

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

FILED

FEB 26 2018

CLERK OF CIRCUIT COURT #11
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

JUDYTH HARLAN,

Plaintiff,

vs.

No. 15-L-84

JOHNSON & JOHNSON, JOHNSON &
JOHNSON CONSUMER COMPANIES,
INC., IMERYS TALC AMERICA, INC.,
f/k/a LUZENAC AMERICA, INC.,
PERSONAL CARE PRODUCTS, f/k/a
COSMETIC, TOILETRY, AND FRAGRANCE
ASSOCIATION, and WALGREEN, CO.,

Defendants.

ORDER

Defendant Imery's motion to dismiss for lack of personal jurisdiction is before the court. The court, having reviewed the record before it, the submissions of counsel, and being fully advised in the premises, finds and orders as follows:

I. FACTS

It is alleged that Plaintiff is an Illinois citizen who developed ovarian cancer as a result of using Johnson's Baby Powder and Shower to Shower. Defendant Imerys Talc America, Inc. is a Delaware corporation with its principal place of business in San Jose, California that mines and supplies raw talc for use in Johnson & Johnson ("J&J") products. J&J is a New Jersey corporation that manufactures and sells personal care products, including body powders containing talc. Imerys sells to its customers, but not consumers. The baby powder products in question consisted of talc supplied by Imerys, plus additional fragrances added by J&J. *Id.*

Imerys is not a resident of Illinois, it does not own, possess, or lease property in the Illinois. It does not maintain an office or operations in Illinois. None of its officers reside in Illinois and it does not maintain any records in the state. It has no registered agent in Illinois. Imerys has not mined, manufactured, sold, or distributed the talc within, to, or from Illinois nor has any business transactions between Imerys and J&J occurred in Illinois. All of the business transactions between Imerys and J&J have occurred outside of Illinois.

II. LAW

A. SPECIFIC JURISDICTION

Illinois courts recognize the "minimum contacts" test as the threshold issue in any personal jurisdiction challenge in Illinois. *Wiles v. Morita Iron Works Co.*, 125 Ill.2d 144, 161 (1988). In turn, the relevant inquiry into whether the minimum contacts test has been satisfied depends on what category of personal jurisdiction is being sought—either general or specific. *Keller v. Henderson*, 359 Ill.App.3d 605, 613 (2005).

In order for a state court to exercise specific jurisdiction, the suit must arise out of or relate to the defendant's contacts with the forum. *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017). In other words, there must be an affiliation between the forum and the underlying controversy. *Id.* (Citing *Goodyear*, 564 U.S., 919 (2011)). When determining whether an Illinois court may exercise personal jurisdiction over a defendant, specific jurisdiction requires a showing that the defendant purposefully directed its activities at the forum state and the cause of action arose out of or relates to the defendant's contacts with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). When considering whether a state's courts may exercise personal jurisdiction over a nonresident defendant, one way to satisfy the requirements for specific jurisdiction is under the "stream of commerce" theory. *Russell v. SNFA*, 2013 IL 113909, ¶ 52, 987 N.E.2d 778, 790.

In the context of corporations, specific personal jurisdiction may be asserted when the suit directly arises out of or is connected to the defendant's purportedly wrongful acts within the forum state, such that it is reasonable to require the defendant to litigate in that state. *Sabados v. Planned Parenthood of Greater Indiana*, 378 Ill.App.3d 243, 248 (2011). It is not enough that a defendant have some minimum contacts with the forum state by way of the plaintiff's injury. *Id.* at 1121. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way. *Id.* at 1125. The Supreme Court has clarified that the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112 (1987). To be subject to specific personal jurisdiction in Illinois, Plaintiff must show that Imerys purposefully directed its activities at Illinois residents and that litigation directly arises from those specific activities.

STREAM OF COMMERCE

Currently, there are two competing stream of commerce theories, the narrow and broad theory, and states are open to adopt either theory. In the present case, Plaintiff argues that the broad theory of the stream of commerce should be used in the analysis of the present

case. However, even in *Russell*, the primary case that Plaintiff relies on, refused to adopt either the narrow or the broad theory of stream of commerce, in accordance with Illinois Supreme Court precedent. *Russell*, 2013 IL 113909, ¶ 72, 987 N.E.2d 778, 794 (“Accordingly, as in *Wiles*, we will not adopt either the broad or narrow version of the theory without more definitive guidance from a majority of the United States Supreme Court”). Thus, Plaintiff’s analysis applying the broad theory of stream of commerce is not the appropriate analysis for this Court to follow.

