

STATE OF NEW HAMPSHIRE
SUPREME COURT

2019 TERM

No. 2019-0012

RED OAK APARTMENT HOMES, LLC

V.

HOLMES CARPET CENTER, LLC & a.

RULE 7 MANDATORY APPEAL OF FINAL DECISION OF THE
HILLSBOROUGH COUNTY SUPERIOR COURT – NORTHERN DISTRICT

**BRIEF OF APPELLEE/DEFENDANT
STRATEGIS FLOOR & DÉCOR, INC.**

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June 14, 2019

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STATEMENT OF THE CASE AND FACTS

Strategis Floor & Décor, Inc. (“Strategis”) is a corporation organized and existing under the laws of the Province of Quebec, Canada. Strategis imports flooring into Canada from Asia and sells it to distributors around the world. The distributors, in turn, typically sell the flooring to retailers who sell it to customers. Strategis is not registered to do business in New Hampshire, does not have a registered agent in New Hampshire, does not have any employees, officers, directors, or shareholders in New Hampshire, does not have any offices or places of business in New Hampshire, does not own assets in New Hampshire, does not market or advertise its business in New Hampshire, and does not solicit businesses in New Hampshire.

In this case, Appellant alleges that Strategis (a Canadian importer) sold its flooring to N.R.F. Distributors, Inc. (a Maine distributor) (“NRF”) who then sold the flooring to Holmes Carpet Center, LLC (a New Hampshire retailer) (“Holmes”) who then sold the flooring to Red Oak Apartment Homes, LLC (“Plaintiff” or “Appellant”). Appellant contracted with Holmes to install flooring in approximately 195 apartments owned by Appellant. Apparently, upon Holmes’ recommendation, Appellant purchased flooring traceable through the stream of commerce to Strategis.

Despite the fact that Strategis lacks any contacts with New Hampshire, the Appellant alleges that Strategis is subject to the specific personal jurisdiction of New Hampshire Courts. However, the overwhelming majority of authority stands in stark contrast, holding, pursuant to the stream of commerce plus test, that a nonresident cannot be subject to personal jurisdiction in the forum state simply because it sold its product to another nonresident. In fact, this Court previously decided a practically identical case when it first adopted the stream of commerce plus test – even down to the same type of product – and held that a “nonresident manufacturer’s awareness that its allegedly defective flooring would reach resident homeowners was insufficient,

without some additional conduct, to show that the manufacturer purposefully availed itself of the protection of state laws required for personal jurisdiction.” Vermont Wholesale Bldg. Prod., Inc. v. J.W. Jones Lumber Co., 154 N.H. 635-36 (2006). While Strategis is not surprised that its flooring reached New Hampshire through the Maine distributor who distributes to all of New England and New York, this level of awareness that its flooring might reach New Hampshire alone is insufficient to subject Strategis to the personal jurisdiction of New Hampshire Courts, and the Appellant has failed to show any additional conduct making Strategis subject to the personal jurisdiction of this State.

By Amended Complaint dated November 16, 2017 filed in Hillsborough County Superior Court – North District, Appellant named Strategis as an additional defendant in the underlying action, claiming that Strategis violated the New Hampshire Consumer Protection Act (RSA 358-A) and breached an implied warranty of merchantability by misrepresenting the quality of its flooring. The Plaintiff also alleged that the flooring contains manufacturing and design defects. Strategis moved for dismissal on the basis that the New Hampshire Superior Court lacks jurisdiction over Strategis as a nonresident defendant because Appellant had not made the required showing that New Hampshire Courts have either general or specific personal jurisdiction over Strategis. After a hearing, the Superior Court agreed and entered a thoughtful and detailed Order dated September 19, 2018 dismissing Strategis from the action. Appellant then filed a Motion for Reconsideration, to which Strategis objected. The Superior Court denied Appellant’s Motion for Reconsideration by Order dated November 28, 2018. This appeal followed.

SUMMARY OF THE ARGUMENT

This appeal solely relates to whether Appellant has satisfied the stream of commerce plus test adopted in Vermont Wholesale such that Strategis is subject to the specific personal jurisdiction of New Hampshire Courts. In products liability cases, plaintiffs are required to satisfy

this test and show that a nonresident defendant took some additional steps, beyond merely placing its product in the stream of commerce, such that it purposefully availed itself of the protection of New Hampshire's laws. The Trial Court properly held that Appellant had not satisfied the stream of commerce plus test and thus that it lacks personal jurisdiction over Strategis. Through every step of this litigation, the Appellant has failed to demonstrate that Strategis did anything more than simply place its flooring in the stream of commerce. Strategis merely sold its flooring to NRF – a Maine-based distributor. The flooring then apparently made its way through the stream of commerce, eventually landing in New Hampshire. The record is absent any evidence that Strategis took any steps to sell its product in New Hampshire, target New Hampshire or its consumers, tailor its products for New Hampshire, advertise in New Hampshire, or otherwise avail itself of New Hampshire law.

According to Asahi, actions that satisfy the stream of commerce plus test include designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. Asahi Metal Industry Co., 480 U.S. at 112. However, none of Appellant's conclusory allegations bring this case within any of these examples set forth in Asahi. Accordingly, the Trial Court's decision dismissing Strategis from the underlying action should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW.

The Plaintiff bears the burden of demonstrating facts sufficient to establish personal jurisdiction. Lyme Timber Co. v. DSF Investors, 150 N.H. 557, 559 (2004). The Plaintiff is required to make a *prima facie* showing of jurisdictional facts to defeat a defendant's motion to dismiss. Id. This Court reviews a trial court's ruling on a motion to dismiss for lack of personal

jurisdiction *de novo*. Id. In determining whether the Plaintiff has met its burden, the Court engages in a two-part inquiry. Vermont Wholesale Bldg. Prod., Inc., 154 N.H. at 628. “First, the State’s long-arm statute must authorize such jurisdiction.” Id. “Second, the requirements of the federal Due Process Clause must be satisfied.” Id. Because the Court construes New Hampshire’s long-arm statute as “permitting the exercise of jurisdiction to the extent permissible under the Federal Due Process Clause, see Alacron v. Swanson, 145 N.H. 625, 628 (2000), [the Court’s] primary analysis relates to due process.” Vermont Wholesale Bldg. Prod., Inc., 154 N.H. at 628. Pursuant to the Federal Due Process Clause, a court may exercise personal jurisdiction over a nonresident defendant if the defendant has minimum contacts with the forum, “such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” Id.

