UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RITCHIE CAPITAL MANAGEMENT, L.L.C., et al.,	:	
Plaintiffs,	:	14-CV-4819 (VSB)
- v -	:	**MEMORANDUM & ORDER**
COSTCO WHOLESALE CORPORATION,	:	
Defendant.	:	

Appearances:

Leonel V. Leyva
Victoria Jean Cioppettini
James T. Kim
Cole Schotz Meisel Forman & Leonard, P.A.
Hackensack, New Jersey
Counsel for Plaintiffs

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New York, New York
Counsel for Defendant

VERNON S. BRODERICK, United States District Judge:

Plaintiffs Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., and Ritchie Special Credit Investments, Ltd. (collectively, "Plaintiffs") bring this action against Defendant Costco Wholesale Corporation ("Defendant" or "Costco") for aiding and abetting fraud and for civil conspiracy. Because there is no basis to assert jurisdiction over Defendant, Defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2), (Doc. 24), is GRANTED, and this case is DISMISSED.

I. Background[1]

Costco, an international warehouse club retailer selling a wide variety of products, is a Washington State corporation with headquarters in Issaquah, Washington. (Am. Compl. ¶¶ 2-3, 15.)[2] Plaintiffs, a Delaware limited liability company and two Cayman Islands exempt companies, bring claims related to Costco's purported role in a fraudulent scheme run by a Minnesota-based now-convicted felon named Thomas Petters ("Petters"). (*See id.* ¶¶ 1, 12-14, 16.) The fraud, which Petters and his co-conspirators ran using a number of Minnesota-based companies and their affiliates, lasted for more than a decade and resulted in over $3 billion in unpaid debts. (*Id.* ¶¶ 1, 16, 84a-e.) Petters' scheme was based on his representations to lenders that he was able to buy brand-name consumer electronics at below-wholesale prices and sell those goods at substantial profit to warehouse retailers such as Costco. (*Id.* ¶ 2.) Based on those representations, Petters and entities controlled by Petters obtained loans from various lenders, including Plaintiffs. (*Id.* ¶¶ 2, 5, 6, 73.)

Beginning in 1992, Petters and Costco entered into a "business relationship" whereby Petters would sell brand-name consumer electronic goods to Costco, which, due to contractual prohibitions, could not obtain the goods directly from manufacturers or authorized distributors. (*Id.* ¶ 3.) Plaintiffs claim that in as early as 2000 Costco was aware that Petters had used counterfeit purchase orders to induce lenders into making loans to Petters' affiliates. (*See id.* ¶¶ 4, 18-21.) Specifically, in October 2000, General Electric Capital Corporation ("GECC"), a commercial lender that had issued a $50 million line of credit to Petters and a Petters affiliate to

[1] The following factual summary is drawn from the allegations of the Amended Complaint, which I assume to be true for purposes of this motion. My references to these allegations should not be construed as a finding as to their veracity, and I make no such findings.

[2] "Am. Compl." refers to the Amended Complaint. (Doc. 19.)

finance the purported purchase of consumer electronics, (*id.* ¶¶ 16-18), wrote to Costco requesting verification of 14 purchase orders purportedly issued by a Costco affiliate called National Distributors f/k/a National Clothing ("National Distributors"), (*id.* ¶¶ 2, 20). Despite Costco employees being aware that "the only legitimate information regarding the 14 purchase orders . . . were the purchase order numbers," (*id.* ¶ 21), Costco entered into an agreement with Petters whereby Costco would assist Petters in refinancing his debts to GECC and "covering up the truth concerning the National Distributors diverting scheme" in exchange for being relieved of liability for the 14 GECC purchase orders. (*Id.* ¶¶ 22-23.) Beginning in early 2001, Costco issued "guaranty letters" to GECC and other prospective lenders that enabled Petters "to obtain billions of dollars of purchase-order financing loans from investment funds." (*Id.* ¶ 5; *see also id.* ¶¶ 74, 85-90.)

