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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ADEL SOMO et al.,

Plaintiffs and Appellants,

v.

KALYNN LARSON et al.,

Defendants and Respondents.

D054083

(Super. Ct. No. 37-2007-00065405-
CU-OR-CTL)

APPEAL from orders of the Superior Court of San Diego County, Joan M. Lewis, Judge. Reversed with directions.

Plaintiffs Adel Somo and Muntaha Somo sued Dixie College Foundation (Foundation) and nine Foundation officers and/or board members alleging they committed fraud and conspiracy to commit fraud in connection with plaintiffs' April 2004 purchase of allegedly contaminated real property. The trial court granted a motion to quash service of summons brought by eight of the individual defendants (the directors or director defendants) on grounds California lacked personal jurisdiction over them, and simultaneously denied plaintiffs' motion to compel written discovery and depositions to

discover information assertedly relevant to personal jurisdiction. On appeal from these orders, plaintiffs contend they made a sufficient showing that the directors possessed material adverse information concerning the property that they failed to disclose to the buyers and also withheld from an appraiser, so as to subject the directors to personal jurisdiction. Plaintiffs further contend the trial court erred in refusing to compel discovery as to the directors' knowledge of the information concerning the property's contamination and cleanup, and the relevant property disclosure requirements.

We conclude that plaintiffs' motion to quash should have been denied as to defendant Kalynn Larson based on evidence that she made an affirmative misrepresentation to plaintiffs' via their real estate agent concerning the property's present condition. Further, we conclude that for purposes of assessing specific personal jurisdiction, plaintiffs presented evidence to justify conducting discovery into each director's and officer's knowledge of the property's condition as well as their personal roles in the decision to sell the property to plaintiffs without disclosing evidence of past and possible present contamination. Because the trial court reached a different conclusion, it declined to consider plaintiffs' motion to compel discovery on jurisdictional issues. We reverse the orders and remand the matter with directions set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2004, plaintiffs purchased real property in Chula Vista California on which a Chevron gasoline station was being operated (the property). The three-way transaction involved a gift from the property's then owner, Elvin Anderson, to Foundation, and a subsequent sale from Foundation to plaintiffs. In April 2007, plaintiffs

sued Foundation and the property's former owners for breach of contract, fraud and negligence alleging that prior to the sale, they failed to disclose the property's contaminated condition. Plaintiffs began conducting discovery and took depositions of some of Foundation's officers and board members.

In May 2008, plaintiffs filed a third amended complaint naming nine individual defendants — Kalynn Larson, Timothy Anderson, Randy Wilkinson, Brock Belnap, Rod Savage, George Whitehead, Scott Hirschi, Scott Lovell and Rick Adams — in a cause of action for "Fraud/Deceit (and Conspiracy)." The nine defendants were all alleged to be Foundation officers or board members in the summer and fall of 2003.¹ Defendants Adams, Belnap, Hirshci, Savage, Whitehead, Larson and Wilkinson are all residents of the state of Utah. Plaintiffs allege that as of December 2003, defendants had knowledge of fuel contamination on the property as reported in 1995 and later in November 2003 by the Chevron dealer, and thereafter engaged in a conspiracy to acquire the property and sell it as quickly as possible by concealing and misrepresenting facts concerning an outstanding Department of Environmental Health (DEH) cleanup order, soil and/or groundwater contamination, and difficulties the plaintiffs would have in selling, developing or using the property. Plaintiffs also allege the defendants failed to inform the property appraiser of the DEH order and present contamination in order to allow an

¹Specifically, plaintiffs alleged Larson was Foundation's secretary/director, Anderson was its president until February 2004, Wilkinson succeeded Anderson as president, and Belnap, Savage, Whitehead, Hirschi, Lovell and Adams were Foundation board members during the relevant time frame.

artificially high appraisal value, and also failed to inform the plaintiffs that Chevron's lease would "cover" any contamination.

In June 2008, plaintiffs propounded form and special interrogatories, requests for admissions and a request for production of documents on the director defendants, who declined to respond on grounds they anticipated challenging the court's jurisdiction and sought to avoid waiving their jurisdictional objection. Plaintiffs moved to compel responses and also served additional discovery aimed at each director's specific knowledge of and involvement in the alleged fraud.² Defendants opposed the motion, maintaining the sought-after discovery was not sufficiently limited to facts relating to the question of personal jurisdiction; that the discovery should have been limited to revealing " 'a sufficient nexus among the defendant[s], the state and the litigation.' "

Thereafter, defendants Larson, Belnap, Savage, Whitehead, Hirschi, Lovell, Adams and Wilkinson moved to quash service of the summons on grounds California lacked general and specific personal jurisdiction over them. With regard to specific jurisdiction, they argued none of them had purposefully availed themselves of California

²Plaintiffs pointed out there were nine outstanding sets of discovery for each board member, but for purposes of the motion relied on one representative set. They argued the discovery concerned the nature of the information each director knew, obtained or shared relating to the property's contamination; covering "awareness of, and communication about, material facts by each board member, defendants, and Chevron regarding matters such as contamination and representations regarding same . . . ; the DEH cleanup order . . . ; a Phase 1 report which would identify reported fuel spills and governmental orders . . . ; new contamination reported by station operator, Park, in November, 2003 . . . ; problems using or selling gas stations as reported by Park . . . ; contact with Chevron regarding status of contamination, a release, and coverage under the lease . . . ; information withheld from the appraisal company prior to receiving two appraisals . . . ; disclosure requirements . . . ; [and] conspiracy to withhold material information . . . prior to the close of escrow."

benefits with respect to the Chula Vista property transaction, and plaintiffs could not use a conspiracy theory to establish specific personal jurisdiction. Each of the director defendants submitted a declaration in part stating that, to the extent they had been involved in the property sales transaction with plaintiffs, their actions were taken only in their capacity as either a member of Foundation's board of directors or as a Foundation officer. They each averred they did not expect any actions in that role would subject them to jurisdiction of any California court.