Specifically, in order for Strategis to be subject to the personal jurisdiction of New Hampshire Courts, the Appellant must show that Strategis did something more than merely place its product in the stream of commerce. Id. at 635-36. Strategis’ awareness that its flooring would reach New Hampshire is insufficient. Id. The Appellant must show that Strategis took some additional action to purposefully avail itself of the protection of New Hampshire law. Id.

II. THE TRIAL COURT DID NOT ERR WHEN IT HELD THAT IT LACKED PERSONAL JURISDICTION OVER STRATEGIS BECAUSE APPELLANT FAILED TO SATISFY THE STREAM OF COMMERCE PLUS TEST.

Personal jurisdiction can either be general or specific. Id. “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. It is uncontested in this matter that New Hampshire Courts lack general personal jurisdiction over Strategis. Appellant has not taken issue with Strategis’ position set forth in its Motion to Dismiss that New Hampshire Courts lack general personal jurisdiction over Strategis.

Rather, the underlying action focused upon whether New Hampshire Courts have specific personal jurisdiction over Strategis. The Trial Court properly determined that it did not. Specific personal jurisdiction may only be relied upon “where the cause of action arises out of or relates to the defendant's forum-based contacts.” Id. In determining whether the exercise of specific personal jurisdiction comports with due process, the Court examines whether: (1) the contacts relate to the cause of action; (2) the defendant has purposefully availed itself of the protection of New Hampshire’s laws; and (3) it would be fair and reasonable to require the defendant to defend the suit in New Hampshire. Id. at 628-29. All three factors must be satisfied in order for the exercise of jurisdiction to be constitutional, and each factor must be evaluated on a case-by-case basis. Id. at 629.

The Appellant goes on at length in its brief arguing why the Gestalt factors relating to the third prong – whether it would be fair and reasonable to require the defendant to defend the suit in New Hampshire – are satisfied. However, the Trial Court’s rulings dismissing Strategis and denying Appellant’s Motion for Reconsideration are based solely on the purposeful availment prong. The Trial Court never made a determination regarding the third prong of specific personal jurisdiction. As such, the Appellant’s discussion concerning the Gestalt factors have no bearing on this appeal, and this Court need not analyze the Appellant’s discussion in that regard.

This appeal solely relates to the second prong – whether Strategis purposefully availed itself of the protection of New Hampshire’s laws. Resolving this question in product liability cases requires application of the stream of commerce plus theory. The stream of commerce plus theory finds its roots in Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 112 (1987) (O’Connor, J., plurality opinion) and provides 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. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for

the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

While some jurisdictions have adopted Justice Brennan's concurrence in Asahi that such "additional conduct" is not needed when the defendant places goods in a stream of commerce and is aware that its product is being marketed in the forum state, id. at 117, this Court unequivocally rejected this line of reasoning in favor of Justice O'Connor's stream of commerce plus test in Vermont Wholesale Bldg. Prod., Inc. v. J.W. Jones Lumber Co., 154 N.H. 625 (2006), because, *inter alia*, Justice O'Connor's stream of commerce plus test "best meets the requirements of the Due Process Clause."

When this Court first adopted the stream of commerce plus doctrine in Vermont Wholesale, the Court addressed a situation where a North Carolina corporation manufactured and sold flooring to a Vermont wholesaler. Id. The Vermont wholesaler then sold the flooring to a New Hampshire retailer. Id. The New Hampshire retailer then sold the flooring to a New Hampshire-based contractor who installed it in his client's home in Whitefield, New Hampshire. Id. In a third party action brought by the Vermont Wholesaler against the North Carolina manufacturer, this Court adopted the stream of commerce plus doctrine and held that the "nonresident manufacturer's awareness that its allegedly defective flooring would reach resident homeowners was insufficient, without some additional conduct, to show that the manufacturer purposefully availed itself of the protection of state laws required for personal jurisdiction." Id. at 635-36.

The facts in Vermont Wholesale are indistinguishable from those of the present action. As such, the Trial Court correctly held that Vermont Wholesale controls here. Appellant alleges that Strategis sold its flooring to NRF, a Maine distributor. From there, the flooring traveled through

the stream of commerce, eventually reaching Appellant in New Hampshire. However, while NRF is registered to do business in New Hampshire, they are a foreign corporation organized under the laws of the State of Maine. Even assuming *arguendo* that Strategis had some level awareness that its flooring might reach New Hampshire, the Plaintiff has not asserted any facts that satisfy the “plus” standard of the stream of commerce plus theory. The Plaintiff only alleges that Strategis’ flooring reached New Hampshire through the stream of commerce and therefore it is subject to the jurisdiction of this Court. However, the Trial Court properly found that these conclusory allegations are insufficient to satisfy the “plus” standard of the stream of commerce plus test.

The Appellant’s attempt to distinguish Vermont Wholesale in favor of State v. N. Atl. Ref. Ltd., 160 N.H. 275, 281 (2010) is disingenuous. In North Atlantic, the nonresident defendant specifically produced and designed reformulated gas containing MTBE for the northeastern region, which was sufficient to satisfy the “plus” standard required by the “stream of commerce plus” test. 160 N.H. at 285. However, as the Trial Court properly found, here, Strategis’ flooring that made its way through the stream of commerce and eventually landed in New Hampshire was not in any way designed for New Hampshire or its consumers specifically. See Order on Motion to Dismiss at 8. Accordingly, unlike in North Atlantic, Strategis did not specifically target the northeast region or New Hampshire by specifically designing flooring specifically for the northeast or New Hampshire consumers. Moreover, the Appellant’s attempt to distinguish Vermont Wholesale on the basis that (1) the relationship between Strategis and NRF; (2) a flyer and an article allegedly published by Strategis; (3) the volume of Strategis flooring that eventually made its way through the stream of commerce to New Hampshire; and (4) Strategis inclusion of a warranty in its cartons of flooring bring Strategis within the personal jurisdiction of New Hampshire Courts are equally unavailing.

