Serface Care, Inc. v Berry Good Labs, LLC
2021 NY Slip Op 31900(U)
June 4, 2021
Supreme Court, New York County
Docket Number: 656942/2020
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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SERFACE CARE, INC.

Plaintiff,

- v -

BERRY GOOD LABS, LLC,

Defendant.

INDEX NO. 656942/2020

MOTION DATE 01/19/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 28, 30, 31, 32, 33, 34, 35, 36, 42, 43, 44
were read on this motion to DISMISS.

In this action, plaintiff Serface Care, Inc. d/b/a Myro (Myro) alleges that defendant Berry Good Labs, LLC d/b/a Texas Beauty Labs a/k/a The Goodkind Co. (TBL), failed to make conforming, usable deodorant product for Myro under a manufacturing agreement between the parties (the Manufacturing Agreement), was unable to provide sufficient manufacturing capacity in breach of the Manufacturing Agreement, anticipatorily repudiated the Manufacturing Agreement, and failed to give Myro the benefit of a credit agreed to in Amendment No. 1 to the Manufacturing Agreement (the Amendment) and a settlement agreement attached to the Amendment (the Settlement Agreement).

TBL now moves for an order dismissing the complaint: (1) pursuant to CPLR 3211 (a) (8) for lack of personal jurisdiction; (2) pursuant to CPLR 3211 (a) (7) and/or CPLR 327 in light of the forum selection clauses in the parties' contracts; (3) pursuant to CPLR 327 on the ground

of forum non conveniens; and (4) in the alternative only, pursuant to CPLR 3211 (a) (1) and/or (a) (7) on the merits.

For the reasons set forth below, TBL's motion to is granted on the grounds of lack of personal jurisdiction.

FACTUAL BACKGROUND

The Manufacturing Agreement

TBL is a Texas limited liability company, with its principal place of business in Round Rock, Texas (complaint, ¶ 4 [NYSCEF Doc No. 2]). TBL is a specialty manufacturer of beauty products, including deodorant (*id.*, ¶ 11). TBL's sole member is Phlur, Inc., a Delaware corporation, with its principal place of business in Texas (*id.*, ¶ 5).

Myro is a Delaware corporation, with its principal place of business in Connecticut (*id.*, ¶ 3). Myro is a vendor and retailer of deodorant (*id.*, ¶ 10).

On May 3, 2019, Myro and TBL entered into the Manufacturing Agreement (NYSCEF Doc No. 3), pursuant to which TBL would manufacture deodorant for Myro in Texas, under Texas law, with disputes to be resolved in Texas Federal court. The Manufacturing Agreement provided as follows:

- TBL is defined as "BERRY GOOD LABS LLC (d/b/a Texas Beauty Labs), a Texas limited liability company with a manufacturing facility located at 100 Michael Angelo Way, Suite 900, Austin, TX 78728-1257";

- "Manufacturer shall manufacture the Products solely at Manufacturer's plant, currently located at 100 Michael Angelo Way, Suite 900, Austin, TX 78728-1257 (the 'Plant')";

- "All shipments will be Ex Works the Plant";

- The Agreement "shall be governed and construed in accordance with the internal laws (expressly excluding conflicts of law provisions) of the State of Texas";

· "Any conflict or controversy arising out of or in connection with [the Manufacturing] Agreement or any breach thereof shall be adjudicated in the Federal courts of the United States of America located in Austin, Texas, and competent courts of appeals therefrom"; and

• "[i]f any part of this Agreement shall be found to be illegal, invalid or unenforceable, Agreement shall be given such meaning as would make this Agreement legal, valid and enforceable in order to give effect to the intent of the parties"

(*see* Agreement, Preamble, §§ 2.5, 5.5, 18, 19).

