transactions that are the subject of these lawsuits. [BHI] did not issue workers['] compensation policies to the Plaintiffs. [BHI] did not collect or receive premium, or any share of the premium, paid by the Plaintiffs. [BHI] was not a party to the Reinsurance Participation Agreements that are the subject matter of these lawsuits." (Id., ¶ 6.) He also states that "[t]here is no legal entity by the name of or doing business as the 'Berkshire Hathaway Group.' [BHI] is a separate legal entity from" the Applied Defendants,

³ The motions were jointly briefed. Although memoranda of law, affidavits, and exhibits were filed in all three actions, they are substantially the same, with an additional objection to jurisdiction in the Alternative Fuels Action. Only the memoranda in the Breakaway Action will be cited with respect to arguments common to the three actions. Affidavits and exhibits common to the three actions will be identified only by reference to the exhibit or docket number in the Breakaway Action.

“has a separate board of directors. . . , has a separate principal place of business . . . , has separate employees . . . , and is not involved in running the day to day activities” of any of the Applied Defendants. (Id., ¶ 8.)

In opposition, plaintiffs contend that the court has specific jurisdiction over BHI under CPLR 302 (a) (1) because BHI has transacted business under Insurance Law § 1101 both directly and through the Applied Defendants, its agents. (Pls.’ Memo. In Opp., at 16-19.) Plaintiffs also contend that the court has jurisdiction under CPLR 302 (a) (2) and (3) by virtue of its commission of tortious acts, in that it “directed, participated and was a co-conspirator” with the Applied Defendants “in an illegal reinsurance scheme targeting a New York victim.” (Id., at 21.)

As a threshold matter, the court rejects plaintiffs’ contention that the Jaksich affidavit is made “without any evidentiary support,” is “contrary to the documentary evidence already before the Court,” and therefore is not probative of the court’s lack of jurisdiction over BHI. (See id., at 21, 23.) Although conclusory, the Jaksich affidavit is made on personal knowledge and provides some evidence as to the relationship between BHI and its subsidiaries. (See Charest v K Mart of NY Holdings, Inc., 71 AD3d 471 [1st Dept 2010].) More important, the affidavit is supported by undisputed evidence in the record that shows not only that BHI is an out-of-state corporation with its principal place of business in Nebraska, but also that it was not a party to the contracts with plaintiffs, and that separately incorporated entities, the Applied Defendants, issued the policies and participated in the reinsurance transactions at issue.

More particularly, as recently held in a decision on motions in these actions concerning the sufficiency of the surety on the bond filed by three unlicensed Applied Defendants, plaintiffs Breakaway and Alternative Fuels each purchased workers’ compensation policies from Continental Indemnity, while plaintiffs in Current Lighting purchased workers’ compensation

policies from both Continental Indemnity and California Insurance. Plaintiffs entered into the RPAs with AUCRA. As recited in the RPAs, AUCRA entered into a Reinsurance Treaty with California Insurance and, “through its pooling arrangement, with other affiliates of Applied Underwriters, Inc.” The RPAs refer to the entities that are parties to the Reinsurance Treaty and pooling arrangement as the “Issuing Insurers.” (See Breakaway Courier Corp. v Berkshire Hathaway Inc., 2019 NY Slip Op 32393 [U], 2019 WL 3765350, * 8 [Sup Ct, NY County Aug. 8, 2019] [Breakaway Surety Decision].)⁴ It is undisputed that BHI was not a party to any of these agreements.

It is also undisputed that BHI is the ultimate parent of the Applied Defendants. (Id., * 9.) As plaintiffs acknowledge, BHI formed AU Holding Company, Inc. (AU Holding), which in turn acquired Applied Underwriters, Inc., its wholly owned subsidiary. (Dowd Aff., ¶ 65 [Breakaway Action, NYSCEF Doc. No. 266], citing AU Holding 2010 & 2011 Consolidated Financial Statements, at 8 [Breakaway Action, NYSCEF Doc. No. 278].) Plaintiffs do not dispute that the Applied Defendants were in business before they were acquired by AU Holding and that they are separately incorporated entities.⁵

