IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 16-cv-02599-RBJ

KIERSTA PAUL, and
CASEY PAUL,

Plaintiffs,

v.

TUV RHEINLAND AG, and
TUV RHEINLAND LGA PRODUCTS, GmbH,

Defendants.

ORDER GRANTING MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION

One summer evening, just after dinner, Kiersta Paul was using her cream whipper to top off a homemade dessert when the pressurized device exploded in her hands. The explosion blew the lid off of the whipped cream dispenser, firing plastic and metal shards into the left side of Ms. Paul's head. Shrapnel partially tore off her ear, cut open her face, and fractured her skull in seven places. Her daughter heard the explosion and ran to the kitchen to find Ms. Paul lying unconscious in a pool of blood.

Two years later, Ms. Paul and her husband filed suit against the cream whipper's manufacturers, retailer, and compliance certifiers to recover for their losses. Plaintiffs subsequently settled with the manufacturers and stipulated to dismissing the retailer, resolving most of their case. *See* ECF Nos. 27, 56. Now before the Court are two motions to dismiss for

lack of personal jurisdiction the remaining defendants that allegedly inspected, tested, and certified the product. ECF Nos. 46, 47. The motions are granted.

STANDARD OF REVIEW

The Court may, in its discretion, address a Rule 12(b)(2) motion based solely on the documentary evidence on file or by holding an evidentiary hearing. *See FDIC v. Oaklawn Apartments*, 959 F.2d 170, 174 (10th Cir. 1992). Where the Court rules on the motion based only on the documentary evidence before it, the plaintiff may meet its burden with a prima facie showing of personal jurisdiction. *See Benton v. Cameco Corp.*, 375 F.3d 1070, 1074 (10th Cir. 2004). The court "tak[es] as true all well-pled (that is, plausible, non-conclusory, and non-speculative) facts alleged" in the complaint, and "any factual disputes in the parties' affidavits must be resolved in plaintiff's favor." *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008).

In this case no party has requested a hearing, and both sides have submitted documents in support of their respective positions. The Court elects to resolve the motions based on the evidence submitted.

ANALYSIS

To establish personal jurisdiction over an out-of-state defendant, "a plaintiff must show that jurisdiction is legitimate under the laws of the forum state and that the exercise of jurisdiction does not offend the due process clause of the Fourteenth Amendment." *Emp'rs Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1159 (10th Cir. 2010). Colorado's "long-arm" statute, C.R.S. § 13-1-124, has been interpreted to confer the maximum jurisdiction permitted by constitutional due process. *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1193 (Colo.

2005). Therefore, this Court need only determine whether exercise of jurisdiction over the defendants comports with due process.

The Due Process Clause requires that an out-of-state defendant have "minimum contacts" with the forum state so that the exercise of jurisdiction does not "offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Wash. Office of Unemployment Comp. and Placement*, 326 U.S. 310, 323 (1945). The defendant's connection to the forum state must be such that he should "reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Minimum contacts may be established in two ways. First, general jurisdiction exists where the defendant's contacts with the forum state are so "continuous and systematic" that exercising personal jurisdiction would be appropriate even if the cause of action did not arise out of those contacts. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Second, specific jurisdiction exists where the cause of action is "related to" or "arises out of" the defendant's activities within the forum state. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). In these cases, jurisdiction is proper "where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (emphasis in original) (citations omitted). Such a defendant must have "purposefully directed" its actions at the forum state or "'purposefully availed' itself of the privilege of conducting activities or consummating a transaction in the forum state." *Dudnikov*, 514 F.3d at 1071 (citations omitted). This inquiry "ensure[s] that an out-of state defendant is not bound to appear

to account for merely 'random, fortuitous, or attenuated contacts' with the forum state." *Id.* (quoting *Burger King*, 471 U.S. at 475).

This Court does not have general jurisdiction over defendants. For a corporation, "the place of incorporation and principal place of business" are the paradigm bases for general jurisdiction. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014). But plaintiffs allege only that defendants are German companies with North American headquarters in Connecticut, not Colorado. Am. Compl., ECF No. 28 at ¶¶ 8–9. Indeed, plaintiffs' exhibits show that neither defendant even has an office in Colorado. ECF No. 49-9; ECF No. 50-9. Plaintiffs also concede that TUV Rhienland LGA Products, GmbH's principal place of business is in Germany. *Id.* at ¶ 9. At most plaintiffs claim that TUV Rheinland AG "provides testing services and conducts business throughout the United States, including the State of Colorado," but these widespread activities are not enough to create "continuous and systematic" contacts with Colorado in particular. *See Goodyear*, 564 U.S. at 919; *see also Shrader v. Biddinger*, 633 F.3d 1235, 1246–47 (10th Cir. 2011) ("Simply because a defendant has . . . business dealings with a person or entity in the forum state does not subject him to general jurisdiction there.").

