

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JEREMY MATTTWAOSHSHE, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:20-cv-01317-TSC
)	
UNITED STATES OF AMERICA, <i>et al.</i> ,)	
)	
Federal Defendants,)	
)	
NEXTERA ENERGY, INC., <i>et al.</i> ,)	
)	
Defendants.)	

**DEFENDANT WESTAR ENERGY'S
REPLY IN SUPPORT OF ITS MOTION TO DISMISS**

Respectfully submitted,

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Defendant “Westar Energy” (“Evergy Kansas”),¹ by and through its counsel of record, respectfully submits the following Reply in Support of its Motion to Dismiss Plaintiff’s Amended Complaint.

I. INTRODUCTION

Like Plaintiffs’ Amended Complaint, which nominally names Evergy Kansas as a defendant while failing to allege or direct any cause of action against Evergy Kansas, Plaintiffs’ Opposition to Defendants’ Motions to Dismiss (Dkt. No. 44, hereinafter “Opposition” or “Opp.”) allocates only a few paragraphs addressing Evergy Kansas, and does not overcome the dispositive issues raised in Evergy Kansas’s Motion to Dismiss (Dkt. No. 40, hereinafter “Motion”).

Plaintiffs have wholly failed to establish, and cannot establish, that this Court has personal jurisdiction over Evergy Kansas. Additionally, Plaintiffs have not adequately pled any cause of action as to Evergy Kansas.

II. ARGUMENT AND AUTHORITY

A. Plaintiffs’ Amended Complaint Should Be Dismissed Against Evergy Kansas for Lack of Personal Jurisdiction pursuant to Rule 12(b)(2).

“It is the plaintiff who bears the burden of establishing personal jurisdiction over each defendant.” *Collingsworth v. Drummond Co. Inc.*, No. CV 19-1263 (ABJ), 2020 WL 2800612, at *5 (D.D.C. May 29, 2020)(citing *Crane v. N.Y. Zoological Soc’y*, 894 F.2d 454, 456 (D.C. Cir. 1990)). To survive a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, a plaintiff must make a *prima facie* showing of the factual basis for asserting personal jurisdiction over a defendant. *Bauman v. Butowsky*, 377 F. Supp. 3d 1, 5 (D.D.C. 2019). Plaintiffs have failed to meet this burden as to Evergy Kansas.

¹ The Amended Complaint names “Westar Energy aka Evergy Kansas Central, Inc.” as a defendant. “Westar Energy” is not and has never been registered to do business in Kansas and Evergy Kansas Central, Inc. (“Evergy Kansas”) does not have any subsidiaries by that name. Out of an abundance of caution, because Plaintiffs attempted service of process on the registered agent of Evergy Kansas, Evergy Kansas is responding to the Amended Complaint.

1. Plaintiffs concede this Court lacks general personal jurisdiction as to Evergy Kansas

Plaintiffs spend the bulk of their Opposition regarding Evergy Kansas attempting to distinguish *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017). *See* Dkt. No. 44, Opp. at 35. That case was cited in the Motion to establish that the Supreme Court recently confirmed its holding in *Daimler AG v. Bauman* and reaffirmed the tenet that general personal jurisdiction attaches only where a defendant's forum contacts are "so 'continuous and systematic'" that it is "essentially *at home* in the forum State." *See Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014). Plaintiffs' efforts to distinguish *BNSF* are misguided because they have since conceded that there is no general jurisdiction over Evergy Kansas here, stating that the factors for general jurisdiction under D.C. Code §13-422 are "not present here nor [were] they plead." Dkt. No. 44, Opp. at 6-7.²

2. Plaintiffs have failed to establish specific personal jurisdiction as to Evergy Kansas

As explained in Evergy's Motion, Plaintiffs are obligated to meet the requirements of both the D.C. long-arm statute and the Due Process Clause to establish specific personal jurisdiction. Dkt. No. 40, Motion at 3-7. In their Opposition, Plaintiffs rely entirely on the vague and unverified allegations in their Amended Complaint to try to establish specific jurisdiction as to Evergy

