UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNICOMP, INC., et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 97-55-P-C***
	)	
HARCROS PIGMENTS, INC., et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Invoking the court's diversity jurisdiction, the plaintiffs assert claims for breach of warranty and negligence in connection with pigments, purchased by the plaintiffs for use in manufacturing shoe soles and other rubber products, which the plaintiffs contend were defective. Each of the two defendants has separately moved pursuant to Fed. R. Civ. P. 12(b)(2) to dismiss the action as against it for lack of personal jurisdiction. For the reasons that follow, I recommend that both motions be denied.

I. Legal Context

A court's personal jurisdiction over a defendant must be premised on one of two theories: specific or general jurisdiction. *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 144 (1st Cir. 1995). "General jurisdiction exists when the litigation is not directly founded on the defendant's forum-based contacts, but the defendant has nevertheless engaged in continuous and systematic activity, unrelated to the suit, in the forum state." *Id*. (citation and internal quotation marks omitted). The plaintiffs in this case do not contend that principles of general jurisdiction are

applicable. Therefore, "the lens of judicial inquiry narrows to focus on specific jurisdiction," which "requires weighing the legal sufficiency of a specific set of interactions as a basis for personal jurisdiction." *Id.* (citation omitted). In so doing, the court applies the long-arm statute of the forum state. *Nowak v. Tak How Invs., Ltd*., 94 F.3d 708, 712 (1st Cir. 1996) (citation omitted), *cert. denied*, 137 L.Ed.2d 493 (1997). Maine's long-arm statute, 14 M.R.S.A. § 704-A, expressly directs courts to construe it in a manner that creates personal jurisdiction to the fullest extent permitted by the due process requirements of the federal Constitution. *Boit v. Gar-Tec Prods*., Inc., 967 F.2d 671, 679 (1st Cir. 1992) (citations omitted).

"[W]hen a state's long-arm statute is coextensive with the outer limits of due process, the court's attention properly turns to the issue of whether the exercise of personal jurisdiction comports with federal constitutional standards." *Sawtelle v. Farrell*, 70 F.3d 1381, 1388 (1st Cir. 1995) (citation omitted). The requisite inquiry proceeds in three stages:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's forum-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's law's and making the defendant's involuntary presence before the state's court foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

Nowak, 94 F.3d at 712-13 (quoting *United Elec. Workers v. 163 Pleasant St. Corp*., 960 F.2d 1080, 1089 (1st Cir. 1992)) (other citations omitted). The gestalt factors are elucidated *infra*.

When a defendant seeks dismissal under Rule 12(b)(2), the burden is on the plaintiff to demonstrate the existence of *in personam* jurisdiction. *Boit*, 967 F.2d at 674-75 (citations omitted). If the relevant facts are essentially undisputed, it is appropriate for the court to employ a prima facie standard in evaluating the dismissal motion, rather than embarking on a more elaborate adjudicatory

process. *Nowak*, 94 F.3d at 712. In such a case, the court's role is similar to the posture it would adopt in a summary judgment proceeding, accepting the plaintiff's properly documented factual assertions as true for purposes of determining whether the case should proceed to trial.[1] *Foster-Miller*, 46 F.3d at 145. In this instance, although the plaintiffs vigorously contest the legal significance of the jurisdictionally relevant facts adduced by the parties in their respective motion papers, the facts themselves are not in dispute. Therefore, this is an appropriate case for application of the prima facie standard.

I. Factual Background

In light of the foregoing, the record developed in connection with the pending motions reveals the following: The complaint alleges that the plaintiffs are both Maine corporations doing business in Sanford, Maine. Complaint (Docket No. 1) at ¶ 2-3. Plaintiff UniComp, Inc. ("UniComp") manufactures "thermoplastic" rubber compound. *Id*. at ¶ 2. Plaintiff Unico, Inc. ("Unico") uses thermoplastic rubber compound to manufacture shoe soles. *Id*. at ¶ 3.

Defendant Harcros Pigments, Inc. ("Harcros") is an Illinois corporation with its principal place of business in that jurisdiction. *Id.* at 4; Memorandum in Support of Motion of Defendant Harcros Pigments, Inc. to Dismiss, etc. ("Harcros Memorandum") (Docket No. 4) at 3. Defendant Walsh & Associates, Inc. ("Walsh") is a Missouri corporation that maintains a place of business in St. Louis, Missouri. Affidavit of Timothy T. Walsh ("Walsh Aff.") (Docket No. 14) at ¶¶ 3-4. Neither company maintains a place of business in Maine, or has any employees or agents in Maine. *Id.* at

[1] When the court applies the prima facie standard and denies a dismissal motion, it is not finally resolving the jurisdictional challenge but is instead deferring the issue to trial. *Boit*, 967 F.2d at 676, citing Fed. R. Civ. P. 12(d).

