NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 20, 2024

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Edward L. Weiner
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Re: *Joshua Everett Bushman, Administrator for the Estate of Calvin Van Pelt, et al.* v. *Salvo Technologies, Inc., d/b/a 80 P Builder, et al.*, CL 2023-6260

Dear Mr. Weitzner and Mr. Weiner:

This matter is before the court on the motion of Defendant Salvo Technologies, Inc., d/b/a 80P Builder (hereinafter "Salvo"), to dismiss for lack of personal jurisdiction. Oral argument was heard by the court on February 9, 2024 and the matter was taken under advisement. After review of the parties' memoranda and oral arguments, the court GRANTS Salvo's motion to dismiss for lack of personal jurisdiction for the reasons set forth below.

BACKGROUND

Plaintiff is the administrator for the Estates of Calvin Van Pelt and Ersheen Elaiaiser who were killed by Zachary Burkard using a pistol which Burkard is alleged to have built from a kit allegedly sold to him by Salvo. As set forth in the *Amended Complaint* (filed September 29, 2023), Plaintiff is suing Salvo, as well as Defendants BUL USA, LLC, d/b/a 80P Builder (hereinafter "BUL USA"), Okori, LLC, d/b/a 80P Builder

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(hereinafter "Okori"), and Polymer80, Inc. (hereinafter "Polymer80") on several theories of recovery: Negligence/Gross Negligence (Count 1), Negligence *Per Se* (Count 2), Negligent Entrustment (Count 3), Common Law Conspiracy (Count 5), and Public Nuisance (Count 6).[1]

SALVO'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

For purposes of Salvo's motion to dismiss, the court may consider the existence of personal jurisdiction based upon the facts alleged in the complaint. *See e.g., Krantz v. Air Line Pilots Assoc.,* 245 Va. 202, 207 (1993) ("the facts alleged indicate that Nottke has engaged in a purposeful activity in Virginia, and has had the minimum contact necessary for Krantz to maintain his action in the Commonwealth") and *Mercer v. MacKinnon,* 297 Va. 157, 159 (2019) ("facts are drawn from the allegations in the complaint"). While the parties have filed affidavits concerning facts related to personal jurisdiction, those affidavits are consistent with the facts alleged in the *Amended Complaint*.

The following are the material facts alleged in the *Amended Complaint*:

> Defendant Salvo Technologies, Inc., doing business both as 80P Builder and as Zaffiri Precision, is a Florida corporation headquartered in Largo, Florida.

Amended Complaint ¶ 18.

> On or around February 1, 2021, Defendant Burkard purchased, from the 80P Builder website, all the components necessary to assemble a Polymer80 PF940C handgun, including a Polymer80 pistol frame kit and a Zaffiri Precision slide and barrel.

Amended Complaint ¶ 91.

> On or around February 1, 2021, 80P Builder knowingly shipped a complete gun building kit -- including the Polymer80 pistol frame kit, the slide, and the barrel -- across state lines, from a warehouse in North Carolina directly to Defendant Burkhard's home in Springfield, Virginia.

Amended Complaint ¶ 96.

> From 2018 until March 1, 2021, Defendants BUL USA, LLC and Okori, LLC, together or separately, were responsible for the operation of the 80P Builder website.

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[1] Plaintiff is also suing Zachary Burkhard, but only in Count 4 (Wrongful Death) and, although a claim for punitive damages is not a cause of action, Plaintiff is suing the corporate defendants for punitive damages (Count 7). Punitive damages are also sought in the *ad damnum* clauses.

Amended Complaint ¶ 21.

Further, "[o]n March 1, 2021, Salvo Technologies entered into an asset purchase agreement with Okori to purchase 80P Builder." *Amended Complaint* ¶ 115. The *Asset Purchase Agreement* (hereinafter "*APA*") provided, *inter alia*, that Salvo:

> obtained virtually all of 80P Builder's assets, including . . . the name and exclusive rights to "80P Builder"; Okori's websites and domains, including the 80pbuilder.com domain name . . . .

