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I. INTRODUCTION

This Court lacks personal jurisdiction over Defendant, CureVac AG, a German corporation. This Court should therefore dismiss this case, or transfer this case to a court that can exercise personal jurisdiction over CureVac AG—the Eastern District of Virginia.

Founded twenty years ago, CureVac AG pioneered technologies that led to today’s RNA-based vaccines for COVID-19. CureVac AG owns a portfolio of patents that cover RNA-based technologies. Plaintiffs manufacture and market a RNA-based COVID-19 vaccine. They filed this case seeking a declaration that their vaccine does not infringe three CureVac AG patents.

Plaintiffs fail to plead, because they cannot, sufficient contacts between CureVac AG and this forum for this Court to exercise personal jurisdiction over CureVac AG. Like CureVac AG, the BioNTech plaintiffs are German corporations. Before filing this case, BioNTech and CureVac AG executives engaged in discussions in Germany about CureVac AG’s patents. During those discussions in Germany, CureVac AG and BioNTech explored whether BioNTech was interested in receiving a license to CureVac’s entire COVID-19-related patent portfolio. While those negotiations did not lead to a license, at all times CureVac AG’s activities were directed to Germany, including two in-person meetings at BioNTech SE’s offices in Mainz, Germany, and discussions between the Chief Executive Officers of CureVac AG and BioNTech SE. Although CureVac AG later filed an action in Germany, none of CureVac AG’s enforcement-related activities were directed towards Massachusetts, or anywhere else in the United States.

Neither general nor specific jurisdiction over CureVac AG exists in this District.

First, general jurisdiction over CureVac AG does not exist in the United States, much less this in District: CureVac AG is incorporated and headquartered in Germany, has no offices

or employees in the United States, pays no taxes in the United States, is not registered to do business in any U.S. state, and owns no real property in the United States. Consequently, CureVac AG can hardly be said to be “at home” in Massachusetts or any other state. *Daimler AG v. Bauman*, 571 U.S. 117 (2014). Plaintiffs rely on the existence of a CureVac AG subsidiary, CureVac, Inc., headquartered in Boston with ten employees, but that cannot make CureVac AG “at home” here.

Second, specific jurisdiction over CureVac AG does not exist in this District. None of CureVac AG’s interactions with Plaintiffs regarding a potential license occurred in the United States: they all took place at meetings in Germany between CureVac AG and BioNTech. And CureVac AG affirmatively avoided any interactions with the apparent U.S. infringer, Plaintiff Pfizer, Inc. (“Pfizer”).

The complaint alleges only two facts to support specific jurisdiction: (1) CureVac AG “sent communications” to an employee of BioNTech US Inc. (a non-party to this litigation); and (2) a CureVac attendee at the meetings in Germany was an employee of CureVac, Inc. (also a non-party to the litigation). Specific jurisdiction in the context of a declaratory judgment action requires much more than these attenuated connections to the United States, especially when CureVac AG did not have any actual contact with the United States as a result. Moreover, any reliance on a contact with CureVac AG’s United States subsidiary—CureVac, Inc.—must fail because CureVac, Inc. maintains corporate separateness from its parent. And even if those contacts could be attributed to CureVac AG, none of CureVac, Inc.’s U.S.-based activities relate to the declaratory judgment claim at issue in the complaint in this case.

Instead of dismissing this case for lack of personal jurisdiction, this Court could transfer this case under 28 U.S.C. § 1631 to a district court where personal jurisdiction would exist over

CureVac AG: namely, the Eastern District of Virginia. Indeed, a foreign patent owner that lacks sufficient contacts for personal jurisdiction to exist in any federal district court of the United States, such as CureVac AG, may be sued in the Eastern District of Virginia to resolve disputes “respecting the patent or rights thereunder that it would have if the [patent owner] were personally within the jurisdiction of the court.” 35 U.S.C. § 293.

Accordingly, the Court should either dismiss this action or transfer it to the Eastern District of Virginia.

II. RELEVANT FACTS

A. CureVac AG lacks contacts with the United States

Founded in 2000, CureVac Aktiengesellschaft (“CureVac AG”) is a German public limited company located in Tübingen, Germany, and dedicated to the development of mRNA-based biologics including vaccines and anti-cancer therapies. Rau Decl. ¶ 3.¹ In its offices located in Germany, CureVac AG employs approximately 415 people. *Id.* CureVac AG has no office in any other country. *Id.* CureVac AG has no offices in the United States, holds no bank accounts in the United States, does not own or lease any real estate in the United States, and pays no taxes to the United States Government. *Id.* ¶ 4. CureVac AG does not sell any products in the United States, and has neither filed nor sought to file articles of incorporation nor qualifications to do business in any state in the United States at any time. *Id.*

CureVac AG owns all the shares of its U.S. subsidiary, CureVac, Inc. Rau Decl. ¶ 5. CureVac, Inc. employs ten people in an office located in Boston, Massachusetts. Krohn Decl.

¹ References to “Rau Decl.” refer to the declaration of Marco Rau, General Counsel, Senior Vice-President Legal & Compliance at CureVac AG (now known as CureVac SE), filed contemporaneously herewith.

¶ 3;² Complaint (Dkt. 1) ¶ 22. These U.S. employees support CureVac AG’s U.S.-focused efforts to develop mRNA-based biologics. For example, CureVac, Inc. employs a U.S. patent agent to advance CureVac AG’s U.S. patent portfolio, and regulatory staff to assist with U.S. Food & Drug Administration interactions associated with CureVac AG’s drug-development efforts. Krohn Decl. ¶ 4. All CureVac personnel that work in the United States are employed by CureVac, Inc. Rau Decl. ¶ 5.

CureVac AG owns all right, title, and interest in U.S. Patent Nos. 11,135,312, 11,149,278, and 11,241,493, the patents for which Plaintiffs seek a declaratory judgment (hereinafter “the patents-in-suit”). Rau Decl. ¶ 6. Under 35 U.S.C. § 293, CureVac AG could have filed “in the Patent and Trademark Office a written designation stating the name and address of a person residing within the United States on whom may be served process or notice of proceedings affecting the patent or rights thereunder.” 35 U.S.C. § 293. But CureVac AG made no such designation at the U.S. Patent & Trademark Office in connection with the patents-in-suit or any other patents.

Unrelated to this litigation, CureVac AG entered into a few research and development agreements with parties located in the U.S., including: (1) a January 1, 2018 development agreement with Arcturus Therapeutics, Inc. (San Diego, CA) related to nanoparticle delivery vehicles; and (2) sponsored research agreements (to conduct clinical research using CureVac’s mRNA-based therapeutic drug candidates) with: (i) The Schepens Eye Research Institute (Boston, MA) dated March 15, 2019, (ii) Yale University (New Haven, CT) dated July 1, 2019; and (iii) Beth Israel Deaconess Medical Center (Boston, MA) dated September 29, 2020. Rau

² References to “Krohn Decl.” refer to the declaration of Frederic Krohn, General Manager at CureVac, Inc., filed contemporaneously herewith.

Decl. ¶ 7. Other than contracts to purchase materials such as reagents and animals for clinical research from U.S.-based suppliers, CureVac AG has no other business relationships in the United States. *Id.* ¶ 8.

The Complaint alleges, on information and belief, that CureVac AG employees and agents regularly visit CureVac, Inc.'s office in Boston. D.I. 1 (Complaint) ¶ 25. That is not true: over the course of the last four years, CureVac AG Executive Board members visited CureVac, Inc. in Boston six times. Rau Decl. ¶ 9; Krohn Decl. ¶ 5.

B. All of CureVac AG and BioNTech SE's licensing discussions occurred in Germany

In March 2022, CureVac AG's CEO, Franz-Werner Haas, sought out the CEO of BioNTech SE to discuss a potential license to CureVac AG's patent portfolio related to BioNTech's SARS-CoV-2 vaccine. Dalton Decl. ¶ 3.³ On March 14, 2022, the two CEOs met at BioNTech's headquarters in Mainz, Germany. *Id.* ¶ 4. Following that meeting, on March 29, 2022, CureVac AG's Chief Business Officer and Chief Commercial Officer spoke by telephone with his counterpart at BioNTech SE, and they agreed to further meetings with a larger group from both companies. *Id.* Those meetings began with a videoconference on April 4, 2022, which BioNTech SE's Europe-based General Counsel attended along with a Senior Patent Counsel based in Philadelphia, Pennsylvania. *Id.* ¶ 5. CureVac attendees included two Europe-based members of CureVac AG's IP team, and CureVac, Inc.'s Director of IP Management for the U.S., who joined the call from his home in Texas. *Id.*

The parties next met in person at BioNTech SE's facility in Mainz, Germany. Dalton Decl. ¶ 6. The first meeting occurred on April 7, 2022. *Id.* All attendees at the meeting were

³ References to "Dalton Decl." refer to the declaration of Marcus Dalton, Vice President Patents for CureVac AG (now known as CureVac SE), filed contemporaneously herewith.

based in Europe except CureVac, Inc.’s U.S.-based Director of IP Management, who attended in person; BioNTech SE’s U.S.-based Senior Patent Counsel; BioNTech US Inc.’s Vice President of IP, who attended remotely from Boston; and New York-based outside counsel for BioNTech. *Id.* Following that meeting, at the request of BioNTech, CureVac sent a copy of the meeting presentation by email to all attendees, including BioNTech US Inc.’s Vice President of IP. *Id.*; Complaint (Dkt. 1) ¶ 27.

The parties met by videoconference on April 26 and May 20, 2022. Dalton Decl. ¶ 7. Then, on June 1, 2022, the parties again met in person at BioNTech SE’s facility in Mainz, Germany. *Id.* All of the in-person attendees were based in Europe, except CureVac, Inc.’s U.S.-based Director of IP Management; BioNTech SE’s U.S.-based Senior Patent Counsel; a BioNTech SE business development officer based in New York; and BioNTech’s New York-based outside counsel. *Id.* BioNTech US Inc.’s Vice President of IP attended remotely from the United States. *Id.* The parties’ negotiations concluded unsuccessfully after a final videoconference on June 9, 2022, which included the same two U.S.-based BioNTech employees, who were invited at the request of BioNTech. *Id.*

None of these contacts occurred in the United States. Nor did CureVac AG initiate communications with BioNTech representatives in the United States; rather, BioNTech chose to include its representatives from the United States in a discussion between two German companies in Germany.

As Plaintiffs allege in the Complaint, Pfizer, Inc. is the direct infringer of the patents-in-suit in the United States (“CureVac was aware that Pfizer manufactures and is responsible for the distribution and sale of COMIRNATY® vaccine in the United States . . .”). Complaint (Dkt. 1) ¶ 84. Yet Pfizer did not participate in any of these pre-suit licensing discussions with CureVac

AG. Nor has CureVac AG directed any accusations of patent infringement toward Pfizer. While the Complaint states that BioNTech was collaborating with Pfizer, and that CureVac was aware that Pfizer is the infringing actor in the United States (*id.* ¶¶ 83–85), CureVac never contacted Pfizer, choosing instead to limit its licensing efforts to Germany in the form of contacts with BioNTech SE.

III. LEGAL STANDARDS

Because this is a patent infringement lawsuit, the law of the Federal Circuit applies to the issue of personal jurisdiction. *Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1359 (Fed. Cir. 2001). The Court may have personal jurisdiction over CureVac AG under either (1) Federal Rule of Civil Procedure 4(k)(1) and the Massachusetts long-arm statute (M.G.L. c. 223A, § 3), or (2) Federal Rule of Civil Procedure 4(k)(2), the so-called federal long-arm rule.

Under Rule 4(k)(1), personal jurisdiction may be exercised over a non-resident defendant if (1) jurisdiction exists under the Massachusetts long-arm statute, and (2) the exercise of jurisdiction comports with constitutional due process. *Trintec Indus. Inc. v. Pedre Promotional Prod. Inc.*, 395 F.3d 1275, 1279 (Fed. Cir. 2005). Section 3(a) of the Massachusetts long-arm statute provides that “[a] court may exercise personal jurisdiction over a person . . . as to a cause of action in law or equity arising from the person’s . . . transacting any business in this commonwealth.” M.G.L. c. 223A, § 3(a). Courts focus the analysis on “whether the defendant attempted to participate in the commonwealth’s economic life.” *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1087 (1st Cir. 1992). In deciding whether a claim arises from a defendant’s “transacting business,” the court determines whether the transacting of business was a “but for” cause of the harm alleged in the claim. *Tatro v. Manor Care, Inc.*, 625 N.E.2d 549, 551 (1994).

Alternatively, under Rule 4(k)(2), a court may exercise personal jurisdiction over a non-resident defendant if (1) the claim arises under federal law, (2) the defendant is not subject to jurisdiction in any state's court of general jurisdiction, and (3) the exercise of jurisdiction comports with constitutional due process. *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com de Equip. Medico*, 563 F.3d 1285, 1293–94 (Fed. Cir. 2009). In this case, the first two requirements are satisfied because Plaintiffs' claims arise under federal law and because CureVac AG is not subject to the jurisdiction of any state's court of general jurisdiction.⁴

Thus, the only remaining inquiry under Rule 4(k)(2) is whether the exercise of jurisdiction comports with constitutional due process. The due process analysis under Rule 4(k)(2) “contemplates a defendant's contacts with the entire United States, as opposed to the state in which the district court sits.” *Synthes*, 563 F.3d at 1295–96 (citing Fed. R. Civ. P. 4(k)(2) Advisory Committee notes to 1993 amendment).

The constitutional due process standard for an assertion of personal jurisdiction has been settled for more than fifty years: courts look to whether the defendant has “minimum contacts” with the forum “such that maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted). To meet this standard under specific jurisdiction, as alleged in this case, the Federal Circuit has established a three-prong test: (1) whether the defendant purposely directed its activities at the residents of the forum; (2) whether the claim arises out of or is related to those activities; and (3) whether assertion of personal jurisdiction is reasonable and fair. *HollyAnne*

⁴ For purposes of this action, CureVac AG is subject to personal jurisdiction in the Eastern District of Virginia under 35 U.S.C. § 293. However, this Court has concluded that the exercise of jurisdiction under § 293 is insufficient to establish personal jurisdiction in another state court of general jurisdiction in the Rule 4(k)(2) analysis. *Pharmachemie B.V. v. Pharmacia S.p.A.*, 934 F. Supp. 484, 488 (D. Mass. 1996).

Corp. v. TFT, Inc., 199 F.3d 1304, 1307–08 (Fed. Cir. 1999) (citing *Akro Corp. v. Luker*, 45 F.3d 1541, 1545–46 (Fed. Cir. 1995)).

Although CureVac AG is raising the issue of lack of personal jurisdiction, Plaintiffs “bear[] the burden of demonstrating personal jurisdiction.” *Synthes*, 563 F.3d at 1292; *Azumi LLC v. Lott & Fischer, PL*, No. CV 21-11311-NMG, 2022 WL 3369197, at *2 (D. Mass. Aug. 16, 2022). Although uncontroverted allegations in the Complaint must be accepted as true, “[o]nce challenged, allegations alone are insufficient to meet the complainant’s burden.” *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993). The Court may consider evidence extrinsic to the Complaint, including declarations, when assessing jurisdiction. *Id.*

IV. ARGUMENT

The Court should dismiss or transfer this case because the Court cannot exercise personal jurisdiction over CureVac AG. Plaintiffs have not, and cannot, allege sufficient contacts between CureVac AG and this District to establish personal jurisdiction under either the Massachusetts long-arm statute, or the “federal long-arm” of Rule 4(k)(2). CureVac AG does not “transact business” in Massachusetts, its contacts are not sufficiently systematic and continuous to support general jurisdiction, and none of the activities that gave rise to the harm alleged in the complaint occurred in the United States.

Put simply, Plaintiffs can have their day in court, just not this Court. Under 35 U.S.C. § 293, Plaintiffs could have filed their declaratory judgment claims in the Eastern District of Virginia. Because this Court lacks jurisdiction over CureVac AG, it should transfer this case to the Eastern District of Virginia under 28 U.S.C. § 1631.

A. This Court lacks personal jurisdiction over CureVac AG under the Massachusetts long-arm statute

In Massachusetts, to establish jurisdiction over a defendant, the plaintiff “must meet the requirements of both the Massachusetts long-arm statute and the Due Process Clause of the Fourteenth Amendment.” *Cossart v. United Excel Corp.*, 804 F.3d 13, 18 (1st Cir. 2015). The Massachusetts long-arm statute is not coextensive with what due process allows. *SCVNGR, Inc. v. Punchh, Inc.*, 85 N.E.3d 50, 52 (2017). Instead, to establish jurisdiction under Section 3(a) of the long-arm statute, (1) the defendant or the defendant’s agent must have transacted business in Massachusetts, *and* (2) the transaction of such business must be a but-for cause of the plaintiff’s claim. *Exxon Mobil Corp. v. Att’y Gen.*, 94 N.E.3d 786, 793 (2018).

The only business CureVac AG has conducted in Massachusetts consists of two agreements with medical centers in Massachusetts relating to clinical research using CureVac’s mRNA-based therapeutic drug candidates. Rau Decl. ¶¶ 7–9. It cannot be disputed that those clinical research agreements are *completely* unrelated to Plaintiffs’ declaratory judgment claim regarding whether BioNTech and Pfizer infringe the patents-in-suit. *Id.* ¶ 7. Accordingly, even if CureVac’s collaborations could qualify as “transacting business” under the long-arm statute, Plaintiffs cannot establish that such activity bears a causal connection to Plaintiffs’ declaratory judgment claims.

No nexus exists between Massachusetts and the conduct alleged in the Complaint. Indeed, Plaintiffs’ claims arise from negotiations between two ***German companies that occurred in Germany***. No negotiations occurred in Massachusetts, and CureVac did not direct any communication regarding those negotiations to any entity in Massachusetts. The Complaint alleges that a CureVac representative “contacted the Senior Patent Counsel of BioNTech US Inc.” regarding a potential license, but it was BioNTech that invited its U.S.-based employees,

and CureVac only sent a communication to those employees because BioNTech SE requested that CureVac AG do so. Complaint (Dkt. 1) ¶ 83; Dalton Decl. ¶¶ 6–7. CureVac did not seek out any resident of Massachusetts (or any other state) regarding a potential license to the patents-in-suit. *See* Section II.B, above.

B. This Court lacks personal jurisdiction over CureVac AG under Fed. R. Civ. P. 4(k)(2)

This Court cannot exercise personal jurisdiction over CureVac AG under Rule 4(k)(2) because doing so would not comport with constitutional due process under the principles of either general or specific jurisdiction. Although the due process analysis under Rule 4(k)(2) “contemplates a defendant’s contacts with the entire United States, as opposed to the state in which the district court sits,” CureVac AG’s contacts with the United States as a whole are insufficient to find personal jurisdiction. *Synthes (U.S.A.)*, 563 F.3d at 1295–96.

1. This Court lacks general jurisdiction over CureVac AG

a CureVac AG lacks sufficient contacts for general jurisdiction

No evidence supports Plaintiffs’ assertions “on information and belief” that CureVac AG “maintains pervasive, continuous, and systematic contacts with Massachusetts.” Complaint (Dkt. 1) ¶ 15. CureVac AG has no offices or employees in Massachusetts or anywhere else in the United States, and is not registered to do business in any state. Rau Decl. ¶ 4. CureVac AG entered into clinical research agreements with two medical centers in Massachusetts, and its corporate representatives visited CureVac, Inc.’s office in Massachusetts six times in the last four years. *Id.* ¶¶ 7–9. CureVac AG also entered into a clinical research agreement with a medical center in San Diego, and it has purchased reagents and animals for clinical research from other U.S. entities outside of Massachusetts. *Id.*

But even if all of CureVac AG’s activities in the U.S. were attributed to this forum, those contacts would not render CureVac AG “at home” in Massachusetts. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984) (forum state lacked general jurisdiction over entity even though entity had made large purchases from a business in the forum state, the chief executive officer had traveled to the state for contract negotiations, and the entity had sent employees into the forum state for training). Accordingly, this Court lacks general jurisdiction over CureVac AG.

b CureVac, Inc.’s contacts are not attributable to CureVac AG

Plaintiffs attempt to establish personal jurisdiction over CureVac AG based on the presence of its wholly-owned subsidiary—CureVac, Inc.—in Massachusetts. Plaintiffs contend that CureVac, Inc.’s ten Massachusetts-based employees, its registration to do business in Massachusetts, and its lease on a Massachusetts building are sufficient to establish personal jurisdiction over CureVac AG, its foreign parent, in this case. Complaint (Dkt. 1) ¶¶ 19, 20, 22, 23.

They are not. The law is clear that a Massachusetts court cannot exercise personal jurisdiction over a foreign parent based solely on the fact that its wholly-owned subsidiary is based in Massachusetts. A “foreign corporation may be subjected to a court’s general jurisdiction based on the contacts of its in-state subsidiary” only where the corporation is “essentially at home” in the state. *Daimler*, 571 U.S. at 134–35, 138–39. This rule typically limits general jurisdiction to a corporation’s state of incorporation and its principal place of business. *Id.* at 137. “Exercising general jurisdiction over an entity that is neither incorporated nor has its principal place of business in the forum is exceptional and must be reserved for situations in which the entity is ‘essentially at home in the forum State.’” *D.S. Brown Co. v. White-Schiavone, JV*, 537

F. Supp. 3d 36, 43 (D. Mass. 2021) (quoting *Daimler*, 571 U.S. at 133 n. 11). Indeed, “after the Supreme Court’s decision in [*Daimler*], it is unlikely that general jurisdiction over a foreign defendant could ever be available under 4(k)(2).” *Venmill Indus., Inc. v. ELM, Inc.*, 100 F. Supp. 3d 59, 69, n.6 (D. Mass. 2015).

The mere fact that a U.S. subsidiary conducts business on behalf of a parent corporation does not, contrary to Plaintiffs’ suggestion, establish an agency relationship for jurisdictional purposes. *Donatelli v. Nat’l Hockey League*, 893 F.2d 459, 465 (1st Cir. 1990). “[A]s a general rule, the jurisdictional contacts of a subsidiary corporation are not imputed to the parent.” *In re Lernout & Hauspie Sec. Litig.*, 337 F.Supp.2d 298, 312 (D. Mass. 2004) (citation omitted); *see also De Castro v. Sanifill, Inc.*, 198 F.3d 282, 283–84 (1st Cir. 1999) (parent corporation’s “mere ownership” of subsidiaries does not justify rejection of corporate identity or establish personal jurisdiction over parent). Indeed, in federal question cases, “personal jurisdiction cannot be exercised over a foreign company through a corporate veil-piercing theory ***absent a showing of fraud.***” *Mass. Carpenters Central Collection Agency v. Belmont Concrete Corp.*, 139 F.3d 304, 308 (1st Cir. 1998) (emphasis added); *see also Schaefer v. Cybergraphic Systems, Inc.*, 886 F. Supp. 921, 925 (D. Mass. 1994) (in order to pierce the corporate veil to exercise personal jurisdiction, there must be a showing that *inter alia* “the principal had some fraudulent intent in its modus operandi.”). Plaintiffs’ jurisdictional allegations do not even suggest fraudulent corporate conduct, much less overcome the presumption of corporate separateness.

CureVac, Inc., a Delaware corporation, is separate and distinct from CureVac AG. An employee of CureVac, Inc. files and pays for corporate records with the Delaware and Massachusetts Secretaries of State on behalf of CureVac, Inc. Krohn Decl. ¶ 6. CureVac, Inc. financed its operations through funds drawn from a bank account owned by CureVac, Inc., and at

all times, was adequately capitalized to continue operations. *Id.* ¶ 7. CureVac, Inc.’s ten employees support CureVac AG’s drug development efforts in the United States. *Id.* ¶ 4. CureVac AG does not control the day-to-day activities of CureVac, Inc. *Id.* ¶ 8. CureVac Inc. operates based on an independent budget agreed with CureVac AG (now CureVac SE) and performs its own contracting with third parties within that budget and the CureVac AG policies applicable to all CureVac entities. *Id.* ¶ 8.

Even assuming, arguendo, that all of CureVac, Inc.’s activities were attributable to CureVac AG, the Court would still lack general jurisdiction over CureVac AG.⁵ CureVac, Inc.’s employing ten people, maintaining an office, and registering to do business in Massachusetts, in addition to the *de minimis* contractual contacts of CureVac AG, fail to establish that this is the “exceptional” case where general jurisdiction can be maintained outside of the parent corporation’s place of incorporation and principal place of business, which are indisputably in Germany. *See Cossaboon v. Maine Medical Center*, 600 F.3d 25, 31 (1st Cir. 2010) (no general jurisdiction in New Hampshire even where hospital advertised to state residents, was registered to do business in state, had one state-based employee, derived 3.24% percent of total revenue from in-state residents, and treated a substantial number of state residents); *Noonan v. Winston Co.*, 135 F.3d 85, 93–94 (1st Cir. 1998) (no general jurisdiction where defendant regularly targeted business solicitations at forum companies, conducted substantial business with one forum company, and sent an employee to forum for work); *Glater v. Eli Lilly & Co.*, 744 F.2d 213, 216–17 (1st Cir. 1984) (no general jurisdiction where defendant advertised in forum, had

⁵ The Court in *Daimler* expressed some doubt about the constitutionality of subjecting a company to general jurisdiction under an agency theory, which provides jurisdiction over the principal where the subsidiary “performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation’s own officials would undertake to perform substantially similar services.” *Daimler*, 571 U.S. at 134 (internal quotation omitted).

several full-time employees who worked there, and sold products to distributors in forum); *D.S. Brown Co.*, 537 F. Supp. 3d at 43 (registering to do business in Massachusetts and maintaining a P.O. box in Boston falls short of the “exceptional” circumstances warranting the exercise of general jurisdiction).

2. This Court lacks specific jurisdiction over CureVac AG

The Federal Circuit employs a three-part test for specific jurisdiction, asking whether: (1) the defendant purposefully directed its activities at residents of the forum, (2) the claim arises out of or relates to those activities, and (3) assertion of personal jurisdiction is “reasonable and fair.” *Breckenridge Pharm., Inc. v. Metabolite Labs., Inc.*, 444 F.3d 1356, 1363 (Fed. Cir. 2006). “The first two factors correspond with the ‘minimum contacts’ prong of the *International Shoe* analysis, and the third factor corresponds with the ‘fair play and substantial justice’ prong of the analysis.” *Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1360 (Fed. Cir. 2001).

In a declaratory judgment action such as this, the relevant contacts are those that relate to CureVac AG’s enforcement activities and whether it has directed enforcement activities at residents of this form, and “the extent to which the declaratory judgment claim ‘arises out of or relates to those activities.’” *Avocent Huntsville Corp. v. Aten Int’l Co.*, 552 F.3d 1324, 1332 (Fed. Cir. 2008) (quoting *Breckenridge*, 444 F.3d at 1363).

a CureVac AG did not purposefully direct its enforcement activities to any entity anywhere in the United States

All of the so-called “enforcement activities” that supposedly give rise to Plaintiffs’ declaratory judgment claims occurred outside of the United States between ***German companies meeting and negotiating in Germany***. No nexus exists between those activities and Massachusetts. CureVac AG’s and BioNTech’s CEOs, both German nationals, discussed a potential license, and representatives of the German parties met four times by videoconference

and twice in person, in Germany. At the parties' meetings in Germany, BioNTech—**not CureVac AG**—invited two of BioNTech's U.S.-based employees to join. Thus, CureVac AG neither encouraged the inclusion of U.S.-based BioNTech employees, nor directed any enforcement efforts to those employees. These negotiations outside the United States between German companies are the antithesis of purposefully directing actions to the United States.

The Federal Circuit's specific jurisdiction jurisprudence plainly shows that BioNTech's jurisdictional allegations fall far short of the quantum of forum-directed activities needed to establish specific jurisdiction. In *Jack Henry & Associates, Inc. v. Plano Encryption Technologies LLC*, 910 F.3d 1199 (Fed. Cir. 2018), the court held that the exercise of personal jurisdiction over a defendant was reasonable after the defendant sent communications to eleven banks located in the forum "identifying . . . patents, stating that the Banks [were] believed to be infringing the patents, and inviting non-exclusive licenses." *Id.* at 1201, 1206. In *Trimble Inc. v. PerDiemCo LLC*, 997 F.3d 1147 (Fed. Cir. 2021), the court found the purposeful prong satisfied by the sending of twenty-two enforcement communications into the forum over three months, including threats to sue for patent infringement in the Eastern District of Texas and identifying counsel that it had retained for that purpose. *Id.* at 1156–57. In *Apple Inc. v. Zipit Wireless, Inc.*, 30 F.4th 1368, 1375 (Fed. Cir. 2022), the court found the purposeful prong satisfied by sending two notice letters to the declaratory-judgment plaintiff, and traveling twice to the forum to discuss allegations of infringement and a potential license with plaintiff. *Id.* at 1376.

As these cases confirm, the touchstone of the purposeful availment prong is **regular and persistent efforts specifically directed to the forum**. No such activity is present here. At no point did CureVac seek out a U.S.-based entity to either enforce or license the patents-in-suit. Accordingly, this Court lacks specific jurisdiction over CureVac AG.

b Exercising specific jurisdiction over CureVac AG would not be reasonable or fair

Even if the Court were to conclude that CureVac AG's enforcement-related contacts were purposefully directed to this forum, those contacts must be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *International Shoe*, 326 U.S. at 320. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), the Supreme Court identified five considerations relevant to the fair play and substantial justice inquiry: (1) "the burden on the defendant," (2) "the forum State's interest in adjudicating the dispute," (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (5) the "shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 477 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). These factors weigh against the assertion of personal jurisdiction over CureVac AG.

An analysis of the five factors establishes that the exercise of jurisdiction over CureVac AG in this forum would be unreasonable and unfair.

First, forcing CureVac AG to litigate this action in Massachusetts would impose a significant burden on the German entity.

Second, Massachusetts has little or no interest in this case, as it does not involve any Massachusetts residents (CureVac AG is a German corporation, *id.* at ¶ 11, BioNTech SE and its wholly owned subsidiary, BioNTech Manufacturing GmbH, are German corporations, *id.* at ¶¶ 7–9, and Pfizer is a Delaware corporation with its principal place of business in New York).
Complaint (D.I. 1) ¶ 10.

Third, while Plaintiffs may have an interest in adjudicating this dispute, Plaintiffs have no legitimate interest in litigating this action in Massachusetts. Instead, as set forth below, Plaintiffs could and should have brought this case in the Eastern District of Virginia, the forum that is home to the U.S. Patent & Trademark Office. 35 U.S.C. § 293, and as established by statute, has an interest in adjudicating declaratory judgment actions brought against foreign patent owners such as CureVac AG.

Fourth, CureVac AG has not sold a product in the United States, so no “shared interest of the several States” exists in connection with this case that would further any substantive social policy.

Accordingly, even if this Court were to find that the activities of CureVac AG meet the minimum contacts, purposeful availment standard, the Court should decline to exercise personal jurisdiction over CureVac AG because such jurisdiction would be both unreasonable and unfair.

C. This Court should transfer this case to the U.S. District Court for the Eastern District of Virginia

Although this Court lacks personal jurisdiction over CureVac AG, jurisdiction over CureVac AG is available in the Eastern District of Virginia. Under 35 U.S.C. § 293, the patent long-arm statute, if a patentee has not filed with the PTO “a written designation stating the name and address of a person residing within the United States on whom may be served process or notice of proceedings affecting [a] patent or rights thereunder,” the Eastern District of Virginia “shall have jurisdiction” over “any action respecting the patent or rights thereunder that it would have if the patentee were personally within the jurisdiction of the court.”

Here, CureVac AG has not provided the PTO with a written designation of a United States-based agent for the patents-in-suit.⁶ Therefore, the Eastern District of Virginia may exercise personal jurisdiction over CureVac AG in connection with Plaintiffs’ declaratory judgment claims regarding the patents-in-suit under Section 293.

Given that personal jurisdiction over CureVac AG exists in the Eastern District of Virginia, this Court may choose not to dismiss this case, but rather to transfer this action under 28 U.S.C. § 1631, which provides that a district court may transfer a case to another district to cure a “want of jurisdiction.” 28 U.S.C. § 1631. This statute’s reference to “‘want of jurisdiction’ encompasses both personal and subject matter jurisdiction,” and, therefore “permits a federal court to order transfer where it lacks either.” *Federal Home Loan Bank of Boston v. Moody’s Corp.*, 821 F.3d 102, 114 (1st Cir. 2016)⁷ (quoting 28 U.S.C. § 1631). “The First Circuit has interpreted this provision to establish a presumption in favor of transfer—rather than dismissal—when the forum court lacks personal jurisdiction over one of the defendants.” *TargetSmart Holdings, LLC v. GHP Advisors, LLC*, 366 F. Supp. 3d 195, 214 (D. Mass. 2019) (citing *Federal Home Loan Bank of Boston*, 821 F.3d at 119); *see also Britell v. United States*, 318 F.3d 70, 73 (1st Cir. 2003) (“Congress’s use of the phrase ‘shall . . . transfer’ in section 1631 persuasively indicates that transfer, rather than dismissal, is the option of choice.”).

“When determining whether a transfer is appropriate, the Court evaluates 1) whether the action could have been brought in another federal court, 2) whether a limitations period has run

⁶ Congress enacted § 293 to avoid a scenario in which a foreign entity that owns a United States patent cannot be sued in federal court. *Venmill*, 100 F. Supp. 3d at 72 n.9 (“By creating jurisdiction in a federal forum, section 293 already remedied—with respect to foreign patentees—the precise problem that 4(k)(2) was enacted to fix.”).

⁷ Regional circuit law applies to motions to transfer. *In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2008).

that would preclude filing in the correct court, and 3) whether the case is frivolous or brought in bad faith.” *Azumi LLC v. Lott & Fischer, PL*, No. CV 21-11311-NMG, 2022 WL 3369197, at *4 (D. Mass. Aug. 16, 2022).

These factors permit transfer here. Plaintiffs could and should have filed this action in the Eastern District of Virginia, and no limitations period has run that would prevent transfer. Although the Court can dismiss this case, CureVac AG is not seeking to avoid resolution of the parties’ underlying dispute: it only seeks to have that dispute resolved in a court that can properly assert jurisdiction over CureVac AG.

V. CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiffs’ declaratory judgment claims for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), or transfer this action to the Eastern District of Virginia under 28 U.S.C. § 1631.

CUREVAC AG

By its attorneys,

Dated: October 27, 2022

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CERTIFICATE OF SERVICE

I, Michael R. Gottfried, hereby certify that on October 27, 2022 I served a copy of the foregoing document via ECF upon all counsel of record:

/s/ Michael R. Gottfried _____
Michael R. Gottfried