Plaintiffs opposed the motion. They conceded the lack of general jurisdiction³ absent further discovery, but maintained the evidence showed a sufficient nexus to intentional torts directed toward them as California residents to justify the exercise of specific personal jurisdiction. Plaintiffs argued the director defendants "facilitated the decisions which led to the fraudulent sale of property in this state, thus purposefully availing themselves of forum benefits." They lodged evidence assertedly showing the director defendants were privy to material adverse information concerning the property that they did not reveal to either the appraiser, resulting in an appraised value based on a false assumption, or the buyer, despite a purchase agreement requiring written disclosure of any such information.

Specifically, plaintiffs submitted excerpts from the depositions of Elvin Anderson, Foundation's past president Tim Anderson, board members Larson, Wilkinson and

³A court may assert general jurisdiction over a defendant when the defendant's contacts with the forum state are substantial, continuous and systematic. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445; *Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 904.)

Hirschi, and Foundation attorneys John Palmer and Sean Sullivan, which were taken before defendants filed their motion to quash, as well as documents produced by Foundation, including board meeting minutes and agendas. The evidence showed that in or about July 2003, at the beginning of the process of gifting his property, Elvin Anderson provided Foundation with his entire service station file because he was aware it would not accept the gift if there were to be future financial problems. Anderson's station file contained information that the property had previously suffered contamination and that there was a pending DEH clean up order in place, as well as a 2002 letter stating that a company on Chevron's behalf, SECOR, would be installing one groundwater monitoring well associated with the property. Anderson testified he gave everything pertinent to attorney Palmer. Palmer testified he customarily shared all of the information he received on the matter with Foundation and the Andersons, and it was his law firm's practice to do so. Sullivan testified he also worked on the matter.

On July 18, 2003, Larson, Foundation's secretary, participated in a telephone conference call with Sullivan and the present gas station operator on the property, Ted Park. Sullivan billed the conversation as pertaining to "documentation relating to site cleanliness." The next day, Larson advised Park by letter (directed to Park at a Spring Valley, California address) that it was Foundation's intent to sell the property to him, but in order to receive the property, "we need to make sure that we are not held liable for any contamination." She asked him to provide documentation showing the property had been inspected to certify the absence of contamination, as well as copies of county inspections or other information in his possession showing no serious environmental problems at the

location. Park wrote back that it was his understanding that Chevron was "held liable" for any contamination, that the site was tested annually and reports were sent to Chevron, and to his knowledge the land had "passed all tests and is free of contamination." Larson testified she never received copies of any county inspection reports, and she reported to the Board that Park had told her the property was free of contamination. She did not pursue the matter any further with Chevron or Anderson.

On August 11, 2003, Larson presented the proposed gift of the property to the board, in the presence of Foundation's then president Tim Anderson, along with directors Belnap, Savage, Whitehead, Hirschi, Lovell, and Adams. Discussion occurred about the "risks involved in receiving property used as a service station," and protecting Foundation from liability, including obtaining an insurance policy or creating a subsidiary organization "to accept high-risk gifts." Director Hirschi moved to "proceed with haste to finalize and exact the gift" and the board unanimously voted in favor of the motion. Later that month, the defendant directors again met (with Savage and Wilkinson absent) and Hirschi was tasked with looking into obtaining liability or pollution insurance.

Hirschi admitted in his deposition that he and Foundation knew the property had been contaminated via Chevron documents provided by Park to Larson. He testified that in July 2003, the board expressed concern specifically about liability Foundation might acquire in connection with a leaking underground tank. Hirschi specifically expressed to the board his concern about whether Foundation would incur liability if it were in the chain of title. He began contacting insurance brokers, and acknowledged to one that the

underground storage tanks on the property had been replaced in 1996 and that the entire system had been "reviewed regularly" since then. However, Hirschi believed there were no current problems with the property since Park had told him that the contamination had been removed. Nevertheless, he felt it prudent to continue to investigate the possibility of Foundation's liability from his prior experience with underground storage tanks. He called the "California Department of Environmental Quality" and inquired with a division about the property. According to Hirschi, at some point between July 2003 and February 2004, he was told by a state representative that the property had been properly mitigated and was no longer a threat for leaking underground storage tanks. He stated that the representative told him that her agency had overseen the mitigation, and he understood that the proper documentation had been created and filed to certify that fact. He did not contact Chevron to determine the status of any contamination or cleanup, since he felt he had all of the information he needed from the state.

