IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE
COUNTY, FLORIDA

CHINESE DRYWALL DIVISION
CASE NO.: 09-07901 CA 42

LENNAR HOMES, LLC, *et al.*,

Plaintiffs

v.

KNAUF GIPS KG, *et al.*,

Defendants.
_____/

ORDER DENYING TAISHAN GYPSUM CO. LTD.'S MOTION TO VACATE THE ENTRY OF DEFAULT AND TO DISMISS THE COMPLAINT

THIS MATTER came before the Court on June 29, 2012, on Taishan Gypsum Co., Ltd.'s motion to vacate the entry of default and to dismiss the complaint. In support of its motion to dismiss for lack of personal jurisdiction, Taishan Gypsum ("TG") argues that it has insufficient contacts with Florida and should not be required to defend itself here. It also argues that the default should be vacated because TG's failure to timely respond was excusable. The plaintiffs respond that TG controlled and dominated its wholly owned subsidiary, Taian Taishan Plasterboard Co., Ltd. ("TTP"), in such a way that TTP's business dealings with Florida customers should be imputed to TG for the purposes of determining whether personal jurisdiction over TG may be appropriately exercised. The Court agrees with the plaintiffs. TG and TTP had an agency relationship under Florida law, and, as a result, the actions of TTP are imputed to TG.

With the threshold issue of agency in mind, the Court finds that TG and TTP (collectively "Taishan") had sufficient business dealings and contacts in Florida to satisfy the exercise of jurisdiction. Taishan actively targeted the Florida market by courting Florida companies, mailing drywall samples to Florida, selling large amounts of drywall to Florida-based companies, arranging the shipment of drywall to those companies with full knowledge of Florida as the ultimate destination, and entering into an exclusive agency agreement with a Florida company. The plaintiffs' causes of action – all of which are related to the installation of defective, Chinese-manufactured drywall in Florida homes – arise out of these contacts. For these reasons – stated in more detail below – the Court asserts personal jurisdiction over Taishan pursuant to both Florida's Long-Arm Statute and the Due Process Clause of the United States Constitution. The Court declines to vacate the entry of default as TG has failed to establish excusable neglect, due diligence and a meritorious defense.

BACKGROUND

TG, formerly Shandong Taihe Dongxin Co., Ltd. ("Taihe") is a Chinese building materials manufacturer focusing mainly on the production of plasterboard, commonly referred to as "drywall" in the United States. In February 2006, TG created TTP, which functioned as a wholly-owned subsidiary of TG, with TG as its only shareholder. On January 30, 2009, Lennar Homes filed suit against TG asserting claims arising out of defective Chinese-manufactured drywall installed in Lennar-constructed homes in Florida. Lennar obtained service on TG in China on August 3, 2009. Six months later, on February 8, 2010, Lennar successfully moved this Court for the entry of default against TG. That default was entered on February 18, 2010. On July 15, 2010, approximately five months after this Court entered the default, TG made its first appearance in this action by filing a notice of appearance that purported to reserve its rights as to jurisdiction, venue and service. Over two months later, on September 30, 2010, TG filed the instant motion to vacate the entry of default, and to dismiss the complaint for lack of personal jurisdiction.

ANALYSIS

I. Choice of Law

When analyzing claims concerning foreign corporations, Florida courts have adopted the "significant relationships" test as set forth in the Restatement (Second) of Conflict of Laws. *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 & n.1 (Fla. 1980). Under the Restatement (Second) Conflicts of Law § 302, a court should consider whether a state other than the state of incorporation has a "more significant relationship to the occurrence and the parties, in which event the local law of the other will be applied." Issues to be taken into account in applying the significant relationships test include: a) the place where the injury occurred; b) the place where the conduct causing the injury occurred; c) the domicil, residence, nationality, place of incorporation, and place of business of the parties; and d) the place where the relationship, if any, between the parties is centered. *Id.* at 1001.These issues should be evaluated according to their relative importance with respect to the particular issue. *Id.*

Here, Florida is not only the place of business for many of the parties, but it is also the place where the injuries that gave rise to the causes of action occurred. The property damage suffered by hundreds of Florida residents comprises the foundation of this litigation, and this factor weighs heavily in finding that Florida law should apply in determining whether TTP's actions can be attributed to TG under Florida principles of agency.

II. Agency

While a parent corporation is not subject to jurisdiction in Florida solely because its subsidiary does business here, a high level of control by a parent over a subsidiary may permit the conclusion that the subsidiary is acting as the agent of the parent, thus subjecting the parent to jurisdictional analysis under Florida's long-arm statute . . ." *Development Corp. of Palm Beach v. WBC Const., L.L.C.*, 925 So. 2d 1156, 1161-62 (Fla. 4th DCA 2006); *Enic, PLC v. F.F. South & Co., Inc.*, 870 So. 2d 888 (Fla. 5th DCA 2004). Florida's long-arm statute itself also

allows for the acts of an agent to bind the principal. Section 48.193(1) states in pertinent part: "[a]ny person . . . who personally or through an agent does any of the acts enumerated in this subsection thereby submits . . . to the jurisdiction of the courts of this state." Plaintiffs argue that TTP was TG's agent, and, as such, that TTP's acts should be imputed to TG for the purposes of jurisdictional analysis. The Court agrees and details its reasoning below.