Amended Complaint ¶ 116(a).[2]

THE COURT LACKS PERSONAL JURISDICTION OVER SALVO

Plaintiff asserts that the court has personal jurisdiction over Salvo pursuant to Code § 8.01-328.1(A)(1), which provides:

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's: 1. Transacting any business in this Commonwealth . . . .

Because Code § 8.01-328.1(A)(1) "speaks of transacting *any* business, it is a single-act statute requiring only one transaction in Virginia to confer jurisdiction on our courts." *Nan Ya Plastics Corp. v. DeSantis*, 237 Va. 255, 260 (1989) (emphasis in original).

Salvo argues (correctly) that the "'single act' can confer personal jurisdiction only as to those claims that 'aris[e] from' the Defendant's in-state actions," but that Plaintiff's claims do not "aris[e] from" Salvo's alleged act in Virginia -- selling kits on a website that was accessible in Virginia and shipping the kits to individuals in Virginia. *Motion To Dismiss* at 2. This is because "the alleged sale of the firearm parts to Burkard occurred before Salvo had acquired any of Okori's assets, including its intellectual property in 80P Builder." *Id.*

The material facts as alleged in the *Amended Complaint* are that the purchase of the kit by Burkard from the 80P Builder website took place "[o]n or around February 1, 2021." *Amended Complaint* ¶ 91. Moreover, on that same date, "80P Builder knowingly shipped a complete gun building kit . . . from a warehouse in North Carolina directly to Defendant Burkhard's home in Springfield, Virginia." *Amended Complaint* ¶ 96. The *Amended Complaint* further alleges that, "[o]n March 1, 2021, Salvo Technologies entered into an asset purchase agreement with Okori to purchase 80P Builder" (*Amended Complaint* ¶ 115) and that, "[f]rom 2018

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[2] Additional material facts from the *APA* and from the *McCalmon Declaration* are set forth where material.

until March 1, 2021, Defendants BUL USA, LLC and Okori, LLC, together or separately, were responsible for the operation of the 80P Builder website." *Amended Complaint* ¶ 21.

Accordingly, based upon the allegations of the *Amended Complaint*, Salvo could not have sold the kit to Burkhard; the seller would had to have been either BUL USA or Okori. It follows that, even if personal jurisdiction could constitutionally be established by selling kits on a website that was accessible in Virginia and shipping the kits to individuals in Virginia,[3] Salvo was not "[t]ransacting any business in

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[3] Selling kits on a website that was accessible in Virginia and shipping the kits to individuals in Virginia establishes personal jurisdiction. *See ALS Scan, Inc. v. Digital Service Consultants,* 293 F.3d 707 (4th Cir. 2002):

> [A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts.

293 F.3d at 714.

Following *ALS Scan, Inc., UMG Recordings, Inc. v. Kurbanov,* 963 F.3d 344 (4th Cir. 2020), explained that it "recognized the need to adapt traditional notions of personal jurisdiction" for online activities and websites, stating that, in the "context of online activities and websites":

> We have adopted the "sliding scale" model articulated in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), to help determine when a defendant's online activities are sufficient to justify the exercise of personal jurisdiction. *See ALS Scan*, 293 F.3d at 707.

963 F.3d at 352.

Thus, in the "context of online activities and websites," the Fourth Circuit has abandoned its "list of various nonexclusive factors to consider":

> (1) whether the defendant maintained offices or agents in the State; (2) whether the defendant maintained property in the State; (3) whether the defendant reached into the State to solicit or initiate business; (4) whether the defendant deliberately engaged in significant or long-term business activities in the State; (5) whether a choice of law clause selects the law of the State; (6) whether the defendant made in-person contact with a resident of the State regarding the business relationship; (7) whether the relevant contracts required performance of duties in the State; and (8) the nature, quality, and extent of the parties' communications about the business being transacted. (Citation omitted).

UMG Recordings, Inc. v. Kurbanov, 963 F.3d at 352.

this Commonwealth" and that Salvo's motion to dismiss must thus be granted, unless some theory of law ties Salvo into BUL USA or Okori on or prior to February 1, 2021. As discussed, *infra*, there is, however, no theory of law that ties Salvo into BUL USA or Okori on or prior to February 1, 2021. Accordingly, Salvo's motion to dismiss for lack of personal jurisdiction must be granted.