The court accordingly finds unpersuasive plaintiffs’ contention that BHI’s motions to dismiss must be denied based on BHI’s failure to submit evidence that it is not subject to jurisdiction. The court turns to plaintiffs’ required showing on these motions. It is well settled that the ultimate burden rests with the plaintiff, as the party asserting jurisdiction, “to present

⁴ The affiliates of Applied Underwriters, Inc. that were parties to the pooling arrangement were Continental Indemnity Co., California Insurance Co., Illinois Insurance Co., Texas Insurance Co., and Pennsylvania Insurance Co.. (Breakaway Surety Decision, 2019 WL 3765350, at * 8.) The court refers the parties to the Breakaway Surety Decision for details as to the transactions with plaintiffs, including citations to the various agreements at issue in the transactions and review of the allegations of the complaints.

⁵ Plaintiffs do, however, claim that BHI dominated and controlled the Applied Defendants, and that it is therefore subject to long-arm jurisdiction. The purported evidence in support of this claim will be addressed below.

sufficient facts to demonstrate jurisdiction.” (Cotia (USA) Ltd. v Lynn Steel Corp., 134 AD3d 483, 484 [1st Dept 2015]; Copp v Ramirez, 62 AD3d 23, 28 [1st Dept 2009], lv denied 12 NY3d 711.) A plaintiff opposing a motion to dismiss for lack of personal jurisdiction is not, however, required to make “[a] prima facie showing of jurisdiction.” (Peterson v Spartan Indus., Inc., 33 NY2d 463, 467 [1974].) Rather, in order to be entitled to jurisdictional discovery, the plaintiff need only make a “sufficient start” showing its position “not to be frivolous.” (Id.; accord Venegas v Capric Clinic, 147 AD3d 457, 458 [1st Dept 2017].) To meet this burden, the plaintiff must “offer some tangible evidence which would constitute a ‘sufficient start’ in showing that jurisdiction could exist.” (SNS Bank, N.V. v Citibank, N.A., 7 AD3d 352, 354 [1st Dept 2004] [internal quotation marks and citation omitted]; SunLight Gen. Capital LLC v CJS Invs. Inc., 114 AD3d 521, 522 [1st Dept 2014] [same].) If a sufficient start is made, the court may “deny the motion . . . or may order a continuance to permit” discovery to take place to explore the issue. (See CPLR 3211[d].)

As noted above, in asserting long-arm jurisdiction over BHI, plaintiffs rely on CPLR 302 (a) (1) and on CPLR 302 (a) (2), and (3). CPLR 302 (a) enumerates the acts which, if performed by a non-domiciliary or its agent, are the basis for the exercise of personal jurisdiction. Section 302 (a) (1) provides for jurisdiction where, among other things, the non-domiciliary or its agent “transacts any business within the state or contracts anywhere to supply goods or services in the state.” Section 302 (a) (2) and (3) confer jurisdiction where the non-domiciliary or its agent commits tortious acts under specified circumstances.⁶

⁶ CPLR 302 provides:

- “(a) 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

CPLR 302 (a) (1)

New York Insurance Law 1101 (b) (1) specifies the acts which, if “effected by mail from outside this state or otherwise . . . shall constitute doing an insurance business in this state . . . within the meaning of” CPLR 302. These acts include, among others, “(A) making, or proposing to make, as insurer, any insurance contract, . . . or solicitation of applications for any such policies or contracts”; and “(B) making, or proposing to make, as warrantor, guarantor or surety, any contract of warranty, guaranty or suretyship as a vocation and not merely as incidental” to other legitimate business.

Plaintiffs’ claim that BHI does the business of insurance in New York, within the meaning of Insurance Law § 1101 (b) (1), is asserted on several grounds. Plaintiffs allege that BHI solicited insurance business, directly or through its agents, “because it (i) allowed its name to be used on the Proposal used to advertise the RPA scheme in New York; [and] (ii) permitted Applied Defendants to assert that they are ‘a member of Berkshire Hathaway, Inc.’ in connection with the RPA scheme.” (Pls.’ Memo. In Opp., at 11-12.) Plaintiffs also claim that BHI has “received payments, including premium, through its wholly owned subsidiaries, the Applied Defendants.” (Id., at 12.) They further claim that BHI provides “parental guarantees” to insurers in New York and “financially supports Applied Defendants.” (Id.) In addition, plaintiffs assert

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- 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
 - 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, 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.”

that BHI “dominates all Applied Defendants[] including through managerial and financial control,” and that the Applied Defendants are BHI’s agents or a “mere department” of BHI. (*Id.*, at 9, 12.) According to plaintiffs, the complaints cite documentary evidence that supports their allegations. (*Id.*, at 12.)