The Dispute

In a nutshell, Myro alleges that TBL failed to perform its obligations under the Manufacturing Agreement, the Amendment, and the Settlement Agreement (*id.*, ¶ 29). According to Myro, TBL breached its obligations by supplying unstable, unmerchantable and unusable deodorant that was not fit for its intended purpose (*id.*, ¶ 30). Myro alleges that the deodorant manufactured by TBL became unacceptably soft and unusable over a relatively short period of time, often leaking out of its container, and did not meet required shelf-life minimum standards (*id.*). Myro alleges that it had to recall the product manufactured by TBL, leading to direct and indirect damages, reputational harm, and lost profits (*id.*, ¶ 33). TBL denies Myro's assertions.

1. The Disputed Order

In August 2019, Myro ordered 500,000 units of deodorant to be manufactured by TBL in Texas pursuant to Purchase Order #3191 (the Disputed Order) (*see* Confidential Settlement Agreement and Release (the Settlement Agreement), 2d "Whereas" clause) (NYSCEF Doc No. 9). Following manufacture and delivery in Texas of the products under the Disputed Order, Myro "asserted that the Products subject to the Disputed Order were defective, and alleged certain claims against [TBL] arising out of the manufacture of such Products (including without

limitation, claims that such Product formula was unstable and/or that such Products did not meet required shelf life minimum standards (collectively, such claims relating to Products manufactured with this formula only, the 'Claims')" (*see id.*, 3d "Whereas" clause).

2. The Settlement Agreement

On August 8, 2019, TBL and Myro entered into the Settlement Agreement to settle and resolve all claims between them with respect to the Disputed Order. In that agreement, each party expressly agreed to release "forever any right to seek further monetary or other relief" from the other party (Settlement Agreement, § 3). TBL also agreed to extend a credit of $1,028,577.13 to be applied against future orders (*id.*, § 1), The Settlement Agreement and the concurrent Amendment (NYSCEF Doc No. 4) also provided that Myro assumed all risk relating to newly manufactured product to avoid further disputes (*see* Amendment, § 2 [a]). Pursuant to the Amendment, Myro would place certain "Committed Special Orders" with TBL, which Myro acknowledged shall be delivered on an "'as-is, where-is' and 'with all faults' basis, all warranties … expressly disclaimed" (*id.*).

The Amendment further provided that, if a "Passing Third Party Stability Test" was not received by December 31, 2019, Section 2 of the Amendment "shall automatically be void and of no further effect" (*see id.*, § 2 [c]). The parties did not receive a Passing Third Party Stability Test by December 31, 2019 (*see* complaint, ¶ 27, fn. 1).

3. Post-Settlement Dispute

Myro alleges that TBL continued to manufacture unusable deodorant after the parties entered into the Settlement Agreement and had to again recall the defective deodorant (complaint, ¶¶ 30, 33). Myro contends that this was a breach of the Settlement Agreement

because "TBL is unable to provide the benefit of the $1,028,577.13 credit for which Myro bargained" (*id.*, ¶ 44).

The Texas Federal and State Lawsuits

On September 15, 2020, Myro filed suit against TBL in the United States District Court for the Western District of Texas (the Federal action) (*see* Federal complaint [NYSCEF Doc No. 10]). In the Federal complaint, Myro alleged that "a substantial part of the events or omissions giving rise to the claims occurred in this District [i.e., Texas]. Specifically, TBL sold and manufactured and contracted to sell and manufacture the deodorant at issue in this lawsuit in this District [i.e., Texas]" (*id.*, ¶ 6). Myro asserted various claims—all pursuant to Texas law. Other than alleging its former principal place of business being in New York (which is now in Connecticut), Myro makes no mention of New York in the Federal action (*see id.*, ¶ 1)

On November 20, 2020, TBL answered the Federal action. However, given that there was not complete diversity of citizenship among the parties and no federal question was alleged, on January 4, 2021, the parties stipulated to dismiss the Federal action without prejudice (*see* Federal stipulation [NYSCEF Doc No. 11]; Federal order [NYSCEF Doc No. 12]).