In September 2003, Hirschi continued pursuing a quote from the insurance broker, telling him he hoped Foundation could purchase a policy that covered the short period of time it was to own the property with perpetual tail insurance. The broker gave Hirschi an extensive application in part requiring Foundation to state whether the property had underground storage tanks and whether they were in compliance with U.S. Environmental Protection Agency standards for leak detection, overflow protection, and corrosion protection, and also whether there were any groundwater monitoring activities at the location. Hirschi sought Larson's help in filling out the application, though Larson did not recall doing anything with it.

In mid-November, Larson arranged for an appraisal service to estimate the property's market value. Tim Anderson signed the engagement letter. Thereafter, on November 22, 2003, Park faxed attorney Sullivan a document from Advanced Fuel Filtration Systems, Inc. with handwritten notes from a site manager, and Park's own note, reading: "Spill/vapor buckets failed. Chevron will replace and retest. This should be the last test. Hope this will be the last environmental test." (Underlining in original.) Sullivan testified he customarily conveyed such documents to the Andersons and Foundation.

Several days later on November 25, 2003, Park advised the Andersons by letter that he had learned from one of the tests that "the spill and vapor buckets show some signs of contamination in the area of the tanks and Chevron has 30 days to rectify any contamination." By that time, Sullivan, who had been copied with Park's letter, was aware of the County's involvement in the property as well as Park's reference to signs of contamination. He testified he most likely would have provided Park's letter to the Andersons and also to Foundation.

In mid-December 2003, the appraisal company sent its report to Larson indicating a market value of \$850,000 for the property as of December 3, 2003. The report was issued subject to assumptions and "limiting conditions" specific to the property, stating: "We made no soils tests nor tests of underground water. If the property has been used for the sale of petroleum products, we suspect that leakage of toxic material may have occurred. However, we are not qualified to detect such substances, and therefore, the extent of toxic waste remaining on the property, if any, is not known. In the absence of

specific information to the contrary, we have estimated the value of the property as if 'clean' and uncontaminated."

Tim Anderson, Foundation's then president, testified that he recalled seeing Park's November 25, 2003 letter at a December 16, 2003 executive committee meeting, and he thought the letter was circulated and discussed. Directors Whitehead, Hirschi, Lovell, Belnap, Savage, and Adams also attended that meeting. Tim Anderson was sure somebody mentioned getting a "Phase I environmental study" done to protect Foundation and the function of such a study was discussed. However, he did not recall whether Foundation or the buyer contemplated such a study, nor could he say whether everyone appreciated or understood how a Phase I study would identify property contamination.

In January 2004, the appraisal company sent Larson another report appraising the property at \$1 million. On January 14, 2004, Foundation's executive board (except Savage) met and decided to approach Wilkinson to serve as its next president. Wilkinson was elected as Foundation's president in mid-February 2004, and signed an official resolution to sell the property for \$1.1 million to an entity that shortly thereafter assigned its purchase rights to plaintiffs. He also signed and initialed the real estate agency disclosures and sales contract, the commercial property purchase agreement and joint escrow instructions, and a March 3, 2004 letter of commitment that explained that Foundation was not at that time holding title to the property. Wilkinson testified he read the contract before the close of escrow and also before signing the document. He delegated responsibility for compliance with the contract to attorney Palmer and acted under Palmer's direction. Wilkinson testified that he was not aware of any specific

efforts by Foundation to comply with the purchase agreement's seller disclosure requirements. He testified that Foundation waited to accept title to the property until April 21, 2004, the date the property was transferred and sold to plaintiffs.

Plaintiffs submitted a declaration from the parties' dual real estate agent stating that in March 2004, she received an environmental disclosure report that referenced a leaking underground storage tank at the property. The agent contacted Larson, who told her she had learned the underground storage tanks had been replaced in 1995, any problems had been resolved, and there was no current problem at the site. The agent communicated that information to plaintiffs.

The trial court granted defendants' motion to quash on several grounds. First, relying on *Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, the court ruled California law did not recognize conspiracy as a basis for acquiring personal jurisdiction over a party. Second, it found no valid claim against the director defendants in the third amended complaint because agents of a corporation acting in their official capacities could not conspire with their corporate principal or employer as a matter of law. Finally, it ruled plaintiffs did not offer sufficient evidence to suggest any of the directors engaged in tortious conduct that caused an effect in California. As for plaintiffs' motion to compel discovery, the trial court found no justification for the requested discovery as to specific jurisdiction because plaintiffs did not present evidence to suggest the defendants had engaged in tortious conduct in the first instance.

Plaintiffs timely appealed the trial court's orders.

DISCUSSION

I. *Motion to Quash*

Plaintiffs contend the trial court erred as a matter of law in granting the director defendants' motion to quash service of summons; that the trial court applied the incorrect legal standard in concluding they had not presented evidence that the individual defendants engaged in tortious activity that caused an effect in California. Plaintiffs maintain that conspiracy to commit fraud by the board members is a valid basis for specific or limited jurisdiction, and under that theory they demonstrated that the individual defendants engaged in conduct with some nexus to the claimed fraud and conspiracy with Foundation to defraud them. They argue they presented evidence of board meetings and minutes showing the "board members were the decisionmakers for [Foundation] and knowingly allowed the fraud to be perpetrated" and that, for purposes of the alleged conspiracy, the evidence showed the directors agreed to perform a wrongful act in that they obtained knowledge of the property's contamination and the DEH order, but withheld such information from the plaintiffs and appraiser.