CPLR 302 (a) (1) “provides two distinct grounds for long-arm jurisdiction: where a defendant transacts any business in the state and where a defendant contracts anywhere to supply goods or services in the state.” (*D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 297 [2017] [internal quotation marks omitted].) Under either ground, “[the] jurisdictional inquiry is twofold: under the first prong the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions. Thus, ‘jurisdiction is proper even though the defendant never enters New York, so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted.’” (*Al Rushaid v Pictet & Cie*, 28 NY3d 316, 323 [2016] [quoting *Fischbar v Doucet*, 9 NY3d 375, 380 (2007)], *rearg denied* 28 NY3d 1161 [2017].) CPLR 302 (a) (1) is “a ‘single act statute’ . . .” (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988].) The determination as to whether a defendant’s activities were purposeful “is an objective inquiry, [which] always requires a court to closely examine the defendant’s contacts for their quality.” (*Al Rushaid*, 28 NY3d at 323 [brackets in original] [quoting *Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 338 [2012]].)

In assessing the quality of BHI’s contacts with New York for purposes of jurisdiction under CPLR 302 (a) (1), the court affords plaintiffs’ complaints a liberal construction and also considers “affidavits submitted by plaintiffs to remedy any defects in the complaint.” (*Al Rushaid*, 28 NY3d at 327 [internal quotation marks and citations omitted].) This rule of liberal

construction is, however, subject to the limitation that “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.” (Simkin v Blank, 19 NY3d 46, 52 [2012] [internal quotation marks and citation omitted].) Applying this standard, the court holds that plaintiffs have failed to meet their burden of demonstrating that long-arm jurisdiction over BHI may exist under Insurance Law § 1101 (b) (1) and CPLR 302 (a) (1).

Plaintiffs’ allegations as to BHI’s role in the alleged reinsurance scheme are entirely conclusory. All of plaintiffs’ causes of action are alleged against defendants collectively as members of the “Berkshire Hathaway Group.” These causes of action include, among others, violations of the Insurance Law and fraud based on defendants’ alleged wrongful scheme in requiring plaintiffs to enter into the RPAs as a condition of their purchase of workers’ compensation insurance. (Breakaway First Am. Compl., at 2-4, “Counts” I-IV, VI; Current Lighting First Am. Compl., at 2-4, “Counts” I-IV, VI; Alternative Fuels First Am. Compl., at 2-4, “Counts” I-IV, VI.) The complaints do not identify the roles of the any of the Applied Defendants or of BHI in the alleged wrongful scheme. They allege, in conclusory fashion, that premiums have been “siphoned” to BHI through the Applied Defendants, its “shell companies.” (Breakaway First Am. Compl., at 2, ¶¶ 16-21, 161; Current Lighting First Am. Compl., at 2-4, ¶ 151; Alternative Fuels First Am. Compl., ¶ 149.)

The evidence does not support the allegation that premiums have been paid to BHI. As discussed above, the documentary evidence establishes that BHI was not a party to any of the agreements pursuant to which the Applied Defendants pooled fees paid by plaintiffs that allegedly included premiums. In claiming that premiums were transferred from the RPAs to BHI, plaintiffs rely on an AUCRA 2016 Annual Statement, filed with the National Association

of Insurance Commissioners (NAIC), which contained an entry showing wire transfers of premiums from AUCRA to BHI. (Breakaway Action, NYSCEF Doc. No. 190, at 14.7.) This document was corrected by an amendment to the Annual Statement, which reflected the transfer of premiums by Applied Risk Services, Inc., an Applied Defendant, to AUCRA, not to BHI. (Breakaway Action, Aff. of Patricia Ahem [AUCRA Accounting Supervisor], ¶¶ 1-5 [Breakaway Action, NYSCEF Doc. No. 201]; Corrected AUCRA 2016 Annual Statement, at 14.7 [Breakaway Action, NYSCEF Doc. No. 202].) The correction was filed under oath and accepted by NAIC, and plaintiffs do not provide a comprehensible basis for their claim that the correction was a falsehood. (See Aff. of Raymond Dowd, ¶¶ 54-57 [Breakaway Action, NYSCEF Doc. No. 266].)