On December 14, 2020, TBL filed an Original Petition in the District Court for Travis County, Texas (the Texas action), seeking declaratory relief against Myro (*see* Texas complaint [NYSCEF Doc No. 13]). In the Texas action, TBL seeks a declaration, among other things, that the parties' Amendment and Settlement Agreement bar any claims by Myro (*see id.*). Myro was served with the Texas Original Petition on December 18, 2020 (*see* NYSCEF Doc No. 13).

This Litigation

On December 10, 2020, prior to the filing of the Texas action, Myro initiated this suit. Myro asserts causes of action for breach of contract for breach of the Manufacturing Agreement,

Amendment and Settlement Agreement (first cause of action); breach of express warranties (second cause of action); breach of implied warranties of merchantability (third cause of action); breach of implied warranties of fitness for a particular purpose (fourth cause of action); breach of the implied duty of good faith and fair dealing (fifth cause of action); negligence (sixth cause of action; unjust enrichment (seventh cause of action); promissory estoppel (eighth cause of action); and attorney's fees under section 38.001 of the Texas Civil Practices and Remedies Code (ninth cause of action).

DISCUSSION

TBL seeks to dismiss this case on numerous grounds, principally that the parties' agreements require that this case be litigated in Texas and that, in any event, TBL is not subject to personal jurisdiction in this case. The Court will address those arguments in turn.

A. The Forum Selection Clause

The forum selection clauses contained in both the Manufacturing Agreement and the Settlement Agreement state that:

> "Any conflict or controversy arising out of or in connection with this Agreement or any breach thereof shall be adjudicated in the ***Federal courts of the United States of America*** located in Austin Texas, and competent courts of appeals therefrom."

(Manufacturing Agreement, § 19; Settlement Agreement, § 10) [emphasis added].

New York courts routinely enforce such provisions (*e.g.*, *Boss v Am. Express Fin. Advisors, Inc.*, 6 NY3d 242, 247 [2006], which "are not to be set aside unless a party demonstrates that the enforcement of such 'would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be

deprived of his or her day in court'" (*Sterling Nat. Bank as Assignee of NorVergence, Inc. v E. Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept 2006] [citation omitted]).

As noted above, Plaintiff initially sought to litigate this dispute in Texas federal court consistent with the terms of the forum selection provisions. However, the case was dismissed by stipulation, without prejudice, because the federal court did not have subject matter jurisdiction. As this Court noted in a similar case in which the parties could not litigate a contract dispute in their chosen forum (federal court) due to lack of subject matter jurisdiction, "[t]he forum selection clause, as drafted, simply cannot be applied under these circumstances. And because it cannot be applied, 'the forum selection clause is properly viewed as non-mandatory and alternative fora can be considered'" (*PBF I Holdings Ltd. v Valero (Peru) Holdings Ltd.*, 2021 N.Y. Slip Op. 30289[U], 6 [N.Y. Sup Ct, New York County 2021] [quoting *Hovensa, L.L.C. v Technip Italy S.P.A.*, 08CIV.1221(NRB), 2009 WL 690993, at *5 [SD NY Mar. 16, 2009]).

TBL's reliance on *Matter of Rosewood Private Investments, Inc.* (2018 WL 4403749 [Tex App 2018]) for the proposition that the forum selection provision in this case should be deemed – really, re-written – to mandate that disputes be resolved in Texas *state* court is misplaced. First, the enforcement of the forum selection clause in this case is governed by New York law, not Texas law (*Amazing Home Care Services, LLC v Applied Underwriters Captive Risk Assur. Co. Inc.*, 191 AD3d 516 [1st Dept 2021] ["[w]e apply New York law in determining whether to enforce a forum selection clause"]). Second, the facts in *Rosewood* are distinguishable. In that case, it was unclear whether the federal court – to which the forum selection provision pointed – had jurisdiction over the dispute, and thus the parties were required to comply with the provision by permitting the federal court to make that determination. Here, by contrast, the lack of federal jurisdiction is undisputed, and thus referring the parties to federal