¶¶ 7-8; Affidavit of Mark Loudenslager ("Loudenslager Aff."), Exh. B to Harcros Memorandum, at ¶¶ 8-9. The plaintiffs allege in their complaint that a quantity of "BU 5250F burnt umber" pigment, manufactured by Harcros or its predecessor-in-interest and sold to the plaintiffs by Walsh, was defective and therefore caused injury to the plaintiffs. Complaint at ¶¶ 8-10. The complaint asserts claims for breach of express and implied warranties against both defendants and a claim for negligence against Harcros. *Id*. at ¶ ¶ 13-21.

Harcros does not have any customers in Maine to whom it sells products directly, nor does it purchase any raw materials from sources in Maine. Loudenslager Aff. at ¶¶ 4, 7. However, Harcros maintains what its literature describes as a "worldwide distribution network," which includes both Walsh and an entity known as New England Resins & Pigments ("New England Resins"). Deposition of Mark D. Loudenslager ("Loudenslager Dep.") at 27. Walsh's sales territory includes the midwest as well as Utah, Wyoming and parts of New Mexico, Idaho and Tennessee. Deposition of Ellen Murphy ("Murphy Dep.) at 44. Walsh does not solicit business anywhere on the eastern seaboard. *Id.*

By contrast, the sales territory of New England Resins is the six New England States. Loudenslager Dep. at 20. Henry Reyna, a sales representative employed by Harcros, visits New England Resins approximately four times a year to ascertain whether the distributor is in need of any "technical support" from Harcros. Deposition of Henry C. Reyna ("Reyna Dep.") at 15. Representatives of New England Resins & Pigments contacted Unico by telephone and in person during 1991 and 1996 in an effort to sell the plaintiffs Harcros pigments. Deposition of William Gurley ("Gurley Dep.") at 11-12, 22 and Exh. 2 thereto. The internal forms generated by New England pigments concerning the 1991 contacts with the plaintiffs refer to Harcros as the "principal."

Exh. 2 to Gurley Dep., *seriatim*. Harcros provides promotional literature to the distributors for their use in marking Harcros products. Reyna Dep. at 19. When technical advice about a Harcros product is required, the distributors pass such requests directly on to Harcros. *Id*. at 17-18. Harcros also maintains a toll-free "800" number, contained in the promotional literature it provides to its distributors for dissemination to customers, through which customers contact Harcros directly for service and technical assistance. Murphy Dep. at 26; Exh. 5 to Gurley Dep. at B-44.

Contact between Walsh and the plaintiffs' predecessor-in-interest traces to 1976. In that year, a concern known as United Shoe Machinery began purchasing Pfizer Pigments, Inc. products from Walsh. Affidavit of Irving Quimby "(Quimby Aff.") (Docket No. 24) at ¶ 3.[2] United Shoe Machinery transferred its operations to Sanford, Maine in 1984 and was purchased by Unico the following year. *Id.* at ¶ 4. Unico continued to purchase pigments from Walsh. *Id.* When Harcros purchased the part of Pfizer's business that manufactured the pigments used by the plaintiffs, the plaintiffs began ordering Harcros pigments from Walsh instead of Pfizer. *Id.* at ¶ 7. In 1989 Unico contacted Walsh and requested 100 pounds of Harcros burnt umber pigment. Murphy Dep. at 45. Although Walsh referred Unico to New England Resins, *id.*, Unico ultimately ordered the pigment from Walsh.[3] Between October 1991 and December 1996, Walsh made 17 separate shipments of Harcros pigments to the plaintiffs in Maine. Murphy Dep. at 49. In each of these transactions, the plaintiffs selected the carrier but it was Walsh that made the arrangements with the carrier. *Id.* at 16. On all occasions when the plaintiffs purchased chemicals from Walsh, the shipments were made F.O.B. St. Louis and

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[2] Quimby made this assertion only on information and belief. However, Walsh explicitly concedes that the relationship between it and the plaintiffs began in this manner.

[3] The Walsh Deposition does not appear to establish that Walsh filled this order, but Walsh so asserts in its motion and the plaintiffs do not dispute the contention.

the plaintiffs took title to the material at Walsh's place of business in that city. Walsh Aff. at ¶ 10. During this period, Walsh considered the plaintiffs to be a "house account" (meaning no specific salesperson had responsibility for the account) but definitely a Walsh customer. Murphy Dep. at 39, 41. Walsh has not sold any chemical products to customers in Maine other than the plaintiffs. Walsh Aff. at ¶ 4.

In approximately January 1995 the plaintiffs began receiving complaints that the shoe soles they had manufactured using the pigment at issue in this litigation were becoming embrittled and were cracking. Affidavit of Robert L. Morin ("Morin Aff.") (Docket No. 22) at ¶ 4. After conducting tests, the plaintiffs determined that the Harcros pigment was the cause of the problem. *Id.* at ¶ 5. Peter Goguen telephoned Mark Loudenslager, the technical services manager at Harcros, to discuss the problem. *Id.* at ¶ 7.[4] Loudenslager did not refer Goguen to Walsh. Loudenslager Dep. at 40-41. Instead, he provided Goguen with certain technical data developed at Harcros in an effort to assist the plaintiffs in correcting the problem by switching to a different pigment. *Id.* at 40. He also suggested, by letter dated August 23, 1995, that UniComp switch from the burnt umber pigment to other pigments not containing certain specified chemicals. Exh. 2 to Loudenslager Dep. at C-2 to C-3. The Harcros sales manager wrote to UniComp in March 1996 to indicate that Harcros was addressing the problem and that a "[s]ales [r]epresentative would be contacting [UniComp] if further follow-up is required." *Id.* at C-14.

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[4] Morin, the plaintiff's manufacturing manager, actually states in his affidavit that Goguen, whom he does not identify, contacted Loudenslager. Morin Aff. at ¶¶ 1, 7. Morin makes this assertion only "[u]pon information and belief." *Id.* at ¶ 7. The plaintiffs identify Goguen as their "Research and Development Manager." Plaintiffs' Opposition to Defendant Harcros Pigments, Inc.'s Motion, etc. (Docket No. 18) at 4. The parties do not appear to be in dispute over the contact that occurred between employees of the plaintiffs and employees of Harcros once the plaintiffs had determined the resin to be defective.

III. Purposeful Availment

In seeking dismissal for lack of personal jurisdiction, Harcros does not contend that the plaintiff's claims fail to arise out of its activities in the forum state. Rather, Harcros moves directly to the second stage of the inquiry and takes the position that its contacts with the forum state did not constitute a purposeful availment of the privilege of conducting activities within its borders.

In *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987), a plurality of the Supreme Court expressed the view that a defendant does not purposefully avail itself of the privilege of conducting activities in the forum state simply by placing a product into the stream of commerce, even when that stream ultimately leads to the forum state. *Id*. at 112 (O'Connor, J.) (plurality opinion). The First Circuit embraced this view in *Boit*, reaffirming an earlier holding that the "stream of commerce" theory will not support a finding of purposeful availment even if the defendant knew that the item or items at issue would ultimately end up in the forum state. *Boit*, 967 F.2d at 682-683 (citations omitted). "The test is not knowledge of the ultimate destination of the product, but whether the manufacturer has purposefully engaged in forum activities so it can reasonably expect to be haled into court there." *Id.* (quoting *Dalmau Rodriguez v. Hughes Aircraft Co.*, 781 F.2d 9, 15 (1st Cir. 1986)).

However, as the *Asahi* plurality noted, "[a]dditional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example . . . establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who had agreed to serve as sales agent in the forum State." *Asahi*, 480 U.S. at 112. As the plaintiffs point out, they have made at least a prima facie showing that this is precisely such a