Plaintiffs' claim that other documents show BHI's receipt of premiums is based on speculation or on their conclusory assertion (discussed below) that BHI dominated and controlled the Applied Defendants. For example, plaintiffs claim that "Berkshire financially supports Applied Defendants including CGI [Commercial General Indemnity Inc.] with 'letters of credit' and receives premium in return." (Pls.' Memo. In Opp., at 12.) Plaintiffs, however, produce no evidence that BHI issued letters of credit for CGI. Plaintiffs do produce Consolidated Financial Statements of AU Holding Company, Inc., which state that as of December 31, 2010, CGI, its wholly owned subsidiary, had a deficiency of \$10,575 in the minimum capital it was required by state regulators to maintain. The Statements disclose that CGI "remedied the deficiency with a cash deposit. . . ." While the Statements make further reference to letters of credit, stating that "[l]etters of credit issued in favor of CGI satisfy regulatory capital requirements," they do not identify the issuer or the amount of the letters. (AU Holding 2010 and 2011 Consolidated Financial Statements, at 9, 31 n 15 [Breakaway Action,

NYSCEF Doc No. 278].) Moreover, plaintiffs conclude, based on nothing more than the “corporate structure” of defendants—and, in particular, BHI’s position as the parent of AU Holding Company, Inc.—that “there is no other possible financial source for this ‘credit’ than Berkshire [BHI].” (Dowd Aff., ¶ 13, citing organizational chart [Alternative Fuels Action, NYSCEF Doc. No. 85].)

To the extent that plaintiffs claim that BHI is subject to jurisdiction based on BHI’s “financial[] support” of the Applied Defendants (Pls.’ Memo. In Opp., at 12), this claim is also unsupported by the evidence or legal authority. As just discussed, plaintiffs do not provide reliable evidence as to BHI’s provision of letters of credit to CGI. As another example of BHI’s financial support for the Applied Defendants, plaintiffs cite 2016 Annual Statements of three Applied Defendants for the statements that BHI manages assets and that they did not renew or obtain catastrophic reinsurance contracts “due to . . . the financial strength of [their] Ultimate Parent Berkshire Hathaway Inc. . . .” (See Dowd Aff. ¶¶ 89, 96, citing 2016 NAIC Annual Statements of Continental Indemnity, AUCRA, California Insurance—Interrogatories 28.05, at 15.4; 6.1, at 16.1 [Breakaway Action, NYSCEF Doc. Nos. 281, 282, 283].) Plaintiffs then go so far as to assert that these disclosures about maintenance of catastrophic reinsurance show that these Applied Defendants “purport to be entirely reliant on the ‘financial strength of their Ultimate Parent Berkshire Hathaway, Inc.’—meaning that Berkshire is acting as a guarantor and thus ‘doing the business of insurance’ in New York.” (Pls.’ Memo. In Opp., at 11.)⁷

Plaintiffs also fail to cite any authority that financial support by BHI of its wholly owned subsidiaries or their dependence on BHI—to the extent that it may exist—differs to a material

⁷ Plaintiffs also fail to note that these Annual Statements do not list BHI as the sole manager of the three Applied Defendants’ assets, but also state that Robert Stafford, Vice President, “manages assets.” (Interrogatory 28.05, at 15.4; see Dowd Aff., ¶¶ 89, 95.)

degree from the support or dependence that would typically characterize the relationship between a parent and a wholly owned subsidiary. (See generally Fletcher v Atex, Inc., 68 F3d 1451, 1459-1460 [2d Cir 1995] [characterizing certain oversight and decision-making by a parent as “indicative” or “typical” of “the usual parent-subsidary relationship”] [internal quotation marks and citations omitted].)

