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U.S. COURT OF APPEALS ALLOWS SPECIFIC PERSONAL JURISDICTION OVER GERMAN WEB-SERVICES FIRM WITH NO PHYSICAL U.S. PRESENCE

To Our Clients and Friends:

On September 13, 2018, the U.S. Court of Appeals for the First Circuit handed down an important personal-jurisdiction ruling in the age of e-commerce. In *Plixer International, Inc. v. Scrutinizer GmbH*, the First Circuit interpreted Federal Rule of Civil Procedure 4(k)(2) to affirm a district court's exercise of personal jurisdiction over a German company whose only ties to the United States were the provision of web-based services to businesses all over the world, including in the United States.[1] This is still a developing area of personal jurisdiction law without clear guidance from the U.S. Supreme Court, and non-U.S. companies should carefully consider whether and how their online commerce might subject them to U.S. litigation.

The decision arose out of a trademark dispute between two companies—U.S.-based Plixer International, Inc. and the German firm Scrutinizer GMBH—over whether Scrutinizer's use of its corporate name in the U.S. caused confusion with Plixer's registered "Scrutinizer" mark.[2] Scrutinizer offers web-based services to software companies, principally in helping customers build better software. These offerings are all cloud-based, and Scrutinizer's activities occur exclusively outside the United States. In particular, Scrutinizer does not have any office, phone number, or agent for service of process in the United States; its employees do not travel to the United States for business; and it does not advertise in the United States. Scrutinizer accepts payment only in euros, and its contracts provide that only German law governs disputes, which would be adjudicated only in German courts. Notwithstanding these non-U.S. ties, Scrutinizer does have business dealings in the United States: its website is published in English, and although its business is "global," 156 of its customers were based in the United States over a three year period, with revenues amounting to just under $200,000.00 (€165,212.07). The only U.S.-based conduct highlighted in the opinion was an unexplained trademark application for the term "Scrutinizer " in January 2017, three years after the case was filed.[3]

Plixer sued Scrutinizer in the U.S. District Court for the District of Maine and Scrutinizer contested personal jurisdiction.[4] (The dispute was not based on Scrutinizer's contracts and thus did not trigger the forum selection clause.) The district court rejected Plixer's initial effort to base personal jurisdiction solely on Scrutinizer's Maine-based contacts, which consisted only of two sales worth approximately €3,100.[5] But, after allowing for jurisdictional discovery, the district court ultimately found jurisdiction based on Scrutinizer's contacts with the United States as a whole, finding that Scrutinizer "operated a highly interactive website that sold its cloud-based services directly through the website, that it was open to business throughout the world, that it accepted recurrent business from the United States in a substantial amount, and that it did so knowingly."[6] According to the district court, this sufficed to

exercise personal jurisdiction over Scrutinizer under Federal Rule of Civil Procedure 4(k)(2), which provides:

> (2) *Federal Claim Outside State-Court Jurisdiction.* For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:
>
> > (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
> >
> > (B) exercising jurisdiction is consistent with the United States Constitution and laws.

The district court denied Scrutinizer's motion to dismiss on these grounds, but granted Scrutinizer's motion to file an interlocutory appeal under 28 U.S.C. § 1292(b).

On appeal, the First Circuit affirmed. The court explained at the outset that the only contested aspect of the case was Rule 4(k)(2)(B), which invokes the requirement that personal jurisdiction comport with due process, a test requiring Plixer to show that

> (1) its claim directly arises out of or relates to the defendant's forum activities;
>
> (2) the defendant's forum contacts represent a purposeful availment of the privilege of conducting activities in that forum, thus invoking the benefits and protections of the forum's laws and rendering the defendant's involuntary presence in the forum's courts foreseeable; and
>
> (3) the exercise of jurisdiction is reasonable.[7]

As Plixer's trademark claim necessarily related to Scrutinizer's U.S. sales, the First Circuit analyzed only elements (2) and (3), and held that Plixer had satisfied both.