Nor does this Court have specific jurisdiction over defendants. Plaintiffs do not allege that any of defendants' actions were purposefully directed at Colorado, that defendants purposefully availed themselves of the privilege of conducting activities in Colorado, or that they otherwise created a substantial connection with the state. *See Burger King*, 471 U.S. at 475; *Dudnikov*, 514 F.3d at 1071. Instead, plaintiffs claim that defendants merely inspected, tested, and certified products that were placed into the "stream of commerce" by other entities and were subsequently sold in Colorado. *See* ECF No. 49 at 10–11; ECF No. 50 at 10–11.

In *Asahi Metal Industry Co., Ltd, v. Superior Court of California*, 480 U.S. 102 (1987), the Supreme Court considered whether a foreign manufacturer's awareness that its component parts would reach the forum state in the stream of commerce constitutes "minimum contacts." Justice O'Connor's plurality opinion (for herself and three other Justices) concluded,

> The substantial connection between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. 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.

Id. at 112. Justice Brennan's concurring opinion, also joined by three other Justices, viewed the stream of commerce test somewhat differently:

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacturer to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. . . . Accordingly, most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct.

Id. at 117.

The Court again addressed stream of commerce as a factor in the minimum contacts analysis in *J. McIntyre Machinery, Ltd. v. Nicastro,* 564 U.S. 873 (2011), but still was unable to achieve a majority opinion. Nicastro was injured in New Jersey while using a metal-shearing machine manufactured in England and brought a products liability action in a New Jersey state court. The manufacturer marketed its machines in the United States solely through an independent U.S. distributor, and apparently no more than four machines were ever sold by the distributor. A four-Justice plurality and two Justices concurring agreed that even under a

relatively relaxed stream of commerce theory of jurisdiction there must be some facts evincing purposeful availment or purposeful targeting of the forum state.[1] Justice Kennedy's plurality opinion concluded that because the manufacturer had no contacts with New Jersey other than that one of its machines ended up there, and the manufacturer had not engaged in conduct purposefully directed at New Jersey, "the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures." *Id.* at 886. In a concurring opinion (joined by Justice Alito) Justice Breyer agreed that "something more" than merely placing a product in the stream of commerce is required, and that the facts did not support a finding of personal jurisdiction, but he found the factual record to be an "unsuitable vehicle" to go further. *Id.* at 888–90.

Plaintiffs have failed to show minimum contacts under any standard endorsed in *Asahi* or *Nicastro*. Plaintiffs simply claim that defendants certified their cream whipper as being "Geprüfte Sicherheit"—compliant with German product safety laws—for its manufacturer. *See* Am. Compl., ECF No. 28 at ¶¶ 26–28, 32–34. The manufacturer then had the product distributed "throughout the world, including in the State of Colorado." *See id.* at ¶ 16. Plaintiffs do not allege that defendants manufactured the product or placed it into the stream of commerce. *See id.* at ¶¶ 16, 23. Nor do plaintiffs allege that defendants' testing or certification of the cream whipper took place in Colorado. *See id.* at ¶¶ 8–9, 23–37. And plaintiffs do not identify "something more" than defendants' mere awareness that the product might end up in Colorado, such as "special state-related design, advertising, advice, [or] marketing." *Nicastro*, 564 U.S. at

[1] When the Supreme Court fails to achieve a majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (2007) (citation omitted). As to *Nicastro* that would be Justice Breyer's concurrence. *See Williams v. Romarm, SA*, 756 F.3d 777, 784 (D.C. Cir. 2014).

889 (Breyer, J., concurring in the judgment). In fact, plaintiffs do not even allege that defendants had any reason to expect this cream whipper bearing a German certification mark without a corresponding American mark would be sold in the United States. *See* Am. Compl., ECF No. 28 at ¶¶ 26–34. As a result, defendants' contacts with Colorado are too attenuated and fortuitous to require them to defend themselves here.

ORDER

Defendant TUV Rheinland AG's Motion to Dismiss for Lack of Personal Jurisdiction [ECF No. 46] and Defendant TUV Rheinland LGA Products, GmbH's Motion to Dismiss for Lack of Personal Jurisdiction [ECF No. 47] are GRANTED. Plaintiffs' complaint is dismissed with prejudice. As the prevailing party, defendants are awarded their reasonable costs pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

DATED this 25th day of July, 2017.

BY THE COURT:

R. Brooke Jackson
United States District Judge