Plaintiffs also appear to seek to support their claim that BHI is subject to jurisdiction based on BHI’s provision of “‘parental guarantees’ worth billions of dollars to insurers in New York.” (Pls.’ Memo. In Opp., at 12.) This claim is based on BHI’s execution of a Parental Guarantee Agreement in favor of National Union Fire Insurance Company of Pittsburgh, Pa. (National Union) with respect to certain obligations of National Indemnity Company. (Id., citing Dowd Aff., ¶¶ 9-11, attaching an SEC filing by American International Group, Inc., which in turn attaches the Parental Guarantee Agreement as an exhibit [Breakaway Action, NYSCEF Doc. No. 302].) This guarantee pertains to non-party entities and is unrelated to the claims at issue in these actions. The guarantee accordingly does not satisfy the jurisdictional requirement, under CPLR 302 (a) (1), that there be a substantial relationship between the transaction and the claim asserted. (See Al Rushaid, 28 NY3d at 323.)⁸

The seemingly strongest support for plaintiffs’ claim that BHI transacts the business of insurance in New York, whether directly or through the Applied Defendants, is the use of BHI’s

⁸ To the extent that plaintiffs suggest that this guarantee supports their claim that the Applied Defendants are (also) “entirely reliant” on BHI’s financial strength (see Pls.’ Memo. In Opp., at 12, 22), this suggestion is unsupported by any evidence. Although National Indemnity Co. is a subsidiary of BHI, the Applied Defendants are subsidiaries of BHI under a separate corporate structure in which National Indemnity Co. is not an affiliate. (See Organizational Charts [Alternative Fuels Action, NYSCEF Doc. No. 85; Breakaway Action, NYSCEF Doc. No. 7; Current Lighting Action, NYSCEF Doc. No. 8].) There is also no evidence that the financial condition of this entity is comparable to that of the Applied Defendants.

name in the proposals for the RPAs that plaintiffs entered into with Applied Defendant, AUCRA. This claim too, however, cannot withstand scrutiny.

Plaintiffs point to the facts that the proposals “provided to Plaintiffs by AUI [Applied Underwriters, Inc.] each provide that AUI is “A Berkshire Hathaway Company” and that AUI is a ‘member of Berkshire Hathaway, Inc.’” (Pls.’ Memo. In Opp., at 12.) Plaintiffs also cite the incorporation in the proposals of the logo: “APPLIED UNDERWRITERS” followed by the words “A Berkshire Hathaway Company.” (Id., at 12-13.) Plaintiffs contend that BHI “has solicited insurance policies in New York by allowing Applied to claim it is a member of ‘Berkshire Hathaway Inc.’ for marketing purposes.” (Id., at 16.) They further assert that BHI’s “goodwill as the parent of the trademarked ‘Berkshire Hathaway Group’ [has] been used in New York to advertise and promote the scheme complained of by Plaintiffs.” (Id., at 11.)

The proposals (Breakaway Action, NYSCEF Doc. No. 146; Current Lighting Action, NYSCEF Doc. No. 6; Alternative Fuels Action, NYSCEF Doc. No. 6) are made in the names “Premier Exclusive From Applied Underwriters” or “EquityComp From Applied Underwriters.” Each proposal states on its face: “This proposal was prepared by Applied Risk Services. New York: ARS Insurance Agency, Lic # PC937411.”⁹ The Premier Exclusive proposal states on its face that “Premier Exclusive is a registered trademark of Applied Underwriters, Inc.” Each EquityComp proposal states on its face that “EquityComp is a registered trademark of Applied Underwriters, Inc.” Each proposal expressly states that the companies issuing the policies are “affiliates of Applied Underwriters Inc. a member of Berkshire Hathaway Inc.” (Policies at 3); that AUCRA, the party to the “Profit Sharing Plan” (i.e., “reinsurance transaction”), “is a subsidiary of Applied Underwriters Inc., a member of Berkshire Hathaway Inc.” (id.); and that

⁹ The Current Lighting proposal also lists New Jersey and Connecticut insurers with license numbers.

“[a]ll services are provided exclusively by Applied Underwriters and its affiliates.” (*Id.*, at 5 [italics omitted].)