Plaintiff's Theories Tying Salvo to BUL USA or Okori

Plaintiff makes two arguments for tying Salvo to BUL USA or Okori on or prior to February 1, 2021: 1) Salvo was a co-conspirator with BUL USA or Okori and 2) Salvo was a successor to BUL USA or Okori.

1. Salvo Is Not A Co-conspirator

To support Plaintiff's contention that the court has personal jurisdiction over Salvo because Salvo is a co-conspirator, Plaintiff relies upon *Nathan* v. *Takeda Pharms. Am. Inc.*, 83 Va. Cir. 216 (Fairfax Cir. 2011) where this court stated that a defendant:

> who joins a conspiracy knowing that acts in furtherance of the conspiracy have taken or will take place in the forum state is subject to personal jurisdiction in that forum . . . .

83 Va. Cir. at 231.

The remainder of the sentence -- which Plaintiff omitted -- explains that the reason a defendant "who joins a conspiracy knowing that acts in furtherance of the conspiracy have taken or will take place in the forum state is subject to personal jurisdiction in that forum" is "because the defendant has *purposefully availed himself of the privileges of that state* and should reasonably expect to be haled into court there." *Id.* (emphasis added).[4] This is an important limitation in light of the Due Process Clause, which requires that "in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253

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[4] One of the federal cases upon which *Nathan* relied was *Noble Security, Inc. v. Miz Engineering, Ltd.*, 611 F. Supp. 2d 513 (E.D. Va. 2009) -- with which this court agrees -- which stated:

> The courts acknowledging the conspiracy theory of jurisdiction seem to recognize that a defendant who joins a conspiracy knowing that acts in furtherance of the conspiracy have taken or will take place in the forum state is subject to personal jurisdiction in that forum state because the defendant has purposefully availed himself of the privileges of that state and should reasonably expect to be haled into court there.

611 F. Supp. 2d at 539.

(1958). And, as further elucidated in *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980): "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 444 U.S. at 297.[5]

In the case at bar, Salvo could not have "purposefully avail[ed] itself of the privilege of conducting activities within" Virginia and could not have "reasonably anticipate[d] being haled into court" in Virginia as the *Amended Complaint* does not allege that Salvo had any ties to BUL USA and Okori prior to March 1, 2021, while the kit was sold to Burkhard on or about February 1, 2021. In particular, the *Amended Complaint* alleges that, "[f]rom 2018 until March 1, 2021, Defendants BUL USA, LLC and Okori, LLC, together or separately, were responsible for the operation of the 80P Builder website" (*Amended Complaint* ¶ 21) and that, "[o]n March 1, 2021, Salvo Technologies entered into an asset purchase agreement with Okori to purchase 80P Builder" (*Amended Complaint* ¶ 115) and that the *APA* included "Okori's websites and domains . . . ." *Amended Complaint* ¶ 116(a). Accordingly, the court cannot exercise personal jurisdiction over Salvo as a co-conspirator with either BUL USA or Okori.

2. Salvo Is Not A Successor In Interest

Salvo Has Not Impliedly Assumed Liabilities: To support its contention that the court has personal jurisdiction over Salvo because it is a successor in interest to BUL USA or Okori, Plaintiff cites *Harris v. T.I., Inc.,* 243 Va. 63 (1992), which held relevant part:

> In order to hold a purchasing corporation liable for the obligations of the selling corporation, it must appear that (1) the purchasing corporation expressly or impliedly agreed to

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[5] Salvo argues that Plaintiff's conspiracy argument "fails at the threshold" in light of, "*e.g., Walden* v. *Fiore,* 571 U.S. 277, 284 (2014) (jurisdiction cannot be based on conduct of 'third parties' over whom the defendant lacks control, but 'must arise out of contacts that the defendant *himself* creates with the forum' or else due process is violated (cleaned up))." *Reply* at 2. The court disagrees that Plaintiff's conspiracy argument "fails at the threshold" because the purposeful availment requirement, *i.e.*, "contacts that the defendant *himself* creates with the forum,'" could be met by a defendant who joins a conspiracy *knowing* that acts in furtherance of the conspiracy have taken or will take place in the forum state. This is exemplified by the cases discussed in *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985) of defendants who did not purposefully avail themselves of the forum state: "an out-of-state automobile distributor whose only tie to the forum resulted from a customer's decision to drive there" (citation omitted), "a divorced husband sued for child-support payments whose only affiliation with the forum was created by his former spouse's decision to settle there" (citation omitted), and "a trustee whose only connection with the forum resulted from the settlor's decision to exercise her power of appointment there . . . ." (citation omitted). 471 U.S. at 487, n.17. The Court explained that, in those instances, "the defendant has had no 'clear notice that it is subject to suit' in the forum and thus no opportunity to 'alleviate the risk of burdensome litigation' there." *Id.*

> assume such liabilities, [or] (2) the circumstances surrounding the transaction warrant a finding that there was a consolidation or *de facto* merger of the two corporations . . . .

243 Va. at 70.[6]

With respect to impliedly agreeing to assume liabilities, Plaintiff cites *States Roofing Corp. v. Bush Constr. Corp.*, 15 Va. App. 613 (1993), for the factors which may be considered in determining that a purchasing corporation impliedly agreed to assume liabilities. Plaintiff states that the factors which exist here are: "[a]dopting contract rights, completing existing contracts, purchasing inventory, purchasing trade accounts, occupying existing premises, and hiring former employees . . . ." *Opp.* at 7.[7] While these are some of the factors, there is another factor (which is not present here): "seeking and receiving payment pursuant to the [purchased company's] contract." 15 Va. App. at 618.

In contending that Salvo is a successor in interest to BUL USA or Okori, Plaintiff argues that Salvo impliedly assumed liabilities because: 1) "the owners of Okori continued to manage the 80P Builder website for Salvo after the sale" (citing *Amended Complaint* ¶ 117), 2) Salvo "undertook to continue the relationship with 80P Builder's suppliers after taking over operation of the website" (citing *McCalmon Declaration* ¶¶ 6-7, 9-10), 3) Salvo "sought to continue the relationships with 80P Builder's suppliers and customers by buying lists of both" (*Amended Complaint* ¶ 116), and 4) Salvo "held itself out to customers like Burkard as the 'ongoing concern of its predecessor' -- and in so doing, 'made a continued, active effort to maintain the same customers' (citation omitted)" (citing *Amended Complaint* ¶¶ 116, 118). *Opp.* at 8.[8]

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[6] Plaintiff does not argue either of the other accepted bases for successor liability: that the "purchasing corporation is merely a continuation of the selling corporation" or that the "transaction is fraudulent in fact." 243 Va. at 70.

[7] The "purchasing inventory" factor refers to the purchasing company's purchasing the inventory of the purchased company, not to the future purchase by the purchasing company of inventory from the same suppliers. *See States Roofing Corp.*, 15 Va. App. at 618 ("States purchased Eastern's . . . inventory").

[8] Salvo contends that there is no implied assumption of liability because, in the *APA*, there is an express protection against liability: "3. Assets Free and Clear: All Purchased Assets and inventory shall be sold and transferred to Buyer free and clear of all mortgages, pledges, security interests, liens, and encumbrances, and debt." The court rejects this contention as it views this language as only ensuring that the assets and inventory themselves have no encumbrances relating to financing for the assets, not that Salvo does not assume potential liabilities arising from a specific asset on which there are no encumbrances relating to financing, *e.g.*, customer contracts.

Addressing each of these arguments in turn.

1) The *Amended Complaint* alleges in pertinent part that, after "Salvo Technologies obtained virtually all of 80P Builder's assets" from Okori (*Amended Complaint* ¶ 116), the owners of Okori "were hired by Salvo Technologies to oversee the continued operation of the 80P Builder website." *Amended Complaint* ¶ 117. Presumably, Plaintiff is attempting to show that the owners of Okori were "former employees" who were hired by Salvo. There is, however, no allegation in the *Amended Complaint* that the owners of Okori were no longer employed by Okori, making them "former employees" of Okori who were hired by Salvo. Indeed, from all that can be gleaned from the *Amended Complaint* -- *see e.g.*, ¶ 119 (Okori and its owners "agreed not to directly complete (*sic*) with Salvo Technologies after the sale of 80P Builder to Salvo Technologies") -- it appears that, after the *APA*, Okori continued to exist as a corporate entity and that its owners remained employed by it. Further, the *APA* expressly states that "this is an asset sale only and Seller (*sic*)[9] is not purchasing the organization in its entirety . . . ." Accordingly, to the extent that Plaintiff is attempting to argue that the "hiring former employees" factor is present here, it is not.

2) Plaintiff contends that Salvo "undertook to continue the relationship with 80P Builder's suppliers after taking over operation of the website," citing *McCalmon Declaration* ¶¶ 6-7, 9-10. The cited paragraphs of the *McCalmon Declaration* state:

> 6. In February 2017, Polymer80 entered into an agreement with Okori, LLC.
>
> 7. All sales to Okori, LLC, were processed under the "80P Builder" name and were sent to the following address: 80P Builder, 4208 South Blvd Unit J, Charlotte, North Carolina 28209.
>
> 9. By information and belief, and at some time unknown to Polymer80, Salvo Industries acquired an interest in the "80P Builder" name from Okori, LLC.
>
> 10. Any Polymer80 purchases made by Salvo Industries were sent to the following address: 4208 South Blvd Unit J, Charlotte, North Carolina 28209.

Plainly, none of these paragraphs state that Salvo "undertook to continue the relationship with 80P Builder's suppliers" as there is no statement about what the relationship between Polymer80 and Salvo was, except that purchases were sent to the same address. Thus, there is no factual support for this aspect of Plaintiff's argument. Moreover, even if there was evidence to support Plaintiff's argument, the fact that

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[9] Presumably, this should be "Buyer."

Salvo acquired inventory from the same supplier as had Okori is not a factor in determining that a purchasing corporation impliedly agreed to assume liabilities.[10]

3) Plaintiff asserts that the *Amended Complaint* alleges that Salvo "sought to continue the relationships with 80P Builder's suppliers and customers by buying lists of both," citing ¶ 116. While ¶ 116(b) alleges that Salvo "obtained . . . Okori's . . . customer lists, . . . supplier lists," merely obtaining either list is not a factor in determining that a purchasing corporation impliedly agreed to assume liabilities. This is made clear by *States Roofing Corp.*, where the material evidence showed far more than just obtaining lists: "States' President, pledged 'to complete the [Eastern] contract' with Bush, 'to take care of [Bush's] work . . . to get more work with [Bush]' and resumed the work." 15 Va. App. at 618. Similarly, the Fourth Circuit case relied upon by *States Roofing Corp. -- City of Richmond* v. *Madison Management Group, Inc.*, 918 F.2d 438 (4th Cir. 1990) -- "concluded that the evidence was sufficient to support a finding that GHA, the purchasing corporation, 'implicitly assumed' the liabilities of Interpace, the selling corporation" because:

> GHA "took credit for Interpace's work on the project," "assumed responsibility for completing the project," "made efforts to collect money under the project," "participated in repairs" on the project, and retained many Interpace employees . . . .

States Roofing Corp., 15 Va. App. at 617.

Thus, as to customer lists, unless the purchasing company is agreeing to complete an existing unperformed, or partially performed, customer contract, the purchasing company is not impliedly agreeing to assume liabilities. As to supplier lists, acquiring inventory from the same supplier as had the company purchased is not a factor in determining that a purchasing corporation impliedly agreed to assume liabilities.

4) Plaintiff lastly argues that Salvo "held itself out to customers like Burkard as the 'ongoing concern of its predecessor' -- and in so doing, 'made a continued, active effort to maintain the same customers' (citation omitted)," citing *Amended Complaint* ¶¶ 116, 118.

¶ 116(c) alleges that Salvo:

> obtained . . . [a]ll rights under any and all customer contracts, including but not limited to open and uncompleted customer orders and customer contracts; customer contact information; customer files . . . .

¶ 118 alleges that, "[o]n information and belief, the operation of

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[10] Using the same suppliers would not be a factor because a supplier could supply inventory to multiple unrelated purchasers and thus does not suggest continuity of any particular purchasing enterprise.

the 80P Builder webstore continued uninterrupted before and after the sale to Salvo Technologies."

While Salvo obtained all rights to customer contracts and customer contact information and files, there is nothing in ¶ 116 or ¶ 118 indicating that Salvo "held itself out" to former customers as the ongoing concern of Okori as there is no allegation that Salvo contacted former customers to inform them that Salvo was now in Okori's shoes.

In addition to the above evidence not supporting Plaintiff's argument, ¶ 9 of the *APA* evidences that Salvo did not impliedly assume liabilities. That paragraph provides that Okori agrees to:

> indemnify and hold [Salvo] harmless from and against any loss, cost, expense, or claim of whatsoever nature asserted against [Salvo] by any individual, entity or third party at any time before or after the date of the closing with respect to any liabilities or obligations of [Okori] which arose prior to the Date of Closing, except as otherwise stated herein.

It is well-established in Virginia that the "guiding light in the construction of a contract is the intention of the parties . . . ." *Magann Corp. v. Electrical Works,* 203 Va. 259, 264 (1962). By agreeing to indemnify Salvo, the *APA* plainly implies that the parties intended that Salvo would not have any liability for any acts of Okori which occurred prior to the closing date of the agreement since such an agreement is inconsistent with Salvo impliedly assuming liabilities.

Salvo Has Not Merged With Okori: Plaintiff asserts that there has been a *de facto* merger between Salvo and Okori, citing the four factors set out in *Augusta Lumber Company, Inc. v. Broad Run Holdings,* 19 Cir. L20063341, 71 Va. Cir. 326 (2006):

> (1) continuity of enterprise; (2) continuity of shareholders; (3) cessation of operations by seller; and (4) assumption of the obligations necessary to uninterrupted continuation of normal business operations by the seller.

71 Va. Cir. at 328.

This summary is drawn from *Blizzard v. National R.R. Passenger Corp.,* 831 F. Supp. 544 (E.D. Va. 1993), which more fully sets out the elements of a *de facto* merger:

> (1) a continuity of the selling corporation's enterprise, including continuity of management, personnel, physical location, assets, and general business operations; (2) a continuity of ownership because the purchasing corporation acquires the assets with shares of its own stock, which ultimately are held by the selling corporation's shareholders; (3) prompt liquidation and dissolution of the selling

> corporation's business operations; and (4) an assumption by the purchasing corporation of the selling corporation's obligations necessary for normal operation of the seller's business. (Citations omitted).

831 F. Supp. at 547.

Plaintiff contends that the "first and fourth factors are adequately pleaded" because the *Amended Complaint* alleges that:

> operation of the 80P Builder webstore continued uninterrupted, under Jesse Sousana's continuous management, both before and after the sale to Salvo. See Am. Compl. ¶¶ 117-19. Under both Salvo and its previous owners, 80P Builder had the same management, personnel, assets, and retail location (*i.e.*, its website); that is continuity of enterprise.

Opp. at 9.

The three cited paragraphs of the *Amended Complaint* cited by Plaintiff allege as follows:

> 117. Under the agreement, Sousana and Cyrus became shareholders in Salvo Technologies and were hired by Salvo Technologies to oversee the continued operation of the 80P Builder website. Under the agreement, Sousana and Cyrus were entitled to bonuses if 80P Builder hit certain revenue targets during the first year of their employment with Salvo Technologies.
>
> 118. On information and belief, the operation of the 80P Builder webstore continued uninterrupted before and after the sale to Salvo Technologies.
>
> 119. Sousana and Cyrus agreed to train and develop Salvo Technologies' staff in all processes required to operate 80P Builder. Okori, Sousana, and Cyrus agreed not to directly complete with Salvo Technologies after the sale of 80P Builder to Salvo Technologies.

First factor: None of the above facts show continuity of enterprise; in fact, they contradict it in that Okori remained an on-going enterprise as evidenced by the fact that it "agreed not to directly complete with Salvo . . . ." ¶ 119. Moreover, there is no allegation in the *Amended Complaint* that the management of Salvo was the same as the management of Okori or that the personnel were the same (except for Sousana and Cyrus, whose only role at Salvo was limited to "oversee[ing] the continued operation of the 80P Builder website," not to managing Salvo); indeed, the personnel could not have been the same in that Sousana and Cyrus "agreed to "train and develop" Salvo's "staff." ¶ 119. The fact that *80P Builder* had the "same management, personnel, assets, and retail

location (*i.e.*, its website)" is not material.[11] What is material is whether the *corporate entity*, *Salvo*, had the same "management, personnel, physical location, assets, and general business operations" as Okori; there is no such allegation in the *Amended Complaint*.

Further, there was not continuity of assets or general business operations as Salvo only obtained Okori's 80P Builder assets and Okori continued as an on-going business.

Fourth factor: Nothing in ¶¶ 117-19 alleges that Salvo assumed Okori's obligations necessary for normal operation of Okori's business.

Second factor: Plaintiff contends that the "second factor -- continuity of shareholders -- has also been alleged. The owners of Okori were paid with Salvo stock and thereby became Salvo shareholders. *Id.* ¶ 117 . . . ." *Opp.* at 9. Plaintiff has misstated and misapplied the second factor. The second factor requires not merely that the purchasing corporation acquires *some* of the assets of the selling corporation, but that the purchasing corporation acquires "the assets," *i.e.*, all the assets, of the selling corporation. There is no allegation in ¶ 117 that Salvo acquired all the assets of Okori; in fact, the allegations in ¶ 116 are to the contrary. Thus, there was no showing of continuity of ownership as required to meet the second factor.

Third factor: Plaintiff asserts that the:

> third factor is satisfied because Okori's ghost-gun business is no longer operating. *See* Am. Compl. ¶ 116 (alleging that Salvo obtained "virtually all" of Okori's 80P Builder assets); *id.* ¶ 119 (alleging that Okori agreed not to compete with Salvo).

Opp. 9.

Plaintiff misapplies the third factor, which is "prompt liquidation and dissolution of the selling corporation's business operations . . . ." *Blizzard v. National R.R. Passenger Corp.*, 831 F. Supp. at 547. All that ¶ 116 alleges is that Salvo obtained virtually all of Okori's *80P Builder* assets, not that Salvo obtained all of Okori's assets or that Okori liquidated and dissolved its business operations. Indeed, the fact that Okori agreed not to compete with Salvo evidences that Salvo did not obtain all of Okori's assets and that Okori did not liquidate and dissolve its business operations.

In addition to showing that Plaintiff has not demonstrated the existence of the four *de facto* merger factors, some comment on Plaintiff's assertion that "courts find de facto mergers even where the predecessor continues to exist" (*Opp.* at 9) is in order as Plaintiff

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[11] For purposes of continuity of enterprise, a website is not a "retail location."

misapprehends the cases he cited.

Plaintiff observes that:

> courts find de facto mergers even where the predecessor continues to exist. *See Chi. Title*, 832 So. 2d at 812, 814; *In reSunSpot, Inc.*, 260 B.R. 88, 106 (Bankr. E.D. Va. 2000) ("[A] finding that the predecessor corporation remains after selling its assets is not fatal to a finding of successor liability."). What matters is "the de facto cessation of all business"; "continued existence de jure ... is immaterial." *Am. Ry. Express Co.* v. *Downing*, 132 Va. 139, 151 (1922).

Opp. at 9.

In *Chi. Title Ins. Co.* v. *Alday-Donalson Title Co. of Fla.*, 832 So. 2d 810 (Fl. Ct. App. 2002), Stewart Title, through a new corporation, acquired "all of the assets of the Alday Agencies," although the "Alday Agencies continue to exist as Florida corporations . . . ." 832 So. 2d at 812. Thus, the court's conclusion that the plaintiff had stated a claim for de facto merger was premised on the fact that all the assets had been purchased, which is not what is alleged in the case at bar.

Similarly, in *Huennekens* v. *Gilcom Corp. of Va. (In re Sunsport, Inc.)*, 260 B.R. 88 ((Bankr. E.D. Va. 2000), "SunSport transferred all of its assets to Gilcom . . . ." 260 B.R. at 101. Moreover, the court found that Gilcom was a "mere continuation" of SunSport (260 B.R. at 105) and did not opine on whether there was a *de facto* merger.

Finally, Plaintiff has partially misquoted *American Ry. Ex. Co. v. Downing,* 132 Va. 139 (1922), concerning *de jure* existence. What the Court actually stated was that "continued existence *de jure* of the constituent companies, *for the purpose of winding up their affairs or other purposes*, is immaterial." 132 Va. at 151 (emphasized language omitted by Plaintiff). In the case at bar, there is no allegation in the *Amended Complaint* that Okori's continued existence was for the purpose of winding up its affairs so that Okori's continued existence was not merely *de jure.* As to *de facto* existence, the Court stated that there must be "the *de facto* cessation of all business -- the abandonment of all life and operation according to the design of the charter of the constituent companies." *Id.* In the case at bar, there is no allegation in the *Amended Complaint* that Okori was ceasing all business or abandoning all life and operation; to the contrary, the *Amended Complaint* makes evident that, after the sale of the 80P Builder assets to Salvo, Okori continued in some form of business.

Jurisdictional Discovery

Plaintiff requests that it be allowed to conduct jurisdictional discovery, citing only Code § 8.01-277.1(B)(3), which provides:

> B. A person does not waive any objection to personal jurisdiction or defective process if he engages in conduct unrelated to adjudicating the merits of the case, including, but not limited to: . . . 3. Conducting discovery authorized by the court related to adjudicating the objection . . . .

By its plain language, Code § 8.01-277.1(B)(3) does not authorize the court to allow jurisdictional discovery; it relates merely to whether an objection to personal jurisdiction by a *defendant* is waived if *defendant* conducts jurisdictional discovery.[12] Thus, Code § 8.01-277.1(B)(3) is not relevant to whether *Plaintiff* may take jurisdictional discovery.

Further, while Plaintiff has not articulated what form of discovery he is requesting the court to allow, if Plaintiff was referring to discovery pursuant to Part 4 of the Rules of the Supreme Court of Virginia, several of those mechanisms are available to a party litigant without permission of the court, *e.g.*, Rule 4:5 (Depositions Upon Oral Examination), Rule 4:6 (Depositions Upon Written Questions), and Rule 4:9A (*Subpoena Duces Tecum*).[13]

The court DENIES Plaintiff's request for jurisdictional discovery.

CONCLUSION

For the reasons set forth above, Defendant's motion to dismiss for lack of personal jurisdiction is GRANTED and this matter is DISMISSED, without prejudice, as to Salvo Technologies, Inc., d/b/a 80 P Builder.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

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[12] Salvo asserted in its *Reply* that it is "well settled that jurisdictional discovery is not appropriate if the facts pleaded in the complaint are insufficient. *See, e.g., Trend Micro Inc.* v. *Open Text, Inc.*, 2023 WL 6446333, at *12 (E.D. Va. Sept. 29, 2023) (denying jurisdictional discovery where no sufficient contacts with Virginia alleged)." *Reply* at 5. In fact, *Trend Micro Inc.* did not address jurisdictional discovery.

[13] Of course, "enforcement of a subpoena seeking out-of-state discovery is generally governed by the courts and the law of the state in which the witness resides or where the documents are located." *Yelp, Inc. v. Hadeed Carpet Cleaning,* 289 Va. 426, 435 (2015).

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOSHUA EVERETT BUSHMAN, ADMINISTRATOR FOR THE ESTATE OF CALVIN PELT, *et al.*	)	
Plaintiffs	)	
v.	)	CL 2023-6260
SALVO TECHNOLOGIES, INC., d/b/a 80 P Builder, *et al.*	)	
Defendants	)	

ORDER

THIS MATTER came before the court on the motion of Defendant Salvo Technologies, Inc., d/b/a 80 P Builder, to dismiss for lack of personal jurisdiction.

THE COURT, for the reasons set forth in the court's letter opinion of today's date, hereby GRANTS Defendant's motion and hereby

ORDERS that this matter is DISMISSED, without prejudice, as to Salvo Technologies, Inc., d/b/a 80 P Builder.

ENTERED this 20th day of March, 2024.

[redacted]

Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

Edward L. Weiner
Counsel for Plaintiffs

Michael Weitzner
Counsel for Defendant Salvo Technologies, Inc. d/b/a 80 P Builder