In March of 2008, following Petters' representation that loan proceeds would be used to purchase Sony PlayStation consoles that had been pre-sold to Costco for $79 million (the "PlayStation Transaction"), Plaintiffs loaned $31 million to Petters and a Minnesota-based Petters affiliate called Petters Company, Inc. ("PCI"). (*Id.* ¶¶ 6, 16, 72, 73.) Petters and PCI stated that Costco would pay the $79 million within 115 days of March 21, 2008. (*Id.* ¶¶ 6, 73.) At least some of the PlayStation Transaction negotiations between Petters and Plaintiffs occurred in New York. (*Id.* ¶¶ 10-11.)

In September of 2008, federal and local law enforcement uncovered Petters' scheme. (*See id.* ¶¶ 1, 2, 82-88.) Petters' criminal trial, which took place in November 2009, revealed that the PlayStation Transaction was a fabrication—there were no PlayStations that had been purchased by PCI for resale to Costco. (*Id.* ¶¶ 7, 19.) Petters was convicted in December 2009 on twenty counts of fraud, money laundering, and related offenses. (*Id.* ¶ 1.) Petters was

sentenced to 50 years' imprisonment in April 2010, and substantially all of his assets were forfeited to the United States pursuant to a forfeiture judgment in excess of $3.5 billion. (*Id*.)

II. Procedural History

Plaintiffs initiated this lawsuit in the Supreme Court of the State of New York, County of New York on February 4, 2014 by filing a Summons with Notice.[3] (Doc. 2-1.) Following Defendant's demand for a complaint, (Doc. 2-3), Plaintiffs filed their complaint on April 9, 2014, (Doc. 2-4).[4] On April 22, 2014, Defendant requested information regarding Plaintiffs' citizenship for purposes of determining whether a federal court could exercise diversity jurisdiction. (*See* Doc. 2 ¶ 8.) On May 30, 2014, Plaintiffs' counsel confirmed that their clients do not have any members who are citizens of Washington State. (*See id.* ¶ 9; *see also* Doc. 2-5.) Defendant filed a Notice of Removal on June 27, 2014, and the action was removed to this Court. (*See* Doc. 2.)

On July 2, 2014, Defendant filed a letter stating its intention to move to dismiss and seeking an extension on its time to respond to the complaint. (Doc. 9.) On July 3, I granted Defendant's request, (Doc. 10), and on July 21, Defendant filed a pre-motion letter seeking leave to file a motion to dismiss Plaintiffs' complaint for lack of personal jurisdiction, failure to file suit within the applicable statute of limitations, and failure to state a claim, (Doc. 13). On July 24, Plaintiffs filed their response opposing Defendant's anticipated motion. (Doc. 14.) I granted Defendant's request for a pre-motion conference, and, after resolving various scheduling issues, set the pre-motion conference for October 10, 2014. (*See* Docs. 17, 18.)

[3] Under New York law a litigation can be initiated by filing and serving a summons with notice. N.Y.C.P.L.R. § 304.

[4] The Summons with Notice, which was filed under Index No. 650382/2014, was filed by three entities in addition to Plaintiffs. Those entities are not named as plaintiffs in the complaint and are not party to this suit. (*See* Doc. 2-4.)

At the pre-motion conference on October 10, Plaintiffs requested and I granted leave to file an amended complaint. (*See* Doc. 20 at 7-8.) I also granted Defendant leave to move to dismiss the forthcoming amended complaint should they wish to do so without the need to file a pre-motion letter. (*See id.*) On October 17, 2014, Plaintiffs filed their Amended Complaint. (Doc. 19.) The parties filed a joint letter on October 22 proposing a briefing schedule for Defendant's motion to dismiss and I approved that schedule the following day. (Docs. 22, 23.) Defendant filed its motion to dismiss the Amended Complaint, (Doc. 24), and accompanying declaration with exhibits, (Doc. 25), and memorandum of law, (Doc. 26), on November 13, 2014. Plaintiffs filed their opposition memorandum, (Doc. 30), and declaration with exhibits, (Doc. 31), on December 19, 2014, and Defendant filed its reply memorandum, (Doc. 34), and reply declaration with an exhibit, (Doc. 35), on January 16, 2015.[5] Costco filed a supplemental letter on July 30, 2015, (Doc. 37), alerting me to a recent decision from the Northern District of Illinois relating to the Petters scheme, Plaintiffs filed a response to Costco's letter on August 7, (Doc. 38), and Costco filed a letter in reply on August 13, (Doc. 39).

III. Legal Standards

The "plaintiff bears the burden of demonstrating personal jurisdiction over a person or entity against whom it seeks to bring suit." *Penguin Gr. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2d Cir. 2010); *accord MacDermid, Inc. v. Deiter*, 702 F.3d 725, 727 (2d Cir. 2012). "[T]o survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists." *Thomas v. Ashcroft*, 470 F.3d 491, 495 (2d Cir. 2006). A

[5] On November 24, 2014, I requested that the parties submit supplemental letters explaining why, in light of the November 10, 2014 ruling in *Ritchie Capital Management, L.L.C. v. JPMorgan Chase & Co.*, No. 14-CV-2557, this case should not be transferred to the District of Minnesota. (Doc. 28.) I reviewed the parties' letters, (Docs. 32, 33), both of which opposed transfer and, on June 4, 2015, confirmed that I would not transfer this case to the District of Minnesota, (*see* Doc. 36).

prima facie case requires (1) procedurally proper service upon the defendant; (2) a statutory basis for personal jurisdiction; and (3) that "the exercise of personal jurisdiction . . . comport[s] with constitutional due process principles." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59-60 (2d Cir. 2012). When a court is sitting in diversity, the "breadth of a federal court's personal jurisdiction is determined by the law of the state in which the district court is located." *Reich v. Lopez*, 38 F. Supp. 3d 436, 454 (S.D.N.Y. 2014) (quoting *Thomas*, 470 F.3d at 495).

"A plaintiff can make [a prima facie] showing [of personal jurisdiction] through his own affidavits and supporting materials, containing an averment of facts that, if credited, would suffice to establish jurisdiction over the defendant." *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 208 (2d Cir. 2001) (internal quotation marks, citation, and alterations omitted); *accord Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 785 (2d Cir. 1999); *see also Hsin Ten Enter. USA, Inc. v. Clark Enters.*, 138 F. Supp. 2d 449, 452 (S.D.N.Y. 2000) (on motions to dismiss for lack of personal jurisdiction, "a court may consider matters outside the pleadings without converting the motion to dismiss into a motion for summary judgment"). In considering the pleadings and supporting materials, "all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor, notwithstanding a controverting presentation by the moving party." *A.I. Trade Finance, Inc. v. Petra Bank*, 989 F.2d 76, 79-80 (2d Cir. 1993); *accord Whitaker*, 261 F.3d at 208. A court is "'not bound to accept as true a legal conclusion couched as a factual allegation,' and a plaintiff may not rely on 'conclusory non-fact-specific jurisdictional allegations' to overcome a motion to dismiss." *Doe v. Del. State Police*, No. 10-CV-3003, 2013 WL 1431526, at *3 (S.D.N.Y. Apr. 4, 2013) (quoting *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir. 1998)).

IV. Discussion

Courts may exercise either general or specific personal jurisdiction. *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014). General jurisdiction allows a court to adjudicate "any and all" claims against a defendant, regardless of whether the claims are connected to the forum state. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). Specific jurisdiction renders a defendant amenable to suit only with respect to claims "arising out of or relating to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984); *Goodyear*, 131 S. Ct. at 2851.

Resolution of a motion to dismiss for lack of personal jurisdiction is a two-step analysis. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 124 (2d Cir. 2002). A district court sitting in diversity in New York "must determine if New York law would confer upon its courts the jurisdiction to reach the defendant," and "[i]f there is a statutory basis for jurisdiction, the court must then determine whether New York's extension of jurisdiction in such a case would be permissible under the Due Process Clause of the Fourteenth Amendment." *Id.* Plaintiffs argue only for jurisdiction under New York Civil Practice Law and Rules ("CPLR") § 301, New York's general jurisdiction statute. Although Plaintiffs do not argue for jurisdiction under CPLR § 302, New York's long-arm specific jurisdiction statute, and have abandoned an argument for jurisdiction on that basis, I nevertheless have considered whether there is a basis for jurisdiction under § 302.[6] For the reasons explained below, construing Plaintiffs' allegations in the light most favorable to Plaintiffs, I find there is no basis to exercise personal jurisdiction over Costco in this case.

[6] With regard to the requirement that Plaintiff establish a prima facie case, Defendant does not challenge whether service was proper.

A. *General Jurisdiction*

Under CPLR § 301, a New York court "may exercise jurisdiction over persons, property, or status as might have been exercised heretofore." New York courts interpret Section 301 to provide a statutory basis to exercise general jurisdiction over an out-of-state corporation that "has engaged in such a continuous and systematic course of 'doing business' in New York that a finding of its presence in New York is warranted." *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 224 (2d Cir. 2014) (alterations and internal quotation marks omitted) (quoting *Landoil Res. Corp. v. Alexander & Alexander Servs.*, 77 N.Y.2d 28, 33 (1990)). A corporation is "doing business" in New York if it "does business in New York not occasionally or casually, but with a fair measure of permanence and continuity." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000) (internal quotation marks omitted).

In arguing that this Court lacks personal jurisdiction under a general jurisdiction theory, Costco correctly focuses on the second prong of the jurisdictional analysis—whether the exercise of jurisdiction over Costco comports with due process. (*See generally* D's Mem. 8-10; D's Reply Mem. 1-5.)[7] Recent Supreme Court precedent supplies guidance on this question. In *Daimler AG v. Bauman*, 134. S. Ct. at 751, the Supreme Court confirmed that consistent with due process a corporation may be subject to general jurisdiction "only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" *Id.* (alteration in original) (quoting *Goodyear*, 131 S. Ct. at 2851) (holding general jurisdiction did not exist over German company even assuming company's United States subsidiary was subject to general jurisdiction in California and

[7] "D's Mem." refers to Defendant's Memorandum of Law in Support of Defendant Costco Wholesale Corporation's Motion to Dismiss the First Amended Complaint. (Doc. 26.) "D's Reply Mem." refers to Defendant's Reply Memorandum of Law in Support of Defendant Costco Wholesale Corporation's Motion to Dismiss the First Amended Complaint. (Doc. 34.)

imputing those contacts to company, because due process did not permit exercise of general jurisdiction over company due to its slim contacts with California). Aside from "exceptional case[s]," a corporation is only "at home" and subject to general jurisdiction in its state of incorporation and its principal place of business. *Id.* at 761 & n.19; *accord Sonera*, 750 F.3d at 225.

The Court in *Daimler* explained that "general jurisdiction has come to occupy a less dominant place in the contemporary scheme." 134 S. Ct. at 758. As far back as *International Shoe Co. v. Washington*, 326 U.S. 310, 317-18 (1954), the Supreme Court recognized that *general* jurisdiction arises from activities that are "so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from those activities," whereas *specific* jurisdiction arises from "continuous and systematic" activities only if those activities give rise to the claims in the suit. *Id.*; *see Daimler*, 134 S. Ct. at 761. In other words, the law has developed to make clear that "ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." *Goodyear*, 131 S. Ct. at 2855.

Drawing on these principles, the *Daimler* Court explicitly rejected as "unacceptably grasping" the view that it is appropriate for courts to exercise general jurisdiction "in every State in which a corporation engages in a substantial, continuous, and systematic course of business." *Daimler*, 134 S. Ct. at 761 (internal quotation marks omitted); *accord Goodyear*, 131 S. Ct. at 2856 (rejecting the view that "any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed"); *see also id.* at 2857 n.6 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales."). That is because "[a] corporation that

operates in many places can scarcely be deemed at home in all of them." *Daimler*, 134 S. Ct. at 762 n.20. If it were otherwise, the Court explained, "'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States." *Id.* Accordingly, the relevant inquiry is whether the non-domiciliary corporation's contacts with the forum state are substantial enough relative to its national and international activities so as to constitute an "exceptional case" in which the corporation is "at home" in the forum. *See Daimler*, 134 S. Ct. at 761 n.19, 762 n.20 (general jurisdiction "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide").

Daimler therefore "expressly cast[s] doubt on previous Supreme Court and New York Court of Appeals cases that permitted general jurisdiction on the basis that a foreign corporation was doing business through a local branch office in the forum." *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014) (citing *Daimler*, 134 S. Ct. at 761 n.18); *accord Sonera*, 750 F. 3d at 224 n.2 ("not[ing] some tension between *Daimler*'s 'at home' requirement and New York's 'doing business' test for corporate 'presence'" and observing that "*Daimler*'s gloss on due process may lead New York courts to revisit" the "doing business" analysis); *Reich*, 38 F. Supp. 3d at 454-55 ("The Supreme Court's recent decision in *Daimler AG v. Bauman* has brought uncertainty to application of New York's 'doing business' rule. As a result, it is unclear whether existing New York general jurisdiction jurisprudence remains viable."); *Cortlandt St. Recovery Corp. v. Deutsche Bank AG, London Branch*, No. 14-CV-1568, 2015 WL 5091170, at *3 (S.D.N.Y. Aug. 28, 2015). The factors relevant to whether a corporation's activities were sufficiently "continuous and systematic" to establish general jurisdiction delineated by New York courts prior to *Daimler* and *Gucci* are, after *Daimler*, "relevant only if they exist to such a degree in comparison to the corporation's overall national and international presence that would

render the corporation an 'exceptional case' where it is at home in [an] additional forum." *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, No. 14-CV-8679, 2015 WL 539460, at *4 (S.D.N.Y. Feb. 6, 2015.)

Applying this framework, I find that while Plaintiffs allege a series of contacts with New York, these activities, relative to Costco's out-of-state domestic and international activities, are not sufficiently substantial so as to render Costco "at home" in New York. Costco is a Washington State corporation that is headquartered in Issaquah, Washington. (Am. Compl. ¶ 15.) Accordingly, in order to find general jurisdiction over Costco the facts would have to establish that, as Plaintiffs urge, (Ps' Opp. 6-9)[8], this is an "exceptional case." *Daimler*, 134 S. Ct. at 761 n.19. A review of Plaintiffs' own allegations and the documents they have submitted to support their arguments in favor of jurisdiction demonstrate that this case is far from exceptional. Moreover, despite the holdings and guidance contained in the relevant case law, Plaintiffs do not even attempt to analyze Costco's amount of business in New York compared with its overall national and international presence.

As an initial matter, the scope of Costco's operations is extensive. Costco operates an international chain of 671 membership warehouses in 474 locations in the United States (in 43 states and Puerto Rico), 88 locations in Canada, 34 in Mexico, 26 in the United Kingdom, 20 in Japan, 11 in Korea, ten in Taiwan, seven in Australia, and one in Spain, employs 189,000 full and part-time employees, and has annual revenues of $112.6 billion. (Leyva Decl. Ex. B, at 2-3.)[9] These facts alone suggest that to establish that the exercise of jurisdiction over Costco

[8] "Ps' Opp." refers to Plaintiffs' Memorandum of Law in Opposition to Costco Wholesale Corporation's Motion to Dismiss the First Amended Complaint. (Doc. 30.)

[9] "Leyva Decl." refers to the Declaration of Leo V. Leyva, Esq. in Opposition to Costco Wholesale Corporation's Motion to Dismiss. (Doc. 31.)

comports with due process Plaintiff would need to demonstrate that a disproportionate concentration of Costco's global business occurs in New York. Plaintiffs do not come close; the contact Costco has with New York that Plaintiffs identify simply does not support their statement that "this is precisely the type of 'exceptional case' that the Supreme Court contemplated in *Daimler*." (P's Opp. 8.) Plaintiffs aver that Costco's annual revenue from New York is $2.8 billion, (*id.*); assuming the truth of Plaintiffs' assertion, this figure amounts to only a small fraction—2.49%—of Costco's aggregate annual revenue. (*See* Ps' Opp. 8; *see also* Leyva Decl. Ex. B, at 3.) Plaintiffs also rely on the fact that Costco has seventeen warehouses in New York, (Ps' Opp. 8; *see also* Leyva Decl. Ex. A), but New York warehouses only comprise 2.53% of Costco's total number of warehouses, (*see* Leyva Decl. Ex. B, at 2).[10] Likewise, Plaintiffs' assertion that Costco has 3,400 New York employees, (Ps' Opp. 8), means that Costco's in-state employees account for only 2.64% of Costco's nationwide workforce and 1.80% of Costco's worldwide workforce, (*see* Leyva Decl. Ex. B, at 3).

Based on these figures, the proportion of business Costco does in New York is similar to the proportion of business the defendant in *Daimler* did in California. Although Daimler was the largest supplier of luxury vehicles in California with $4.6 billion in annual sales in the state, *Daimler*, 134 S. Ct. at 752, 767; Daimler's business in California accounted for only 10% of Daimler's new vehicle sales in the United States and only 2.4% of Daimler's worldwide sales, *id.* at 752, and thus Daimler was not "at home" in California for purposes of general jurisdiction, *id.* at 760. Here, Plaintiffs' jurisdictional assertions are likewise insufficient to make a prima facie

[10] Costco submitted additional documentation highlighting that six states have more Costco warehouse stores than New York. (*See* D's Reply Mem. 4; Reply Declaration of Adam M. Harris in Further Support of Costco Wholesale Corporation's Motion to Dismiss the First Amended Complaint, Ex. A.) This documentation is entirely consistent with the documentation provided by Plaintiffs and provides additional support for the determination that this is not an exceptional case. It is proper for me to consider Defendant's submission of these documents on a 12(b)(2) motion. *See, e.g., Pilates, Inc. v. Pilates Inst., Inc.*, 891 F. Supp. 175, 178 n.2 (S.D.N.Y. 1995).

case of general jurisdiction as nothing in the Supreme Court's jurisprudence "suggests that [Costco's] particular quantum of local activity should give [New York] authority over a far larger quantum of activity having no connection to any in-state activity." *See id.* at 762 n.20. Therefore, Plaintiffs have failed to sustain their burden of demonstrating personal jurisdiction under a theory of general jurisdiction and the Amended Complaint must be dismissed.

B. *Specific Jurisdiction*

In New York, CPLR § 302(a) provides the statutory basis for "specific jurisdiction over a non-domiciliary defendant arising out of particular acts." *Reich*, 38 F. Supp. 3d at 457 (internal quotation marks omitted). Jurisdiction is authorized if the claims arise from when the non-domiciliary:

> (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; or (4) owns, uses or possesses any real property situated within the state.

CPLR § 302(a). Defendant argues that there is no basis for specific jurisdiction under any of the subsections of CPLR § 302(a). (*See* D's Mem. 10-17.) Plaintiffs do not respond to these arguments—they do not mention Section 302(a) in their briefing or even raise the possibility of specific jurisdiction—and therefore they have abandoned the argument that specific jurisdiction applies here.[11] *Cf. Gundlach v. Int'l Bus. Machines Corp.*, No. 11-CV-846, 2012 WL 1520919,

[11] Plaintiffs' response to Defendant's pre-motion letter cursorily addresses CPLR § 302(a), saying that because of Costco's presence in New York (warehouses, employees, etc.), "each and every one of [subsections (1), (3) and (4)] applies to Costco." (*See* Doc. 14 at 2.) However, despite Costco raising arguments against specific jurisdiction in its opening brief, (*see* D's Mem. 10-17), Plaintiffs do not press those arguments in their opposition. Under these facts, Plaintiffs' pre-motion letter is insufficient to preserve this argument.

at *8 n.10 (S.D.N.Y. May 1, 2012) (plaintiff made explicit that he would not argue a Section 302 theory and accordingly had "abandoned any claim that the Court has jurisdiction over [the defendant] under CPLR section 302."); *Arquest, Inc. v. Kimberly-Clark Worldwide, Inc.*, No. 07-CV-11202, 2008 WL 2971775, at *11 (S.D.N.Y. July 31, 2008) ("Plaintiffs make no mention of specific jurisdiction in their supplemental brief, and appear to have abandoned this argument."). To demonstrate that jurisdiction would not be appropriate regardless of which theory—specific or general—Plaintiff might assert, I have considered whether specific jurisdiction is applicable and conclude that there is no basis for specific jurisdiction here.

