

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MICHELLE STIRLING, BRANDON  
STIRLING  
Plaintiffs,  
vs.  
NOVARTIS PHARMACEUTICALS  
CORPORATION, ZEECRO INC. fka  
AAIPHARMA, INC., LANNETT  
COMPANY, INC., GLEN  
LOVELACE, M.D., and DOES I-XX,<sup>1</sup>  
Defendants.

Case No. CV01-18-04880  
MEMORANDUM DECISION AND  
ORDER GRANTING DISMISSAL OF  
NOVARTIS PHARMACEUTICALS  
CORPORATION FROM SECOND  
AMENDED COMPLAINT

Specially-Appearing Defendant Novartis Pharmaceuticals Corporation's ("NPC") Motion to Dismiss Plaintiffs' Second Amended Complaint, filed March 13, 2020, came before the Court for hearing by videoconference on June 12, 2020.

Appearances: Jennifer Dempsey for Plaintiffs  
John Burke and Matthew Malinowski for Novartis Pharmaceuticals  
Portia Rauer for Dr. Lovelace  
Steven Thomas for Genus Lifesciences

**FACTUAL AND PROCEDURAL BACKGROUND**

The Complaint was filed March 12, 2018; an Amended Complaint was filed August 11, 2018; and the Second Amended Complaint was filed February 28, 2020.

On August 1, 2019, Defendant Novartis Pharmaceuticals Corporation ("Novartis") filed a Motion to Dismiss<sup>2</sup> pursuant to Idaho Rules of Civil Procedure 12(b)(2) for lack of jurisdiction and 12(b)(6) for failure to state a claim for which relief could be granted. That motion was argued on September 4, 2019 and the Court took the portion of the motion under I.R.C.P. 12(b)(6), relating to "innovator liability," under advisement, indicating it would consider the jurisdictional issue after Plaintiffs had conducted jurisdictional discovery.

<sup>1</sup> The Second Amended Complaint does not list ZeeCro as a Defendant in the case heading even though it is named as a party in the body of that pleading.

<sup>2</sup> Defendant Novartis Pharmaceuticals Corporation's Special Appearance and Motion to Dismiss, filed Aug. 1, 2019; Memorandum in Support of Specially-Appearing Defendant Novartis Pharmaceuticals Corporation's Motion to Dismiss ("Novartis Memo to Dismiss"), filed Aug. 1, 2019.



A Memorandum Decision was issued September 25, 2019 finding:

Plaintiff's Amended Complaint fails to state a claim against Novartis as to each count in which Novartis is named[, which supports dismissal under Rule 12(b)(6)]. That conclusion is preliminary pending determination of whether this Court has jurisdiction over Novartis. The order dismissing the case will be held in abeyance pending determination of jurisdiction.

The Court then set a briefing schedule for the jurisdictional issue.

Several disputes were resolved by the Court related to a protective order and jurisdictional discovery before the parties fully briefed Novartis's motion to dismiss for lack of personal jurisdiction. Prior to hearing on that matter, the Plaintiffs filed a Memorandum in Support of Plaintiffs' Motion for Leave to File Second Amended Complaint with a proposed Second Amended Complaint on November 12, 2019 with hearing date at the same time as the motion to dismiss.

At the January 8, 2020 hearing, the Court denied the motion to dismiss for lack of personal jurisdiction from the bench and then also issued a written Memorandum of Pinpoint Citations to Record Considered by the Court in its January 8, 2020 Decision, filed January 21, 2020. The Court issued a written decision on February 18, 2020 granting in part and denying in part the motion for leave to amend. In relevant part, the Court granted leave to amend to include a claim of fraud against Novartis because the reasoning articulated in the Court's prior decision dismissing the previous fraud alleged in the Amended Complaint under Rule 12(b)(6) and Rule 9(b) did not apply to the Second Amended Complaint fraud claim.<sup>3</sup>

Plaintiff filed the Second Amended Complaint and Demand for Jury Trial on February 28, 2020. Count I-Fraud is the only allegation including Defendant Novartis. On March 13, 2020, Novartis filed a motion to dismiss the Second Amended Complaint with supporting memorandum,<sup>4</sup> arguing dismissal is appropriate under Idaho Rules of

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<sup>3</sup> In opposition to the proposed Second Amended complaint, Novartis' only substantive argument related to the claims was that the proposed amendments would be futile since no new claims are being added and the Court's rationale for dismissal of previous claims in the Amended Complaint under Idaho Rule of Civil Procedure 12(b)(6) would also apply to the claims in the Second Amended Complaint. *Specially-Appearing Defendant Novartis Pharmaceuticals Corporation's Opposition to Plaintiffs' Motion for Leave to File Second Amended Complaint*, filed Dec. 31, 2019, pp. 2, 4–5.