The court first found that Scrutinizer had purposely availed itself of the United States—such that Scrutinizer had the necessary "minimum contacts" with the United States for personal jurisdiction—despite the fact that it had no physical contacts with the United States. The court recognized that a prior personal-jurisdiction decision from the Supreme Court, *Walden Fiore*, expressly "le[ft] questions about virtual contacts for another day," and the First Circuit therefore based its ruling solely on Scrutinizer's "sizeable and continuing commerce with United States customers," but was otherwise "extremely reluctant to fashion any general guidelines beyond those that exist in law [and] emphasize[d] that [its] ruling [was] specific to the facts of this case."[8]

The court also rejected each of Scrutinizer's arguments against the finding of minimum contacts. According to the court, Scrutinizer had not simply "enter[ed] its products into the stream of commerce" and thus had no control where those products ended; "Scrutinizer's service [went] only to the customers that Scrutinizer has accepted."[9] Scrutinizer did not attempt to limit access to its website to block U.S. users, nor did it "take the low-tech step of posting a disclaimer that its service is not intended for U.S. users."[10] The court similarly rejected Scrutinizer's argument that its U.S. contacts

were solely "the product of its customers' unilateral actions," because Scrutinizer "knew that it was serving U.S. customers" through its "globally accessible website."[11]

But the key minimum-contacts analysis arose in the Court's rejection of Scrutinizer's final argument that it did not "specifically target" the United States.[12] That test came from a four-justice plurality opinion in the 2011 Supreme court Decision, *J. McIntyre Machinery, Ltd. v. Nicastro*, where the plurality would have allowed jurisdiction only "where the defendant can be said to have targeted the forum."[13] The First Circuit instead relied on Justice Breyer's more narrow concurrence in *Nicastro*, which relied on findings that the defendant in *Nicastro* had not made any regular course of sales in the jurisdiction to support a finding of purposeful availment or minimum contacts.[14] According to the First Circuit, *Nicastro* thus did not concern itself with companies that, like Scrutinizer, "'target[] the world' by making its website globally available."[15] Ultimately, the Court held that "the German company could have 'reasonably anticipated' the exercise of specific personal jurisdiction based on its U.S. contacts," including Scrutinizers regular sales to the U.S. and its use of a website "to obtain U.S. customer contracts."[16] The First Circuit defended this conclusion as consistent prior decisions from the Supreme Court and other courts emphasizing the importance of forum sales in minimum-contacts analysis.[17]

Having found that Scrutinizer had sufficient minimum contacts, the First Circuit concluded that exercising personal jurisdiction was reasonable.[18] The First Circuit recognized that litigating in the United States would burden Scrutinizer given its location in Germany, but discounted that burden in light of Scrutinizer's U.S. business and the fact that "modern travel 'creates no especially ponderous burden for business travelers.'"[19] But no other factor weighed against exercising jurisdiction. The court concluded that "'[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.'"[20]

The First Circuit's decision is drafted in narrow terms, but non-U.S. companies should take note of *Plixer's* potentially sweeping conclusion: A company with no physical ties to the U.S. whatsoever could be hauled into a U.S. court based solely on rather modest web-based sales. The Internet and e-commerce have revolutionized the ways in which companies can do business all over the world, opening up markets in ways that were unthinkable in the analog past. But the flip-side of this openness is the risk of litigation in foreign fora. In light of decisions such as *Plixer*, non-U.S. companies should carefully assess the costs and benefits of selling their products to identifiable U.S. individuals and companies.

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[1] --- F.3d ----, 2018 WL 4357137 (1st Cir. Sept. 13, 2018).

[2] *Id.* at *2.

[3] *Id.* at *1-2.

[4] *Id.* at *2.

[5] *Id.* at *2 n.4.

[6] *Id.* at *2.

[7] *Id.*at *3.

[8] *Id.* at *4 (citing *Walden v. Fiore*, 571 U.S. 227, 290 n.9 (2014)).

[9] *Id.* at *5.

[10] *Id.* at *5.

[11] *Id.* at *5.

[12] *See id.* at *6-7.

[13] 564 U.S. 873, 882 (2011) (plurality).

[14] *Id.* at 889 (Breyer, J., concurring).

[15] *Plixer*, 2018 WL 4357137, at *6 (quoting *Nicastro*, 564 U.S. at 890 (Breyer, J. concurring)).

[16] *Id.* at *6.

[17] *Id.* at *7 (citing *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984); *Oticon, Inc. v. Sebotek Hearing Sys., LLC*, 865 F. Supp. 2d 501 (D.N.J. 2011); *Willemsen v. Invacare Corp.*, 282 P.3d 867 (Or. 2012); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218 (9th Cir. 2011); *Bird v. Parsons*, 289 F.3d 865 (6th Cir. 2002); *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796 (7th Cir. 2014); *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390 (4th Cir. 2003)).

[18] *Id.* at *8.

[19] *Id.* at *8.

[20] *Id.* at *9 (quoting *Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano, Cnty.*, 480 U.S. 102, 114 (1987)).

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