In Florida, the elements of an agency relationship are: (1) acknowledgment by the principal that the agent will act for it; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent. *State v. American Tobacco Co.*, 707 So. 2d 851, 854 (Fla. 4th DCA 1998). Of these three elements, "[t]he issue of control is critical to the determination of agency." *Id.* A principal may so dominate the activities of a subsidiary company that is necessary to treat the dominated company as an agent of the principal. *Baker v. Raymond Int'l, Inc.*, 656 F.2d 173, 181 (5th Cir.1981); *Pappalardo v. Richfield Hospitality Services, Inc.*, 790 So. 2d 1226 (Fla. 4th DCA 2001). Additionally, an agency relationship may be conferred where the evidence establishes that a subsidiary's separate corporate status is only a formality, and actually just a vehicle through which the parent company conducts business. *Sehringer v. Big Lots, Inc.*, 532 F. Supp. 2d 1335, 1346 (M.D. Fla. 2007) (applying Florida state agency law); *Gen. Cigar Holdings, Inc. v. Altadis, S.A.*, 205 F. Supp.2d 1335, 1343 (S.D. Fla. 2002) ("A plaintiff must show that the subsidiary is merely an agent through which the parent company conducts business, 'or that the subsidiary's separate corporate status is formal only and without any semblance of individual identity.'")

The facts demonstrate that TTP's separate corporate status was a formality, and that TTP was merely a vehicle through which TG exported its products to the United States. To support the designation of an agency relationship between TG and TTP, the plaintiffs put forth evidence of a lack of true corporate separateness between the two companies. First, TG created TTP in order to enhance its own ability to sell drywall to buyers outside of China. According to Jia Tongchun, TG's chairman of the board, and Zhang Jianchung, TG's secretary of the board of directors, TG created TTP in order to assist existing TG customers with the payment of value-added taxes ("VAT") when those customers shipped drywall outside of China.[1] Because TG had obtained an exemption from issuing VAT invoices,[2] the Chinese government informed TG that to the extent its customers required VAT invoices, those documents would have to be produced by a different corporate entity.[3] As a result, in February 2006, TG created TTP to provide a method for managing its VAT invoice problem.[4]

TG and TTP's connection did not end with the VAT issue. The evidence demonstrates that TTP ignored corporate formalities and acted on TG's behalf without prior authorization or approval – particularly as it relates to TG's various trademarked brands of drywall. TTP was formally authorized to sell TG's "Taishan" brand drywall.[5] But TTP acted on its own initiative in contracting with Florida-based Oriental Trading Company ("Oriental") to sell a different TG

[1] Jia Tongchun Depo dated April 4, 2011, 480:24-481:24; Zhang Jianchun Depo dated April 6, 2011, 141:24-142:21.
[2] Zhang Jianchun Depo dated April 6, 2011, 141:15-20; Jia Tongchun Depo dated April 4, 2011, 481:4-24.
[3] Zhang Jianchun Depo dated April 6, 2011, 141:15-20; Jia Tongchun Depo dated April 4, 2011, 481:4-24.
[4] Jia Tongchun Depo dated April 4, 2011, 480:24-481:24; Zhang Jianchun Depo dated April 6, 2011, 141:24-142:21.
[5] Trademark Use Authorization, Herman Affidavit Exhibit 174.

drywall brand marked "DUN."[6] TG was not consulted prior to TTP entering into the agreement with Oriental, and TG was not compensated for the use of the "DUN" trademark.[7]

TG and TTP also muddied the financial separateness from one another by volunteering to settle one another's debts and obligations. In one instance, TTP was the sole signatory on a settlement agreement that TG negotiated which arose out of defective drywall that a TG affiliate sold to US-based company, Guardian Building Supplies. TTP agreed to pay Guardian a six-figure sum to resolve the claims against TG.[8] In another instance, the roles were reversed and TG attempted to resolve one of TTP's debts. There, TG took over negotiations with Florida-based company, Oriental, on TTP's behalf with regard to a $100,000 deposit[9] Oriental paid to TTP when TTP authorized Oriental to sell TG's "DUN" brand drywall.[10]

TTP and TG were even intertwined at the level of daily operations – the two companies shared an address,[11] phone numbers,[12] business cards and marketing materials.[13] The two also shared employees – when TTP was created, employee and staff positions were filled by individuals who, up until that point, had been employees of TG.[14] When TTP ceased operations in 2008, these employees returned immediately to TG.[15] Moreover, TG and TTP officers and employees used the TG and TTP names interchangeably, with TTP employees conducting TTP business via email using TG's name and information.[16] When TTP negotiated with Oriental with regard to it selling TG's "DUN" brand drywall, TTP employees presented the Oriental representative with a Taishan brochure, and directed him to the Taishan website.[17] Further, during the negotiations between Oriental and TTP, Oriental representatives never knew that TG and TTP were separate entities.[18]

TTP and TG further compromised their separate corporate status by not consistently engaging in arms length transactions. For the duration of TTP's two-year existence, it used TG's production lines, equipment and facilities at below-market rates, with TG unilaterally increasing TTP's rent only days after entering into the rental agreement.[19] Additionally, TG entered into an

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[6] Sole Agency Agreement between TTP and Oriental Trading Co., Herman Affidavit Exhibit 20; Jia Tongchun Depo dated April 4, 2011, 800:22-801:10, 802:6-10, 804:14-805:24.
[7] Jia Tongchun Deposition dated April 4, 2011, 800:22-801:10, 802:6-10, 804:14-805:24.
[8] Settlement and Release Agreement, Herman Affidavit Exhibit 158.
[9] Sole Agency Agreement between TTP and Oriental Trading Co., Herman Affidavit Exhibit 20.
[10] Deposition of Ivan Gonima dated December 13, 2011, 145:17-147:10, 153:12-154:14.
[11] Compare address on Contract between TTP and Wood Nation, Herman Affidavit Exhibit 100, with Address listed on TG website, Herman Affidavit Exhibit 5.
[12] Compare Taishan marketing and product brochure listing phone number for TG, Herman Affidavit Exhibit 5, p. 16, with email dated February 10, 2007, sent from TTP employee Peng Wenglong (business alias "Frank Clem") containing identical phone number (Exhibit 4 to Deposition of Peng Wenglong dated April 7-8, 2011) .
[13] Deposition of Peng Wenglong dated April 7-8, 2011, 87:7-88:4; TG business card given by TTP employee to representative of US company, Guardian Building Supplies, during visit to Taishan plant, Herman Affidavit Exhibit 156.
[14] Tinghuan Fu Deposition 108:4-7.
[15] Tinghuan Fu Deposition 110:13-20.
[16] Deposition of Peng Wenglong dated April 7-8, 2011, 484:17-487:8.
[17] Deposition of Ivan Gonima dated December 13, 2011, 44:9-21, 89:7-10, 96:11-25.
[18] Deposition of Ivan Gonima dated December 13, 2011, 27:3-14.
[19] Lease Agreement, Herman Affidavit Exhibit 179; Lease Agreement, Herman Affidavit Exhibit 180.