court is not an option (*PBF I Holdings*, 2021 WL 291201 at *3). The *Rosewood* court's alternative suggestion that "even if" the federal court determined it did not have jurisdiction the "severability" provision in the contract could be employed to "strike the word 'federal'" from the forum selection clause (2018 WL 4403749 at *5) is dicta, and the Court chooses not to follow it here. Myro and TBL limited the forum selection provision to the *federal* courts of Texas, and the Court sees no reason to override that choice.

In sum, the forum selection provisions in the parties' agreements do not preclude litigating this action in this Court, though they do reflect the fact that the locus of the parties' commercial arrangement was in Texas. As discussed below, the complaint must be dismissed on the independent ground that the Court lacks personal jurisdiction over the Defendant.

B. Personal Jurisdiction

Upon a defendant's motion to dismiss for lack of personal jurisdiction, "the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction" (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017]). To sustain that burden, the plaintiff must show not only that the defendant is within the reach of New York's long-arm statute, but also that exercising jurisdiction "comport[s] with federal constitutional due process requirements" (*Rushaid v Pictet & Cie*, 28 NY3d 316, 330 [2016]). Where a plaintiff cannot make a prima facie showing that a defendant is subject to personal jurisdiction, a motion to dismiss for lack of personal jurisdiction should be granted (*see Iavarone v Northpark Partners, LP*, 89 AD3d 902, 903 [2d Dept 2011]). Here, Myro is unable to make such a showing, and thus the complaint must be dismissed.

The parties agree that the relevant long-arm provision is CPLR 302 (a) (1). Pursuant to that provision, "a court may exercise personal jurisdiction over any non-domiciliary . . . who in

person or through an agent: transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302 [a] [1]).

CPLR 302 (a) (1) is a "single act statute," which means that "'proof of one transaction in New York is sufficient to invoke jurisdiction'" (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006] [citation omitted], *cert denied* 549 US 1095 [2006]). But "our precedents establish that it is the ***quality*** of the defendants' New York contacts that is the primary consideration" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007] [emphasis added]). Accordingly, CPLR 302 (a) (1) supports exercising personal jurisdiction over a nondomiciliary "if the nondomiciliary conducts 'purposeful activities' within the state and the claim against the nondomiciliary involves a transaction bearing a 'substantial relationship' to those activities" (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 21 AD3d 90, 93 [1st Dept 2005], *affd* 7 NY3d 65 [2006], *cert denied* 549 US 1095 [2006]; *accord SPCA of Upstate N.Y., Inc. v American Working Collie Assn.*, 18 NY3d 400, 404 [2012] ["Transact(ing) business within the meaning of CPLR 301 (a) (1)" must consist of "purposeful activities within the state that would justify bringing the nondomiciliary defendant before the New York Courts"] [citation and internal quotation marks omitted]). Insignificant or unrelated contacts with the forum state are not enough to confer specific jurisdiction under CPLR 302 (a) (1), unless the defendant purposely "avails itself of the privilege of conducting activities within the forum State" (*see e.g. Paterno v Laser Spine Inst.*, 24 NY3d 370, 376 [2014] [citation and internal quotation marks omitted]).

Due process considerations also hold that "[t]he plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for jurisdiction over him" (*Walden v Fiore*, 571 US 277, 285 [2014]). Accordingly, "[i]n order for a state court to exercise specific jurisdiction,

"the suit must arise out of or relate to ***defendant's*** contacts with the forum" (*Bristol-Meyers Squibb Co. v Superior Court of California, San Francisco County*, 137 S Ct 1773, 1780 [2017] [emphasis added] [citation and internal quotation marks omitted]).