² Even if Plaintiffs had not conceded the lack of general jurisdiction, Plaintiffs' attempt to substantively distinguish *BNSF* is equally misguided. Plaintiffs argue that *BNSF* "dealt with Montana state court jurisdictional issues and that was decided, not based on federal court personal jurisdiction grounds, but on appeal from the Montana Supreme Court." Dkt. 44, Opp. at 35. This argument, of course, overlooks the fact that Montana's long-arm statute still has to "comport with the Due Process Clause of the Fourteenth Amendment." *BNSF*, 137 S. Ct. at 1558. Because *BNSF* was not incorporated or headquartered in Montana and its activity there was not "so substantial and of such a nature as to render the corporation at home in that State," the Supreme Court held that the Montana's state court's exercise of general jurisdiction over *BNSF* was improper and in violation of the Fourteenth Amendment. *Id.* at 1559.

Kansas. Importantly, Plaintiffs fail to rebut or even mention the facts established by Evergy Kansas in the affidavit accompanying its Motion.³

“A court may consider material outside of the pleadings in ruling on a motion to dismiss for lack of ... personal jurisdiction[.]” *Artis v. Greenspan*, 223 F. Supp. 2d 149, 152 (D.D.C. 2002). Moreover, the Court need not treat all of the plaintiff’s jurisdictional allegations as true. *United States v. Philip Morris Inc.*, 116 F. Supp. 2d 116, 120 n.4 (D.D.C. 2000); *see also First Chicago Int’l v. United Exch. Co.*, 836 F.2d 1375, 1378 (D.C. Cir. 1988) (“Conclusory statements ... [do] not constitute the prima facie showing necessary to carry the burden of establishing personal jurisdiction”). “Instead, the court may receive and weigh affidavits and any other relevant matter to assist it in determining the jurisdictional facts.” *In re Papst Licensing*, 590 F. Supp. 2d 94, 98 (D.D.C. 2008) (internal quotation marks and citation omitted). Plaintiffs have not presented any affidavit or other evidence to “weigh” against the evidence submitted by Evergy Kansas.⁴

Unable to point to any allegations in the Amended Complaint connecting Evergy Kansas to the District or otherwise satisfying the D.C. long-arm statute, Plaintiffs simply claim that Evergy Kansas “should not be released from this case.” Dkt. No. 44, Opp. at 37. But they offer the Court no basis or legal justification for this contention. Plaintiffs’ allegations fall far short of the required

³ The Affidavit, attached as **Exhibit A** to Evergy Kansas’s Motion states: Evergy Kansas, is a Kansas Corporation with its principal place of business in Kansas. *Id.* at ¶3; Evergy Kansas is not authorized to do business in the District of Columbia, nor does it do business there. *Id.* at ¶4; Evergy Kansas has neither offices nor a mailing address in the District of Columbia. *Id.* at ¶5; Evergy Kansas has no employees in the District of Columbia, nor does it regularly conduct or solicit business there. *Id.* at ¶¶6-7; Evergy Kansas does not engage in a persistent course of conduct in the District of Columbia, does not derive substantial revenue, or own real property there. *Id.* at ¶¶ 9 -11; Evergy Kansas does not consent to personal jurisdiction in the District of Columbia. *Id.* at ¶12.

⁴ When “a defendant presents credible evidence through affidavits or other materials suggesting the absence of personal jurisdiction, the plaintiff must come forward with sufficient evidence to create a genuine dispute of material fact on the issue.” *Presidential Hospitality, LLC v. Wyndham Hotel Grp., LLC*, 333 F.Supp.3d 1179, 1201 (D.N.M. 2018); *see also Pan-American Prods. & Holdings, LLC v. R.T.G. Furniture Corp.*, 825 F. Supp. 2d 664, 676 (M.D.N.C. 2011) (“[W]here the defendant provides evidence that denies the facts essential for jurisdiction, the plaintiff must present sufficient evidence to create a factual dispute on each jurisdictional element which has been denied by the defendant and on which the defendant presented evidence.”).

prima facie showing of the pertinent jurisdictional facts to establish that this Court has personal jurisdiction over Evergy Kansas. Without any facts or allegations connecting Evergy Kansas to the District, Plaintiffs seek to avoid their obligations by grouping Evergy Kansas in with all of the Nextera Defendants in an effort to establish jurisdiction as to Evergy Kansas.