agreement to sell certain equipment to TTP,[20] but plaintiffs' have represented that TTP's financial records do not indicate full payment made to TG for that equipment. When TTP later wound down operations, it returned the equipment to TG. There is no evidence in the record, however, to suggest that TG compensated TTP for the equipment return.

Considered in their totality, the facts demonstrate that TG and TTP had an agency relationship under Florida law. TG allowed TTP to act unilaterally on its behalf, and TTP not only accepted, but freely exercised this power. *Benson v. Seestrom*, 409 So. 2d 172, 173 (Fla. 2d DCA 1982) ("Even where an agent's act is unauthorized, the principal is liable if the agent had the apparent authority to do the act and that apparent authority was reasonably relied upon by the third party dealing with the agent.") TTP, which was so intertwined with TG so as to share phone numbers, addresses, websites, and more, was created so that TG could better serve its own clients' VAT invoice requirements. In short, TTP had no independent purpose outside of serving TG's needs and, as such, was its agent under Florida law. *State v. Am. Tobacco Co.*, 707 So. 2d 851 (Fla. 4th DCA 1998) (holding that parent company may be liable for its subsidiary's acts under an agency theory where "the subsidiary manifests no corporate interests of its own and functions solely to achieve the purposes of the dominant corporation.")

III. Personal Jurisdiction

With the agency relationship between TTP and TG established such that TTP's actions will be imputed to TG, the Court must next examine the companies' business dealings and behavior to determine whether they acted in a manner sufficient to confer personal jurisdiction. A two-part analysis is used to evaluate personal jurisdiction. *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989); *Renaissance Health Publ'g, LLC v. Resveratrol Partners, LLC*, 982 So. 2d 739, 741 (Fla. 4th DCA 2008). First, the Court must determine whether the facts alleged bring the action within the ambit of the Florida long-arm statute. *Venetian Salami*, 554 So. 2d at 502. Second, the Court must determine whether the defendant has sufficient "minimum contacts" with Florida such that due process requirements of the United States Constitution are satisfied. *Id.* Due process is satisfied if the foreign defendant should reasonably anticipate being haled into court in the forum state. *Golant v. German Shepherd Dog Club of Am., Inc.*, 26 So. 3d 60 (Fla. 4th DCA 2010).

A. Florida's Long–Arm Statute

Florida's long-arm statute bestows broad jurisdiction on Florida courts, and holds nonresident defendants accountable both for acts performed within the state, as well as those performed outside the state that have repercussions within the state. *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co. Ltd.*, 752 So. 2d 582, 584 (Fla. 2000). As further elaborated below, TG, acting through its agent, TTP, had sufficient contacts with Florida to satisfy three separate bases for jurisdiction under the Florida long-arm statute – sections 48.193(1)(a), (b), and (f). The statute provides in pertinent part:

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts

[20] Purchase and Sale Agreement, Herman Affidavit Exhibit 175; 2006.

> enumerated in this subsection thereby submits himself or herself . . . to the courts of this state for any cause of action arising from the doing of any of the following acts:
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> (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency.
> (b) Committing a tortious act within the state.
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> * * *
>
> (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:
> 1. The defendant was engaged in solicitation or service activities within this state; or
> 2. Products, materials or things processed, serviced or manufactured by the defendant anywhere were used or consumed within the state in the ordinary course of commerce, trade or use.

Florida Statutes Section 48.193(1).

1) Section 48.193(1)(a), Fla. Stat. – Carrying on a General Course of Business in Florida

To invoke long-arm jurisdiction over a foreign corporation under Fla. Stat § 48.193(1)(a), the activities of the corporation "must be considered collectively and show a general course of business activity in the state for pecuniary benefits." *Citicorp Ins. Brokers (Marine), Ltd. v. Charman*, 635 So. 2d 79, 81 (Fla. 1st DCA 1994), citing *Foster, Pepper & Riviera v. Hansard*, 611 So. 2d 581, 582 (Fla. 1st DCA 1992). TG and TTP (collectively "Taishan") did act in such a way to constitute "conducting" or "carrying on" business in Florida within the parameters of section 48.193(1)(a) since Taishan targeted the Florida market by: 1) courting Florida businesses by mailing drywall samples to companies within the state; 2) inviting representatives of Florida-based companies to visit Taishan headquarters in China; 3) selling significant amounts of drywall to Florida businesses; 4) customizing some of its drywall with markings that included a Tampa-based phone number; 5) establishing an exclusive agency relationship with a Florida company to sell certain Taishan-branded drywall; and 6) controlling some of the shipping arrangements for drywall sold to Florida clients, and tailoring those arrangements to take into account Florida shipping and trucking regulations.

Taishan actively courted the Florida market by shipping drywall samples to potential customers in Florida,[21] including Oriental,[22] and Carn Construction Company of Weston, Florida.[23] Taishan fielded similar sample requests from Florida-based company, B. America.[24]

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[21] Che Deposition 312:6-313:6.
[22] Instant message discussion dated May 22, 2007, between Ivan Gonima and Che Gang, Herman Affidavit Exhibit 27 at p. 31; Deposition of Ivan Gonima dated December 13, 2011, 109:20-110:5.
[23] Carn Construction Co. Deposition 25:13-22, Herman Affidavit Exhibit 23.
[24] Email from Marcia Muci to Bill Cher dated April 21, 2008, Herman Affidavit Exhibit 99.