Myro makes the following jurisdictional allegations in the complaint:

> "This Court has personal jurisdiction over TBL because it does business in New York. Due to TBL's extensive business activities in New York, the Court's exercise of personal jurisdiction over TBL does not offend traditional notions of fair play and substantial justice."
>
> "Venue is properly based in this Court under N.Y. C.P.L.R. § 503 (a) because a substantial part of the events or omissions giving rise to Myro's claims occurred in New York County. Specifically, Myro negotiated the contracts described herein with TBL from its office at the time in New York County at 132 Mulberry St., Ste. 503, New York, NY 10013; Myro executed the contracts in New York County; Myro performed its obligations under the contracts by making payments to TBL from its bank—Chase Bank—located in New York County; TBL accepted performance of its obligations under the contracts by delivering defective deodorant in New York County; and TBL breached the contracts by failing to deliver conforming deodorant to Myro in New York County"

(complaint, ¶¶ 6-7).

Putting aside its conclusory references to "traditional notions of fair play and substantial justice," Myro fails to make a prima facie showing that its "cause[s] of action aris[e] from" and have a substantial relationship with TBL's alleged contacts with New York.

First, although Myro generically avers that TBL conducted "extensive business activities" in New York (*id.*, ¶ 6), Myro admits in its own Federal complaint that "a substantial part of the events or omissions giving rise to the claims occurred in this District [i.e., Texas]" (*see* Federal complaint, ¶ 6). Myro cannot escape the fact that the conduct *at issue in this case* occurred entirely in Texas. Indeed, the Manufacturing Agreement specifically provides that "[a]ll shipments will be Ex Works the Plant," *i.e.*, TBL delivered the Products by making them available at its Texas plant (*see* Manufacturing Agreement, ¶¶ 2.5, 5.5; *Claudia v Olivieri*

Footwear Ltd., 1998 WL 164824, * 1, n 2, 1998 US Dist LEXIS 4586, *4, n 2 [SD NY 1998] ["'Ex works' indicates that "the seller fulfils his obligation to deliver when he has made the goods available at his premises (i.e. works, factory, warehouse, etc.) to the buyer'"]; *see also* affidavit of Eric Korman, TBL's CEO [NYSCEF Doc No. 7], ¶ 4 ["TBL has never shipped its products to the State of New York"]).

Second, Myro's allegation that TBL initiated its negotiations with Myro via a LinkedIn message to Myro's Chief Executive Officer in New York (*see* Laptevsky aff ¶¶ 16-17), and TBL's representatives also attended at least one trade show in New York State marketing TBL's goods (*id.*, ¶¶ 23-24) is insufficient. The "mere solicitation of business within the state does not constitute the transaction of business within the state, unless the solicitation in New York is supplemented by business transactions occurring in the state" (*O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 201 [1st Dept 2003]; *accord Paterno*, 112 AD3d at 41). Myro fails to carry its burden of demonstrating that the LinkedIn message or the trade show involved any business transaction in the state of New York, and indeed, while Korman admits that he "did attend a trade show in New York in 2019," he specifically avers that he "did not meet with Myro or conduct any business relating to Myro on that trip" (Korman reply aff [NYSCEF Doc No. 43], ¶ 7]).

Third, the allegation that Myro "negotiated the contracts described herein . . . from its office at the time in New York County," as well as "executed the contracts in New York County," and made payments under the contract to TBL from a bank located in New York (complaint, ¶ 7) is unavailing. Myro's activities in New York cannot and do not establish that TBL purposely availed itself of the privilege of conducting business in this State (*J. E. T. Adv. Assocs. v Lawn King*, 84 AD2d 744, 745 [2d Dept 1981] ["plaintiff's own activities in New