A. The relationship between Strategis and NRF alleged by Appellant is insufficient to satisfy the stream of commerce plus test.

Appellant alleges that because Strategis sought to establish a relationship with NRF, and because NRF's distribution area includes all of the New England states (and New York), a geographic region that necessarily includes New Hampshire, Strategis marketed its product through a distributor who agreed to serve as the sales agent in the forum State. Appellant would have this Court believe that this type of relationship is the same as the example set forth in Asahi which provides that "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State" is sufficient conduct to satisfy the stream of commerce plus test. It is not.

As a preliminary matter, Appellant seems to suggest that the Trial Court erred because it did not address this alleged relationship in its September 19, 2018 Order dismissing Strategis. This suggestion is misleading because it implies that the Trial Court never addressed Appellant's argument, which is not the case. The Trial Court held in its Order on Appellant's Motion for Reconsideration that:

Because NRF serves the New England market, Strategis was aware that NRF would distribute its product to New Hampshire. However, as noted above, Strategis' awareness that its product will likely reach New Hampshire, without more, is an insufficient basis for personal jurisdiction. While Strategis established a distribution relationship with NRF, NRF is located in Maine and Strategis cannot be subject to jurisdiction based on the activity of nonresident third parties. See [Vermont Wholesale Bldg. Prod., Inc., 154 N.H.] at 635-36 ("We fear that the stream of commerce rationale alone would subject defendants to judgment in locations based on the activity of third persons and not the deliberate conduct of the defendant, making it impossible for defendants to plan and structure their business contacts and risks"); see also Walden v. Fiore, 571 U.S. 277, 286 (2014) (holding that "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction").

Moreover, there is no indication that NRF and Strategis had an exclusive agreement giving Strategis control over NRF's distribution decisions in New Hampshire or elsewhere. Compare Staple Cotton Coop. Assoc. v. D.G. & G., Inc., 631 F. Supp. 2d 1168, 1172 (E.D. Mo. 2007) (finding no

personal jurisdiction over nonresident defendant where defendant did not have “any control or input into where its devices were sold”), with Allianz Global Corp. & Specialty Marine Ins. Co. v. Watts Regulator Co., 92 F. Supp. 3d 910, 918 (S.D. Iowa 2015) (finding personal jurisdiction over nonresident defendant where defendant utilized a sales representative in the forum state, had “control over its distribution system” and could choose where and how it sold its products), and Spir Star AG v. Kimich, 310 S.W.3d 868, 873 (Texas 2010) (finding personal jurisdiction over a nonresident defendant who exclusively marketed its products through a distributor within the forum state).

To the extent the Appellant implies that the Trial Court ignored its argument regarding the relationship between Strategis and NRF, that simply did not occur.

But more importantly, the Trial Court’s analysis was both sound and proper. Under New Hampshire law, a nonresident defendant who establishes a relationship with a distributor to sell the nonresident defendant’s products in a larger geographic region that includes, as part of that region, the forum state, is not the same as “marketing the product through a distributor who has agreed to serve as the sales agent in the forum State” as suggested in Asahi. Unlike in Spir Star AG, *supra*, there is no agreement between Strategis and NRF whereby NRF serves as the exclusive distributor of Strategis’ products in New Hampshire. There is no evidence that NRF could only sell Strategis’ flooring in New Hampshire. There is also no evidence that Strategis could not sell its flooring to another distributor who could then sell it in New Hampshire. The mere allegation that Strategis established a distribution relationship with NRF to serve the New England market (and New York) remains insufficient to satisfy the stream of commerce plus test because there is no exclusive distribution relationship and Strategis has zero downstream control over where NRF sells its products. See Staple Cotton Coop. Assoc., 631 F. Supp. 2d at (nonresident manufacturer not subject to personal jurisdiction in Missouri where it had one distributor in California and two in Texas, but had no control or input into where its products were sold); see also Meridian Enterprises Corp. v. C/Base Inc., No. 4:04CV1522-DJS, 2005 WL 1983801, at 2 (E.D. Mo. Aug. 16, 2005) (finding no specific personal jurisdiction in Missouri

where Georgia corporation sold products to clients through contracts negotiated in Georgia and clients then distributed the products to third-parties in other states, but Georgia corporation had no control over such distribution); Dever v. Hentzen Coatings, Inc., 380 F.3d 1070, 1072 (8th Cir. 2004) (finding insufficient jurisdictional contacts under the stream of commerce theory in a case in which the defendant had no offices, inventory, real estate, employees, bank accounts, personal property, or agents in the forum state and the mere fact that the manufacturer's products were found in the forum state did not support personal jurisdiction).

Moreover, even if Strategis did have some level of awareness that NRF might sell its product in New Hampshire, this fact is insufficient to subject Strategis to the personal jurisdiction of New Hampshire Courts. In Vermont Wholesale, a nonresident defendant manufactured and sold flooring to a Vermont distributor, who distributed the flooring to Massachusetts, Vermont, New York, and New Hampshire. 154 N.H. at 627. At the time the nonresident defendant sold the flooring to the Vermont distributor, it was aware that the Vermont Distributor sold flooring to businesses in a four-state region which included New Hampshire. Id. This Court still found these facts insufficient to bring the nonresident defendant within the specific personal jurisdiction of New Hampshire Courts under the stream of commerce plus test because the nonresident “defendant’s awareness that its product may or will reach the forum state is not sufficient to establish that the defendant purposefully availed itself of the protection of that state’s laws.” Id. at 636. Even if Strategis did have some degree of awareness that its flooring might reach New Hampshire, this is an insufficient basis for personal jurisdiction under the stream of commerce plus test. In both Vermont Wholesale and the instant matter, an alleged distribution relationship between a nonresident defendant and a distributor who sells the former’s product in New Hampshire is insufficient – in and of itself – to satisfy the stream of commerce plus test and bring

the nonresident defendant within the personal jurisdiction of New Hampshire Courts. Accordingly, the Trial Court's decision dismissing Strategis should be affirmed.