Plaintiffs' neither plead any count of conspiracy, nor argue with any specificity or reference to precedent that their allegations establish conspiracy jurisdiction as to Evergy Kansas. Conspiracy jurisdiction is "a form of long-arm jurisdiction in which the defendant's 'contact' with the forum consists of the acts of the defendant's co-conspirators within the forum." *Youming Jin v. Ministry of State Sec.*, 335 F. Supp. 2d 72, 78 (D.D.C. 2004). For a court to exercise personal jurisdiction over non-resident co-conspirators under the so-called "conspiracy theory" of jurisdiction, the plaintiff must allege "(1) the existence of a civil conspiracy ..., (2) the defendant's participation in the conspiracy, and (3) an overt act by a co-conspirator within the forum, subject to the long-arm statute, and in furtherance of the conspiracy." *Globe Metallurgical, Inc. v. Rima Indus. S.A.*, 177 F. Supp. 3d 317, 323 (D.D.C. 2016). Further, to prevail under this jurisdictional theory, Plaintiff must make a *prima facie* showing of civil conspiracy. *Second Amendment Found. v. U.S. Conference of Mayors*, 274 F.3d 521, 524 (D.C. Cir. 2001). In the District of Columbia, civil conspiracy has four elements: "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme." *Id.* Plaintiffs' Amended Complaint does not allege these elements, let alone make the required *prima facie* showing to establish jurisdiction.

"Bald speculation' or a 'conclusory statement' that individuals are co-conspirators is insufficient to establish jurisdiction under a conspiracy theory." *Jungquist v. Shelkh Sultan Bin*

Khalifa Al Nahyan, 115 F.3d 1020, 1031 (D.C. Cir. 1997). Even when personal jurisdiction is based on a conspiracy theory, purposeful availment is still required. *Youming Jin*, 335 F. Supp. 2d at 80. To meet this requirement, the plaintiff must assert with particularity “the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy.” *Jungquist*, 115 F.3d at 1031.

Plaintiffs have not met these requirements. Plaintiffs’ Amended Complaint is premised only on conclusory statements that Evergy Kansas conspired with Nextera. Moreover, the activity which Plaintiffs allege constituted conspiracy took place in Kansas. *See, e.g.* Pl. Amended Compl. at ¶29. Plaintiffs allege no overt acts as to Evergy Kansas in this jurisdiction. Moreover, as stated in Defendants’ Motions to Dismiss, any actions that are alleged to have occurred in the District cannot establish jurisdiction because they are excluded by the government contact exception. *Globe Metallurgical, Inc. v. Rima Indus. S.A.*, 177 F. Supp. 3d 317, 324 (D.D.C. 2016).

B. The Government Contacts Exception Applies

Plaintiffs attempt to cast doubt on the existence or application of the government contacts exception by citing decades-old cases to argue that the exception is “hotly debated” and therefore should not apply here. This argument is without merit. The government contact exception is routinely applied to exclude contact with the government of the kind alleged here from any jurisdictional analysis. *Alkanani v. Aegis Def. Servs., LLC*, 976 F. Supp. 2d 13, 25 (D.D.C. 2014)(“there is a settled ‘government contacts’ exception to this general rule. Under the government contacts exception, a nonresident's entry into the District of Columbia for ‘the purpose of contacting federal governmental agencies cannot serve as a basis for personal jurisdiction.’”) *See also Morgan v. Richmond Sch. of Health & Tech., Inc.*, 857 F. Supp. 2d 104, 110 (D.D.C. 2012); *Robo-Team NA, Inc. v. Endeavor Robotics*, 313 F. Supp. 3d 19, 24 (D.D.C. 2018). Consistent with that binding precedent, this Court has already determined that other defendants’

contacts with the District of Columbia would fall under the government contract exception. Dkt. 28, June 16, 2020 TRO Order, at 4.