York, on behalf of defendant, cannot be relied on to establish the presence of the defendant in this State"]; *accord American Bio Medica Corp. v Bailey*, 2018 WL 4278270, * 12, 2018 US Dist LEXIS 237998 [ND NY 2018]; *see e.g. Deufrains v Karcauskas*, 2013 WL 4806955, * 12, 2013 US Dist LEXIS 129163, *34 [ED NY 2013] ["Plaintiff's transfer of money is not a New York contact attributable to Defendants for the purpose of finding New York personal jurisdiction"]; *SunLight Gen. Capital LLC v CJS Invs. Inc.*, 114 AD3d 521, 522 [1st Dept 2014] [dismissing complaint and noting that "[p]laintiff's actions within New York . . . cannot be imputed to [defendant] for jurisdictional purposes"]; *Royalty Network, Inc. v Harris*, 95 AD3d 775, 775–76 [1st Dept 2012] [affirming dismissal of complaint for lack of personal jurisdiction where "all of the New York activities relating to the consulting agreement . . . were performed by plaintiff and cannot be attributed to defendant"]).

Fourth, Myro's allegation that "TBL's representatives … negotiated the contracts with Myro via telephone and e-mail and regularly communicated with Myro about the production of deodorant by telephone and e-mail" (Myro's memorandum of law [NYSCEF Doc No. 30] at 13, citing Laptevsky aff, ¶¶ 18-19]) do not suffice to trigger personal jurisdiction. Such communications "generally are held not to provide a sufficient basis for personal jurisdiction under the long-arm statute" unless they are "shown to have been used by the defendant to actively participate in business transactions in New York" (*Liberatore v Calvino*, 293 AD2d 217, 220 [1st Dept 2002] [citation and internal quotation marks omitted]; *accord C. Mahendra (N.Y.), LLC v National Gold & Diamond Ctr., Inc.*, 125 AD3d 454, 457 [1st Dept 2015] ["courts of this state have generally held telephone communications to be insufficient for finding purposeful activity conferring personal jurisdiction"]; *see also Deutsche Bank*, 21 AD3d at 94 ["electronic communications, telephone calls or letters . . . may be sufficient [to

confer personal jurisdiction] if used by the defendant deliberately to project itself into business transactions occurring within New York State"]). Contrary to Myro's suggestion, "negotiating a contract from outside New York 'is insufficient to constitute the transaction of business in New York'" (*ABKCO Music, Inc. v McMahon*, 175 AD3d 1201 [1st Dept 2019] [citation omitted]).

Fifth, Myro submits the affidavit of its CEO, Greg Laptevsky, to support the allegation that TBL delivered product to Myro in New York. Laptevsky alleges that TBL shipped an unidentified amount of product to his apartment in Manhattan, citing three UPS receipts in January and February 2019 (Laptevsky aff [NYSCEF Doc No. 31], ¶¶ 12-14). These shipments occurred several months *before* the Manufacturing Agreement was signed, and thus there is no indication that Myro's claims stem from these deliveries, or even that these deliveries included the allegedly defective merchandise at issue in this action. Indeed, Myro has produced no documents or other evidence indicating exactly what those alleged shipments contained. Against the backdrop of agreements specifically requiring production and delivery in Texas, these thin allegations do not support the exercise of personal jurisdiction (*McGowan v Smith*, 52 NY2d 268, 271 [1981] ["the long-arm authority conferred by this subdivision [CPLR 302 (a) (1)] does not extend to nondomiciliaries who merely ship goods into the State without ever crossing its borders"; *accord Unitrade Corp. v International Data Sys., Inc.*, 35 Misc 3d 1235[A], 2012 NY Slip Op 51006[U], * 5 [Sup Ct, Kings County 2012] ["'The classic instance in which personal jurisdiction is found not to exist is the one in which the in-state plaintiff ships goods to the out-of-state defendant, who ... fails to send() payment. Without more, this is insufficient to confer long-arm jurisdiction'"] [citation and internal quotation marks omitted]; *affd* 114 AD3d 934 [2d Dept 2014]).