case. The only glitch here is that New England Resins & Pigments agreed to be the Harcros agent for serving Maine and the rest of New England, whereas Walsh was actually the distributor who sold the products to the plaintiffs in Maine. That, of course, is a function of the course of dealing that arose between the parties to the transactions in question and their predecessors. I am not aware of any sense in which it alters the calculus on the issue of purposeful availment. Harcros used its distribution network to service the plaintiffs in Maine and likewise made its technical advisors available to the plaintiffs in Maine. This is the sort of additional conduct described by the *Asahi* plurality that renders it reasonable to hale Harcros into a Maine court. *See, e.g., Logan Prods., Inc. v. Optibase, Inc*., 103 F.3d 49, 53 (7th Cir. 1996) (defendant sold product in forum through distributor and "not some little mom and pop retailer who passively sold only to those out-of-staters who happened to wander into its shop"); *Kuenzle v. HTM Sport-Und Freizeitgeräte AG*, 102 F.3d 453, 458 (10th Cir. 1996) ("The actions of an independent distributor may not insulate a foreign company from *specific* jurisdiction.) (emphasis in original); *Barone v. Rich Bros. Interstate Display Fireworks Co*., 25 F.3d 610, 613, 615 (8th Cir. 1994) (jurisdiction over manufacturer appropriate in face of its "willful" ignorance of its distributor's sales in forum state); *Tobin v. Astra Pharm. Prods., Inc*., 993 F.2d 528, 543-44 (6th Cir. 1993) (seeking distributors who would market product in each state constitutes the "something more" described in *Asahi*).

It obviously follows that the court should also reject the similar contention of Walsh that it did not purposefully avail itself of the privilege of doing business in Maine. In so asserting, Walsh relies principally on the Eleventh Circuit's opinion in *Banton Indus., Inc. v. Dimatic Die & Tool Co.*, 801 F.2d 1283 (11th Cir. 1986), in which a divided panel held that one sale of goods to a customer in the forum state did not constitute purposeful availment. *Id*. at 1284. The present case is

distinguishable. As noted, *supra*, the relationship between Walsh and the plaintiffs grew out of contacts between Walsh and the plaintiffs' predecessor-in-interest, but the business relationship endured through United Shoe Machinery's move to Maine in 1984 and its subsequent takeover by Unico. Even after Walsh attempted thereafter to divert Unico to the Harcros distributor whose territory included Maine, Walsh made numerous sales to the plaintiffs. Therefore, it cannot be said that the assertion of personal jurisdiction is "premised solely upon [Walsh's] random, isolated, or fortuitous contacts with the forum state." *Sawtelle*, 70 F.3d at 1391 (citation and internal quotation marks omitted).

IV. The Gestalt Factors

The remaining inquiry relates to the so-called gesalt factors. Designed to assure that personal jurisdiction is exercised only within the dictates of "fair play and substantial justice," the gestalt factors are:

> (1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (2) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.

Nowak, 94 F.3d at 717 (citations omitted). The term "gestalt factors" refers to the principle that, in any given case, the factors "may neither be amenable to mechanical application nor be capable of producing an open-and-shut result. Their primary function is simply to illuminate the equitable dimensions of a specific situation." *Foster-Miller*, 46 F.3d at 150. At this stage of the analysis, the burden shifts to the defendant to convince the court that the gestalt factors militate against the exercise of jurisdiction. *Coolidge v. Judith Gap Lumber Co.*, 808 F.Supp. 889, 891 (D.Me. 1992);

see also Foster-Miller, 46 F.3d at 145 (plaintiff "must carry the devoir of persuasion on the elements of relatedness and minimum contacts") (citations omitted).

In my opinion, neither defendant has carried its burden of persuasion concerning the gestalt factors. Harcros contends in a conclusory manner that it would be burdensome to require an Illinois corporation to litigate in Maine. That self-evident assertion, without more, is insufficient to raise any significant issue as to the first gestalt factor. *See Nowak*, 94 F.3d at 718 (for this factor to assume significance, defendant must allege something "beyond the ordinary cost and inconvenience of defending an action so far from its place of business"). Next, addressing the second gestalt factor, Harcros suggests that Maine has no interest in adjudicating the dispute because none of the acts or omissions complained of took place in Maine. While that may attenuate the forum state's interest, the fact that injury occurred within the forum state means the interest is still demonstrable. *See Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 211 (1st Cir. 1994). Finally, and apparently addressing the final gestalt factor, Harcros warns of a chilling effect on commerce if jurisdiction is exercised here because such a determination would imply that all manufacturers must be prepared to defend themselves in any forum. The case law belies this hyperbolic assessment, which requires no further discussion. Walsh does not specifically address the gestalt factors beyond suggesting that, if the court declines to exercise jurisdiction over Harcros it should certainly take the same approach to the much-smaller Walsh. Therefore, I am satisfied that requiring either defendant to litigate this case in Maine would be fully consistent with notions of fair play and substantial justice.

V. Conclusion

For the foregoing reasons, I recommend that the defendants' motions for dismissal of the

action pursuant to Rule 12(b)(2) be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 14th day of October, 1997.

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David M. Cohen
United States Magistrate Judge