The proposals thus all clearly state that they are proposals from Applied Underwriters, Inc., and that the policies and the “Profit Sharing Plan” will be issued by affiliates and a subsidiary, respectively, of Applied Underwriters, Inc., not by BHI. In the face of this explicit identification of the providers of the insurance products, the use of the name Berkshire Hathaway Group in the logo, or the statement that Applied Underwriters, Inc. is associated with BHI as a “member,” cannot support plaintiffs’ claim that BHI is doing business in New York.¹⁰

There is persuasive authority that “[t]he presence of a parent’s logo on documents created and distributed by a subsidiary, standing alone, does not confer authority upon the subsidiary to act as an agent.” (*Fletcher*, 68 F3d at 1461-1462 [applying New York law].) Moreover, courts have repeatedly held that the mere use of a parent’s name in its subsidiaries’, or even its own, marketing materials is insufficient to establish jurisdiction. Thus, even assuming that BHI knew of the use of its name in the Applied Defendants’ proposals, such knowledge would not be a basis for subjecting BHI to jurisdiction. (See *e.g. Aerotel Ltd. v Sprint Corp.*, 100 F Supp 2d 189, 193 [SD NY 2000] [holding, under the New York long-arm statute, that statements on a web page, which offered the parent’s and its subsidiaries’ telecommunication services “under the common trade name ‘Sprint,’” and “were intended to be read by the consuming public, cannot create a single entity structure given the sophistication and complexity of today’s corporate

¹⁰ The reasonableness of plaintiffs’ asserted reliance on the representation in the proposals that Applied Underwriters, Inc. is a member of BHI is highly questionable, given the explicit identification of the providers of the insurance products. Moreover, although plaintiffs’ corporate officers submit affidavits claiming that plaintiffs relied on the alleged oral representation that “Berkshire Hathaway backed” the workers’ compensation plan, the affidavits provide no detail as to the content of the representations, and do not identify the person(s) who purportedly made the representations. (See *Aff. of Robert Kotch* [President of Breakaway], ¶ 7; *Aff. of Ed Winiarz* [CFO of First Quality Maintenance II, LLC, affiliate of Current Lighting], ¶ 14; *Aff. of Melissa Eichholz* [President of Alternative Fuels], ¶ 19.)

world”]; accord Matter of Ski Train Fire in Kaprun Austria on Nov. 11, 2000, 230 F Supp 2d 403, 411 [SD NY 2002], motion to certify denied 2005 WL 1523508 [SD NY 2005 (SAS)]; Matter of Aluminum Warehousing Antitrust Litig., 90 F Supp 3d 219, 232 [SD NY 2015] [holding that the court lacked jurisdiction over the parent based on the acts of the subsidiary in the absence of allegations of facts “which support a disregard of corporate formalities,” the court noting that “[i]nstead, there is simply a website that touts the global reach of a family of companies”]; see also Berkshire Life Ins. Co. of Am. v Hagerman, 2010 WL 2771839, at * 4 [ED NY, July 13, 2010, No. 09-CV-2037 [ILG] [holding that the use of the parent’s logo on its subsidiary’s insurance documents was insufficient to show the parent’s control needed to pierce the corporate veil, “especially” where the policy explicitly stated that it was issued by the subsidiary]; Porter v LSB Indus., Inc., 192 AD2d 205, 213 [4th Dept 1993] [holding that where the parent made an un rebutted showing that it was a mere holding company, the subsidiary’s use of the parent’s registered trademark did not support the exercise of jurisdiction over the parent]¹¹.)

The court further holds that plaintiffs fail to produce evidence that BHI dominated and controlled the Applied Defendants and that the Applied Defendants acted as a “mere department” of BHI in entering into the transactions with plaintiffs. It is well settled that for a New York court to exert long-arm jurisdiction over a foreign parent corporation based on the activities of the foreign parent corporation’s subsidiary, “the parent company’s degree of control over the subsidiary’s activities ‘must be so complete that the subsidiary is, in fact, merely a

¹¹ In Porter, the trademark was registered to the parent. Here, in contrast, evidence produced by plaintiffs on a prior motion shows that the trademark, “Berkshire Hathaway Group,” is registered by National Liability & Fire Insurance Company and National Indemnity Company [Breakaway Action, NYSCEF Doc. No. 123], companies which plaintiffs allege are subsidiaries of BHI. (Dowd Aff., ¶¶ 10-11, 17.)

department of the parent.” (Amsellem v Host Marriott Corp., 280 AD2d 357, 359 [1st Dept 2001] [quoting Delagi v Volkswagenwerk AG of Wolfsburg, Germany, 29 NY2d 426, 432 [1972], rearg denied 30 NY2d 694].) Jurisdiction over a foreign parent may be asserted “when the activities of the parent show a disregard for the separate corporate existence of the subsidiary” (Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp., 751 F2d 117, 120 [2d Cir 1984] [Beech Aircraft] [weighing four factors to determine if a subsidiary is a mere department of the parent, for purposes of assertion of jurisdiction over the parent under New York law]; accord Wolberg v IAI North America, Inc., 161 AD3d 468, 468 [1st Dept 2018] [noting that the First Department has “adopted” the Beech Aircraft four factors]; see also Porter, 192 AD2d at 213 [holding that a “subsidiary will be considered a ‘mere department’ only if the foreign parent’s control of the subsidiary is so pervasive that the corporate separation is more formal than real”].) The four factors weighed in Beech Aircraft are “summarized as follows: first, ‘common ownership’—which is ‘essential’—; second, ‘financial dependency of the subsidiary on the parent corporation;’ third, ‘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 fourth, ‘the degree of control over the marketing and operational policies of the subsidiary exercised by the parent.’” (Jazini v Nissan Motor Co., 148 F3d 181, 184-185 [2d Cir 1998] [quoting Beech Aircraft, 751 F2d at 120-122].)

Here, plaintiffs satisfy the first factor of common ownership, as it is undisputed that the Applied Defendants are BHI’s wholly owned subsidiaries. It is also undisputed that Mark Hamburg is both CFO of BHI and President of AU Holding. (Defs.’ Memo. In Supp., at 29.) Common ownership and overlap of officers and directors of a parent and its subsidiaries are, however, “intrinsic to the parent-subsidiary relationship and, by themselves, not determinative.”

(Porter, 192 AD2d at 213-214 [citing Beech Aircraft, 751 F2d at 120].) Plaintiffs do not claim that there is any additional overlap of officers or directors, and make no factual showing that BHI interferes in the selection and assignment of the Applied Defendants' executive personnel or otherwise fails to observe corporate formalities. Nor, as held above, does the use of BHI's name in the Applied Defendants' proposals support a claim that BHI exercised the degree of control over marketing policies that would support a finding that the Applied Defendants acted as a mere department of BHI in entering into the transactions with plaintiffs. Finally, as also held above, plaintiffs fail to make a factual showing that any of plaintiffs' premiums were paid to BHI or that the extent to which the Applied Defendants are financially dependent upon BHI deviates from the norm in relationships between parents and wholly-owned subsidiaries.

In sum, plaintiffs fail to produce evidence that supports their bald assertions that BHI's "total control of defendants . . . and its receipt of all profits are factors showing a highly integrated enterprise warranting exercise of personal jurisdiction under CPLR 302 (a) (1)." (See Pls.' Memo. In Opp., at 19.) Plaintiffs accordingly fail to meet their burden of showing that jurisdiction may exist under CPLR 302 (a) (1) or to make a "sufficient start" warranting jurisdictional discovery.¹² This discovery would undoubtedly be extensive and burdensome, and cannot be countenanced under these circumstances in which plaintiffs have not come forward with tangible evidence of control or financial interdependence deviating from the parent-subsiary norm.¹³

¹² In view of this holding, the court does not and need not reach BHI's additional argument in the Alternative Fuels Action that it is not subject to jurisdiction because Alternative Fuels pleads that it is based in New Jersey and does not allege that the transactions on which its claims are based occurred in New York. (BHI Memo. In Supp., at 11.)

¹³ In so holding, the court notes that jurisdictional discovery as to whether "complex corporate relationships involved the parents' exercise of control over their subsidiaries" may be allowed, but only where the plaintiff has made a sufficient start in demonstrating that jurisdiction may exist. (See e.g. Edelman v. Taittinger, S.A., 298 AD2d 301, 302 [1st Dept 2002]; HBK Master Fund L.P. v Troika Dialog USA, Inc., 85 AD3d 665, 666 [1st Dept 2011].)