Finally, Myro alleges that "TBL's Chief Executive Officer and other representatives … met with Myro's executives on at least four separate occasions in New York County to discuss the manufacturing of deodorant for Myro under the Manufacturing Agreement and TBL's production capabilities" (Myro's memorandum of law at 13, citing Laptevsky aff, ¶¶ 20-21). These meetings, which purportedly occurred on October 15, 2019, November 8, 2019, January 22, 2020 and February 12, 2020, after the disputes under the Manufacturing Agreement and Settlement Agreement already had arisen, do not provide a basis for specific jurisdiction. "'[T]o establish jurisdiction in New York based on a meeting or meetings in that state, the meeting or meetings must be essential to the formulation of a business relationship'" *Kforce Inc. v Foote*, 33 Misc 3d 1201[A], 2011 NY Slip Op 51741[U], * 3 [Sup Ct, NY County 2011], quoting *United Computer Capital Corp. v Secure Prods., L.P.*, 218 F Supp 2d 273, 278 [ND NY 2002]). "When the visit, however, is not for the purpose of initiating or forming a relationship, but is to alleviate problems under a pre-existing relationship, New York courts have declined to assert jurisdiction" (*United States Theatre*, 825 F Supp at 596, citing *McKee Electric Co. v Rauland–Borg Corp.*, 20 NY2d 377 [1967] [a few visits to New York by agent of defendant to discuss problems of representation agreement do not sustain jurisdiction]; *see e.g. Greco v Ulmer & Berne L.L.P.*, 23 Misc 3d 875, 889 [Sup Ct, NY County 2009] [declining to find jurisdiction on ground that "even if the alleged meetings did take place, there is no support for the claim that they were 'essential to the formation or continuance' of the relationship between the Ulmer and plaintiffs, since they took place long after the Firm began its representation of the Trust and its trustee"]; *see also Kennedy v Yousaf*, 127 AD3d 519, 520 [1st Dept 2015] [dismissing complaint for lack of personal jurisdiction on ground that plaintiffs failed to show that defendants' two appearances in New York had a substantial relationship to plaintiffs' claims"]). Thus, even taking as true

Myro's allegation that the parties discussed the manufacture of deodorant and TBL's production capabilities during these meetings, that is insufficient to confer specific jurisdiction (*see id.*; *see also* Korman reply aff, ¶ 7 ["(t)hese meetings were in essence brief social interactions with Myro and did not involve formation of the contracts at issue"]).

In sum, Myro's factual allegations, supplemented by affidavits in opposition to this motion, do not show that TBL "projected [itself] into New York in such a manner [as to] purposefully avail [itself] of the benefits and protections of [New York] law" (*Paterno v Laser Spine Inst.*, 112 AD3d 34, 41 [2d Dept 2013] [citation and internal quotation marks omitted], *affd* 24 NY3d 370 [2014]). The various telephone calls, emails, and other communications between the parties focused on doing business *outside* of New York (*see id.* at 42 [declining to find jurisdiction where "the 'many communications' between the parties . . . were all related to the surgeries which occurred in Florida"]; *see also United States Theatre Corp. v Gunwyn/Lansburgh Ltd. Partnership*, 825 F Supp 594, 595 [SD NY 1993]). In the end, Myro is the only party in this matter that has any substantive connection to New York.

Accordingly, the complaint must be dismissed for lack of personal jurisdiction.

* * * *

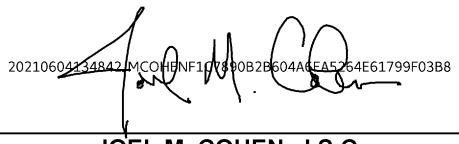
Given that this action is being dismissed due to lack of personal jurisdiction, it is unnecessary to reach TBL's alternative arguments that this action should be dismissed on the ground of forum non conveniens, or for failure to state viable causes of action.

Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is **granted**, and the complaint is dismissed; and it is further

ORDERED that the clerk is directed to enter judgment dismissing the complaint and to mark the case disposed.

This constitutes the decision and order of the Court.



6/4/2021
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE