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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding
Special Title (Rule 3.550)

JOHNSON & JOHNSON TALCUM POWDER CASES

This document relates to:

ALL CASES

JCCP NO. 4872

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO ALLOW JURISDICTIONAL DISCOVERY AND CONTINUE SCHEDULE RE MOTIONS TO QUASH

Hearing: May 3, 2018
Judge: Hon. Maren E. Nelson
Dept.: 307

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Specially Appearing Defendants Johnson & Johnson ("J&J") and Johnson & Johnson Consumer Inc. ("JJCI"), f/k/a Johnson & Johnson Consumer Companies, Inc. (collectively, the "J&J defendants") respectfully submit this memorandum of points and authorities in opposition to the Plaintiffs' Executive Committee's ("PEC's") motion to allow jurisdictional discovery and continue the schedule regarding motions to quash.

The Court should deny the PEC's motion because the Court lacks personal jurisdiction over the J&J defendants as to the claims being asserted by the non-California plaintiffs who do not allege that they or their decedents purchased or used Baby Powder® or Shower-to-Shower® in California. This is so because the Master Complaint does not allege ***any relevant connection between these plaintiffs' claims against the J&J defendants and California***, precluding a finding of personal jurisdiction under the U.S. Supreme Court's recent ruling in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773, 1783 (2017) ("*BMS*"). Discovery could not alter this conclusion and, as such, would amount to nothing more than a dilatory tactic to postpone the dismissal of their claims.

The PEC's motion nevertheless highlights several allegations from the recently-filed Master Complaint that supposedly support the exercise of personal jurisdiction over the J&J defendants. Specifically, plaintiffs allege that the J&J defendants: (1) sourced talc from their own California mines years before any of the plaintiffs in these cases were exposed to the products in question; (2) contracted with Imerys Talc America, Inc. f/k/a Luzenac America, Inc. ("Imerys"), which allegedly mined and tested talc in California; (3) marketed the products extensively in California; (4) engaged in a supposed conspiracy with Imerys to expose consumers to the products in California; (5) lobbied various government agencies regarding the regulation of talc; and (6) have maintained a "substantial" presence in California. But none of those purported California-based contacts comes close to conferring either general or specific jurisdiction over the J&J defendants because they are irrelevant to the specific claims asserted by the non-California plaintiffs in these cases; they pertain solely to Imerys; or they do not provide a viable basis for exercising personal jurisdiction under *BMS* and related caselaw.

Tellingly, the PEC barely argues the legal proposition that any of these allegations, if

proven, could establish personal jurisdiction; instead, plaintiffs expound on the abstract virtues of jurisdictional discovery. But regardless of its theoretical virtues, jurisdictional discovery is improper where – as here – it "would not likely lead to production of evidence establishing jurisdiction." *Beckman v. Thompson*, 4 Cal. App. 4th 481, 487 (1992); *see also Dyson v. Bayer Corp.*, No. 4:17CV2584 SNLJ, 2018 WL 534375, at *4 (E.D. Mo. Jan. 24, 2018) (jurisdictional discovery is not appropriate if "[e]ven assuming that discovery would prove exactly what plaintiffs contend happened[,]" any links between defendants' alleged conduct in the forum and the plaintiffs' claims would be "too attenuated . . . to prove specific, 'case-linked' personal jurisdiction"). Because recent Supreme Court precedent makes clear that personal jurisdiction is lacking with respect to the non-California plaintiffs, there is no good cause for jurisdictional discovery, and the Court should proceed expeditiously to briefing and resolution of the J&J defendants' motion to quash for lack of personal jurisdiction. *In re Automobile Antitrust Cases I & II*, 135 Cal. App. 4th 100, 126-27 (2005) (*"Automobile Antitrust Cases"*).

I. BACKGROUND

Plaintiffs allege that the J&J defendants can be subject to suit in California by ***non-California*** plaintiffs, even though the J&J defendants are organized under the laws of New Jersey with their principal places of business in New Jersey, because of various alleged activities in which they or Imerys allegedly engaged in California. (*See* Master Compl. ("MC") ¶¶ 3-4, 172.) Plaintiffs seek jurisdictional discovery to support these theories, and the J&J defendants oppose such discovery.

II. ARGUMENT

Although a court has discretion to allow jurisdictional discovery, it should not do so when "discovery would not likely lead to production of evidence establishing jurisdiction." *Beckman*, 4 Cal. App. 4th at 486-87 (affirming denial of request for jurisdictional discovery); *see also Automobile Antitrust Cases*, 135 Cal. App. 4th at 127 (affirming denial of request for jurisdictional discovery because "[p]laintiffs failed to show that . . . discovery was likely to lead to the production of evidence establishing jurisdiction."); Patricia Knighten, *California Judges Benchbook: Civil Proceedings-Before Trial* § 8.86 (2017 ed.); *Young v. Daimler AG*, 228 Cal. App.