A. *Legal Principles Relating to Personal Jurisdiction*

" 'California courts may exercise personal jurisdiction on any basis consistent with the Constitution of California and the United States. [Citation.] The exercise of jurisdiction over a nonresident defendant comports with these Constitutions "if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate ' "traditional notions of fair play and substantial justice." ' ' ' [Citations.] [¶] 'The concept of minimum contacts . . . requires states to observe certain territorial limits

on their sovereignty. It "ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." ' [Citation.] To do so, the minimum contacts test asks 'whether the "quality and nature" of the defendant's activity is such that it is "reasonable" and "fair" to require him to conduct his defense in that State.' [Citation.] The test 'is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present.' " (*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1061-1062 (*Snowney*)).

"Under the minimum contacts test, '[p]ersonal jurisdiction may be either general or specific.' [Citation.] . . . 'When determining whether specific jurisdiction exists, courts consider the " 'relationship among the defendant, the forum, and the litigation.' " [Citation.] A court may exercise specific jurisdiction over a nonresident defendant only if: (1) "the defendant has purposefully availed himself or herself of forum benefits" [citation]; (2) "the 'controversy is related to or "arises out of" [the] defendant's contacts with the forum' " [citation]; and (3) " 'the assertion of personal jurisdiction would comport with "fair play and substantial justice" ' " [citation].' " (*Snowney, supra*, 35 Cal.4th at p. 1062.) The question of purposeful availment focuses on the defendant's intentionality, and is " 'only satisfied when the defendant purposefully and voluntarily directs [its] activities toward the forum so that [it] should expect, by virtue of the benefit

[it] receives, to be subject to the court's jurisdiction based on' [its] contacts with the forum." (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269 (*Pavlovich*).)⁴

In *Pavlovich*, the California Supreme Court discussed the "effects test" of *Calder v. Jones* (1984) 465 U.S. 783, used in intentional tort cases for purposes of determining a defendant's purposeful availment. (*Pavlovich, supra*, 29 Cal.4th at pp. 269-270.) It noted that in *Calder*, a libel action, the effects test was used to exercise jurisdiction over a magazine's president and editor and a reporter " 'based on the "effects" of their Florida conduct in California.' " (*Pavlovich, at p. 270, quoting Calder, 465 U.S. at p. 789.*) "The court found jurisdiction proper because 'California [was] the focal point both of the story and of the harm suffered.' [Citation.] 'The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California . . . and the brunt of the harm, in terms both of [Jones's] emotional distress and the injury to her professional reputation, was suffered in California.' [Citation.] The court also noted that the individual defendants wrote or edited 'an article that they knew would have a potentially

⁴Our state's high court in *Snowney* explained that "purposeful availment occurs where a nonresident defendant ' "purposefully direct[s]" [its] activities at residents of the forum' [citation], ' "purposefully derive[s] benefit" from' its activities in the forum [citation], 'create[s] a "substantial connection" with the forum' [citation], ' "deliberately" has engaged in significant activities within' the forum [citation], or 'has created "continuing obligations" between [itself] and residents of the forum' " (*Snowney, supra*, 35 Cal.4th at p. 1063.) "By limiting the scope of a forum's jurisdiction in this manner, the "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts" (*Ibid.*) Instead, the defendant will only be subject to personal jurisdiction if " "it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the state." " (*Ibid.*)

devastating impact upon [Jones]. And they knew that the brunt of that injury would be felt by [Jones] in the State in which she lives and works and in which the National Enquirer has its largest circulation.' " (*Pavlovich*, at p. 270.)

Pavlovich explained, however, that to establish purposeful availment, it is generally not enough to assert that a defendant could foresee his or her conduct would have injurious effects in California. (*Pavlovich, supra*, 29 Cal.4th at pp. 270-271 ["[M]ost courts agree that merely asserting that a defendant knew or should have known that his intentional acts would cause harm in the forum state is not enough to establish jurisdiction. . . ."] & fn. 1; e.g., *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 474, fn. and italics omitted ["Although it has been argued that foreseeability of causing injury in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction"].) The California Supreme court requires "additional evidence of express aiming or intentional targeting" to meet the effects test. (*Pavlovich*, at p. 273; see also *Goehring v. Superior Court, supra*, 62 Cal.App.4th at p. 909 [jurisdiction under effects test may be invoked only where the actor committed an out-of-state act intending to cause effects in California or reasonably expecting that effects in California would result].)

Plaintiffs opposing a motion to quash service of process for lack of personal jurisdiction have the initial burden to demonstrate facts establishing a basis for personal jurisdiction. (*Snowney, supra*, 35 Cal.4th at p. 1062; *HealthMarkets, Inc. v. Superior Court* (2009) 171 Cal.App.4th 1160, 1167-1168 (*HealthMarkets*); *In re Automobile*

Antitrust Cases I and II (2005) 135 Cal.App.4th 100, 110.) The burden must be met by competent affidavits containing specific evidentiary facts or authenticated documentary evidence, not by allegations of an unverified complaint. (*In re Automobile Antitrust Cases I and II*, at p. 110.) If plaintiffs satisfy that burden, the burden shifts to the defendant to show the exercise of jurisdiction would be unreasonable. (*HealthMarkets*, at p. 1168; *Snowney*, at p. 1062.)