Taishan further cultivated business relationships in the state by inviting representatives of Florida-based companies to visit Taishan manufacturing headquarters in China. For instance, in June 2006, TTP employee, Peng Wenglong arranged a tour of Taishan's Chinese facilities for Richard Hannam, a representative of Wood Nation, a Florida-based company.[25] As a result of that visit, Taishan sold Wood Nation over $100,000 worth of drywall, all shipped in 40 cargo containers destined for Tampa, Florida.[26] Taishan even went so far as to place custom markings on the drywall it shipped to Wood Nation, printing a Tampa-based contact phone number on the product.[27]

Taishan similarly courted Florida-based Oriental Trading Co. when it invited an Oriental representative to tour Taishan's facility in Asia.[28] Oriental made it clear both during its China visit, and in subsequent emails, that it was interested in having drywall exported to Florida.[29] Taishan sold Oriental 60,000 sheets of drywall via several different orders placed between 2006 - 2007, with total sales amounting to over $200,000.[30]

Taishan's contact with Oriental went a step further when, as detailed in Section II of this Order, Taishan and Oriental successfully negotiated to make Oriental the exclusive US supplier of Taishan's trademarked "DUN" drywall.[31] The Sole Agency Agreement between Taishan and Oriental referenced sales in the range of one million sheets of drywall per year.[32]

Taishan sold drywall to yet a third Florida-based company, B. America Corporation,[33] and also took control of the shipping arrangements for the order. The Taishan invoice sent to B. America confirmed the delivery of 660 sheets of drywall,[34] and included the shipping method "CIF," which refers to the seller, Taishan, paying the cost, insurance and freight of shipping the drywall to Miami, the port of destination.[35] The cargo insurance policy Taishan obtained with regard to the B. America sale confirmed Miami as the port of destination.[36] Taishan also took some level of control over the shipping arrangements for the drywall it sold to Oriental. Taishan emails to Oriental not only confirmed shipping to Miami, but suggested specific shipping

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[25] Herman Affidavit, Exhibit 58.
[26] Taishan Profile Forms, Herman Affidavit Exhibit 19; Emails, Revised Contract and related documents regarding Taishan shipment to Wood Nation, Herman Affidavit Exhibit 103; Contract between TTP and Wood Nation, Herman Affidavit Exhibit 100; "Taishan Gypsum Board Sales to United States," pg. 3-4, Herman Affidavit Exhibit 1.
[27] Exhibit A, p. 31 accompanying TG Manufacturer Profile Forms, Herman Affidavit Exhibit 19; Deposition of Peng Wenglong dated January 13, 2012, 514:10-515:6.
[28] Deposition of Ivan Gonima dated December 13, 2011, 41:9-52:6.
[29] Deposition of Ivan Gonima dated December 13, 2011, 33:11-13; Emails from Bill Cher to Ivan Gonima dated April 10-17, 2007, Herman Affidavit Exhibit 64.
[30] Deposition of Ivan Gonima dated December 13, 2011, 77:25-78:9; "Taishan Gypsum Board Sales to United States," pg. 3-4, Herman Affidavit Exhibit 1.
[31] Sole Agency Agreement, Herman Affidavit Exhibit 20.
[32] Sole Agency Agreement, Herman Affidavit Exhibit 20.
[33] Contract between Taishan and B. America dated September 2, 2006, Herman Affidavit Exhibit 86; TTP Invoice to B. America dated April 7, 2007, Herman Affidavit Exhibit 88.
[34] TTP Invoice to B. America dated April 7, 2007, Herman Affidavit Exhibit 88; "Taishan Gypsum Board Sales to United States," pg. 3-4, Herman Affidavit Exhibit 1.
[35] TTP Invoice to B. America dated April 7, 2007, Herman Affidavit Exhibit 88; Onxy Deposition dated February 9, 2012, 71:2-9, Herman Affidavit Exhibit 97.
[36] Cargo Insurance Policy with TTP as "insured," Herman Affidavit Exhibit 98.

companies Taishan preferred.[37] Beyond that, Taishan emails to Oriental establish that Taishan took into account Florida Department of Transportation trucking weight limits, confirming for Oriental that Taishan drywall containers would "ship within the road-carrying limit."[38]

On these facts, the Court finds that Taishan was "carrying on business" in Florida and that the Court may assert jurisdiction over Taishan under Section 48.193(1)(a) of the Florida long-arm statute.

2) Section 48.193(1)(b), Fla. Stat. – Committing a Tortious Act Within the State of Florida

Allegations as to Taishan's tortious acts within Florida also provide a basis for asserting jurisdiction pursuant to section 48.193(1)(b) of the Florida long-arm statute. For jurisdiction to attach under this provision, a defendant's actions must directly cause damage or injury within Florida. *Blumberg v. Steve Weiss & Co.*, 922 So. 2d 361, 364 (Fla. 3d DCA 2006). The Florida Supreme Court has held that the defendant's physical presence is not required in order to commit a tortious act "within this state," under part (1)(b). *Wendt v. Horowitz*, 822 So. 2d 1252, 1260 (Fla. 2002); *Execu Tech Bus. Sys. v. New Oji Paper Co.*, 752 So. 2d 582, 585 (Fla. 2000) (jurisdiction exercised over Japanese corporation who did not have a presence in Florida, and did not sell product in Florida, but whose violation of the law was felt in Florida). Instead, telephonic, electronic, or written communications into Florida may form the basis for personal jurisdiction if the facts supporting the cause of action develop by virtue of those communications. *Blumberg v. Steve Weiss & Co., Inc.*, 922 So. 2d 361 (Fla. 3d DCA 2006), citing *Horowitz*, 822 So. 2d at 126.

Here the Plaintiffs allege that Taishan is liable for torts in Florida based on product liability and negligence. They further allege that Taishan's contacts with and sales to Florida businesses comprise a substantial aspect of those claims, and that all the resulting damages occurred in Florida. This Court thus finds that the plaintiffs have put forth sufficient allegations to support the exercise of personal jurisdiction under Section 48.193(1)(b).

3) Section 48.193(1)(f)(1) and (2) Fla. Stat. – Causing Injury Within the State While Targeting the Florida Market

Taishan is likewise subject to personal jurisdiction in Florida under § 48.193(1)(f)(1) and (2), Fla. Stat. These provisions extends long-arm jurisdiction over a defendant who injures persons or property within Florida, arising out of an act or omission by the defendant outside the state, if, at or about the time of the injury, either: (1) the defendant was engaged in solicitation or service activities within this state; or (2) products manufactured by the defendant anywhere were used or consumed within the state in the ordinary course of commerce, trade or use. Florida courts have recognized that subsection 48.193(1)(f) is designed for "situations in which acts or omissions committed outside the state (usually manufacturing) cause injury to Florida residents located within the State at the time of injury." *Price v. Point Marine, Inc.*, 610 So. 2d 1339 (Fla. 1st DCA 1992) (citing *Aetna Life & Cas. Co. v. Therm-O-Disk, Inc.*, 488 So. 2d 83 (Fla. 1st

[37] Emails from Bill Cher to Ivan Gonima dated April 10-17, 2007, Herman Affidavit Exhibit 64; email from Bill Cher to Joseph Weiss dated July 14, 2007, Herman Affidavit Exhibit 67.
[38] Email from Bill Cher to Ivan Gonima dated April 12, 2007, Herman Affidavit Exhibit 64.

DCA 1986), aff'd 511 So. 2d 992 (1987)).

The claims at issue in this case seek damages for injuries caused by drywall Taishan manufactured in China, which entered the Florida market as part of Taishan's efforts to target and serve customers in Florida. The same facts and evidence discussed in Section IIIA(1) of this Order that support the exercise of jurisdiction over Taishan under Section 48.193(1)(a) similarly support the exercise of jurisdiction under Section 48.193(1)(f)(1) and (2). Taishan drywall was used in Florida through the ordinary course of commerce, spurred-on by Taishan's targeting the Florida market by courting Florida businesses to visit its manufacturing facilities, mailing drywall samples to Florida, selling large amounts of drywall to Florida-based companies, arranging the shipment of drywall to those companies with full knowledge of Florida as the ultimate destination, and entering into an exclusive agency agreement with a Florida company.

Indeed, Florida courts have exercised jurisdiction under subsection (f)(1) on the basis of less-aggressive solicitation and servicing behavior than Taishan engaged in here. *See Northwestern Aircraft Capital Corp. v. Stewart*, 842 So. 2d 190 (Fla. 5th DCA 2003) (passive advertisements and defendant holding itself out as serving Florida clientele satisfied "solicitation and service activities" requirement of subsection (1)(f)(1)); *North Star Intern. Seafood Co., Inc. v. Banner Beef and Seafood*, 677 So. 2d 1003 (Fla. 3d DCA 1996) (employing subsection (1)(f)(2) to assert jurisdiction over defendant who had no marketing scheme in Florida, but who received and fulfilled one order from a Florida client) *McHugh v. Kenyon*, 547 So. 2d 318 (Fla. 4th DCA 1989)(per curiam) (personal jurisdiction exercised over a nonresident Taiwanese manufacturer even though manufacturer conducted no business in Florida, had no salesmen or distributors in Florida and had no other ties to the State, other than some 6000 of its ladders being distributed for sale in Florida by a single national retailer).

The Court is not persuaded by Taishan's argument that (1)(f) is inapplicable to these plaintiffs because their injury is "purely economic" and fails to satisfy the "injury to persons or property" requirement for jurisdiction under section 48.193(1)(f). In support of this argument, Taishan maintains that the corporation-plaintiffs sustained no personal injury or property damage. The Court, however, finds that it is sufficient that the allegations contained in the Second Amended Complaint state that off-gassing from Taishan drywall caused personal injury and property damage to affected residents' homes, as well as to personal property in those homes.[39] Notwithstanding, Taishan argues that the facts of this case are analogous to *Aetna Life & Cas. Co. v. Therm-O-Disk, Inc.*, 488 So. 2d 83, 87 (Fla. 1st DCA 1986), where the court declined to exercise jurisdiction under section 48.193(1)(f). In that case, the First District Court stated that injury to property *outside* the state, which causes financial injury *inside* the state, is an insufficient basis upon which to exercise jurisdiction under (1)(f). But, unlike the facts in *Aetna*, both the property injury *and* the financial injury alleged in this case occurred *within* the state of Florida. This factual distinction brings the instant case outside the realm of *Aetna*, and the Court can find no statutory language or case law that prohibits the exercise of jurisdiction in a situation where a plaintiff incurs economic damages in Florida in relation to property damage suffered in Florida by a third party.

[39] Second Amended Complaint ¶¶ 136 – 139, 146-147.

The Court is similarly unconvinced by Taishan's argument that the plaintiffs' causes of action do not "arise from" Taishan's alleged business activities as required by the express language of the long-arm statute. Subsection (1) of the statute establishes that personal jurisdiction may only be maintained for a cause of action "arising" from the doing of certain predicate acts. Fla. Stat. § 48.193(1). Florida courts, however, broadly interpret the term "arising from," and have stated that "it does not mean 'proximately caused by,' but only requires a 'direct affiliation,' 'nexus,' or 'substantial connection' to exist between the basis for the cause of action and the business activity." *Citicorp Ins. Brokers (Marine), Ltd. v. Charman*, 635 So. 2d 79, 82 (Fla. 1st DCA 1994) (quoting *Damoth v. Reinitz*, 485 So. 2d 881, 883 (Fla. 2d DCA 1986)). Indeed, "the fact that the particular defective item which caused injury while in use in this state was purchased in another state does not render defendant – whose same product is distributed in the state – immune from the jurisdiction of the Florida court." *Kravitz v. Gebrueder Pletscher Druckgusswaremfabrik*, 442 So. 2d 985, 987 (Fla. 3d DCA 1983); see also *Wetzel v. Fisherman's Wharf of Pompano Beach, Inc.*, 771 So. 2d 1195, 1198 (Fla. 4th DCA 2000) ("A defendant's connection to Florida making it amenable to suit under the long-arm statute is established by the defendant's 'business activities in Florida' and not by focusing solely on how the product causing injury entered the state.") Thus, the Court finds that the plaintiffs' causes of action 'arise from" Taishan's business activities and contacts with Florida notwithstanding that the particular Taishan drywall that caused injury here may not have been the exact same pieces of drywall Taishan sold to its Florida clients. It is enough under the long-arm statute that the type of Taishan drywall that injured homeowners, and caused the damages sustained by the plaintiffs, was otherwise available for purchase in Florida.

For the foregoing reasons, this Court finds that personal jurisdiction can be appropriately exercised over Taishan pursuant to § 48.193(1)(f)(1) and (2), Fla. Stat.

B. Constitutional Due Process

If, as here, the defendant's acts bring it within the ambit of Florida's long-arm statute, the court must then determine whether the exercise of jurisdiction is consistent with the Due Process Clause of the US Constitution. The law recognizes two types of personal jurisdiction – specific and general. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8 & 415 n. 9 (1984). General jurisdiction exists "[w]hen a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum. . ." *Id.* at 415, n. 9. The standard for an exercise of general personal jurisdiction is a high one – the court must find that the defendant maintained continuous and systematic general business contacts with the forum state. *Id.* at 416. Specific jurisdiction, on the other hand, exists "when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Id.* at 414, n. 8. To exercise specific personal jurisdiction over a defendant, a court must find that "the nonresident. . .defendant. . . has 'certain minimum contacts with [the forum] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 414 (quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)).

Here, the Court's inquiry concerns specific jurisdiction. To this end, Florida courts have articulated a multi-step analysis for determining whether the exercise of specific jurisdiction is

appropriate: 1) the defendant's contacts must involve some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum such that the defendant should reasonably anticipate being haled into court there; and 2) the defendant's contacts must be related to the plaintiff's cause of action or have given rise to it. *Corporacion Aero Angeles, S.A. v. Fernandez*, 69 So. 3d 295, 299 (Fla. 4th DCA 2011).

1. Purposeful Availment

Purposeful availment of a forum state's market is the primary inquiry into whether the exercise of specific personal jurisdiction comports with the Due Process Clause:

> When a corporation purposefully avails itself of the privilege of conducting activities within the forum state . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation . . . Hence, if the sale of a product by a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its products in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

World-Wide Volkswagen Corp. v. Woodsen, 444 U.S. 286, 297-98 (1980).

The Supreme Court's recent decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011), elaborated on the "purposeful availment" requirement stating "[t]he principal inquiry. . .is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must 'purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Nicastro*, 131 S.Ct. at 2788, quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

In *Nicastro*, the Supreme Court declined to exercise personal jurisdiction where a British manufacturing defendant sold its products exclusively through a US distributor not located in the forum state, attended annual conventions in the US in states other than the forum state, and where only four of the defendant's subject products ended up in the forum state. In short, the defendant's only contact with the forum was that one of its products ended up there.

Taishan's business activities and conduct are not analogous to the defendant in *Nicastro*. Indeed, as more thoroughly detailed in Section IIIA(1) of this Order, Taishan actively targeted the Florida market by courting Florida companies, mailing drywall samples to Florida, selling large amounts of drywall to Florida-based companies, arranging the shipment of drywall to those companies with full knowledge of Florida as the ultimate destination, tailoring its drywall and/or the shipping of that drywall to Florida specifications, and entering into an exclusive agency agreement with a Florida company. This goes beyond a simple "awareness that the stream of commerce may or will sweep the product into the forum State . . ." *Asahi Metal Indus. Co. v. Superior Court of California, Solano County,* 480 U.S. 102, 112 (1986). Instead, Taishan played

a large role in creating and nurturing the contacts that brought the defective drywall to Florida.

Taishan's behavior stands in contrast to the defendant in *Nicastro*. Where the *Nicastro* defendant used one main distributor to sell its products in the US, Taishan courted, enticed and sold directly to multiple Florida customers. Additionally, unlike the Nicastro defendant, Taishan knew that large quantities of its drywall would be shipped to Florida – not only because its clients informed it of that fact, but also because, in certain instances, Taishan itself made the shipping arrangements to transport that drywall into Florida. Moreover, Taishan engaged an exclusive agent in Florida propelling it well into the realm of "purposeful availment" in this state. In short, Taishan cannot successfully maintain that it is of a *Nicastro* class of defendants whose products ended up in the forum state by virtue of forces beyond its control and/or knowledge. Instead, this Court finds that Taishan's contacts with Florida are such that it purposefully availed itself of the privilege of doing business here, and, as such should have reasonably anticipated being haled into court here.

2. Claims against Taishan are Related to its Florida Contacts

In order to satisfy the "relatedness" prong of the specific jurisdiction inquiry, the plaintiffs need only establish that the [defendant's] contacts with Florida [are] related to Plaintiffs' claims." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (holding that exercise of specific jurisdiction requires that cause of action "relate to" defendant's contacts with the forum). Here, there is a nexus between Taishan's forum-related contacts and the Plaintiffs' injuries: Plaintiffs are seeking to recover for injuries and damages they suffered as a result of the defective drywall that Taishan purposely directed to Florida, the place where both the property damage and plaintiffs' damages occurred. This Court agrees with other Florida courts which have held that a lawsuit "relates to" the defendant's contacts with the forum state where, as here, the facts demonstrate that: 1) the plaintiff purchased the defendant's product outside of the forum state; 2) the injury occurred in the forum state; and, (3) the defendant's products are available in the forum state. *Kravitz*, 442 So. 2d at 986-87; Wetzel, 771 So. 2d at 1198; *Shoei Safety Helmet Corp. v. Conlee*, 409 So. 2d 39 (Fla. 4th DCA 1982).

3. Fair Play and Substantial Justice

Having established that Defendant has constitutionally sufficient minimum contacts with Florida that arise out of Plaintiff's claim, the Court must now determine whether the exercise of jurisdiction over Defendant comports with "fair play and substantial justice." *International Shoe*, 326 U.S. at 320. Relevant factors include the burden on the defendant, the forum's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, and the judicial system's interest in resolving the dispute," *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987), *World–Wide Volkswagen,* 444 U.S. at 292. An analysis of these factors weighs in favor of exercising personal jurisdiction over Taishan.

Taishan asserts that it is too burdensome for it to bear the travel time, expense, and logistical and bureaucratic difficulties of defending this case in Florida. The Court is mindful, however, that while the financial and logistical expenses of traveling to another country are relevant, they are not definitive in this analysis. Travel is a burden for any foreign defendant; Taishan must show why the burden is *exceptional* in its case since, as directed by the Supreme Court:

"[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

An example of "other considerations" rendering jurisdiction unreasonable might include a showing by Taishan that its minimum contacts with Florida are not sufficiently strong to justify the burden of traveling here for litigation. The Court, however, as already established that Taishan's contacts are not tenuous or limited, but instead involve the active solicitation of Florida businesses. The Court is also not persuaded by Taishan's claims that travel to Florida is unduly burdensome in light of the apparent ease with which Taishan courted Florida businesses by inviting representatives of those companies to fly to China for days-long tours of its Asian manufacturing facilities. If Taishan can fly representatives of Florida businesses to China for the purpose of pecuniary gains, then it can fly its representatives to Florida to defend itself against the claims arising out of those pecuniary gains. Moreover, the Supreme Court recognized as far back as 1957 that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957). And, in 1980, the Court emphasized that "progress in communications and transportation ha[ve] made the defense of a lawsuit in a foreign tribunal less burdensome." *World-Wide Volkswagen Corp.*, 444 U.S. at 294. In the 55 years since *McGee*, and the 32 years since *World-Wide Volkswagen*, international travel and communication have become increasingly easier – particularly for a defendant, like Taishan, whose minimum contacts with the state of Florida are well established. As such, the Court does not find it an undue burden on Taishan to litigate this case in Florida.

As to the other factors relevant to fair play and substantial justice – the forum's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief and the judicial system's interest in resolving the dispute – the Court finds in favor of exercising jurisdiction. Plaintiffs are Florida homebuilders with claims arising out of property damage suffered in Florida. The evidence relating to damages is located in Florida, as are the parties and many witnesses. The state of Florida also has an interest in adjudicating disputes relating to torts or other wrongful acts either committed within its borders, or committed against its residents.

In light of the foregoing, the Court finds that exercising jurisdiction over Taishan does not offend traditional notions of fair play and substantial justice.

IV. Taishan's Motion to Vacate the Default

For a trial court to grant a motion to set aside a default final judgment, the moving party must establish that its failure to respond was excusable, that it acted with due diligence in seeking relief from the default, and that there exists a meritorious defense. *Lazcar Intern., Inc. v. Caraballo*, 957 So. 2d 1191, 1192 (Fla. 3d DCA 2007); *Inter-Atlantic Ins. Services, Inc. v. Hernandez*, 632 So. 2d 1069, 1070 (Fla. 3d DCA 1994). Taishan has not demonstrated any of the above three factors, and, as such, the motion to set aside the default is denied.

A. Excusable Neglect & Due Diligence

As to whether the failure to respond was excusable, and whether it acted with due diligence, Taishan puts forth the same argument – that its lack of Florida contacts and business dealings led it to a good faith belief that it was not subject to jurisdiction in Florida, and was not obligated to respond to the litigation. It further maintains that it "did not understand the significance of the First Amended Complaint." The Court has already thoroughly explained the basis for finding that Taishan's Florida contacts were sufficient to exercise jurisdiction, and will not reiterate those findings except to say that as to excusable neglect and due diligence, Taishan should have known that its contacts with Florida were sufficiently significant to require some response to this litigation. The Court is also not persuaded by Taishan's argument that it did not comprehend the significance of the litigation since "ignorance of the law, whether on the part of counsel or client, does not qualify as excusable neglect." *Gables Club Marina, LLC v. Gables Condominium and Club Ass'n, Inc.*, 948 So. 2d 21, 23-24 (Fla. 3d DCA 2006). Taishan's claim that it did not appreciate the significance of the First Amended Complaint is also contradicted by its own statement that "many American law firms" sought Taishan's retainer in connection with this lawsuit via mailing letters to the company offering assistance, or sending firm representatives to China to meet with Taishan on the matter.[40]

Taishan also argues in favor of excusable neglect due to the fact that it lacked sufficient mastery of the English language to fully appreciate the legal documents sent to it in English. With regard to English language documents, the Court finds that the allegations in the complaint were translated into Chinese, and that the translated complaint was properly served upon Taishan. In any event, however, a defendant's lack of English proficiency, standing alone, is not a sufficient basis for finding excusable neglect. *Santos v. 47 Service Station, Inc.*, 613 So. 2d 547 (Fla. 3d DCA 1993).