CPLR § 302(a)(1) confers specific jurisdiction when a defendant transacts business in New York and that transaction has an "articulable nexus, or a substantial relationship," with the claims asserted. *Licci*, 673 F.3d at 66. It is not sufficient that the claims are merely related to the defendant's in-state business. *Id.* at 66-67. While Plaintiffs make assertions regarding Defendant's business transactions in New York, most notably that Costco has a retail presence in New York, (*see* Ps' Opp. 8; Leyva Decl. Exs. A, B), Plaintiffs provide no evidence to support a finding that there is any relationship between Plaintiffs' claims for fraud and civil conspiracy and Costco's New York retail operations.[12] Accordingly, CPLR § 302(a)(1) does not provide a basis for jurisdiction.

To establish jurisdiction under CPLR § 302(a)(3) a plaintiff must show that the defendant committed a tortious act outside of New York, the cause of action arose from that act, the act caused injury to a person or property in New York, and either the defendant engaged in "one of four alternative forms of ongoing New York activity" or the defendant derived substantial

[12] In a letter unrelated to the instant motion, Plaintiffs explained that "Costco is believed to have acted largely from its headquarters in Washington," citing to communications from Costco headquarters in Washington attached to the Amended Complaint. (Doc. 32 at 3 & n.7.)

revenue from interstate or international commence and expected or should have expected that the act would have consequences in New York. *Doe v. Del. State Police*, 939 F. Supp. 2d 313, 326 (S.D.N.Y. 2013) (internal quotation marks omitted). Under the well-established "situs-of-injury" test, a tortious act "caused injury . . . in New York" if the "original event which caused the injury" occurred in New York. *Bank Brussels Lambert*, 171 F.3d at 791. When a fraud is committed outside of New York, the key question is "where the first effect of the tort was located that ultimately produced the final economic injury." *Id.* at 792. Plaintiffs' allegations regarding the effects of the fraud in New York amount to, in essence, that the negotiations between Plaintiffs' agents and Petters regarding the PlayStation Transaction took place at least in part in New York and that at least one of the Plaintiffs maintained an office in New York during the relevant time. (Am. Compl. ¶¶ 9-12.) These allegations, which do not address where Plaintiffs acted in reliance on the purported misrepresentations, are not sufficient to show that Costco's acts caused injury in New York. *See, e.g.*, *Bank Brussels Lambert*, 171 F.3d at 792 (plaintiff's disbursement of funds following misrepresentations was "original event that caused the injury" to a bank with a New York office); *Miller Inv. Trust v. Xiangchi Chen*, 967 F. Supp. 2d 686, 696 (S.D.N.Y. 2013) (location of first action in reliance on misrepresentation is location of the "original event" giving rise to the injury); *de Ganay v. de Ganay*, No. 11-CV-6490, 2012 WL 6097693, at *6 (S.D.N.Y. Dec. 6, 2012) ("original event" was French court liquidating the plaintiff's marital estate in reliance on misrepresentation). CPLR § 302(a)(3) thus does not provide a basis for jurisdiction over Defendant.

The remaining statutory bases for specific jurisdiction over Defendant are similarly inapplicable. Plaintiffs make no allegations that Costco committed any tortious acts in New York, nor do any of the materials submitted in connection with personal jurisdiction suggest that

any of Plaintiffs' allegations regarding Costco involve torts within in New York. CPLR § 302(a)(2) thus does not apply. Finally, CPLR § 302(a)(4) is wholly inapplicable because although Plaintiffs allege that Costco maintains a physical footprint in New York, Plaintiffs' allegations do not arise from Costco's ownership or use of that real property.

C. *Jurisdictional Discovery*

Plaintiffs have not sought jurisdictional discovery, instead relying on the factual allegations in the Amended Complaint and their sworn submissions in connection with this motion.[13] In any event, jurisdictional discovery is not warranted here.

District courts have broad discretion in deciding whether to order jurisdictional discovery. *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 255 (2d Cir. 2007); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981). To avoid what could amount to a fishing expedition, jurisdictional discovery is appropriate when "Plaintiffs' preliminary showings . . . reveal more than mere speculations or hopes that jurisdiction exists." *Reich*, 38 F. Supp. 3d at 459 (internal quotation marks omitted). Plaintiffs who fail to state a prima facie case for personal jurisdiction are not automatically entitled to jurisdictional discovery. *Jazini*, 148 F.3d at 186. As a result, "[d]istrict courts in this [C]ircuit routinely reject requests for jurisdictional discovery where a plaintiff's allegations are insufficient to make out a *prima facie* case of jurisdiction." *Stutts v. De Dietrich Grp.*, 465 F. Supp. 2d 156, 169 (E.D.N.Y. 2006) (collecting cases).

Plaintiffs have failed to make a prima facie case for personal jurisdiction and have identified no facts amounting to a "sufficient start toward establishing" jurisdiction, *Biro v.*

[13] Plaintiffs simply note that "[w]here, as here, discovery has not yet occurred, a plaintiff need only make a prima facie showing that the court possesses personal jurisdiction over the defendant." (Ps' Opp. 6.) Plaintiffs do not address whether there is a basis to proceed with discovery should I find that they have not made a prima facie showing of personal jurisdiction.

Condé Nast, No. 11-CV-4442, 2012 WL 3262770, at *8 (S.D.N.Y. Aug. 10, 2012) (internal quotation marks omitted); *see also Reich*, 38 F. Supp. 3d at 459. Moreover, Plaintiffs have not put forth any arguments, and I do not glean any on the record before me, suggesting that they could prove jurisdiction through additional discovery. *See Havlish v. Royal Dutch Shell PLC*, No. 13-CV-7074, 2014 WL 4828654, at *5 (S.D.N.Y. Sept. 24, 2014). In particular, because "it is hard to see why much in the way of discovery would be needed to determine where a corporation is at home," *Daimler*, 134 S. Ct. at 762 n.20, even if Plaintiffs had requested jurisdictional discovery it is not appropriate here.

D. *Statute of Limitations*

Because I find that this Court lacks jurisdiction over Defendant, I decline to consider the arguments raised by Defendant's 12(b)(6) motion. *See DH Servs., LLC v. Positive Impact, Inc.*, No. 12-CV-6153, 2014 WL 496875, at *2 (S.D.N.Y. Feb. 5, 2014); *Rosario v. Cirigliano*, No. 10-CV-6664, 2011 WL 4063257, at *6 (S.D.N.Y. Sept. 12, 2011) (having found improper service, "[t]he Court declines to reach Defendants' contention that the Complaint should be dismissed for failure to state a claim, or address whether the statute of limitations ceased to be tolled . . . as the Court is yet without jurisdiction to do so."); *Mende v. Milestone Tech., Inc.*, 269 F. Supp. 2d 246, 251 (S.D.N.Y. 2003) ("Before addressing Defendants' Rule 12(b)(6) motion to dismiss, the Court must first address the preliminary questions of service and personal jurisdiction."). I therefore do not address Defendant's argument that this lawsuit was not timely filed.

V. Conclusion

For the foregoing reasons, Defendant's motion to dismiss, (Doc. 24), for lack of personal jurisdiction is GRANTED, and the Amended Complaint is DISMISSED.

The Clerk's Office is respectfully directed to terminate all pending motions and close the case.

SO ORDERED.

Dated: September 21, 2015
New York, New York

Vernon S. Broderick
United States District Judge