Plaintiff’s main arguments for the Court having specific personal jurisdiction over Imerys centers on *Russell*. Plaintiff argues that Imerys knew its talc would ultimately be distributed through interstate commerce by J&J. Consequently, since Imerys was aware of these sales to Illinois, J&J was servicing as a conduit for Illinois consumers. Thus, specific jurisdiction attaches because the talc in question ultimately reached Illinois consumers via J&J sales in Illinois. In *Russell*, the executor’s decedent died in the crash of a helicopter containing tail-rotor bearings made by the corporation. *Id.* at 15. Thereafter, defendant moved to dismiss plaintiff’s claims against it for lack of personal jurisdiction. *Id.* Specifically, defendant, a French company, argued that it lacked the requisite contacts in Illinois because there was no allegation of wrongdoing in Illinois by defendant. *Id.* The court concluded that, for the purposes of the stream of commerce analysis, Augusta and ACC were considered distributors based on their relationship with the defendant and defendant’s contacts within the forum through those distributors. *Id.* at 29. The court reasoned that the fact that Augusta acted as the marketer and distributor of their joint and ultimate product to the consumer and ACC sold manufactured parts by the defendant in Illinois was sufficient to render them the defendant’s distributors. *Id.*

First, Plaintiff argues that because Imerys made talc to the specification of J&J for the use of its products and then J&J packaged, marketed, sold, and distributed the talc nationally, including in Illinois, it serves as a conduit to Illinois consumers. Unlike *Russell*, Imerys does not have a joint product with J&J. Imerys is a supplier of talc and simply produces talc to J&J, one of its *customers*. J&J can use the talc in any of its products and alter, market, sell, and distribute the product to its company’s benefit. Thus, J&J does not serve as a distributor, but rather as customer of its product. Alternatively, it can be argued that because Imerys supplies talc to J&J and, J&J packaged it in its own branded packaging, and handled the distribution, J&J adopted the product and serves as a distributor for the purposes of the stream-of-commerce analysis. However, simply because J&J would be considered a distributor, this is not enough to attach personal jurisdiction. Personal jurisdiction needs to be analyzed independently for each defendant and his contacts in the forum. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1783. In the present case, there is no evidence that Imerys contracted to do business in Illinois, that Imerys shipped talc to J&J in Illinois, or that Imerys distributes its talc to J&J from Illinois.

Secondly, in *Russell*, the court remarked that they rejected the lack of personal jurisdiction because the *only* way that defendant’s product, custom-made helicopter tail-rotor bearings, would ever reach the final consumer, including consumers in the United States and Illinois,

was through its distributors. *Id.* at 28. Unlike *Russell*, where the tail-rotor bearings were custom made for the helicopters, Imerys mines talc and supplies raw talc to J&J and J&J can modify the talc by adding fragrances, thus it's not "custom made". Additionally, J&J can add the talc to any of its products, then package, sell, and ship the talc to any location its business benefits it to do so. Unlike *Russell*, where the defendant only had two sole distributors, J&J is one of Imerys talc customers, but it's not its *only* customer. As a result, Imerys' talc can reach *any* forum, including Illinois, through its different customers and, ultimately, reach *any* final consumer. Specifically to the talc sold to J&J, Imerys does not have any control as to how J&J modifies its talc, in what products J&J uses the talc, the forums that are targeted, nor where J&J ultimately distributes the talc.

Further, in *Russell*, the court held that sufficient evidence showed that the defendant engaged in Illinois-specific activity to establish minimum contacts, as it knowingly used a distributor to distribute and market its custom-made products in Illinois and had a business relationship with an Illinois based company. Unlike in *Russell*, here, Imerys did not contract with J&J in Illinois, deliver, sell, prepare, or distribute any of the talc in Illinois, nor does Imerys have contacts with Illinois based corporations that conduct any of its distributions to or from Illinois. Unlike *Russell*, Imerys acknowledges that it generally knows that J&J, sells an abundance of its products across the country, however, it does not have any knowledge of who J&J contracts with and which entities it sells its product to, let alone what particular states the product is ultimately sold in. Illinois Courts have concluded that personal jurisdiction cannot be attached to a party that is not specifically aware where and how products are marketed or sold, and had no control over or *knowledge* regarding the distribution of the products.¹ The Supreme Court has also held that even foreseeability of a product eventually reaching the forum state is insufficient to satisfy the requisite minimum contacts. *World-Wide Volkswagen*, 444 U.S. at 298. Ultimately, the general sale of use of talc-based body powders by third parties in the State of Illinois is insufficient to establish specific jurisdiction in Illinois. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781.

Lastly, Plaintiff argues that the Imerys obtained an economic benefit of Illinois consumers. Conversely, Imerys only received an economic benefit of its *customer*, J&J, and not the products that J&J manufactured and sold in Illinois. In addition, the Plaintiff claims that Imerys did nothing to restrict the sale of its talc or the products containing its talc to a certain area or region of the United States. Imerys only has control where its own company distributes talc to its customers, such as J&J.

BRISTOL-MYERS REAFFIRMS THE PARAMETERS OF ATTACHING SPECIFIC PERSONAL JURISDICTION TO A NONRESIDENT DEFENDANT

¹ *Dickie v. Cannondale Corp.*, 388 Ill. App. 3d 903 (2009); *Loos v. American Energy Savers, Inc.*, 168 Ill. App. 3d 558 (1988); accord *Morris v. Halsey Enterprises Co.*, 379 Ill. App. 3d 574 (2008); *Soria v. Chrysler Can., Inc.*, 2011 IL App (2d) 101236.

The parties agree that Supreme Court case *Bristol-Myers* applies, however, they differ in the application to the present case. In *Bristol Myers*, a group of plaintiffs², most of whom were not California residents, sued Bristol-Myers Squibb Company (“BMS”) in California State Court, alleging that its pharmaceutical company’s drug Plavix had damaged their health. *Id.* at 1775. BMS is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. *Id.* The court held that nonresident consumers’ products liability claims against nonresident prescription drug manufacturer were not connected to California. *Id.* at 1776. The court reasoned that BMS did not develop, create a marketing strategy for, manufacture, label, package, or work on the regulatory approval for Plavix in the state. *Id.* at 1775. BMS’s unrelated activities to Plavix in the state were not sufficient to establish personal jurisdiction. *Id.* at 1776. Lastly, BMS’s decision to contract with a California company to distribute to sell the drug provides an insufficient basis for personal jurisdiction. *Id.* at 1783.

Like in *Bristol-Myers*, the Court may only constitutionally exercise specific jurisdiction over Imerys suit arises out if Imerys contacts with Illinois. *Id.* at 1781. What is needed and, what is missing in the present case, is a connection between the forum and the specific claims at issue. *Id.* Unlike *Bristol-Myers*, Imerys is challenging personal jurisdiction for the *resident* plaintiff’s claims. Like in *Bristol-Myers*, Imerys did not develop, create a marketing strategy for, manufacture, label, package, or work on the regulatory approval for its talc in Illinois. Unlike *Bristol-Myers*, where BMS engaged in direct acts in the state, here, Imerys engaged in no activities in Illinois in relation to talc. It did not contract with J&J in Illinois, it did not engage in business transactions with J&J in Illinois, nor did Imerys sell, distribute, or ship talc directly to J & J to or from Illinois. Imerys has no agents in Illinois nor has any business relationship with any Illinois based company to distribute its talc.

The Supreme Court goes further to state that the mere fact that BMS contracted with a California distributor was not enough to establish personal jurisdiction in the State. Like in *Bristol-Myers*, Plaintiff’s argument that J&J was serving as a conduit/distributor for Illinois consumers fails because Imerys having distributor is not sufficient to establish personal jurisdiction. Plaintiffs argue that Imerys knew that its talc would ultimately be distributed through interstate commerce by J&J, including Illinois. However, following the rationale in *Asahi*, the mere placement of a product into the stream of commerce without more is not an act of the defendant purposefully directed toward the forum state. The court echoes this in their decision in *Bristol-Myers*, by reiterating that BMS’s decision to distribute Plavix nationally did not provide a sufficient basis for personal jurisdiction. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 178. Thus, the mere fact that Imerys placed its talc into the stream of commerce outside of Illinois and that products manufactured by a third party using that talc ultimately made their way to Illinois, does not satisfy the requirement of meaningful contact with Illinois. *See Walden* 134 S. Ct. at 1123. (A defendant’s relationship with a third party, standing alone is an insufficient basis for jurisdiction).

² 86 California residents and 592 residents from other states.

IV. CONCLUSION

In applying Illinois precedent and the recent Supreme Court decision, *Bristol-Myers Squibb Co. Superior Court*, to the facts of the present case, this court does not have specific jurisdiction over Imerys since there is no adequate link between State of Illinois and the Plaintiff's claims. Imerys's motion to dismiss is therefore GRANTED.

IT IS SO ORDERED. *Clerk to send copies of this order to the parties of record.*

Enter:

FEB 26 2018



William A. Mudge
Judge Presiding