B. *Standard of Review*

" 'On review, we apply our independent judgment to the ultimate question of jurisdiction, but to the extent that the question of jurisdiction turns on factual issues, we are bound by the trial court's findings of fact if they are supported by substantial evidence. [Citation.] We have no power to substitute our own assessment of the facts for that of the trial court if substantial evidence supports [its] finding. [Citation.] That is a trial court function, not one for us as an appellate court.' " (*CenterPoint Energy, Inc. v. Superior Court* (2007) 157 Cal.App.4th 1101, 1119, quoting *In re Automobile Antitrust Cases I and II, supra*, 135 Cal.App.4th at pp. 113-114; see also *HealthMarkets, supra*, 171 Cal.App.4th at p. 1168.) Though the director defendants are the moving parties, "we focus first on whether plaintiffs made a sufficient showing of the jurisdictional facts on which they bear the burden of proof." (*In re Automobile Antitrust Cases I and II, supra*, 135 Cal.App.4th at p. 111.)

Here, defendants characterize the trial court as having made "factual determinations" to which we should defer. However, the trial court did not set out facts as to the individual board members' conduct relating to plaintiffs' alleged fraud or

conspiracy. It stated only that "[p]laintiffs offered insufficient evidence to suggest that any of the Board Members engaged in tortious conduct which caused an effect in California." We view the trial court's ruling as a conclusion of law. "Generally, '[t]he existence or nonexistence of substantial evidence is a question of law.'" (*Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1515.)

C. The Focus Must Be On the Director Defendants' Personal Forum-Related Contacts

Plaintiffs' third amended complaint includes allegations of California effects by both affirmative misrepresentation (by Wilkinson and Larson in asserting to plaintiffs that Foundation was not aware of contamination at the time of the property sale in April 2004) and omission (by the director defendants allegedly agreeing to fraudulently conceal known facts concerning the outstanding DEH order, soil and/or groundwater contamination, and the coverage obligations within Chevron's lease). Plaintiffs allege the director defendants either defrauded them or participated in a conspiracy to defraud them by agreeing to conceal material adverse information about the property's condition to them and to the real estate appraiser involved in the sales transaction. California law recognizes that fraudulent omissions could give rise to a claim of personal jurisdiction if such omissions are shown by competent evidence: "A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act done elsewhere with respect to causes of action arising from these effects, unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable." (Judicial Council of Cal., com. (9), reprinted at 14A West's Ann. Code Civ. Proc. (2004 ed.) foll. § 410.10, p. 381.)

In part, the trial court concluded that defendants' actions were taken in their capacities as directors or officers of Foundation, and on that independent basis found no ground for personal jurisdiction because the directors could not conspire with the corporation as a matter of law. However, the authority on which the trial court relied, *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511, does not involve a question of personal jurisdiction over corporate officers or directors for acts taken on behalf of the corporation. We decline to extend *Applied Equipment* to such personal jurisdiction questions. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372 ["[C]ases are not authority for propositions not considered therein".])

Rather, in the personal jurisdiction context, this court and others have rejected reliance on the so-called "fiduciary shield" doctrine to insulate corporate directors or officers from jurisdiction based on tortious acts performed solely in their corporate capacity. (See *Anglo Irish Bank Corp., PLC v. Superior Court* (2008) 165 Cal.App.4th 969, 980; *Seagate Technology v. A.J. Kogyo Co.* (1990) 219 Cal.App.3d 696, 701-703 (*Seagate*) [criticizing contrary dicta in *Mihlon v. Superior Court* (1985) 169 Cal.App.3d 703]; *Taylor-Rush v. Multitech Corp.* (1990) 217 Cal.App.3d 103, 117-118 (*Taylor-Rush*) [same]; *Goehring v. Superior Court, supra*, 62 Cal.App.4th at pp. 905-906 [citing, in addition to *Seagate* and *Taylor-Rush*, recent state and federal decisions questioning continued validity of the fiduciary shield doctrine in the personal jurisdiction context].) In *Anglo Irish Bank*, the court explained — and we agree — that "reliance on state substantive law of agency and alter ego to determine the constitutional limits of specific personal jurisdiction is unnecessary and is an imprecise substitute for the appropriate

jurisdictional question. The proper jurisdictional question is not whether the defendant can be liable for the acts of another person or entity under state substantive law, but whether the defendant has purposefully directed its activities at the forum state by causing a separate person or entity to engage in forum contacts. That constitutional question does not turn on the specific state law requirements of alter ego or agency, although the inquiry may be similar in some circumstances." (*Anglo Irish Bank*, 165 Cal.App.4th at p. 983; see also *HealthMarkets, supra*, 171 Cal.App.4th at p. 1170.)

Thus, corporate officers are not shielded from jurisdiction in a forum merely because their acts in the forum were undertaken in an official business capacity. However, corporate officers are not automatically subject to jurisdiction in a distant forum merely because their corporation is subject to jurisdiction. Rather, courts examine the individual officer's personal conduct with respect to the forum to determine whether he or she developed sufficient minimum contacts for personal jurisdiction: whether he or she personally authorized or actively participated in tortious activity or otherwise engaged in actions of the type that could subject them to personal liability. (*Seagate, supra*, 219 Cal.App.3d at pp. 701-702, quoting *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 503-505; *Goehring v. Superior Court, supra*, 62 Cal.App.4th at p. 906.) *Seagate* observed that not all acts by a corporate officer merit consideration in a jurisdictional analysis, expressly stating, "For example, no personal contact would result from doing nothing more than ratifying an act taken by the corporation or by another corporate officer." (*Seagate*, at p. 703.) However, if both requirements of personal tort liability and personal contact with the forum are met, "the act may be

considered in determining if the contacts between the individual and the state are substantial enough as to permit the state to exercise personal jurisdiction over the individual, or whether the exercise of personal jurisdiction over the defendant offends 'traditional notions of fair play and substantial justice.' " (*Seagate, supra*, 219 Cal.App.3d at pp. 703-704.)⁵

In *Taylor-Rush*, for example, the plaintiff, a former owner of a California corporation, sued six non-resident corporate officers and directors alleging breach of contract, fraud and conspiracy to defraud her in connection with the sale of her company to their company. (*Taylor-Rush, supra*, 217 Cal.App.3d at pp. 108-109.) The plaintiff contended she was induced to sell her stock by the fraudulent misrepresentations and nondisclosures of the defendants, who moved to quash service of summons on them on grounds they were simply performing their duties as corporate officers or directors. (*Id.* at pp. 108, 112-113.) Observing that corporate officers and directors could be held

⁵In *Seagate*, the Court of Appeal reversed an order quashing service of summons against a Japanese citizen who was president of a Japanese corporation and a California corporation. He had no contacts with California as an individual. However, the plaintiff argued jurisdiction was proper based on the president's alleged guaranty issued on behalf of both corporations, in which he allegedly misrepresented that he would make good on the guaranty. The plaintiff alleged it granted credit to the California corporation based on that letter. (*Seagate, supra*, 219 Cal.App.3d at pp. 699-700.) In reversing the order quashing service, the Court of Appeal held a California court could properly assume jurisdiction over a nonresident corporate officer whose only contacts with the state were in a corporate capacity if (1) the officer's act was one for which the officer would be personally liable; and (2) the officer's act in fact created contacts between the officer and the forum state. (*Id.* at pp. 703-704.) The court remanded the matter to determine if there were sufficient facts to justify the exercise of jurisdiction. The court held that jurisdiction over the individual defendant would not be proper if he did not personally cause the Japanese corporation to issue the guaranty, the letter was not in fact a guaranty, or there was no misrepresentation. (*Seagate, supra*, 219 Cal.App.3d at p. 706.)

personally liable if they directly authorized or actively participated in wrongful or tortious conduct, the Court of Appeal held she had made a compelling showing that two individuals had made fraudulent representations and nondisclosures inducing her to execute the buy/sell agreement, one during a meeting with her in California and one during a meeting in New York. (*Id.* at pp. 113-114.) The court pointed out that in their opposing declarations, neither officer or director denied the fraudulent conduct, but only stated they acted in their capacities as directors or officers. (*Id.* at p. 114.) The appellate court stated that as to the officer who met with the plaintiff in New York, "his alleged tortious conduct outside California was purposefully directed at appellant in California and had a tortious effect here." (*Ibid.*) It concluded the plaintiff established sufficient minimum contacts for California to exercise personal jurisdiction over those individuals. (*Ibid.*) However, as to the other defendants, the court concluded there was "no evidence that they participated in or directed any tortious act or omission either within or without California." (*Ibid.*)

On appeal, defendants point to the insufficiency of plaintiffs' conspiracy allegations, arguing the third amended complaint lacks specific factual averments as to each individual defendant and instead suggests that knowledge of some directors should be imputed to others. However, this matter does not involve a demurrer, and we are not assessing the sufficiency of plaintiffs' pleading. Though plaintiffs maintain that a defendant's acts in connection with a conspiracy can serve as a valid basis for personal jurisdiction, they concede they must nevertheless show personal forum-related acts by each individual defendant; they may not rest the assertion of personal jurisdiction on

mere allegations of conspiracy. "Allegations of conspiracy do not establish as a matter of law that if one conspirator comes within the personal jurisdiction of our courts, then California may exercise jurisdiction over other nonresident defendants who are alleged to be part of that same conspiracy. Personal jurisdiction must be based on forum-related acts that were personally committed by each nonresident defendant. The purposes and acts of one party — even an alleged co-conspirator — cannot be imputed to a third party to establish jurisdiction over the third party defendant." (*In re Automobile Antitrust Cases I and II, supra*, 135 Cal.App.4th at pp. 113, 118; see also *CenterPoint Energy, Inc. v. Superior Court, supra*, 157 Cal.App.4th at p. 1118; *Kaiser Aetna v. Deal* (1978) 86 Cal.App.3d 896, 901.)

Mansour v. Superior Court, supra, 38 Cal.App.4th 1750, relied upon by defendants and also the trial court, is not inconsistent with this conclusion. The cases cited by the *Mansour* court stand for the proposition that mere allegations of conspiracy without a prima facie showing of its existence do not suffice to establish jurisdiction (see *id.* at pp. 1759-1760 [citing *Taylor-Rush*]) and in *Mansour*, the plaintiffs had not made a prima facie case of conspiracy because the complaint was of no evidentiary value, and the declarations presented were insufficient to suggest a conspiracy to publish defamatory statements about the defendants in that case. (*Mansour*, 38 Cal.App.4th at p. 1760.) *Mansour* held that the purposes of one coconspirator could not be imputed to another coconspirator for purposes of asserting jurisdiction over the latter. (*Ibid.*, in part citing *Kaiser Aetna v. Deal, supra*, 86 Cal.App.3d at p. 901 ["Allegations of conspiracy do not

establish as a matter of law that if there is one resident coconspirator, jurisdiction may be exercised over nonresident coconspirators"].)

Accordingly, for purposes of assessing jurisdiction over the nonresident directors, we may not automatically impute to them every alleged act of misrepresentation, nondisclosure or concealment committed by others involved in the alleged conspiracy. We must have evidence of some tortious acts on their part expressly aimed or targeted at California. (*Pavlovich, supra*, 29 Cal.4th at p. 271; see *In re Automobile Antitrust Cases I and II, supra*, 135 Cal.App.4th at p. 122; *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 447-448; *Edmunds v. Superior Court* (1994) 24 Cal.App.4th 221, 231, 233; *Kaiser Aetna v. Deal, supra*, 86 Cal.App.3d at p. 901.) And, as stated, the defendants' mere knowledge that their tortious conduct might cause harm in California is not sufficient to establish express aiming at California. (*In re Automobile Antitrust Cases I and II*, at p. 123.)

Given these principles and the nature of plaintiffs' fraud cause of action (alleging both affirmative and nondisclosure fraud), we would normally assess plaintiffs' evidence to ascertain each individual director defendant's role, if any, in the property transaction, including his or her knowledge pertaining to the DEH order and its status, the existence of contamination, knowledge of Foundation's disclosure obligations with regard to the sale, and involvement in the decision to withhold information about past and potentially present contamination. But the trial court declined to rule on plaintiffs' motion to compel discovery of these facts based on its conclusion that plaintiffs "ha[d] no evidence to suggest that a defendant has engaged in tortious conduct in the first instance." Thus, the

court did not consider plaintiffs' request to obtain requested discovery as to the individual director defendants' personal involvement in and knowledge of the alleged fraud.

We disagree with the trial court's legal conclusion about the state of the evidence. Fraud includes concealment of a known fact, i.e., nondisclosure when a party has a duty to disclose. (*Stevenson v. Baum* (1998) 65 Cal.App.4th 159, 165.) And active concealment or suppression of facts by a nonfiduciary is the equivalent of actual fraud. (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 291.) "In general, a seller of real property has a duty to disclose "where the seller knows of facts *materially* affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer" " (*Stevenson*, 65 Cal.App.4th at p. 165; see also *Barnhouse v. City of Pinole* (1982) 133 Cal.App.3d 171, 187.) Furthermore, once the seller undertakes to disclose information, all material facts must be disclosed. Civil Code section 1710, subdivision (3) provides that "[t]he suppression of a fact, by one . . . who gives information of other facts which are likely to mislead for want of communication of that fact" constitutes deceit. (See *Barnhouse, supra*, at p. 190 [adopting rule that if a seller has "knowledge of past or present existence of an instrumentality of progressive destruction or substantial impairment, notwithstanding reason to believe that the progression has been halted, a duty to disclose the circumstances arises"].)

Applying all of the above principles, we conclude that as to defendant Larson, plaintiffs' evidence was sufficient to deny the motion to quash. As stated, a defendant is

subject to personal jurisdiction if the evidence affords an inference that he or she committed or directed others to commit torts against plaintiffs for which he or she would be personally liable. (*Taylor-Rush, supra*, 217 Cal.App.3d at pp. 113-114.) Elvin Anderson's and attorney Palmer's deposition testimony permits a reasonable inference that Larson was in possession of Anderson's property file which included the DEH clean-up order indicating the property had suffered contamination in 1995. Larson thereafter personally dealt with Park, the property lessee and gas station owner, to protect Foundation from liability for contamination. Unlike *Mansour*, 38 Cal.App.4th 1750, plaintiffs submitted deposition testimony (including from Hirschi and Tim Anderson) showing the directors discussed the property's past contamination as well as reviewed Park's November 2003 report of possible present contamination, and nevertheless approved the transaction without disclosing those facts. Larson affirmatively told the real estate agent in March 2004 that there was "no problem" at the site. There is further evidence that despite her knowledge, Larson remained silent about Park's report of possible contamination to the property appraisal company, which proceeded to evaluate and value the property under the express assumption it was clean and uncontaminated. Larson's direct representations to the parties' dual California real estate agent of false or misleading information that she reasonably knew would induce plaintiffs to proceed with the sale could subject her to personal tort liability for fraud. (*Barnhouse, supra*, 133 Cal.App.3d at p. 190.)

We further conclude under these facts that Larson's alleged tortious misrepresentation and/or concealment meets the *Calder* effects test. (*Calder, supra*, 465

U.S. at p. 789; *Pavlovich, supra*, 29 Cal.4th at p. 270. Her conduct was "expressly aimed at or targeting" California (*Pavlovich*, at p. 271) in that Larson was tasked with obtaining a significant gift — the California property and its sales proceeds — for Foundation, and dealt directly with the California-based property lessee and dual real estate agent in California so as to sell the property to California buyers, using California Association of Realtor commercial property purchase documents having specified disclosure obligations. The commercial property purchase agreement is governed by California law. These contacts satisfy the purposeful availment prong because they show Larson personally engaged in intentional acts expressly aimed at California causing harm that she knew was likely to be suffered entirely in California. Evidence that Larson reached out to California and committed an intentional tort weighs heavily in favor of personal jurisdiction in California. Plaintiffs' fraud cause of action is directly based upon and arises out of Larson's forum-related actions.⁶

As for the other director defendants, it is not sufficient to establish specific personal jurisdiction to show that they merely approved or ratified Foundation's sale with knowledge that the sale might cause harm to plaintiffs in California. (See *Seagate, supra*, 219 Cal.App.3d at p. 703.) However, plaintiffs' evidence summarized above suggests that one or more directors, Hirschi in particular, may have directly participated in a

⁶Indeed, defendants do not meaningfully dispute that the controversy alleged in plaintiffs' third amended complaint is related to or arises out of the defendants' contacts with California, i.e., there is a substantial nexus or connection between the defendants' California related actions (their involvement in approving Foundation's receipt of the Chula Vista property as a gift and its sale to plaintiffs, who are California residents) and the alleged fraud and conspiracy. (E.g., *Snowney, supra*, 35 Cal.4th at pp. 1067-1070.)

decision to withhold material information affecting the desirability or value of the property, namely, the past and possible present contamination at the site. Hirschi and Tim Anderson testified that before the close of escrow, the directors possessed the DEH clean-up order and Park's November 25, 2003 letter reporting signs of new contamination. The board discussed Foundation's potential liability with regard to leaking underground storage tanks and other information relating to possible current contamination at the site and also discussed obtaining an environmental assessment of the property, but no further investigation or disclosure was made. Director Wilkinson signed and reviewed the purchase agreement and disclosure statements, which did not mention past or present contamination at the site.

Importantly, in their supporting declarations, defendants do not deny knowledge of or participation in discussions concerning the property's condition or Foundation's disclosure obligations, including discussions as to whether or not the DEH order or information in Park's letter should have been disclosed to plaintiffs. Rather, they rely on the fact that they acted solely on Foundation's behalf in their capacity as an officer or director. We have concluded such status does not by itself negate specific personal jurisdiction. Having focused solely on their director status, defendants have not made a compelling showing that California would be an unreasonable forum to make personal jurisdiction over them inappropriate.

II. *Motion to Compel Discovery*

"A plaintiff is generally entitled to conduct discovery on a jurisdictional issue before the trial court grants a motion to quash." (*Thomson v. Anderson* (2003) 113

Cal.App.4th 258, 271; *School Dist. of Okaloosa County v. Superior Court* (1997) 58 Cal.App.4th 1126, 1131-1132; see, e.g, *Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1234.) The right to discovery is limited to questions relevant to the jurisdictional issue, and necessary to sustain the plaintiff's burden in opposing the motion. (See *1880 Corp. v. Superior Court of City and County of San Francisco* (1962) 57 Cal.2d 840, 843; *Mihlon v. Superior Court, supra*, 169 Cal.App.3d at p. 710; *Ziller*, at p. 1234.) If a plaintiff is unable to complete such discovery before the hearing on the motion, he or she is generally entitled to a continuance for that purpose. (*School Dist. of Okaloosa County v. Superior Court*, at pp. 1131-1132.)

Given our conclusions above, we hold plaintiffs were entitled to a ruling on the merits of their motion to compel discovery, which, according to plaintiffs, seeks information about the directors' knowledge of material information about the property and involvement in the events leading to the property transaction, information sufficiently relevant and related to the directors' potential specific personal jurisdiction. Under the analysis set forth above, specific personal jurisdiction may be established if a director defendant is shown to have authorized or personally participated in the decision to withhold evidence of past and possible present contamination from plaintiffs in connection with the sale. A defendant in those circumstances would know that his conduct would likely cause harm to plaintiffs in this state, and he " 'should reasonably anticipate being haled into court [here].' " (*Pavlovich, supra*, 29 Cal.4th at p. 272, quoting *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297.) Based on our holding, we deny plaintiffs' motion to take evidence on appeal.

We reject defendants' argument that the trial court's order on plaintiffs' discovery motion is not an appealable order. Because the court did not reach the merits of that motion on flawed grounds, we shall remand the matter with directions that the trial court vacate its orders and enter a new order denying the defendants' motion to quash service as to Larson. The trial court shall rule on plaintiffs' motion to compel discovery and, if granted in whole or part, thereafter allow plaintiffs to refile their opposition to defendants' motion.

DISPOSITION

The orders are reversed and the matter remanded with directions that the trial court vacate its orders quashing service of summons and denying plaintiffs' motion to compel discovery and enter a new order denying the defendants' motion to quash service as to Larson. The trial court shall rule on plaintiffs' motion to compel discovery and, if granted in whole or part, allow plaintiffs to refile their opposition to defendants' motion to quash service as to the other director defendants. Plaintiffs shall recover their costs on appeal.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.