Turning once again to due diligence, the long period of time between the entry of default, and Taishan's motion to vacate weighs heavily in favor of denying the motion. Taishan made its first appearance in this case on July 15, 2010, five months after the default was entered against it. Taishan then waited eleven additional weeks before moving to set aside the default on September 30, 2010. Florida law is well-established that "swift action must be taken upon first receiving knowledge of any default." *Caraballo*, 957 So. 2d at 1192, citing *Westinghouse Credit Corp. v. Steven Lake Masonry, Inc.*, 356 So. 2d 1329, 1330 (Fla. 4th DCA 1978). The "requirement [for swift action] . . . is directly related to the reasons for the entry of the default in the first place – to provide for prompt disposition of legal proceedings. In essence, one might say, then, that timely action is required to avoid 'defaulting' upon the opportunity to set aside a previously entered default." *Caraballo*, 957 So. 2d at 1192, quoting *Techvend v. Phoenix Network, Inc.*, 564 So. 2d 1145, 1146 (Fla. 3d DCA 1990).

To establish due diligence in the face of a lengthy delay, such as the one here, the moving party must put forth "competent substantial evidence of 'some exceptional circumstance explaining the delay,'" *Caraballo*, 957 So. 2d at 1193, citing *Westinghouse Credit Corp.*, 356 So. 2d at 1330 (six-week delay in filing a motion to vacate a default after receiving notice constitutes a lack of due diligence as a matter of law). Here, Taishan waited an inexplicably long

[40] Jia Tongchun Depo dated January 10, 2012, 886:3-887:13.

time before moving to set aside the default, and has not put forth any evidence of exceptional circumstances justifying the delay. As such, the Court finds that Taishan did not exercise due diligence sufficient to vacate the default against it. See, e.g., *Trinka v. Struna*, 913 So. 2d 626, 628 (Fla. 4th DCA 2005) (finding "[t]hat defendant's attorney ignored his duty to act with all due diligence" where "more than a month passed between the discovery of the default and the entry of the final judgment without any attempt to vacate the default"); *Fischer v. Barnett Bank of S. Fla., N.A.*, 511 So. 2d 1087, 1088 (Fla. 3d DCA 1987) ("five week delay by the defendants [in filing motion to vacate] entirely inexcusable"); *Bayview Tower Condo. Ass'n v. Schweizer*, 475 So. 2d 982, 983 (Fla. 3d DCA 1985) (delay of one month "showed a lack of due diligence in seeking relief after learning of the default and was fatal to the subject motion to vacate filed below"); see also *Allstate Floridian Ins. Co. v. Ronco Inventions, LLC*, 890 So. 2d 300, 304 (Fla. 2d DCA 2004) ("the seven-week delay here was unreasonable").

B. Meritorious Defenses

Because the Court has found neither excusable neglect nor due diligence on the part of Taishan, it need not reach the issue of meritorious defenses. *Anthony Abraham Leasing, Inc. v. Developers of America, Corp.*, 506 So. 2d 59 (Fla. 3d DCA 1987). But, to the extent a discussion on meritorious defenses is instructive, the Court will undertake it. Taishan argues that its "meritorious defenses" include: 1) that it is not subject to personal jurisdiction in Florida; 2) that the negligence and product liability claims are barred by the economic loss rule; 3) that the equitable subrogation claims fail because the decision to repair damaged homes was voluntary; and 4) that Lennar's indemnity claim cannot lie against Taishan since there is no "special relationship" between the parties, such as a contractual relationship, and Lennar's liability is not vicarious, constructive, derivative, or technical. Taishan's asserted defenses have either been previously decided, or are not properly supported by sworn proof. As such, the Court rejects them for the purposes of vacating the default.

Taishan's asserted meritorious defenses relating to equitable subrogation and indemnity are conclusory and unsupported by sworn proof, as required by Florida law. *Mathews Corp. v. Green's Pool Service*, 584 So. 2d 1006, 1007 (Fla. 3d DCA 1990) ("[T]he defendant's motion to vacate and affidavits in support thereof contain only conclusory assertions that defendant has a meritorious defense to plaintiff's complaint and no other sworn proofs were submitted establishing, as required, such defense.") As such, the Court rejects these two defenses for the purposes of vacating the default. Further, as to the subrogation defense – specifically, that Lennar was not legally bound to repair the subject homes, but instead, was a mere volunteer in that undertaking – the Court is not persuaded. "The right of subrogation is not necessarily confined to those who are legally bound to make payments, but extends as well to persons who pay the debt in self protection, since they might suffer loss if the obligation is not discharged." *Kala Investments, Inc. v. Sklar*, 538 So. 2d 909, 917 (Fla. 3d DCA 1989), citing *West American Ins. Co. v. Yellow Cab Co. of Orlando, Inc.*, 495 So. 2d 204, 207 (Fla. 5th DCA 1986).

As to the remaining defenses of lack of personal jurisdiction and the application of the economic loss rule, this Court has decided these matters via the instant Order dated August 31, 2012, and in its previous Order Denying Defendants' Motions to Dismiss Plaintiffs' Tort Claims Under the Economic Loss Ruled dated December 18, 2009.

Because Taishan has not shown excusable neglect, due diligence, and a meritorious defense, the Court denies its motion to vacate the entry of default.

WHEREFORE it is **ORDERED** and **ADJUDGED:**

Taishan Gypsum's motions are DENIED. The Court finds that Taishan Gypsum's contacts with the state of Florida are sufficient to justify the exercise of personal jurisdiction under both the Florida long-arm statute, and the Due Process Clause of the United States Constitution. The Court also denies the motion to set aside the default as Taishan Gypsum has not met its burden of showing excusable neglect, due diligence and a meritorious defense.

DONE and ORDERED in chambers this 31 day of August, 2012 at Miami-Dade County, Florida.

JOSEPH P. FARINA
CIRCUIT COURT JUDGE

Copies furnished to:
All counsel of record via *LexisNexis*