4th 855, 867 n.7 (2014) ("[G]iven the holding in *Bauman II* and the outcome of this case, additional discovery into the 'intricate and detail-rich relationships between [Daimler] and its subsidiaries' would hardly have been likely to lead to the production of facts establishing general jurisdiction over Daimler in California.") (second alteration in original) (quoting *Automobile Antitrust Cases*, 135 Cal. App. 4th at 127). In *Dyson*, for example, the plaintiffs sued various non-Missouri defendants in Missouri, alleging that they had sustained injuries purportedly caused by an implantable birth control device. *See* 2018 WL 534375, at *1. The defendants moved to dismiss the claims brought by the non-Missouri plaintiffs under the recently-decided *BMS* case, 137 S. Ct. 1773. *See Dyson*, 2018 WL 534375, at *1. The plaintiffs sought jurisdictional discovery with respect to alleged clinical trials undertaken by defendants in Missouri, their marketing in Missouri, and other activities in the forum aimed at obtaining FDA approval for the device. *Id.* at *2, *4.

Applying the Supreme Court's recent constitutional personal jurisdiction jurisprudence, the court rejected the request for jurisdictional discovery and dismissed the claims brought by the out-of-state plaintiffs. As the court recognized, the contacts that the plaintiffs sought to prove could not possibly make out a *prima facie* case of specific personal jurisdiction because they could not "provide the necessary 'connection between the forum and ***the specific claims at issue***.'" *Id.* at *4 (emphasis added) (quoting *BMS*, 137 S. Ct. at 1781). For instance, according to the court, marketing the product in the forum state could not provide the necessary connection. *Id.*; *see also Jordan v. Bayer Corp.*, No. 4:14-cv-00865-AGF, 2018 WL 837700, at *4 (E.D. Mo. Feb. 13, 2018) (relying on *Dyson* and finding that "these [marketing] allegations are simply too attenuated to serve as a basis for specific personal jurisdiction over Bayer"). Similarly, undertaking clinical trials in the forum state could not provide a link merely because those trials helped the manufacturer obtain regulatory approval. *Dyson*, 2018 WL 534375, at *4. Accordingly, "[e]ven assuming that discovery would prove exactly what plaintiffs contend happened in Missouri with respect to [] marketing and clinical trials, the individual plaintiffs' claims [were] too attenuated from those activities to prove specific, 'case-linked' personal jurisdiction." *Id.* Because "[t]he links that

plaintiffs propose[d], if allowed, would violate the Due Process Clause," the court found that the request for jurisdictional discovery was meritless. *Id.*[1]

Jinright v. Johnson & Johnson, Inc., No. 4:17CV01849 ERW, 2017 WL 3731317 (E.D. Mo. Aug. 30, 2017), another case involving similar talcum powder allegations, is also highly instructive. There, a bevy of non-Missouri plaintiffs joined with a couple of Missouri residents to initiate a product liability lawsuit in Missouri state court, naming the J&J defendants, Imerys, and one Missouri-based company ("Pharma Tech Industries") that purportedly bottled talcum powder products. *Id.* at *1, *4. The J&J defendants removed the case to federal court, arguing, *inter alia*, that personal jurisdiction was lacking over them as to the claims asserted by the non-Missouri plaintiffs under *BMS*. Of most relevance here, the plaintiffs "argue[d] they need[ed] additional time to conduct discovery into Johnson & Johnson's contacts with Missouri to establish specific personal jurisdiction." *Id.* at *4. In particular, the plaintiffs contended that specific jurisdiction could be exercised over the J&J defendants based on the claim that "Imerys sen[t] their raw talc, with a Material Safety Data sheet warning of the risk of ovarian cancer, to Pharma Tech Industries in Union, Missouri, where, at the direction of Johnson & Johnson, the warning [was] cast aside and the talc [was] processed, bottled and labeled without warning, creating the defect in Missouri." *Id.* As the court explained in denying the plaintiffs' request for jurisdictional discovery, the U.S. Supreme Court rejected a virtually identical theory of personal jurisdiction in *BMS*, reasoning that

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[1] Relying in large part on *Dyson* and *Jordan*, a judge of this Superior Court recently rejected other pharmaceutical plaintiffs' requests for jurisdictional discovery in a case strikingly similar to this one. *See In re Xarelto Cases*, No. 4862, 2018 WL 809633 (Cal. Super. Ct. Feb. 6, 2018). In *Xarelto*, Judge Freeman found that the plaintiffs had not made the necessary *prima facie* case for jurisdictional discovery where the specially appearing defendants were not citizens of California and the nonresident plaintiffs alleged they had used the product in their home states and not in California. *See id.* at *10. As in *Dyson*, Judge Freeman found that discovery with respect to clinical trials and marketing in California could never yield facts capable of establishing specific jurisdiction over the defendants. *See id.* The court reached the same conclusion with respect to the non-California defendants' relationship with a California distributor. *See id.* Although Cal. Rule Ct. 8.1115 only purports to restrict citation of unpublished decisions of the Court of Appeal or the appellate division, the J&J defendants acknowledge that some judges have also invoked that rule in limiting the citation of unpublished Superior Court orders. As such, they cite *Xarelto* only for the Court's reference, and base their argument on analogous federal cases and the other authorities cited herein. *See City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.*, 109 Cal. App. 4th 1668, 1678 n.5 (2003) (federal district court cases not published in the Federal Supplement may be cited as persuasive authority).

"'the bare fact that [Bristol-Myers] contracted with a California distributor is not enough to establish personal jurisdiction in the State.' . . . '[T]he nonresidents have adduced no evidence to show ***how*** or ***by whom*** the Plavix they took was distributed to the pharmacies that dispensed it ***to them.***'" *Id.* (first alteration in original) (emphases added) (quoting *BMS*, 137 S. Ct. at 1783). Applying that reasoning in *Jinright*, the court explained that none of the alleged facts with respect to which the plaintiffs sought discovery "create[d] a connection between nonresident Plaintiffs' injuries in this matter, the Johnson & Johnson products used by nonresident Plaintiffs, and what was manufactured by Pharma Tech." *Id.* at *5. Instead, "[a]ll they have shown is a connection with a third party in Missouri. That is not enough to create specific jurisdiction for nonresidents' claims." *Id.*

The same result applies to the PEC's similar effort to gain jurisdictional discovery here. While the PEC pasted into its brief all of the jurisdictional allegations from its Master Complaint (*see* Pls.' Mem. of P. & A. in Supp. of Mot. to Allow Jurisdictional Disc. & Continue Schedule Re Mots. to Quash ("Pls.' Mem.") at 4-10 (citations omitted)) and argues that those alleged facts support jurisdictional discovery under *BMS*, those allegations and arguments fall well short of making a "*prima facie* case for personal jurisdiction." Specifically, plaintiffs allege that the J&J defendants: (1) have conducted "substantial" business in California; (2) marketed and sold talc products in California to other people; (3) contracted with Imerys and other California entities to test and market talc products; (4) conspired with Imerys in California; (5) sourced raw talc from California mines up until 1926 and from 1941 to 1946; and (6) lobbied government agencies. Because none of these allegations, even if proven, would suffice to establish personal jurisdiction under *BMS* and other governing precedent, there is no reason to permit jurisdictional discovery.

A. <u>Evidence of doing "substantial" business in California would not justify the exercise of personal jurisdiction.</u>

Plaintiffs' allegation that the J&J defendants have conducted "substantial" business in California (MC ¶¶ 160-64) cannot justify jurisdictional discovery because, even if proven, the conduct of substantial business in a state by a foreign defendant cannot suffice to establish personal jurisdiction where, as here, such conduct did not give rise to the non-California plaintiffs' claims.

"To comport with federal and state due process, California may only exercise jurisdiction

when a defendant has sufficient minimum contacts with the state to satisfy 'traditional notions of fair play and substantial justice.'" *Strasner v. Toughstone Wireless Repair & Logistics, LP*, 5 Cal. App. 5th 215, 221 (2016) (quoting *Int'l Shoe Co. v. State of Wash., Office of Unemployment Compensation & Placement*, 326 U.S. 310, 316 (1945)). In determining whether minimum contacts exist, courts consider "the quality and nature of a defendant's action to determine whether requiring him to submit to jurisdiction in California is reasonable and fair." *Id.* (citation omitted). "Personal jurisdiction may be general (all purpose) or specific." *Id.* at 22. Neither general nor specific jurisdiction would be established merely by proving that the J&J defendants conducted substantial business in California.

First, as plaintiffs appear to concede (albeit tacitly), they could never prove facts supporting the exercise of general personal jurisdiction over the J&J defendants. (*See* Pls.' Mem. at 2 (arguing that their allegations "give rise to ***specific*** personal jurisdiction over J&J in California") (emphasis added).) General jurisdiction cannot be justified, regardless of any discovery, because it is undisputed that the J&J defendants are not "at home" in California – i.e., they are not headquartered or incorporated in California and do not have contacts so continuous and systematic that it would be fair to treat them as though they were based in this State.

As the U.S. Supreme Court has made clear, "a court may assert [general] jurisdiction over a foreign corporation 'to hear any and all claims against [it]' ***only*** when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014) (second and third alterations in original) (emphasis added) (citation omitted). In *Daimler*, the Court concluded that general jurisdiction over a defendant will usually exist only in states where the defendant is formally incorporated or has its principal place of business. *Id.* at 760.

Following *Daimler*, other courts have rejected the notion that doing "substantial business" in a state makes a foreign defendant subject to general jurisdiction there. *See, e.g.*, *Gray v. Apple Inc.*, No. 13-cv-7798 (KM) (MAH), 2016 WL 4149977, at *3-4 (D.N.J. Aug. 3, 2016) (explaining that "it is not sufficient that corporate defendants be engaged in a 'substantial, continuous, and systematic course of business' in the forum state" to create general jurisdiction) (quoting Daimler,

134 S. Ct. at 761); *BeRousse v. Janssen Research & Development, LLC*, No. 3:17-cv-00716-DRH, 2017 WL 4255075 (S.D Ill. Sept. 26, 2017) ("[C]orporations are subject to general personal jurisdiction where they are incorporated, and where their principle place of business is located."), *appeal pending*, No. 17-3200 (7th Cir. 2017). Here, too, allegations about substantial business cannot justify the exercise of general jurisdiction. What is decisive is that the J&J defendants are not California corporations and do not maintain their principal places of business in California. Accordingly, discovery to pursue a theory of general jurisdiction cannot be justified.

Second, plaintiffs' substantial-business allegations also cannot justify discovery to pursue a theory of specific jurisdiction because no amount of discovery could support a showing that the non-California plaintiffs' claims arise out of the J&J defendants' activities in California.

Specific jurisdiction can only be exercised consistent with due process where the defendant's "in-state activities are ***not only*** 'continuous and systematic, ***but also give rise to the liabilities sued on***.'" *Daimler*, 134 S. Ct. at 761 (emphases added) (quoting *Int'l Shoe*, 326 U.S. at 317). Consistent with this principle, the Supreme Court held in *BMS* that because the nonresident plaintiffs "[did] not claim to have suffered harm in that State" and "all the conduct giving rise to the nonresidents' claims occurred elsewhere," "California courts [could not] claim specific jurisdiction" over the nonresident defendant for those claims. 137 S. Ct. at 1782. This was so notwithstanding the allegation of "extensive forum contacts that [were] unrelated to [the plaintiffs'] claims." *Id.* at 1781. The Supreme Court squarely rejected a "'sliding scale approach'" to the question of specific jurisdiction that would "relax[]" the "requisite connection between the forum and the specific claims at issue" based solely on the volume of unrelated contacts as a "loose and spurious form of general jurisdiction" that the Court had already squarely rejected in *Daimler*. *Id.*

For the same reasons, the *Dyson* court rejected the notion that discovery was needed to develop the factual record concerning the defendants' alleged business activity in Missouri, the forum state. As it explained, although the same product was sold in the forum state, and the product was tested and aggressively marketed in the forum state, none of this related to the connections between the plaintiffs' injuries and the jurisdiction. *Dyson*, 2018 WL 534375, at *4. And that connection was "attenuated" in light of the fact that the plaintiffs alleged that they were

injured where they resided and used the product in question, not in Missouri. *Id.*

The same reasoning applies here. Neither allegations nor evidence that the J&J defendants engaged in substantial business in California could establish specific jurisdiction. Any such showing would go only to the quantity of the J&J defendants' contacts, a factor that both the U.S. Supreme Court and courts across the country have held is irrelevant. What matters is where the non-California plaintiffs purchased and used talcum powder products, and no amount of discovery will alter the fact that those activities occurred somewhere other than California.

B. Evidence of selling or marketing the same products to California consumers would not justify the exercise of personal jurisdiction.

For essentially the same reasons, the PEC's allegations that the J&J defendants also sold the same talc products that allegedly injured the non-California plaintiffs to California consumers (MC ¶¶ 167-69) would not support the exercise of personal jurisdiction, making any discovery of such facts unnecessary and inappropriate. *See BMS*, 137 S. Ct. at 1781 (rejecting specific jurisdiction where the "nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California").

As the Supreme Court explained in *BMS*, the sale of the product at issue to other plaintiffs (even joined plaintiffs) does not provide an "adequate link between the State and the nonresidents' claims." *Id.*[2] Other courts have reached the same result. *See, e.g.*, *Jinright*, 2017 WL 3731317, at *4 (rejecting personal jurisdiction where "[t]he nonresident Plaintiffs do not allege they purchased Defendants' products in Missouri, ingested or applied it in Missouri, or were injured in Missouri").

Following the reasoning of these decisions, both the *Dyson* and *Jordan* courts specifically refused plaintiff requests for jurisdictional discovery based on allegations that the defendants had sold or marketed the products in the forum state. In *Dyson*, the plaintiffs emphasized that the defendants had not only marketed the product in Missouri, but in fact made it "'ground zero' for their national marketing campaign." 2018 WL 534375, at *4 (citation omitted). Specifically, they

[2] *BMS* also establishes that a plaintiff whose claims have no relevant contacts with the forum cannot manufacture specific jurisdiction by joining her claims with those of another plaintiff whose claims do have forum contacts. *See* 137 S. Ct. at 1781.

contended that "Missouri was one of eight principal sites in the United States chosen to conduct pre-market clinical trials," that "St. Louis . . . was . . . the first city in the United States to commercially offer" implantation of the device, and that "Missouri was one of the first [states] targeted for an aggressive campaign." *Id.* at *2, *4. But, as the court noted, marketing to ***other*** people could not provide a link between the defendants' supposed activities in the forum and the claims of out-of-state plaintiffs, absent any allegation that they viewed the Missouri advertisements. *See id.* at *4 (finding it decisive that the plaintiffs "were not prescribed Essure in Missouri, did not purchase Essure in Missouri, and were not injured by Essure in Missouri," despite allegations that a marketing program was conceived there). Similarly, in *Jordan*, the court rejected an identical claim, reasoning that nothing in *BMS* "authorize[s] a . . . court to exercise broad personal jurisdiction on the mere basis of nationwide contacts – such as the development of a marketing strategy." 2018 WL 837700, at *4.

This Court should reach the same conclusion with respect to the PEC's request for discovery on indistinguishable allegations. The PEC's assertions that the J&J defendants targeted California residents with advertising do not provide a basis for specific jurisdiction because plaintiffs do not allege that the non-California plaintiffs at issue here were exposed to such advertising in California. No amount of jurisdictional discovery could demonstrate otherwise. For this reason too, the motion should be denied.

C. Evidence of contracting with California companies would not justify the exercise of personal jurisdiction.

The PEC's allegations that the J&J defendants contracted with Imerys and other nonparty California-based companies (*e.g.*, MC ¶¶ 150, 155-59, 164-66, 172) also fail to supply a basis for jurisdictional discovery because, even if proven, these allegations would not permit the exercise of specific personal jurisdiction.

BMS is again squarely on point. There, the plaintiffs attempted to argue that the California court could exercise personal jurisdiction over defendant Bristol-Myers with respect to plaintiffs who did not purchase or use the drug at issue in California because it sold its product through McKesson, which was based in California. The Supreme Court rejected this argument, explaining that it had long held that "[t]he requirements of *International Shoe* . . . must be met as to each

defendant over whom the state court exercises jurisdiction," *BMS*, 137 S. Ct. at 1783 (alterations in original) (citation omitted), and the "bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State," *id.* Here, too, the mere fact that the J&J defendants have or had relationships with Imerys or other California-based companies does not justify the exercise of personal jurisdiction over the J&J defendants with respect to the non-California plaintiffs' claims. And because evidence supporting the PEC's allegations would do nothing to advance their jurisdictional argument, discovery on such matters is not appropriate and should be denied. *See Jinright*, 2017 WL 3731317, at *4 (no reason to conduct jurisdictional discovery where it would merely "show[] a connection with a third party" in the forum state).

The J&J defendants anticipate that plaintiffs will argue that discovery is nevertheless proper based on the *BMS* Court's further observations that it was "not alleged that BMS engaged in relevant acts together with McKesson in California" or that BMS was "derivatively liable for McKesson's conduct in California." 137 S. Ct. at 1783. Indeed, plaintiffs have populated their Master Complaint with allegations that the J&J defendants "engaged in relevant acts" with Imerys and/or can be held "derivatively liable" for Imerys's conduct. (*See* MC ¶¶ 94-100, 144-54, 168-70; Pls.' Mem. at 13-14.)

The Court should reject this attempt at artful pleading for several reasons. As an initial matter, nothing in the Supreme Court's opinion suggests that, in observing what had ***not*** been alleged about the relationship between BMS and McKesson, the Court intended to promulgate an affirmative standard for establishing personal jurisdiction in future cases. To the contrary, *BMS* makes clear that specific jurisdiction must be established over each defendant independently. *See* 137 S. Ct. at 1783 (citing *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014)).

Moreover, even if the language from *BMS* did set forth a test for specific jurisdiction, plaintiffs' allegations would not satisfy it – and discovery premised on those allegations would therefore be improper – because they do not plausibly allege that the J&J defendants "engaged in ***relevant*** acts ***together*** with" Imerys, much less with other third parties in California. *See id.* (emphases added). Most notably, even if plaintiffs had adduced evidence that raw talc mined or tested by Imerys in California ever made its way into the talc products used by the non-California

plaintiffs, the allegations that ***Imerys*** mined and tested talc in California (MC ¶¶ 149, 151) do not show any "act[]" done "together with" the ***J&J defendants***, who only allegedly "communicated with" Imerys regarding "testing methods and standards" and supposedly had "knowledge" that the testing was insufficient.[3]

What the supposed "relevant acts" identified in the Master Complaint really show is that the J&J defendants worked with Imerys on a supply chain element of products that JJCI ultimately manufactured outside of California. Courts applying *BMS* have made clear that similar arrangements with forum-state entities provide a far too attenuated relationship with the forum state to supply the required connection between non-forum plaintiffs' claims and a defendant's actual in-state contacts. *Jinright*, 2017 WL 3731317, at *4-5; *see also Zon LED, LLC v. Power Partners, Inc.*, No. CIV-16-1090-D, 2017 WL 4158663 (W.D. Okla. Sept. 19, 2017) ("The fact that [defendant] may have some contractual relationship with [an in-state company] is not enough to establish personal jurisdiction.").

In *Jinright*, for example, the plaintiffs claimed that specific jurisdiction could be exercised over the same defendants as those here, based on evidence that "Imerys sen[t] [its] raw talc, with a Material Safety Data Sheet warning of the risk of ovarian cancer, to Pharma Tech Industries in Union, Missouri, where, at the direction of Johnson & Johnson, the warning [was] cast aside and the talc [was] processed, bottled and labeled without warning, creating the defect in Missouri." 2017 WL 3731317, at *4. Based on these allegations, the plaintiffs sought remand to state court so that they could conduct discovery in support of specific jurisdiction. *Id.*

The court rejected this argument, explaining that directing Pharma Tech to disregard the

[3] Courts have held in the wake of *BMS* that forum-based testing of a product does not give rise to specific jurisdiction for non-forum plaintiffs who do not tie their injuries to that testing. *See, e.g.*, *Dyson*, 2018 WL 534375, at *5 ("Missouri clinical trials – the existence of which defendants readily admit – are simply too attenuated to serve as a basis for specific personal jurisdiction for defendants. . . . . The non-Missouri plaintiffs do not allege they participated in a Missouri clinical study or that they reviewed and relied on Missouri clinical studies in deciding to use Essure."); *BeRousse*, 2017 WL 4255075, at *4 (rejecting theory of specific jurisdiction based on defendants' having "purposefully targeted Illinois as the location for multiple clinical trials which formed the foundation for defendants' Food and Drug Administration application" because "the non-Illinois plaintiffs' claims do not arise out of defendants' contacts with the state of Illinois").

warning and bottle the talc did not establish that the J&J defendants "act[ed] together with Pharma Tech" or "that Pharma Tech is an agent of Johnson & Johnson such that Johnson & Johnson would be liable for Pharma Tech's conduct." *Id.* at *5. The court found that "[n]one of the evidence presented create[d] a connection between nonresident Plaintiffs' injuries in this matter, the Johnson & Johnson products used by nonresident Plaintiffs, and what was manufactured by Pharma Tech." *Id.* Instead, "[a]ll they have shown is a connection with a third party in Missouri. That is not enough to create specific jurisdiction for nonresidents' claims." *Id.*

The *Jinright* court's decision compels denial of the PEC's request for discovery here. The PEC alleges that the J&J defendants "worked closely with" Imerys "for the supply and testing of" their products and that this relationship "was specific to the issues herein" because it concerned talc and the products at issue. (MC ¶¶ 144-46.) But even taken as true, these allegations are virtually indistinguishable from those deemed to be insufficient to justify jurisdictional discovery in *Jinright*, which involved non-forum defendants working closely with forum-based entities to bottle or distribute the specific product at issue. *See* 2017 WL 3731317, at *4. And although plaintiffs have attempted to tie Imerys's alleged talc testing to their asbestos-based claims by alleging that Imerys used a "flawed testing methodology" when testing "for asbestos and asbestiform talc fibers at their California facility," these allegations also fall short of giving rise to the non-California plaintiffs' claims ***against the J&J defendants***. (*See* MC ¶¶ 145-49.) Indeed, these allegations are even ***less*** related to those claims than the allegations at issue in *Jinright*, where the forum-based entity had allegedly ***disregarded a warning at J&J's direction*** when bottling the specific product at issue. *See* 2017 WL 3731317, at *4. Accordingly, the J&J defendants' alleged relationship with Imerys amounts, at best, to a tenuous contact between them and California, which is wholly insufficient to demonstrate specific personal jurisdiction as to non-California plaintiffs' claims.[4]

[4] The PEC's allegation that the J&J defendants contracted with other California entities to test the products for "harmful carcinogens and other harmful constituents" (MC ¶ 150) is even less robust and insufficient to establish specific jurisdiction notwithstanding *BMS* for the same reasons. The same is true as to the allegations that the J&J defendants contracted with California companies to promote talc (*id.* ¶¶ 167-69), which, as explained above, resulted in advertisements that the non-California plaintiffs did not allegedly see.

D. Evidence of an alleged "conspiracy" between the J&J defendants and California-based businesses would not justify the exercise of personal jurisdiction.

Plaintiffs' additional allegations that the J&J defendants and Imerys engaged in "an actionable conspiracy" (MC ¶ 170; *see also id.* ¶¶ 94) likewise could not establish specific jurisdiction, even if proven, and discovery accordingly should not be permitted on this issue either.

"California does not recognize conspiracy as a basis for acquiring personal jurisdiction over a party." *Mansour v. Superior Court*, 38 Cal. App. 4th 1750, 1760 (1995). Rather, "[p]ersonal jurisdiction must be based on forum-related acts that were personally committed by ***each nonresident defendant***." *Automobile Antitrust Cases*, 135 Cal. App. 4th at 113 (emphasis added). "The purposes and acts of one party – even an alleged coconspirator – cannot be imputed to a third party to establish jurisdiction over the third party defendant." *Id.* (affirming order granting motion to quash where plaintiffs failed to establish "jurisdictional facts pertaining to each of the nonresident defendants" that was purportedly part of the conspiracy); *see also McKay v. Hageseth*, No. C 06 1377 MMC, 2007 WL 1056784, at *2 n.3 (N.D. Cal. Apr. 6, 2007) ("Although . . . some jurisdictions recognize a theory of personal jurisdiction based on conspiracy . . . California courts have rejected such [a] theory.") (citations omitted).

Even if conspiracy-based jurisdiction were cognizable, the forum-based conspiratorial acts would still have to be tied to the non-California plaintiffs here, *see, e.g.*, *BMS*, 137 S. Ct. at 1781, and plaintiffs have failed to draw a connection between alleged conspiratorial acts in California and the non-California plaintiffs' injuries, as explained above.

Plaintiffs also have not plausibly alleged that the J&J defendants are "derivatively liable" for Imerys's allegedly wrongful conduct (or that of any other California entity). (*Contra* Pls.' Mem. at 1, 14.) Although the PEC argues that "there are a number of recognized theories of derivative liability" in California (*id.* at 1), the Master Complaint identifies no such theory other than conspiracy (*see* MC ¶ 100), which cannot serve as a basis for personal jurisdiction, as just explained. And the Master Complaint does not include a single count asserting the J&J defendants' derivative liability for any other defendant's alleged misconduct. (*See id.* ¶¶ 173-273.) Accordingly, there is no basis to permit discovery of the PEC's allegations sounding in conspiracy.

E. Evidence of the J&J defendants' alleged ownership of talc mines in California 70 or 90-plus years ago would not justify the exercise of personal jurisdiction.

J&J's alleged mining of talc in California during the early 1900s does not give rise to specific personal jurisdiction because – unsurprisingly – plaintiffs do not attempt to allege that they used products containing talc mined by the J&J defendants in California. (MC ¶¶ 134-36.) Even assuming it would suffice for the exercise of ***specific*** personal jurisdiction that talc was mined in California for a product that was manufactured, purchased and used outside the state – which is not the case – it is virtually inconceivable that talc mined in California prior to 1926 made its way into products used by plaintiffs or their decedents, none of whom is alleged to have been alive then, let alone old enough to have been using talc perineally. Nor do plaintiffs allege that any of the non-California plaintiffs used talc perineally from 1941 to 1946 (the brief window during which the J&J defendants allegedly resumed mining talc in California), let alone that the non-California plaintiffs' use of California-mined talc during the time period 1941 to 1946 (or during the years prior to 1926) caused their injuries. Lastly, the inchoate act of thinking about taking action in a state cannot possibly establish a "contact" for personal jurisdiction purposes; thus, the fact that the J&J defendants allegedly "considered" utilizing talc from a California mine in 1971 (*Id.* ¶ 136) is irrelevant. Absent any allegations tying the talc that the J&J defendants allegedly mined in California to the products used by the non-California plaintiffs in the JCCP, there is no "connection between the forum and the specific claims at issue." *BMS*, 137 S. Ct. at 1781. Accordingly, there is no reason to permit discovery on these allegations either.

F. Evidence of the J&J defendants' alleged lobbying efforts also would not justify the exercise of personal jurisdiction.

Finally, plaintiffs' allegations that the J&J defendants maintained a lobbying office in California and engaged "thought leader scientists" in California in an effort to "fend of[f] negative publicity and government regulation" regarding talc products (*see* MC ¶¶ 154-59, 164-65) also would not give rise to specific personal jurisdiction even if proven. As to the "thought leader[s]," the "bare fact" that the J&J defendants engaged individuals in California would not give rise to specific jurisdiction because business relationships with California residents do not suffice, as explained above. *See Part* II.C, *infra.*; *BMS*, 137 S. Ct. at 1783.

And as to lobbying more generally, courts – including in the talcum powder litigation – have held that forum-related lobbying efforts "are simply too attenuated to serve as a basis for specific personal jurisdiction." *Dyson*, 2018 WL 534375, at *2, *4 (clinical trials in Missouri that allegedly "were used to support the FDA approval process" were "simply too attenuated to serve as a basis for specific personal jurisdiction"); *BeRousse*, 2017 WL 4255075, at *4 ("clinical trials which formed the foundation for 'defendants' . . . Food and Drug Administration application" insufficient to provide personal jurisdiction). Moreover, lobbying is constitutionally protected as "a legitimate exercise of the right to influence government action" and "accordingly do[es] not support the exercise of specific jurisdiction." *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 774, 776 (Tex. 1995) (granting writ of mandamus; writing letters to government agencies cannot furnish basis for exercising personal jurisdiction consistent with federal constitution), *superseded by statute on other grounds as stated in Ramond Overseas Holding, Ltd. v. Curry*, 955 S.W.2d 470 (Tex. App. 1997); *see also Herman v. YellowPages.com, LLC*, 780 F. Supp. 2d 1028, 1034 (S.D. Cal. 2011) ("[T]his Court declines to expose AT & T to the jurisdiction of this Court based solely on its alleged lobbying activities."). Because lobbying activities in California, even if proven, would not support the exercise of personal jurisdiction, there is no basis to permit discovery on this ground either.

* * * * *

In sum, "even assuming that discovery would prove exactly what plaintiffs contend," it would be insufficient to demonstrate personal jurisdiction over the J&J defendants under the Supreme Court's recent and controlling personal jurisdiction jurisprudence. *Dyson*, 2018 WL 534375, at *4. Accordingly, the Court should deny plaintiffs' request for jurisdictional discovery.

III. CONCLUSION

For the foregoing reasons, the J&J defendants respectfully request that the Court deny the PEC's motion to allow jurisdictional discovery.

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PROOF OF SERVICE

Johnson & Johnson Talcum Powder Cases

Los Angeles County Superior Court, Case No. JCCP No. 4872

I am employed in the County of Los Angeles. I am over the age of eighteen years and not a party to the within entitled action. My business address is 515 South Flower Street, Forty Second Floor Los Angeles, CA 90071.

On **April 2, 2018**, I served the foregoing document(s) described as: **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO ALLOW JURISDICTIONAL DISCOVERY AND CONTINUE SCHEDULE RE MOTIONS TO QUASH** on the interested party(ies) in this action through Case Anywhere. I caused the foregoing document to be transmitted to Case Anywhere for electronic service in the following manner:

(X) **BY ELECTRONIC SERVICE**: I provided the document(s) listed above electronically through the Case Anywhere website pursuant to the instructions on that website. [The document will be deemed served on the date that it was uploaded to the website as indicated by the Case Anywhere system.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **April 2, 2018**, at Los Angeles, California.

Stella Villegas