Here, the government contract exception is particularly misplaced as to Every Kansas because Plaintiffs fail to allege that Every Kansas entered the District of Columbia for any reason. Moreover, Plaintiffs' argument that the application of the government contacts exception deprives them of First Amendment rights (Opp. at 26) is nonsensical. Plaintiffs have had multiple opportunities to pursue their claims in Kansas, but have chosen not to do so. Plaintiffs' decision to proceed against the Every Kansas in this forum does not mean that their First Amendment rights will be violated if their claims are dismissed. Equally important, Plaintiffs' decision to proceed in the District of Columbia does not mean that Every Kansas's Due Process rights must be sacrificed in favor of Plaintiffs' favored forum.

C. Plaintiffs Fail to Rebut Every Kansas' 12(b)(6) arguments

Just as the Amended Complaint fails to direct any cause of action to Every Kansas, Plaintiffs' Opposition fails to even address Every Kansas's motion to dismiss for failure to state a claim. As set out in Every Kansas's Motion (Dkt. No. 40, at 7-10), Plaintiffs' allegations that Every Kansas has agreed to purchase and or transport energy at some unknown future date are insufficient to state a claim for nuisance under Kansas or District of Columbia law. Dkt. No. 40, Motion, at 9. Those arguments went unchallenged by Plaintiffs in their Opposition.

Further, Plaintiffs have not, and cannot allege that Every Kansas owes any duty to Plaintiffs sufficient to support a cause of action for negligence against Every Kansas. Indeed, Plaintiffs concede that their negligence claim "may now be dismissed" because they cannot allege the required elements. Dkt. No. 44, Opp. at 37. Plaintiffs' negligence claim should be dismissed, with prejudice, as to Every Kansas.

D. Plaintiffs' Claims Are Not Ripe with Regard to Evergy Kansas

Plaintiffs spend pages arguing that this matter is ripe with little citation to any law or precedent to support their argument. Instead, they argue that because construction of the wind towers has begun and continues, the matter is ripe. While Evergy Kansas does not concede that this argument overcomes the arguments raised by Defendants, the argument is wholly irrelevant as to Evergy Kansas. Evergy Kansas does not own the wind towers. Evergy Kansas is not constructing the wind towers. Instead, Evergy Kansas will be a customer of Soldier Creek Wind, LLC once it is operational. Plaintiffs have not alleged that Evergy Kansas has sought FERC approval, but has instead alleged that Evergy Kansas “will require FERC approval.” *See Am. Compl.* at ¶7. “A claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” *Texas v. United States*, 523 U.S. 296, 300 (1998); *see also Endeley v. United States Dept. of Def.*, 268 F. Supp. 3d 166, 175-76 (D.D.C. 2017)(explaining that the ripeness doctrine prohibits federal courts from hearing “claims seeking relief for future injuries that are hypothetical and speculative.”). Moreover, Plaintiffs now concede that “Plaintiffs are not obviously (*sic*) challenging the substance of the FERC interconnection decision.” Dkt. No. 44, Opp. at 11. While this concession is unnecessary because any such challenge is not ripe, it underscores that Plaintiffs have not articulated any actionable claim as to Evergy Kansas.

III. CONCLUSION

For the reasons discussed above and in Defendants’ Motions to Dismiss and Replies in support thereof, Plaintiffs’ Amended Complaint should be dismissed as to Evergy Kansas, and dismissed in its entirety.

Dated: September 3, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system that will send a notice of electronic filing to counsel of record in this case.

/s/ Rebecca Ruby Anzidei
Rebecca Ruby Anzidei