B. The advertising activities alleged by Appellant are insufficient to satisfy the stream of commerce plus test.

The Appellant argues that Strategis is subject to personal jurisdiction in New Hampshire because it developed advertising materials – a flyer for bamboo flooring and an article quoting Strategis' vice president – which it directed toward the northeast region. The flyer suggests that potential customers in the north east should contact NRF. See Appellant's Appendix p. 68. This argument is really in the nature of another attempt to show a distribution relationship between Strategis and NRF which fails for the reasons set forth above. Nonetheless, there is nothing contained in the alleged advertisement and article that is specifically tailored for or targeted at New Hampshire, and there is no evidence that the advertisement and article were ever sent, received, or viewed by any person or entity within New Hampshire or otherwise. The Trial Court properly held in its Order on Appellant's Motion for Reconsideration that these materials do not affect its finding that it does not have personal jurisdiction over Strategis. See Order on Motion for Reconsideration at 5. "There is nothing about the "advertisements" that is tailored to New Hampshire, and Plaintiff has offered no evidence of when, where, and how they were distributed." Id. "Even if Strategis provided NRF with these advertisements, this fact falls short of purposeful availment." Id. The record is absent any indicia that these two materials are sufficient to satisfy the stream of commerce plus test. Appellant never even attempted to show the Trial Court how or why Strategis purposefully directed these advertisements towards New Hampshire consumers. The Trial Court's decision dismissing Strategis should be affirmed.

Even assuming *arguendo* that the flyer and article did reach New Hampshire, this would merely show that Strategis knew that NRF distributes in the north east region. The flyer and article do not prove that Strategis has an exclusive distribution agreement with NRF whereby NRF

serves as the sole distributor of Strategis' products in New Hampshire. Simply because the flyer suggests that potential customers in the north east should call NRF does not mean that only NRF can distribute Strategis' flooring in New Hampshire. Moreover, the flyer specifically lists other states – e.g. Michigan and Kansas – and suggests that customers in those states should reach out to the distributor that serves Michigan (Radio) and the distributor that serves Kansas (Self). Unlike Road and Self who appear to exclusively serve Michigan and Kansas respectively, NRF does not exclusively serve New Hampshire. NRF merely serves a larger region that includes New Hampshire, an arrangement that this Court found insufficient to subject a nonresident to personal jurisdiction in Vermont Wholesale.

C. The amount of Strategis' flooring products that allegedly reached New Hampshire customers is insufficient to satisfy the stream of commerce plus test.

The Appellant cites an interrogatory from NRF suggesting that NRF, between December 2011 and October 2016, sold 18,000 cartons of Strategis' LVT flooring and 13,000 cartons of Strategis' wood flooring in New Hampshire in an attempt to support its position that this alleged volume of product – on its face – is somehow relevant or significant to the stream of commerce plus test. In a vacuum, it is neither. While the Trial Court acknowledged that the volume of product ultimately sold in a forum state can be relevant to the stream of commerce plus test, the Trial Court properly held that Appellant failed to show whether 31,000 cartons of flooring over a five year period is a noteworthy amount. See Order on Motion for Reconsideration at 6. It was the Appellant's burden to offer affirmative evidence demonstrating these facts before the Trial Court. See Metcalf v. Lawson, 148 N.H. 35, 37 (2002). The Appellant failed to carry that burden. There is nothing in the record suggesting that the volume of Strategis flooring allegedly sold by NRF in New Hampshire over a five year period is a significant volume in the marketplace, much less that the alleged volume satisfies the stream of commerce plus doctrine in and of itself. As

such, there is no basis for the Trial Court's decision to be reversed. The Trial Court's decision dismissing Strategis should be affirmed.

D. Strategis' inclusion of a warranty within its flooring cartons is insufficient to satisfy the stream of commerce plus test.

Appellant contends on appeal that because Strategis included a written warranty in its cartons of flooring that eventually made its way to a New Hampshire consumer, Strategis established a contractual relationship that satisfies the stream of commerce plus test. However, as was the case before the Trial Court, Appellant has again failed to cite any law supporting the proposition that inclusion of a warranty alone subjects one to personal jurisdiction in a given state. See Order on Motion to Dismiss at 9. The Trial Court properly found that, to the contrary, many, if not most, jurisdictions find that inclusion of a warranty alone is insufficient to support an exercise of specific personal jurisdiction. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985) (an individual's contract with an out-of-state party alone does not establish sufficient minimum contacts in the other party's forum state). While a warranty may create obligations between two parties, it does not serve as a basis for personal jurisdiction absent direct contact between the parties in the forum state. See Montgomery v. Airbus Helicopters, Inc., 414 P.3d 824, 831-32 (Okla. 2018); see also Ex parte Edgetech, 159 So. 3d 629, 649 (Ala. 2014); Sorrells v. R&R Custom Coach Works, Inc., 636 So. 2d 668, 671-72 (Miss. 1994).

Dinkel v. Crane Care, Inc., No. Civ. 09-388-LH/RHS, 2010 WL 11453201 at 7 (D.N.M. Jan. 28 2010) contains an excellent discussion of the principle that a warranty obligation of a nonresident which becomes owed to a forum state resident by virtue of a subsequent sales transaction cannot form the basis for specific personal jurisdiction over the nonresident in the forum state. In Dinkel, a Texas corporation participated in the design and manufacture of a remote control and then sold it with a warranty to a company in Wisconsin. Id. at 1-2. The remote control was eventually installed in a crane in New Mexico. Id. at 2. The Court held that a

warranty obligation owed to a resident of the forum state, without more, is insufficient to satisfy the purposeful availment requirement. Id. at 7. The Court reasoned its decision on two primary factors. First, at the time the warranty obligation arose (i.e. when the Texas corporation sold the product to the Wisconsin company) the Texas corporation was unaware “that the remote control would end up in New Mexico or that the warranty obligation would someday extend to a New Mexico resident.” Id. Second, there was no indication that the Texas corporation “somehow directed the channels of distribution that the remote control would take after the sale to” the Wisconsin company. Id.

Similarly, here, Appellants allege that Strategis sold its flooring with a generic warranty to NRF, a company in Maine. The flooring eventually made its way to New Hampshire. However, Strategis’ inclusion of a warranty in each of its cartons of flooring which it ships all over the world is insufficient to bring Strategis within the personal jurisdiction of New Hampshire Courts. At the time the warranty obligation arguably arose (i.e. when Strategis sold the flooring to NRF who is located in Maine), Strategis was unaware that its flooring would end up in New Hampshire or that the warranty obligation would someday extend to a New Hampshire resident. Moreover, as discussed above, Strategis had no ability to direct the channels of distribution that its flooring would take after the sale to NRF. Accordingly, Strategis’ inclusion of a generic warranty is insufficient to satisfy the stream of commerce plus test. While a “[s]tate generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors . . . the constitutional touchstone remains whether the defendant purposefully established “minimum contacts” in the forum.” Burger King Corp., 471 U.S. at 473-74. Here, the simple fact is that Strategis has not. This overriding constitutional principle mandates the dismissal of Strategis in the underlying action.

CONCLUSION

For the foregoing reasons, Strategis submits that the decision of the Trial Court dismissing Strategis from the underlying action for lack of personal jurisdiction should be affirmed.

RULE 16(3)(i) CERTIFICATION

I hereby certify that the decisions being reviewed are in writing and that copies thereof are appended to this Brief.

Respectfully submitted,

Strategis Floor & Décor, Inc.

By its attorneys

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Dated: June 14, 2019

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellee has on this been forwarded to all counsel of record via the Court's electronic filing system. Parties who are not represented by counsel were sent a copy of the Brief of Appellee via First Class Mail, postage prepaid.

Dated: June 14, 2019


Brett W. Allard, Esq.

ADDENDUM

FINAL ORDERS

**THE STATE OF NEW HAMPSHIRE
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September 21, 2018

FILE COPY

Case Name: **Red Oak Apartment Homes, LLC v Holmes Carpet Center, LLC, et al**
Case Number: **216-2016-CV-00807**

You are hereby notified that on September 19, 2018, the following order was entered:

RE: MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO DISMISS:

See copy of Order attached. (Messer, J.)

W. Michael Scanlon
Clerk of Court

(923)

C: Jon N. Strasburger, ESQ; Edward D. Philpot, ESQ; Brandon Prewara; Everson Flooring, LLC; Jeff Lavigne; Paul Dimich, II d/b/a PD Flooring; Rafael Rodriguez d/b/a On all Floors; Steve Loan; Gregory A Ramsey, ESQ; Roy W. Tilsley, ESQ; Brett William Allard, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Red Oak Apartment Homes, LLC

v.

Holmes Carpet Center, LLC, et al.

Docket No. 216-2016-CV-00807

ORDER

Plaintiff brought this action against defendants alleging a number of claims arising out of the installation of vinyl flooring in its apartment units. Presently before the Court are: (1) Defendant Holmes Carpet Center, LLC's ("Holmes") motion for partial summary judgment; and (2) Defendant Strategis Floor and Décor, Inc.'s ("Strategis") motion to dismiss. The court held a hearing on the motions on July 31, 2018. Upon consideration of the pleadings, the parties' arguments, and the applicable law, Holmes' motion for partial summary judgment is DENIED and Strategis' motion to dismiss is GRANTED.

Factual Background

Plaintiff owns approximately 1,500 residential units in numerous communities around New Hampshire. Plaintiff contracted with Holmes to install vinyl plank floating flooring in approximately 195 of its units. Installation of the flooring began in February 2012 and continued through April 2016. After installation, defects such as large gaps between the flooring planks began to appear.

The flooring used by Holmes was manufactured by Strategis, a Canadian corporation located in Quebec. Strategis does not directly sell to any flooring retailers in

New Hampshire and it does not have any offices, perform any advertising, or employ any registered agents in this state. Instead, Strategis sold the flooring to defendant NRF Distributors, Inc. ("NRF"), a flooring distributor located in Maine. NRF in turn sold the flooring to Holmes. In each flooring package, Strategis includes a limited warranty.

Analysis

I. Motion for Partial Summary Judgment

In deciding whether to grant summary judgment, the court considers the pleadings, affidavits, and other evidence, as well as all inferences properly drawn from them, in the light most favorable to the non-moving party. See Amica Mut. Ins. Co. v. Mutrie, 167 N.H. 108, 111 (2014). In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath sufficient to indicate that a genuine issue of material fact exists." Brown v. Concord Grp. Ins. Co., 163 N.H. 522, 527 (2012). An issue of fact is "material" for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law. Macie v. Helms, 156 N.H. 222, 224 (2007) (quoting VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006)). "If there is no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, the grant of summary judgment is proper." Town of Barrington v. Townsend, 164 N.H. 241, 244 (2012) (quoting Bates v. Vt. Mut. Ins. Co., 157 N.H. 391, 394 (2008)); see also RSA 491:8-a, III.

Holmes argues that plaintiffs' claims based upon the installation of floors that occurred between February 22, 2012, and November 15, 2013, are barred by the three-year statute of limitations. Generally speaking, "all personal actions . . . may be brought only within 3 years of the act or omission complained of." RSA 508:4, I. Once a

defendant establishes the cause of action was not brought within three years of the alleged action, the burden shifts to the plaintiff to raise and prove the applicability of the discovery rule. Kelleher v. Marvin Lumber and Cedar Co., 152 N.H. 813, 824 (2005) (citing Glines v. Bruk, 140 N.H. 180, 181 (1995)). “The discovery rule is designed to provide relief in situations where the plaintiff is unaware of either his injury or that the injury was caused by a wrongful act or omission.” Glines, 140 N.H. at 181. Under the discovery rule exception, the statute of limitations does not accrue until: (1) the plaintiff knows or reasonably should have known of the injury; and (2) the plaintiff knows or reasonably should have known of the causal connection between the injury and the alleged conduct of the defendant. Kelleher, 152 N.H. at 824–25 (citing Big League Entm’t v. Brox Indus., 149 N.H. 480, 485 (2003)); see also Perez v. Pike Indus., 153 N.H. 158, 160 (2005) (“The discovery rule does not apply unless the plaintiff did not discover, and could not reasonably have discovered, either the alleged injury or its causal connection to the alleged . . . act.”).

Here, the instant complaint was filed on November 16, 2016. Holmes installed flooring in 97 individual units belonging to plaintiff more than three years prior to that date. (Def.’s Mot. Summ. J., Ex. B.) Therefore, plaintiff bears the burden of establishing the discovery rule tolled the statute of limitations for all claims arising out of those installations.

Plaintiff does not challenge the installation dates provided by Holmes. However, plaintiff claims it does not regularly inspect the units it owns unless there is a specific request by a tenant or a tenant vacates the unit. (Morrill Aff. April 20, 2017 ¶ 6.) Therefore, plaintiff argues it did not discover an issue with the flooring until May 2015,

when it inspected a unit that had been vacated. (*Id.* ¶ 7.) Thereafter, plaintiff's maintenance staff discovered additional problems, and plaintiff received complaints from tenants, through 2016. (*Id.* ¶ 8.)

Holmes argues that plaintiff is bound by the claims in its complaint that issues with the flooring arose "shortly after" installation, (Compl. ¶ 12), and that a period of three to four years is not "short." This argument is unavailing. The purpose of summary judgment is to look beyond the complaint and evaluate the evidence presented. "When a motion for summary judgment is made and supported, . . . the adverse party may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial." RSA 491:8-a, IV. Here, Holmes has presented no evidence establishing that plaintiff discovered any defects prior to 2015. Plaintiff asserts that the defects were first discovered in May 2015. Therefore, the court finds a material question of fact exists as to when the defects were discovered or in the exercise of due diligence should have been discovered. Accordingly, Holmes' motion for partial summary judgment is DENIED.

II. Motion to Dismiss

In ruling on a motion to dismiss for lack of personal jurisdiction "without holding an evidentiary hearing, the [Court] employs a *prima facie* standard." Petition of Reddam, 170 N.H. 590, 595 (2018). "Under the *prima facie* standard, the inquiry is whether the [plaintiff] has proffered evidence which, if credited, is sufficient to support findings of all facts essential to personal jurisdiction." *Id.* "The [plaintiff] ordinarily cannot rest upon the pleadings, but must adduce evidence of specific facts." *Id.* The

Court “when undertaking *de novo* review, must accept the [plaintiff’s] properly documented proffers as true for the purpose of determining the adequacy of the *prima facie* jurisdictional showing.” Id. “The [plaintiff’s] evidentiary proffers must be construed in the light most congenial to its jurisdictional claim.” Id. “Facts put forward by a respondent may be considered to the extent they are uncontradicted.” Id.

In determining whether plaintiffs have met their burden, the court examines “whether our long-arm statute authorizes such jurisdiction, and whether the requirements of the Federal Due Process Clause are satisfied.” State v. N. Atl. Ref. Ltd., 160 N.H. 275, 281 (2010). “As a practical matter, because [the court] construe[s] the long-arm statute as permitting the exercise of jurisdiction to the extent permissible under the Federal Due Process Clause, [the court’s] primary analysis relates to due process.” Id.

“Pursuant to the Federal Due Process Clause, a court may exercise personal jurisdiction over a nonresident defendant if the defendant has minimum contacts with the forum, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” Id. “Personal jurisdiction can be general, if the [defendant’s] contacts with the forum state are continuous and systematic, or specific, if the cause of action arises out of or relates to the [defendant’s] forum-based contacts.” Reddam, 170 N.H. at 597. Plaintiff solely argues that New Hampshire has specific personal jurisdiction over Strategis.

In determining whether it has specific jurisdiction over defendant, the court examines whether: “(1) the contacts relate to the cause of action; (2) the [defendant] has purposefully availed [itself] of the protection of New Hampshire’s laws; and (3) it

would be fair and reasonable to require the [defendant] to defend the suit in New Hampshire.” Reddam, 170 N.H. at 597. “Each factor must be evaluated on a case-by-case basis, and all three factors must be satisfied for the exercise of jurisdiction to be constitutional.” Id.

“With respect to the second part of [the] inquiry, [the Court] must consider whether the defendant[] purposely availed [itself] of the protection of New Hampshire’s laws.” Fellows v. Colburn, 162 N.H. 685, 694 (2011). “The defendant’s instate contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protection of that state’s laws and making the defendant’s involuntary presence before the state’s courts foreseeable.” Id. “Purposeful availment requires both foreseeability and voluntariness.” Id. “Voluntariness requires that each of the defendant’s contacts with the forum state proximately result from the actions by the defendant [*itself*].” Id. “Foreseeability requires that the contacts also must be of a nature that the defendant could reasonably anticipate being haled into court there.” Id. “This requirement ensures the orderly administration of the laws, and, thus, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” Id. at 695–96.

In products liability cases, New Hampshire employs the “stream of commerce plus” theory. N. Atl. Ref. Ltd., 160 N.H. at 284. That theory states that “[t]he 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) (O’Connor, J., plurality opinion). “Nor is the

defendant's 'awareness that the stream of commerce may or will sweep the product into the forum State' sufficient to establish purposeful availment." N. Atl. Ref. Ltd., 160 N.H. at 284 (quoting id. (O'Connor, J., plurality opinion)). Rather, there must be some additional conduct that indicates an intent or purpose to serve the market in the forum state. Id. Such conduct could include "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." Asahi, 480 U.S. at 112 (O'Connor, J., plurality opinion).

Here, Strategis is not registered to do business in New Hampshire, does not advertise in New Hampshire, does not have a registered agent in New Hampshire, and does not have any employees or offices in New Hampshire to provide regular advice to New Hampshire customers. Strategis' flooring is a generic product not specifically designed for the New Hampshire market. Even assuming that Strategis was aware that its flooring would reach New Hampshire residents, the New Hampshire Supreme Court has explicitly rejected the notion that awareness alone is sufficient to establish jurisdiction. See Vermont Wholesale Bldg. Prod., Inc. v. J. W. Jones Lumber Co., 154 N.H. 625, 634–35 (2006). Instead, the court looks to whether the manufacturer engages in additional conduct indicating an intent or purpose to serve the market in the forum State. See id. at 636.

Plaintiff argues this case is analogous to North Atlantic. The court disagrees. In finding that the defendant in North Atlantic met the stream of commerce plus requirements, the New Hampshire Supreme Court found as follows:

In this case, the “plus” required by the “stream of commerce plus” theory is that North Atlantic specifically produced and designed reformulated gas containing MTBE for the northeastern United States market (which includes New Hampshire). The MTBE gasoline North Atlantic produced was blended according to a protocol to which North Atlantic specifically agreed with its sole MTBE gasoline customer, its sister company, Vitol Refining. North Atlantic agreed to meet the specifications of Vitol Refining, and operated a laboratory at the refinery to test the finished MTBE gasoline to ensure that these specifications were met. While Vitol Refining owned the MTBE gasoline, and Vitol S.A., Inc., distributed it to United States customers, North Atlantic was the exporter of record for all MTBE gasoline shipments. North Atlantic was an integral and voluntary part of this distribution system. Further, North Atlantic realized economic advantages from producing MTBE gasoline for the northeastern United States market. We hold that these contacts are sufficient to satisfy the “plus” component of the “stream of commerce plus” theory.

160 N.H. at 285. The actions of the defendant in that case therefore fell squarely within one of the examples explicitly set forth in the original Asahi case, i.e., “designing the product for the market in the forum State.” 480 U.S. at 112 (O'Connor, J., plurality opinion). In contrast, as noted above, Strategis' flooring products were not in any way designed for New Hampshire specifically.

Plaintiff also argues that Strategis' inclusion of a warranty with its products constitutes additional conduct that meets the stream of commerce plus test. Again, the court disagrees. First, there is nothing about the warranty that is specific to New Hampshire or any other jurisdiction. Rather, it is a blanket warranty provided with every product Strategis sells. The warranty, like the flooring products, was simply placed in the stream of commerce. Therefore, Strategis did not avail itself of the protection of New Hampshire's laws because the inclusion of the warranty was not purposely directed at New Hampshire.

Second, plaintiff has failed to cite any law supporting the proposition that inclusion of a warranty alone subjects one to personal jurisdiction in a given state. To the contrary, other courts have found that a warranty obligation owed to a resident of the forum, without more, does not support such an exercise of jurisdiction. See Montgomery v. Airbus Helicopters, Inc., 414 P.3d 824, 831–32 (Okla. 2018) (finding that while a warranty may create continuing obligations between participants in the stream of commerce, it does not create personal jurisdiction in plaintiff's home state in absence of any direct contact between defendant and plaintiff); Ex parte Edgetech, 159 So. 3d 629, 649 (Ala. 2014) (finding Alabama lacked personal jurisdiction over Ohio corporation that had not placed its warrantied products into the stream of commerce with the expectation that they would be purchased by Alabama residents); Dinkel v. Crane Care, Inc., No. Civ. 09-388 LH/RHS, 2010 WL 11453201, at *7 (D.N.M. Jan. 28, 2010) (holding that "[a] warranty obligation owed to a resident of the forum, without more, is insufficient to satisfy the purposeful availment requirement"); Sorrells v. R&R Custom Coach Works, Inc., 636 So. 2d 668, 671–72 (Miss. 1994) (finding that personal jurisdiction could not be exercised in Mississippi over a California manufacturer, even though manufacturer owed obligations to the Mississippi resident); see also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985) (holding that "an individual's contract with an out-of-state party alone" does not establish sufficient minimum contacts in the other party's forum).

Because plaintiff does not meet the stream of commerce plus test and has thus failed to meet the second prong of the specific jurisdiction analysis, the court need not address the remaining prongs. Accordingly, for the foregoing reasons, Strategis' motion to dismiss for lack of personal jurisdiction is GRANTED.

SO ORDERED.

9/19/2018
Date

Amy B. Messer
Amy B. Messer
Presiding Justice

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

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December 06, 2018

FILE COPY

Case Name: **Red Oak Apartment Homes, LLC v Holmes Carpet Center, LLC, et al**
Case Number: **216-2016-CV-00807**

You are hereby notified that on November 28, 2018, the following order was entered:

RE: MOTION for RECONSIDERATION AND REQUEST FOR REHEARING:

See copy of Order attached. (Messer, J.)

W. Michael Scanlon
Clerk of Court

(923)

C: Jon N. Strasburger, ESQ; Edward D. Philpot, ESQ; Aaron Masi; Everson Flooring, LLC; Paul Dimich, II d/b/a PD Flooring; Gregory A Ramsey, ESQ; Roy W. Tilsley, ESQ; Brett William Allard, ESQ

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Docket No. 216-2016-CV-00807

ORDER

On September 19, 2018, the court granted Strategis Floor & Décor, Inc.'s ("Strategis") Motion to Dismiss for lack of personal jurisdiction. Plaintiff now moves for reconsideration¹ and Strategis objects. Upon consideration of the pleadings, the parties' arguments, and the applicable law, plaintiff's motion is DENIED.

Legal Standard

Under Superior Court Rule 12(e), a motion for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended and shall contain such argument in support of the Motion as the movant desires to present." A motion for reconsideration "does not purport to authorize either party to submit further evidence bearing on the motion," Brown v. John Hancock Mut. Life Ins. Co., 131 N.H. 485, 492 (1989), but "[w]hether to receive further evidence on a motion for reconsideration rests in the sound discretion of the trial court," Farris v. Daigle, 139 N.H. 453, 455 (1995).

¹ Plaintiff has also requested a rehearing of the motion for summary judgment due to the fact that the judge that originally heard the matter subsequently recused himself. Because the parties were able to fully present their arguments to the court and the court has reviewed the original hearing, the court finds a rehearing unnecessary.

In ruling on a motion to dismiss for lack of personal jurisdiction, “[t]he plaintiff bears the burden of demonstrating facts sufficient to establish personal jurisdiction over the defendant.” Metcalf v. Lawson, 148 N.H. 35, 37 (2002). The “[p]laintiff[] must not only plead facts sufficient to support jurisdiction, but must also go beyond the pleadings and make affirmative proof.” Brother Records, Inc. v. Harpercollins Publishers, 141 N.H. 322, 324 (1996).

As noted in its prior order, the court’s focus is on the purposeful availment prong of the personal jurisdiction inquiry. More specifically, the sole issue is whether Strategis’ conduct meets the stream of commerce plus theory. The stream of commerce plus theory states that “[t]he 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) (O’Connor, J., plurality opinion). “Nor is the defendant’s ‘awareness that the stream of commerce may or will sweep the product into the forum State’ sufficient to establish purposeful availment.” State v. N. Atl. Ref. Ltd., 160 N.H. 275, 284 (2010) (quoting id. (O’Connor, J., plurality opinion)). Rather, there must be some additional conduct that indicates an intent or purpose to serve the market in the forum state. Id. Such conduct could include “designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.” Asahi, 480 U.S. at 112 (O’Connor, J., plurality opinion).

Analysis

In its motion, plaintiff asserts that the court misapprehended or misconstrued matters of fact in its September 19, 2018 order. Specifically, plaintiff submits that the court overlooked the following facts relevant to finding that Strategis availed itself of the New Hampshire market under the “stream of commerce plus” test: (1) Strategis affirmatively established a distribution relationship with NRF to serve the New England market; (2) Strategis specifically advertised its flooring to the Northeast market which necessarily includes New Hampshire; and (3) Strategis sold a significant amount of flooring through NRF.

Strategis sets forth several arguments as to why this court cannot properly exercise jurisdiction over it. Strategis argues that any contacts it had with New Hampshire were not purposefully directed here such that it availed itself of the benefits and privileges of this state. Relying upon Vermont Wholesale Building Products, Inc. v. J.W. Jones Lumber Co., Inc., 154 N.H. 625 (2006), Strategis argues that it did nothing more than place its flooring in the stream of commerce, and even if it was aware that its flooring might reach New Hampshire, awareness alone is insufficient to establish specific jurisdiction.

In Vermont Wholesale, the plaintiff brought a lawsuit against the defendant, a nonresident manufacturer, alleging the defendant sold it defective flooring. The trial court denied the defendant’s motion to dismiss for lack of personal jurisdiction because it sold flooring to the plaintiff knowing that the plaintiff sold to New Hampshire retailers. The Supreme Court vacated and remanded because “the trial court applied the stream of commerce rationale alone and did not require additional conduct on the part of [the

defendant] but, instead, based its finding of personal jurisdiction upon [the defendant's] awareness that its product would likely reach New Hampshire.” Vermont Wholesale, 154 N.H. at 637. The Supreme Court held that “the defendant’s awareness that its product may or will reach the forum state is not sufficient to establish that the defendant purposefully availed itself of the protection of that state’s laws.” Id. at 636. Upon remand, the Supreme Court instructed the trial court to apply the stream-of-commerce plus analysis.

Because NRF serves the New England market, Strategis was aware that NRF would distribute its product to New Hampshire. However, as noted above, Strategis’ awareness that its product will likely reach New Hampshire, without more, is an insufficient basis for personal jurisdiction. While Strategis established a distribution relationship with NRF, NRF is located in Maine and Strategis cannot be subject to jurisdiction solely based on the activity of nonresident third parties. See id. at 635–36 (“We fear that the stream of commerce rationale alone would subject defendants to judgment in locations based on the activity of third persons and not the deliberate conduct of the defendant, making it impossible for defendants to plan and structure their business contacts and risks”); see also Walden v. Fiore, 571 U.S. 277, 286 (2014) (holding that “a defendant’s relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction”).

Moreover, there is no indication that NRF and Strategis had an exclusive agreement giving Strategis control over NRF’s distribution decisions in New Hampshire or elsewhere. Compare Staple Cotton Coop. Assoc. v. D.G. & G., Inc., 631 F. Supp. 2d 1168, 1172 (E.D. Mo. 2007) (finding no personal jurisdiction over nonresident defendant

where defendant did not have “any control or input into where its devices were sold”), with Allianz Global Corp. & Speciality Marine Ins. Co. v. Watts Regulator Co., 92 F. Supp. 3d 910, 918 (S.D. Iowa 2015) (finding personal jurisdiction over nonresident defendant where defendant utilized a sales representative in the forum state, had “control over its distribution system” and could choose where and how it sold its products), and Spir Star AG v. Kimich, 310 S.W.3d 868, 873 (Texas 2010) (finding personal jurisdiction over a nonresident defendant who exclusively marketed its products through a distributor within the forum state).

Second, the two print advertisements cited in plaintiff’s motion do not affect the court’s finding that it does not have personal jurisdiction over Strategis. There is nothing about the advertisements that is tailored to New Hampshire, and plaintiff has offered no evidence of when, where, and how they were distributed. Even if Strategis provided NRF with these advertisements, this fact falls short of purposeful availment. See, e.g., Staple Cotton, 631 F. Supp. 2d at 1171–72 (finding no personal jurisdiction over nonresident manufacturer although manufacturer provided distributor with marketing manuals, operation manuals, and installation guides, and 7% of manufacturer’s products were sold in forum state).

Finally, the amount of merchandise distributed to New Hampshire may be relevant to the stream-of-commerce plus analysis. See Allianz Global Corp., 92 F. Supp. 3d at 919 (finding “sales of \$10 million dollars per year are hardly insignificant and represent a regular flow of [defendant’s] products into the [forum state]”); Spir Star AG, 310 S.W.3d at 873 (finding that “reap[ing] substantial economic gain” through its Texan distributor and “travel[ing] to Houston . . . [to] establish an office [there]” meets

the stream of commerce plus standard). However, the Court is unable to determine whether the volume of merchandise shipped to New Hampshire is substantial. During the July 30, 2018 motion hearing, Plaintiff only stated that NRF sold 18,000 cartons of vinyl flooring and 13,000 cartons of wood flooring to New Hampshire between December 2011 and October of 2016. Whether 31,000 cartons of flooring in a five-year period amounts to millions of dollars of revenue per year or represents a noteworthy percentage of Strategis' nationwide sales is unclear. Plaintiff bears the burden of offering affirmative evidence demonstrating such facts. Lawson, 148 N.H. at 37.

In light of the foregoing, the court finds that plaintiff's motion raises no issues of fact or law that the court overlooked or misapprehended. Accordingly, plaintiff's motion is DENIED.

SO ORDERED.

11/28/2018
Date

Amy B Messer
Amy B Messer
Presiding Justice