IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

HEWLETT-PACKARD COMPANY, § Plaintiff, § CIVIL ACTION NO. 6:05CV456 vs. BYD:SIGN, INC.; BYD:SINE, CO. LTD., Jury Trial Demanded a/k/a/ BYD:SIGN, CO. LTD., a/k/a BYD:SIGN § Judge: Schneider COMPANY JAPAN, LTD, a/k/a/ BYD:SIGN WORLDWIDE; EYEFI DIGITAL TV, INC.; IDAPT SYSTEMS, LLC; KATSUMI ELECTRONICS CORPORATION; J. BRIAN DENNISON; KARL KAMB, JR.; KATSUMI IIZUKA; MARC McEACHERN; WILLIAM TAFFEL; DAVID THORSON; POOJITHA § § PREENA, § § Defendants.

DEFENDANTS BYD:SINE, CO. LTD., a/k/a/BYD:SIGN, CO. LTD., a/k/a BYD:SIGN
COMPANY JAPAN, LTD, a/k/a/BYD:SIGN WORLDWIDE, EYEFI DIGITAL TV, INC.,
AND KATSUMI IIZUKA'S MOTION TO DISMISS AND SUPPORTING BRIEF
(ORAL HEARING REQUESTED)

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TO THE HONORABLE COURT:

Defendants byd:sine, Co. Ltd., a/k/a byd:sign, Co. Ltd., a/k/a byd:Sign Company Japan, Ltd, a/k/a byd:sign Worldwide ("Bydesign Japan"), Eyefi Digital TV, Inc. ("Eyefi") and Katsumi Iizuka ("Iizuka") (collectively "Moving Defendants") hereby move to dismiss all claims against them pursuant to Rules 12(b)(2) (lack of personal jurisdiction) and 12(b)(5) (insufficiency of service of process) of the Federal Rules of Civil Procedure. This motion is made and based upon the following points and authorities, the exhibits attached hereto, the papers and pleadings on file herein, and those matters adduced by the Court at any hearing hereof.

I.

SUMMARY OF MOTION

Bydesign Japan, Eyefi, and Iizuka move to dismiss all claims against them pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure because they are not subject to personal jurisdiction in the Eastern District of Texas. These Moving Defendants do not have sufficient contacts with Texas under either a specific or general jurisdiction analysis. Moreover, traditional notions of fair play and substantial justice would be offended if jurisdiction is asserted over these Moving Defendants in Texas. Both Bydesign Japan and Iizuka also move to dismiss on the grounds of insufficiency of service of process because, to the extent Plaintiff Hewlett-Packard Company ("HP" or "Plaintiff") seeks to serve them, it must do so pursuant to the Hague Convention.

II.

STATEMENT OF FACTS

A. The Moving Defendants Have Little to No Contacts with Texas

1. Bydesign Japan

Bydesign Japan is a company organized under the laws of Japan and has its principal place of business in Tokyo, Japan. *See* Katsumi Iizuka Affidavit ("Iizuka Aff."), ¶ 15, attached

DEFENDANTS BYD:SINE, CO. LTD., a/k/a/BYD:SIGN, CO. LTD., a/k/a BYD:SIGN COMPANY JAPAN, LTD, a/k/a/BYD:SIGN WORLDWIDE, EYEFI DIGITAL TV, INC., AND KATSUMI IIZUKA'S MOTION TO DISMISS AND SUPPORTING BRIEF - Page 1

hereto as Exhibit "A." It does not maintain any offices in the State of Texas. *Id.* It owns all of the stock in one subsidiary corporation, Eyefi, which is incorporated in Nevada and has its principal place of business in Las Vegas, Nevada. *Id.* Bydesign Japan does not have any offices, agents, or employees located in Texas. *Id.* at ¶ 19. It also does not advertise or solicit business in Texas. *Id.* at ¶ 38. Moreover, Bydesign Japan has never even had any meetings in Texas. *Id.* at ¶ 36.

Bydesign Japan is in the business of selling flat panel television sets that are manufactured and distributed out of China. *Id.* at ¶22. Specifically, Bydesign Japan has a business relationship with Xiamen Overseas Chinese Electronic Co. Ltd ("Xoceco"), a Chinese company that manufactures low cost flat-panel television sets. *Id.* Bydesign Japan also has a business relationship with Best Buy Co., Inc. ("Best Buy"), a retailer of electronic products, based in Richfield, Minnesota. *Id.* at ¶¶26, 27. Bydesign Japan sells to Best Buy certain Liquid Crystal Display ("LCD") flat panel television sets that are manufactured by Xoceco. *Id.* at ¶29. Best Buy takes possession of these flat-panel television sets from Bydesign Japan, in China. *Id.* These flat-panel television sets are then distributed from China to Long Beach, California by Best Buy. *Id.* Best Buy sells these flat-panel television sets through many of its retail electronic stores under the private label name of "Insignia." *Id.* at ¶32. Bydesign Japan is just one of many vendors that supplies Best Buy with low cost television sets for sale under the "Insignia" name. *Id.* Bydesign Japan does not control where Best Buy sells its "Insignia" flat panel television sets nor does it have an interest in those locations. *Id.* at ¶34.

Bydesign Japan has also purchased rear projection digital light processing ("DLP") television sets manufactured from Amoi Electronics in China. *Id.* at ¶ 44. These DLP television sets are then shipped to ADI, a division of Honeywell, with byd:sign USA acting as a sales

agent, and then shipped to three distribution centers located in the United States--Reno, Nevada, Atlanta, Georgia, and Louisville, Kentucky. *Id.* Upon information and belief, ADI has only sold eleven of these DLP television sets. *Id.*

2. Evefi Digital TV, Inc.

Eyefi is a company incorporated in Nevada in July 2005 with its principal place of business in Las Vegas, Nevada. Iizuka Aff., ¶ 15. Eyefi is a subsidiary of Bydesign Japan. *Id*.

3. Katsumi Iizuka

Katsumi Iizuka ("Iizuka") is the chief executive officer of Bydesign Japan. Iizuka Aff., ¶ 13. He was born in Tokyo, Japan. *Id.* at ¶ 3. Iizuka is a Japanese citizen and a resident of Japan. *Id.* He has resided in Japan continuously since 1987. *Id.* Iizuka does not own any real property or companies in Texas. *Id.* at ¶ 4. In April 2003, Iizuka formed Bydesign Japan. *Id.* at ¶ 12.

B. Background

1. HP Requested Karl Kamb to Develop Relationships With PC Industry Experts

In June 2000, as Compaq's vice president of business development and strategy, Karl Kamb ("Kamb") was involved in researching and internally advocating new technologies. *See* Karl Kamb, Jr. Affidavit ("Kamb Aff."), ¶ 6, attached hereto as Exhibit "B." His responsibilities required that he develop relationships and strategic opportunities with computer industry experts. *Id.* In October/November 2001, Kamb was introduced to Iizuka who was considered an expert in the computer industry. *Id.* at ¶ 7. Shortly thereafter, in approximately April of 2002, HP merged with and absorbed Compaq. *Id.* at ¶ 8.

In 2002, HP became concerned with a major competitor entering the printer business, one of HP's primary areas of focus. *Id.* As a result of HP's concerns, HP directed Kamb to make

contacts with individuals who had knowledge about upcoming printing and imaging technologies. *Id.* Specifically, at HP's direction, Kamb was instructed to develop relationships with key individuals within the printing and imaging industry. *Id.* at ¶ 9. Because Kamb had previously established a relationship with Iizuka, HP instructed Kamb to obtain highly confidential information from Iizuka regarding a specific HP competitor who was entering into the printing business and seen as a direct competitor to HP. *Id.* Iizuka was paid, via his companies, a consulting fee by HP's Imaging and Printing Group ("IPG") Competitive Intelligence unit. *Id.* Kamb never received, either directly or indirectly, any monies paid by HP to Iizuka. *Id.*

2. Iizuka, the Pioneer in Flat Panel Technology, Shares Information to Kamb Regarding This Industry

Iizuka had first pioneered the flat panel technology when, as President of Akia, he led his company to design and develop the first flat panel computer monitor for non-industrial applications in 1996. Iizuka Aff., \P 7. Subsequently, in 2001, Iizuka left Akia and joined Dinner as an advisor to market and sell flat panel television sets throughout Asia and the United States. *Id.* at \P 8.

In mid 2002, Iizuka not only shared information with Kamb and others, about a specific HP competitor who was entering the printing industry but he also shared information regarding Dinner, a company that since 2002 had been selling low cost Taiwanese and Korean manufactured flat panel televisions sets throughout Japan. *Id.* at ¶ 10. In mid to late 2002, as the personal relationship between Iizuka and Kamb progressed, Iizuka began to share Dinner's business model with Kamb. Kamb Aff., ¶ 10. In late 2002, Dinner began its relationship with Xoceco to sell flat panel television sets. Iizuka Aff., ¶ 11.

3. Bydesign Japan Sells Flat Panel Television Sets Manufactured by Xoceco

In April 2003, Iizuka formed Bydesign Japan. Iizuka Aff., ¶ 12. Bydesign Japan was created to sell flat panel television sets manufactured and distributed out of China, including products manufactured by Xoceco. *Id.* at ¶ 22. However, because of the unattractive design of these Chinese manufactured flat panel television sets, Bydesign Japan worked with a Japanese industrial design firm under contract to design an "injection molded faceplate," or bezel, that could be installed on the exterior of the flat panel television sets made by Xoceco, to make these sets more appealing to Japanese consumers. *Id.* at ¶ 23. These Xoceco manufactured flat panel television sets sold by Bydesign Japan did not have any technical advantage over any other products sold at the time. *Id.* at ¶ 24. Instead, the advantage over its competitors is the low price at which they are able to sell. *Id.* All engineering for these televisions sets is performed exclusively by Xoceco. *Id.*

4. Kamb Informs HP About a Business Opportunity to Sell Flat Panel Television Sets Based on a Model Established by Bydesign Japan

Based upon information Kamb had acquired from Iizuka about the emerging flat panel television industry and because of Kamb's loyalty to HP, Kamb informed his supervisors at HP that the flat panel television industry was a potential new market for HP. Kamb Aff., ¶ 13. Kamb informed HP supervisors about Bydesign Japan's business model was to purchase low cost flat panel television sets from Xoceco and then replace the stock bezels so as to make them more attractive to other markets. *Id.* at ¶ 14. Through Kamb's efforts, he arranged for HP to obtain a first right of refusal for a business opportunity that was already developed by Bydesign Japan. *Id.*

As a loyal HP employee, Kamb was developing new ideas for HP based on a business model that had already been developed by Bydesign Japan. Kamb Aff., ¶ 16. Kamb believed

that because HP was "behind the curve" when compared to other computer manufacturers which had already entered the flat panel television market (e.g., Gateway Computer), HP could ride on the coattails of Bydesign Japan which already had an entry level product. *Id.* Specifically, on or about September 2003, Kamb had a meeting with the then Chairman and Chief Executive Officer of HP, Carly Fiorina ("Fiorina") to discuss the possibility of HP entering into the flat panel television market. *Id.* at ¶ 17. Kamb informed Fiorina that other companies were purchasing unattractive but low cost flat panel television sets from China and marketing them throughout Asia and the United States as their own. *Id.* Intrigued by the idea of HP entering into the flat panel television market, Fiorina instructed Kamb to speak to HP's PC Product Division. *Id.* Approximately two days after meeting with Fiorina, Kamb met with the general manager of HP's PC Product Division who, however, was not interested in Kamb's idea. *Id.* at ¶ 18.

Kamb subsequently met with HP's Imaging and Printing Group ("IPG") and provided them with information regarding Xoceco manufactured flat panel television sets and provided samples of LCDTV products that were customized with HP logos by Bydesign Japan's Tokyobased custom modeling shop. Kamb Aff., ¶ 19. The IPG Group expressed an interest in HP selling these flat panel television sets. *Id.* As a result of this and many other internal meetings, HP's IPG and the PC Consumer Division, formed a hybrid division called the Digital TV Solutions ("DTVS") group. *Id.* at ¶ 20. The DTVS group sought to launch and market flat panel televisions under the HP name. *Id.*

5. HP Rejects Television Sets Made by Bydesign Japan's Manufacturer Xoceco

During this time, in late 2003, HP realized it would be impractical and economically unfeasible to develop its own flat panel technology. Kamb Aff., ¶ 21. In an effort to project the image to the electronics world that it did posses its own flat panel technology, it attempted to

find reliable vendors that could provide it with attractive flat panel television sets so that HP could market them as its own. *Id.* To accomplish this goal, DTVS sought to purchase flat panel television sets from two established Taiwanese companies, Tatung and Lite-On. *Id.* HP favored Tatung and Lite-On because they were established companies already doing business with HP. *Id.* DTVS rejected television sets manufactured by Xoceco and Kamb's involvement in the project ceased. *Id.*

6. After HP's Vendors Could Not Provide HP with Flat Panel Televisions, HP Requested Kamb's Assistance in Locating Alternative Manufacturers

HP intended to showcase these flat panel television sets at the January 2004 Consumer Electronics Show held in Las Vegas. Kamb Aff., ¶22. However, weeks before the January 2004 CES show, DTVS experienced significant problems with Tatung and Lite-On in its ability to commit to producing early pre-production samples in time for the CES show, and it became apparent to HP that they would need to find another manufacturer, on an expedited basis, to manufacture product for display at the January 2004 CES and other upcoming promotional events. *Id.*

In desperation, HP instructed Kamb to use his contacts at Bydesign Japan to procure HP branded flat panel television sets that could be displayed at the January 2004 CES show and other promotional events. Kamb Aff., ¶ 23. Due to the looming January 2004 deadline only weeks away, Kamb requested the assistance of Iizuka and arranged for Xoceco to assemble several flat panel television sets. *Id.* at ¶ 25. The Xoceco television sets Kamb requested and ordered for the January 2004 CES show were based on the same television sets that Xoceco had been selling in China and was intending to sell worldwide. *Id.* At this time, Bydesign Japan was in talks with retailers in Japan and the United States to sell these Xoceco flat panel television sets. *Id.*

7. Kamb Requests Iizuka's Assistance To Help Procure Flat Panel Television Product for HP

Specifically, Iizuka was assigned the task of finding a model maker/designer in Japan who could design and provide HP with a hand made series of bezels that had the professional HP design criteria and "look." Kamb Aff., ¶ 24. Through the assistance of Iizuka and Bydesign Japan, Kamb was able to meet the aggressive January 2004 deadline and provide HP with several flat panel television set models manufactured by Xoceco that had hand-made HP bezels installed to give them the HP "look." *Id.* As a result, HP was able to showcase flat panel television sets at the January 2004 CES convention in Las Vegas and other promotional events, including a showing of the promotional video of the NBC television show "Queer Eye for the Straight Guy" that played during Carly Fiorina's key note address at CES. *Id.*

8. Bydesign Japan Begins Selling Flat Panel Television Product to Best Buy

In August 2004, Bydesign Japan entered into talks with Best Buy to sell specific models of its low cost flat panel television sets. Iizuka Aff., ¶ 26. After being awarded a contract by Best Buy, Bydesign Japan started selling flat panel LCD television sets to Best Buy. *Id*.

At no time while employed by HP, did Kamb ever receive compensation from either Bydesign Japan or Iizuka. Kamb Aff., ¶ 25. Moreover, Kamb never had an ownership interest or managerial role in Bydesign Japan. *Id.* Further, Kamb never provided Bydesign Japan or Iizuka with any information proprietary or confidential to HP. *Id.* Instead, Kamb provided Bydesign Japan with general marketing advice that was not unique or proprietary to HP. *Id.*

III.

LEGAL ARGUMENT

- A. The Complaint Must Be Dismissed As To Bydesign Japan, Eyefi, and Iizuka Because They Do Not Have Sufficient Contacts with Texas to Support the Exercise of Personal Jurisdiction Over Them
 - 1. Where a State Long Arm Statute is Used For Service, Contacts With The Forum State Must Be Analyzed

The analysis of whether personal jurisdiction exists over these three defendants, who were served under the state's long arm statute, must be based on an evaluation of their contacts with Texas. The Fifth Circuit has rejected a national contacts test in state long-arm service cases. Specifically, the Fifth Circuit has held that a federal court, even in a federal question case, can use a state long-arm statute only to reach those parties whom a court of the state could also reach under it. *See DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1266 (5th Cir. 1983).

In this case, personal jurisdiction over each Moving Defendant is limited to the contacts each of the defendants had with Texas only. In other words, there does not exist a national contacts test for purposes of asserting federal court jurisdiction over Bydesign Japan, Eyefi or lizuka. Here, HP has asserted "subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331." Plaintiff's Original Complaint ("Complaint"), ¶ 14. This section states that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. HP has alleged two claims for relief that arise under the laws of the United States. Specifically, HP seeks relief under the Lanham Act and the Racketeer Influenced and Corrupt Organizations ("RICO") Act. Complaint, ¶¶ 140-144 and 152-156, respectively. These two federal laws, however, are "silent as to service of process" on a non-resident foreign defendant.

Courts have held that "[b]ecause the Lanham Act does not provide for national service of process, the [forum state's] long-arm statute governs this inquiry." *Sunward Elec. v. McDonald*, 362 F.3d 17, 22 (2nd Cir. 2004). *See also Hershey Pasta Group v. Vitelli-Elvea Co.*, 921 F. Supp. 1344, 1346 (M.D. Pa. 1996) (because the Lanham Act does not authorize national service of process, the court must look to the laws of the [forum state] to determine whether it may exercise personal jurisdiction over the instant non-resident corporate Defendants). Accordingly, to the extent HP seeks jurisdiction over Bydesign Japan, Eyefi or Iizuka, it must be based on their contacts with the state of Texas as the Lanham Act does not provide for national service of process.

Civil RICO is also "silent as to service of process" for purposes of a foreign defendant. Although 18 U.S.C. § 1965(b), which pertains to "Venue and Process," relates to national service of process in RICO cases, it applies only to defendants residing in the United States. Specifically, 18 U.S.C. § 1965(b) states that:

In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other **parties residing in any other district** be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

18 U.S.C. § 1965(b) (emphasis added).

In this case, HP asserts a RICO claim against only one moving defendant, Katsumi Iizuka. HP does not assert a RICO claim against Bydesign Japan or Eyefi. Complaint, ¶155. Iizuka is not subject to national service of process under RICO because he is not a resident of the United States or any judicial district thereof. One Texas Court held that "section 1965(b) authorizes nationwide service of process under RICO, but by its terms section 1965(b) does not apply to foreign defendants, as they do not 'reside in any other district' of the United States."

Nocando Mem Holdings, Ltd. v. Credit Commercial de France, S.A., No. Civ.A. SA-01-1194-XR, 2004 WL 2603739, at *8 (W.D. Tex. Oct. 6, 2004) (emphasis added). In other words, "Plaintiffs may not invoke RICO as a basis for a nationwide contacts analysis." *Id.* Although RICO may authorize nationwide service of process over defendants within the United States, it does not permit service of process over a non-resident foreign defendant. Accordingly, the national contacts test cannot be used as a basis to assert personal jurisdiction over Iizuka.

2. There Is No Specific Personal Jurisdiction Over Bydesign Japan, Eyefi, and Iizuka Because None of these Defendants Maintain the Requisite Level of Minimum Contacts with the State of Texas

Bydesign Japan, Eyefi, and Iizuka must be dismissed from this action under Federal Rule of Civil Procedure 12(b)(2) because these Moving Defendants do not have the requisite level of minimum contacts with the State of Texas. The Fifth Circuit has held that the plaintiff bears the burden of establishing the district court's jurisdiction over a defendant that has filed a motion to dismiss for lack of personal jurisdiction. *See Stuart v. Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985).

"In federal court, personal jurisdiction over a non-resident defendant is proper if: (1) the defendant is amenable to service of process under the forum state's long-arm statute; and (2) the exercise of personal jurisdiction over the defendant is consistent with due process." *Toshiba Funding Auth. Ltd. v. Somerset Marine, Inc.*, 923 F. Supp. 982, 984 (S.D. Tex. 1996) (citing *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061 (5th Cir. 1992)). In Texas, the "long arm statute authorizes the service of process on a non-resident defendant if the defendant 'does business' in Texas." *Id.* "Because the phrase 'doing business' has been interpreted to reach as far as Constitutionally permissible, the jurisdictional inquiry under the Texas long-arm statute collapses into a single due process inquiry." *Id.*

"Whether the exercise of personal jurisdiction over a non-resident defendant is consistent with the due process clause of the United States Constitution involves a two-pronged inquiry. First, the Court must conclude that the defendant has 'minimum contacts' with Texas. Second, the Court must also conclude that requiring the defendant to litigate in Texas does not offend 'traditional notions of fair play and substantial justice.'" Toshiba, 923 F. Supp. at 984. "The minimum contacts aspect of due process is divided into two types of personal jurisdiction – specific and general." Toshiba, 923 F. Supp. at 985. "If the cause of action arises from particular activities of the defendant in the forum, specific jurisdiction is generally involved." *Id.* "The minimum contacts analysis in cases of specific jurisdiction is narrow, focusing on the relationship between the defendant, the cause of action, and the forum state." *Id.* "The critical inquiry, therefore, is whether the defendant, by directing activities to the forum state, purposefully availed himself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws. Id. The Fifth Circuit has held that "[t]he nonresident defendant must have purposefully established 'minimum contacts' with Texas. There must be a 'substantial connection' between the nonresident defendant and Texas arising from action or conduct of the nonresident defendant purposefully directed towards Texas." Jones v. Petty-Ray Geophysical Geosource, Inc., 954 F.2d 1061, 1068 n.9 (5th Cir. 1992) (emphasis added).

Indeed, the Supreme Court has held that for purposes of asserting personal jurisdiction over a non-resident defendant "it is essential 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." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a

result of 'random', 'fortuitous', or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person." *Id.* "Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Id.* (emphasis in original). Similarly, the Fifth Circuit has held that specific personal jurisdiction exists over a non-resident defendant if the defendant has "purposefully directed' his activities at the residents of the forum, and the litigation results from alleged injuries that 'arise from or relate to' the (sic) those activities." *Toshiba*, 923 F. Supp. at 985.

Moreover, in cases dealing with products sold into the stream-of-commerce, for purposes of analyzing personal jurisdiction, the Supreme Court has considered other factors. The Court noted that "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Specifically, the court considered whether in the forum state the defendant carried on any activity, closed any sales or performed services, solicited any business, or advertised. *Id.* at 295.

In World-Wide, the plaintiffs sustained burn injuries in an automobile accident and brought a products liability action in Oklahoma claiming that their injuries resulted from the defective design and placement of the automobile's gas tank and fuel system. *Id.* at 288. The plaintiffs purchased their automobile in New York, when they were New York residents, but were traveling to their new home in Arizona when they were involved in a car accident in Oklahoma. *Id.* Although plaintiffs sued numerous defendants, two of the defendants, World Wide Volkswagen Corp. ("World-Wide VW"), VW's regional distributor, and Seaway Volkswagen, Inc. ("Seaway"), the retail dealership, argued that there was no personal

jurisdiction over them. *Id.* World-Wide VW was incorporated and had its business office in New York. It distributed vehicles, parts and accessories, under contract with Volkswagen, to retail dealers in New York, New Jersey and Connecticut. *Id.* at 289. Seaway, a Volkswagen retail dealership, was incorporated and had its place of business in New York. *Id.* There was no evidence that either World Wide VW or Seaway did any business in Oklahoma, shipped or sold any product to or in that State, had an agent to receive process there, or purchased advertisements in any media calculated to reach Oklahoma. *Id.*

The Supreme Court held that "the relationship between the defendant and forum must be such that it is 'reasonable . . . to require the corporation to defend the particular suit. . . ." *Id.* at 292. Further, the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Id.* at 294.

Applying these principals, the Court found "a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction." *Id.* at 295. The court recognized that the "[p]etitioners carry on no activity whatsoever in Okalahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State." Moreover, "the record [does not] show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market." *Id.*

Moreover, in *Asahi Metal*, a plurality of the Supreme Court recognized that personal jurisdiction does not exist over a company in a location where a product it sold ended up based

only on the fact it placed its product into the stream of commerce. Asahi Metal Ind. Co., Ltd. v. Superior Court, 480 U.S. 102, 112 (1987). In Asahi Metal, the defendant, Asahi, manufactured tire valve assemblies in Japan and sold them to several tire manufacturers, including Cheng Shin Rubber Industrial Co. ("Cheng Shin") in Taiwan. Id. at 102. Cheng Shin then incorporated these tire valve assemblies into finished tires and sold these tires to businesses in the United States, including California (the forum state). See id. The plurality of the Supreme Court held that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." Id. at 112. "[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed towards the forum State." Id. Additional conduct on the part of the defendant for purposes of exerting jurisdiction may evidence an intent or purpose to serve the market in the forum State through the following:

- "designing the product for the market in the forum State"
- "advertising in the forum State"
- "establishing channels for providing regular advice to customers in the forum State."
- "marketing the product through a distributor who has agreed to serve as a sales agent in the forum State."

Id. In this case, the plurality held that Asahi did not "avail itself of the [forum state]." *Id.* The Court recognized that Asahi had no office, agents, employees, or property in California nor did it advertise or otherwise solicit business in California. *See id.* Moreover, it did not create, control or employ the distribution system that brought its product into California. *See id.*

Moreover, the court also considered other factors such as the unique burdens placed on a defendant that must defend itself in a foreign legal system. *Id.* at 114. The Court recognized that

"[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Id.* at 115.

a. There is No Specific Jurisdiction Over Bydesign Japan Because It Does Not Maintain the Requisite Level of Minimum Contacts With Texas

The Complaint must be dismissed as to Bydesign Japan because there is no personal jurisdiction over that company in Texas. Under *Burger King*, Bydesign Japan has not purposefully availed itself of the privilege of conducting activities within the forum state. Moreover, Bydesign Japan has not "deliberately" engaged in "significant activities" in Texas. Indeed, Bydesign Japan does not engage in any activity within Texas. Iizuka Aff., ¶21. It does not have any offices, agents or employees located in Texas. *Id.* at ¶19. Moreover, it does not advertise or solicit business in Texas. *Id.* at ¶20. As the Fifth Circuit has held "[t]here must be a 'substantial connection' between the nonresident defendant and Texas arising from action or conduct of the nonresident defendant purposefully directed towards Texas." *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1068, n.9 (5th Cir. 1992) (emphasis added). In this case, no such substantial connection exists between Bydesign Japan and Texas, and there are no contacts with Texas from which plaintiff's claims arise.

In addition, Bydesign Japan is not subject to the jurisdiction of this Court under a stream-of-commerce theory because this is not a products liability case. The Fifth Circuit has expressly held that it is "reluctant to extend the stream-of-commerce principle **outside the context of products liability cases**." *Nuovo Pignone, SpA v. Storman Asian M/V*, 310 F.3d 374, 381 (5th Cir. 2002) (emphasis added). The Fifth Circuit recognizes that "[w]here we have been presented with the opportunity to extend the principle to other areas such as contract or copyright, we have found the defendant's delivery of products into the stream of commerce to be unrelated to the

cause of action." *Id.* In this case, the stream-of-commerce theory does not apply because, to the extent any injury occurred, which Bydesign Japan denies, the injury was not the result of a failure of any products sold in Texas akin to a products liability case.

b. There is No Specific Jurisdiction Over Katsumi Iizuka Because He Does Not Maintain the Requisite Level of Minimum Contacts With Texas

In this case, in the unlikely event the court finds personal jurisdiction over Bydesign Japan, there can be no personal jurisdiction over Iizuka because all of his actions were done on behalf of and for the benefit of Bydesign Japan, as its Chief Executive Officer. Iizuka Aff., ¶ 14. The Fifth Circuit has recognized the fiduciary shield doctrine which "holds that an individual's transaction of business within the state solely as a corporate officer does not create personal jurisdiction over that individual though the state has in personam jurisdiction over the corporation." *Stuart v. Spademan*, 772 F.2d 1185, 1197 (5th Cir. 1985). The Complaint is completely void of any claim that Iizuka was the alter ego of Bydesign Japan or Eyefi, and therefore there can be no basis to assert personal jurisdiction over Izuka for actions taken on behalf of his companies.

Moreover, aside from any defenses under the fiduciary shield doctrine, Iizuka simply did not purposefully avail himself of the privilege of conducting any activities within the forum state. Iizuka is a Japanese citizen and a resident of Japan. Iizuka Aff., \P 3. He has resided in Japan continuously since 1987. *Id.* Iizuka does not own any real property or companies in Texas nor does he engage in business in Texas. *Id.* at \P 4.

c. There is No Specific Jurisdiction Over Eyefi Digital TV, Inc. Because It Does Not Maintain the Requisite Level of Minimum Contacts with the State of Texas

Specific jurisdiction also does not exist over Eyefi in Texas. Eyefi was incorporated in Nevada in or about June 2005 and has its principal place of business in Las Vegas, Nevada. Iizuka Aff., ¶ 15. Eyefi is the only subsidiary of Bydesign Japan. *Id.* It has not engaged in any business in Texas or any state for that matter. *Id.* Eyefi has not shipped any product or sold any product to any place in the United States. *Id.* at ¶ 17. Moreover, Eyefi does not have any officers, employees or agents located in Texas. *Id.* at ¶ 18. Eyefi has simply not purposefully availed itself of any privilege of conducting any business in Texas, and therefore personal jurisdiction is lacking. Again, Eyefi has no contacts with Texas from which plaintiff's claims arise.

3. There is Also No General Jurisdiction Over Bydesign Japan, Eyefi or Iizuka

To establish general jurisdiction over a nonresident defendant, a plaintiff must show that the defendant's contacts with Texas are substantial, continuous, and systematic. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16 (1984); *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 217 (5th Cir. 2000). In this case, HP fails to plead any facts demonstrating Bydesign Japan's, Eyefi's, or Iizuka's contacts with Texas are "substantial, continuous, and systematic." Bydesign Japan, Eyefi, and Iizuka nevertheless address the general jurisdiction issue to foreclose all jurisdictional theories that could potentially be asserted to apply to them.

To dispense with the general jurisdiction analysis in the context of a foreign defendant, it is necessary to look no further than the United States Supreme Court's holding in *Helicopteros*. There, the court held that contacts significantly greater than those present in this case would not

support general jurisdiction. *Helicopteros*, 466 U.S. at 417-19. In *Helicopteros*, plaintiffs filed a wrongful death suit in Texas against Helicopteros, a Columbian corporation, that had contracted to provide helicopter transportation to a Peruvian consortium. The consortium, in turn, was the alter ego of a Texas joint venture. Helicopteros' chief executive officer had traveled to the joint venture's headquarters in Houston to negotiate the terms of the helicopter transportation contract. In addition, over a seven year period, Helicopteros purchased eighty percent of its fleet, spare parts, and accessories from Bell Helicopter in Fort Worth, Texas. During that same time period, Helicopteros sent prospective pilots to Fort Worth for training and sent management and maintenance personnel to Texas to receive "plant familiarization" and technical consultation. Helicopteros also received \$5 million in payments from a bank in Houston. According to the Supreme Court, however, these substantial contacts were not sufficiently continuous and systematic to support general jurisdiction over the company in Texas. *Helicopteros*, 466 U.S. at 418-19.¹

In this case, Defendants' contacts with Texas are substantially less than the contacts of the defendant in *Helicopteros*. None of the officers for Bydesign Japan, Eyefi or Iizuka traveled to Texas for purposes of selling or distributing flat panel television sets or any other products. Iizuka Aff., ¶ 38. Moreover, Defendants did not sell any flat panel television sets or other products directly to individuals residing in Texas. *Id.* at ¶ 37. Also, Defendants are not licensed or qualified to do business in Texas, have no employees in Texas, have no offices, mailing addresses, or telephone numbers in Texas, have no bank accounts in Texas, pay no taxes in

In a similar case, the Fifth Circuit held that there was no general jurisdiction over a nonresident defendant that contracted with Texas distributors, sold goods to those distributors, and that advertised in Texas as part of its national marketing strategy. *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 376 (5th Cir. 1987).

Texas, do not own, use, or possess real or personal property in Texas, or advertise in Texas, and do not otherwise conduct business in Texas. *Id.* at ¶ 38.

a. There is No General Jurisdiction Over Bydesign Japan Because It Did Not Have Substantial Contacts With Texas That Are Continuous and Systematic

In fact, Bydesign Japan's only contact with Texas is that Adtx sold and distributed its product to Byd:sign USA for that company to resell to retailers. Iizuka Aff., ¶ 43. Although Adtx may have sold Bydesign Japan product to Bydesign USA, which in turn may have sold products in Texas, Bydesign Japan did not employ or direct this distribution system. In addition, Bydesign Japan delivered Xoceco flat panel television sets to Best Buy in China. *Id.* at ¶ 29. Although HP may be under the mistaken impression that these Xoceco flat panel television sets represent a substantial amount of the Insignia sets sold by Best Buy, in reality these sets represent a very small percentage of the total television product purchased by Best Buy. *Id.* at ¶ 33.

b. There is No General Jurisdiction Over Iizuka Because He Did Not Have Substantial Contacts With Texas That Are Continuous and Systematic

Iizuka's contact with Texas is de minimus. Although he was born and raised in Japan, and has always been a citizen of Japan, he briefly lived in Texas from 1982 to 1983. Iizuka Aff., ¶ 5. Iizuka lived in Texas for eighteen months, from 1982-1983, when he worked for Tandy Corp. (which later merged with Radio Shack). *Id.* Iizuka's brief stay in Texas occurred more than 23 years ago. Since 1987, Iizuka has permanently resided in Japan. *Id.* at ¶ 3. Moreover, he was the former President of Dell Computer Corporation Japan and a former employee of Radio Shack's Far-East sourcing office. *Id.* Although Iizuka worked in Asia, including Japan, he did on occasion have to travel to Texas to attend meetings at Dell Computer Corp.'s

headquarters. Id. at ¶ 6. Iizuka retired from Dell in 1995. Id. These contacts more than 10 years ago, however, do not support general jurisdiction over Iizuka.

c. There is No General Jurisdiction Over Eyefi Because It Does Not Have Substantial Contacts With Texas That Are Continuous and Systematic

Eyefi also has no substantial contacts with Texas that can be characterized as continuous and systematic. Eyefi was incorporated in Nevada in or about June 2005 and has its principal place of business in Las Vegas, Nevada. Iizuka Aff., ¶ 15. It has not engaged in any business in Texas or any state for that matter. *Id.* Moreover, Eyefi does not have any officers, employees or agents located in Texas. *Id.* at ¶ 18. Accordingly, Eyefi does not have any substantial contacts with Texas that are continuous or systematic.

4. Requiring Bydesign Japan, Eyefi, and Iizuka to Litigate in Texas Offends Traditional Notions of Fair Play and Substantial Justice

"In addition to requiring minimum contacts with the forum state, due process requires the exercise of personal jurisdiction over a non-resident defendant to comply with 'traditional notions of fair play and substantial justice.'" *Toshiba Funding Auth. Ltd. v. Somerset Marine, Inc.*, 923 F. Supp. 982, 986 (S.D. Tex. 1996) (citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). "Whether the exercise of jurisdiction is consistent with notions of fair play and substantial justice requires an evaluation of the burden on the defendant, the forum state's interest in resolving the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies. *Id.* (citing Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987)).

In this case, it is extremely burdensome to require Bydesign Japan, Eyefi and Iizuka to defend this case in Texas. Bydesign Japan is a Japanese company with its principal place of business in Tokyo. Iizuka is a Japanese citizen and a resident of Japan. In addition, a substantial amount of the documents necessary for Bydesign Japan, Eyefi and Iizuka to defend against these claims are in Japanese and are located at Bydesign Japan's office in Tokyo, Japan. Moreover, it would be extremely difficult for Iizuka to constantly have to commute to Texas from Japan to attend court proceedings and to participate in discovery.

Also, the forum's interest in resolving this dispute is *de minimus*. One Texas Court has held that "Texas has no interest in resolving [a] dispute, given that neither [Plaintiff] nor [Defendant] are Texas corporations." *Toshiba Funding Auth. Ltd*, 923 F. Supp. at 987. In this case, HP is a Delaware corporation with its principal place of business in Palo Alto, California. Bydesign Japan is a Japanese corporation with its principal place of business in Japan. Eyefi is a Nevada corporation with its principal place of business in Nevada. Iizuka is a Japanese citizen and resident of Japan. Although HP is under the mistaken belief that Byd:sign USA is the "domestic subsidiary" of Bydesign Japan, Complaint ¶ 54, this is not the case. Also, there has been no harm done in Texas. Assuming *arguendo* that any harm or injury had been done, this harm would have occurred in Japan when Bydesign Japan or Iizuka allegedly "misappropriated business opportunities," Complaint, ¶ 88, or in Palo Alto, California where HP is headquartered.

Also, the most efficient resolution of this controversy is to have this matter heard in Japan. In this case, HP has demanded a jury trial. Complaint, ¶157. This case will be especially difficult for a jury given that a substantial amount of the documents related to Bydesign Japan's, Eyefi's and Iizuka's defenses are written in the Japanese language. Iizuka Aff., ¶46. Jurors would be forced to read evidence second hand through an interpreter.

Potential delays, mistakes in interpretation and disputes regarding each side's interpretation of these Japanese documents would further encumber the jury.

Finally, HP's interest in obtaining convenient and effective relief can still be furthered by filing this action in Japan. According, "traditional notions of fair play and substantial justice" would be offended if Bydesign Japan, Eyefi, and Iizuka were forced to defend this action in Texas.

B. <u>Service of Process Must be Quashed As To Bydesign Japan and Iizuka for Insufficiency of Service of Process Under Federal Rule of Civil Procedure 12(b)(5)</u>

Alternatively, service of process on these two Japanese defendants through the Texas Secretary of State is insufficient since they were not served under the procedures set forth in the Hague Convention. Rule 12(b)(5) of the Federal Rules of Civil Procedure contemplates a matter being dismissed for insufficiency of service of process. "Service on a corporation in a foreign country in a federal court is governed by Federal Rule of Civil Procedure 4(h)." *Alternative Delivery Solutions, Ind. v. Donnelley & Sons Co.*, No. Civ. SA05CA0172-XR, 2005 WL 1862631, at *2 (W.D. Tex. Jul. 8, 2005). "Rule 4(h)(2) incorporates the service methods in Rule 4(f) [Service Upon Individuals in a Foreign Country] and directs that service in a place not within any U.S. judicial district may be effected pursuant to any internationally agreed means, including the Hague Convention." *Id.* Specifically, Rule 4(f) states, in pertinent part, as follows:

Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; ...

Fed. R. Civ. P. 4(h).

Moreover, the Fifth Circuit has held that "the Hague Service Convention – by its own terms – 'appl[ies] in all cases, in civil or commercial matters, *where there is occasion to transmit a judicial . . . document for service abroad.*" *Kreimerman v. Casa Veerkamp, S.A., de C.V.*, 22 F.3d 634, 639 (5th Cir. 1994) (emphasis in original).

In a provision relied upon by HP with respect to service on Bydesign Japan and Iizuka, Texas law provides that the Secretary of State "is an agent for service of process on a nonresident who engages in business in this state, but does not maintain a regular place of business in [Texas] or a designated agent for service of process, in any proceeding that arises out of the business done in [Texas] and to which the nonresident is a party." Donnelley, 2005 WL 1862631, at *2 (citing TEX. CIV. PRAC. & REM. CODE § 17.044(b)). The "Texas Secretary of State . . . will then be directed to forward duplicate copies of the summons and this Petition by international registered mail to the corporate address of [the nonresident defendant]." Id. In other words, "[u]nder this law, the Secretary of State must send notice of service of process to a nonresident defendant via registered mail." Id. More importantly, "[b]ecause, the Secretary must mail the notice to [the foreign country], this transmittal of service documents abroad implicates the Hague Convention and its requirements." *Id.* (emphasis added). "Thus, service via the Texas Secretary of State is insufficient because it requires service by mail, which fails to comply with the Hague Convention under Fifth Circuit law." Id. Similarly, another Texas court has held that "service via the Texas Secretary of State would be insufficient as to any defendant who is a signatory to the Hague Convention." *Nocando*, 2004 WL 2603739, at *5 (W.D. Tex. Oct. 6, 2004).

Under the Hague Convention, "Japanese courts expect that that a U.S. service of process upon a Japanese resident in Japan, in which the summons and complaint from the United States

are transmitted to Japan, will be effected by two methods recognized under the convention: service through the Japanese Central Authority (the Foreign Affairs Ministry) or the U.S. consular officer stationed in Japan." Yasuhiro Fujita, *Enforcing U.S. Judgments in Japan*, Los Angeles Lawyer, Dec. 2004, at 19-20 (citing *Hague Service Abroad Convention*, Nov. 15, 1965, arts. 5, 8, 9, 20 U.S.T. 361). Also, for purposes of service of process under the Hague Convention, "[i]n Japan, documents must be translated into Japanese." *Taylor v. Uniden Corp. of Am.*, 622 F. Supp. 1011, 1016 (E.D. Mo. 1985) (emphasis added).

In this case, Bydesign Japan and Iizuka are both non-resident defendants. Bydesign Japan is a Japanese company with its principal place of business in Japan. Iizuka Aff., ¶ 15. Iizuka is a Japanese citizen and resident of Japan. Iizuka Aff., ¶ 3. Moreover, Japan is a signatory to the Hague Service Convention ("Hague Convention"). See Service Abroad of Judicial and Extrajudicial Documents Convention, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638.

Not only has HP failed to serve the two Japanese defendants, Bydesign Japan and Iizuka, via the Japanese Foreign Affairs Ministry or the U.S. Consular officer stationed in Japan, but HP has also failed to translate the summons and complaint into Japanese. Accordingly, this court must quash the service of process on both Bydesign Japan and Iizuka because it does not satisfy the requirements for international service in Japan.

In addition, service on both Bydesign Japan and Iizuka through the Texas Secretary of State is improper because neither defendant engages in business in the State of Texas as required for use of that procedure. Iizuka Aff., ¶ 38. The Texas Civil Practice and Remedies Codes, section 17.044, states, in pertinent part, as follows:

(b) The secretary of state is an agent for service of process on a nonresident who engages in business in this state, but does

not maintain a regular place of business in this state or a designated agent for service of process, in any proceeding that arises out of the business done in this state and to which the nonresident is a party.

TEX. CIV. PRAC. & REM. CODE § 17.044(b).

Therefore, because neither Bydesign Japan nor Iizuka does business in Texas as discussed above, it is improper to serve them via the Texas Secretary of State. Accordingly, service of process must be quashed as to these two defendants under Federal Rule of Civil Procedure 12(b)(5).

IV.

CONCLUSION

Accordingly, Bydesign Japan, Eyefi, and Iizuka respectfully request that all claims against them be dismissed pursuant to Rules 12(b)(2) and 12(b)(5) of the Federal Rules of Civil Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 19th day January, 2006, a true and correct copy of the foregoing DEFENDANTS BYD:SINE, CO. LTD., a/k/a/ BYD:SIGN, CO. LTD., a/k/a BYD:SIGN COMPANY JAPAN, LTD, a/k/a/ BYD:SIGN WORLDWIDE, EYEFI DIGITAL TV, INC., AND KATSUMI IIZUKA'S MOTION TO DISMISS AND SUPPORTING BRIEF was served electronically.

/S/Ryan C. Wirtz

Ryan C. Wirtz