CPLR 302 (a) (2) and (3)

Plaintiffs' allegations of tortious conduct are based on the same conduct that plaintiffs rely on in attempting to show that BHI transacted business in New York under CPLR 302 (a) (1). (Compare Pls.' Memo. In Opp., at 21 ["The FACS [first amended complaints] allege that [BHI] directed, participated and was a co-conspirator in an illegal reinsurance scheme targeting a New York victim. The FACS allege that [BHI] completely controls the Shell Companies and reaps the profits of the fraud. . . . Here, allegations regarding [BHI's] advertising, receipt of monies from, control over and even the existence of the Berkshire Hathaway Group are in dispute precluding dismissal under CPLR 302"] with Pls.' Memo. In Opp., at 18 ["As described in the FACS and in more detail in the Dowd Affirmation, [BHI] does the business of insurance in New York by, *inter alia*, (1) allowing its name to be used on the actual Proposal given to Plaintiffs in New York, (2) allowing the Applied Defendants or 'Shell Companies' to claim that they are 'a member of Berkshire Hathaway,' and (3) by receiving premiums through [BHI's] fully-owned and controlled Shell Companies"].)

For the reasons stated in connection with plaintiffs' assertion of jurisdiction under CPLR 302 (a) (1), plaintiffs fail to meet their burden of showing that jurisdiction may exist under CPLR 302 (a) (2) and (3) or that jurisdictional discovery is warranted under these provisions.

Conclusion

The court has considered plaintiffs' remaining contentions and finds them to be without merit.¹⁴ BHI's motion to dismiss the first amended complaints against it will be granted with prejudice.

¹⁴ Although the first amended complaints plead jurisdiction only under CPLR 302, Plaintiffs also assert in the briefing of these motions that the court may have general jurisdiction over BHI pursuant to CPLR 301. They thus state in a footnote: "For the sake of clarity, given Berkshire's worldwide footprint it is clear that jurisdiction may be appropriate under CPLR 301." (Pls.' Memo. In Opp., at 21 n 2, 24.) This contention is insufficient on its face to

ORDER

It is accordingly hereby ORDERED that in the action brought by Breakaway Courier Corporation (Breakaway) (Index No. 654806/16), the motion (Mot. Seq. No. 006) of defendant Berkshire Hathaway Inc. (BHI) is granted to the extent of dismissing the first amended complaint against it with prejudice; and it is further

ORDERED that plaintiff Breakaway's request for jurisdictional discovery is denied; and it is further

ORDERED that the branch of plaintiff Breakaway's motion for an order compelling defendant BHI to post a bond (Mot. Seq. No. 001) is denied as moot; and it is further

ORDERED that in the action brought by Current Lighting & Electric, Inc., MAS Electrical Maintenance, LLC, and First Quality Maintenance II, LLC (Current Lighting) (Index No. 652316/17), the motion (Mot. Seq. No. 005) of defendant Berkshire Hathaway Inc. (BHI) is granted to the extent of dismissing the first amended complaint against it with prejudice; and it is further

ORDERED that plaintiff Current Lighting's cross-motion for jurisdictional discovery is denied; and it is further

ORDERED that the branch of plaintiff Current Lighting's motion for an order compelling defendant BHI to post a bond (Mot. Seq. No. 001) is denied as moot; and it is further

ORDERED that in the action brought by Alternative Fuels Transportation, Inc. (Alternative Fuels) (Index No. 652702/17), the motion (Mot. Seq. No. 004) of defendant

support jurisdictional discovery under CPLR 301. Plaintiffs do not otherwise make any factual or legal showing that BHI's activities are sufficient to support general jurisdiction under CPLR 301.

Berkshire Hathaway Inc. (BHI) is granted to the extent of dismissing the first amended complaint against it with prejudice; and it is further

ORDERED that plaintiff Alternative Fuel's cross-motion for jurisdictional discovery is denied; and it is further

ORDERED that the branch of plaintiff Alternative Fuel's motion for an order compelling defendant BHI to post a bond (Mot. Seq. No. 001) is denied as moot.

This constitutes the decision and order of the court.

Dated: New York, New York
August 26, 2019



MARCY FRIEDMAN, J.S.C.