<sup>4</sup> *Specially-Appearing Defendant Novartis Pharmaceuticals Corporation's Motion to Dismiss Plaintiff's Second Amended Complaint*, filed Mar. 13, 2020; *Memorandum in Support of Specially-Appearing Defendant Novartis Pharmaceutical's Corporations Motion to Dismiss Plaintiff's Second Amended Complaint ("Novartis Memo")*, filed Mar. 13, 2020.



Civil Procedure 9(b) for failure to plead with particularity, 12(b)(6) for failure to state a claim, and 12(b)(2) for lack of personal jurisdiction. Plaintiffs responded and Defendant replied.

The Court considers this matter fully submitted.

### LEGAL STANDARDS AND ANALYSIS

Novartis argues dismissal of claims against it in the Second Amended Complaint is appropriate for lack of personal jurisdiction and because Plaintiffs cannot maintain their fraud claim under the pleading standards and/or because it fails to state a claim for which relief can be granted.

#### 1. 12(b)(2)—Personal Jurisdiction

“[A] state [may] exercise personal jurisdiction over a non-resident defendant when that defendant has certain minimum contacts with the state such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Profits Plus Capital Mgmt., LLC v. Podesta*, 156 Idaho 873, 883-84, 332 P.3d 785, 795-96 (2014) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). In determining the existence of minimum contacts, a court must focus on the relationship among the defendant, the forum, and the litigation. *Id.* (citing *Shaffer v. Heitner*, 433 U.S. 186, 205, 97 S. Ct. 2569, 2580, 53 L. Ed. 2d 683 (1977)). The minimum contacts required by *International Shoe's* minimum contacts requirement is satisfied if the defendant “purposefully directs his activities at residents of the forum state and the litigation arises out of or relates to those activities.” *Id.* (quoting *Saint Alphonsus Reg'l Med. Ctr. v. State of Wash.*, 123 Idaho 739, 744, 852 P.2d 491, 496 (1993)); *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 75, 803 P.2d 978, 981 (1990) (“It is not just any contacts by the defendant with Idaho that will sustain the exercise of specific personal jurisdiction, but only those out of which the suit arises or those that relate to the suit.”).

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Novartis also filed a declaration in support of its motion to dismiss this complaint that includes excerpts from Dr. Lovelace's deposition. *Declaration of John J. Burke in Support of Specially-Appearing Defendant Novartis Pharmaceutical's Corporations motion to Dismiss Plaintiff's Second Amended Complaint*, filed Mar. 13, 2020. Based on the standard for a motion to dismiss under Rule 12(b)(6) and the reasons stated at the hearing, the Court finds it cannot consider Dr. Lovelace's deposition when reaching a decision on the motion to dismiss. The Court will not convert this motion to a motion for summary judgment where such deposition excerpts can be considered. Therefore, the Court did not consider the declaration or deposition excerpts as evidence that dismissal is appropriate under Rules 9(b) or 12(b)(6).



During proceedings on the earlier motion to dismiss, the main issue raised by the parties related to personal jurisdiction was whether Novartis had an agency relationship with its third-party distributors, specifically Horizon. Plaintiffs argued that Horizon, as an agent of Novartis, specifically targeted Idaho for the purpose of promoting Brethine. The Court determined Novartis had an agency relationship with Novartis based their actions and the terms of the marketing agreement.

Plaintiffs then cited to discovery related to Horizon showing that Horizon called doctors in Idaho during the weeks May 22<sup>nd</sup><sup>5</sup> and 5 and May 15<sup>th</sup>, 1999<sup>6</sup> for the purpose of promoting Brethine. Plaintiff also cited a report for the retail of Brethine in Idaho from December 1998<sup>7</sup> as support that Novartis was aware that marketing for its benefit would take place in Idaho. Based on the parties' arguments at that time, this Court denied that motion to dismiss, finding this evidence was sufficient to show a deliberate targeting of Idaho medical professionals to promote Brethine and that Novartis had reasonable notice of the possibility of being called into Idaho Courts to answer for any alleged tortious action related to the promotion or distribution of Brethine. See *Knutsen v. Cloud*, 142 Idaho 148, 151, 124 P.3d 1024, 1027 (2005) (finding "a court [can] exercise personal jurisdiction over a principal when its agent has sufficient contacts with Idaho.").

The arguments in this second motion to dismiss differ from the first. Novartis now argues "what is needed—and what is missing here—is a connection between the forum and the specific claims at issue."<sup>8</sup> Novartis argues that purposefully directing or market activity for Brethine in Idaho does not show an action that NPC took to give rise to a cause of action in this case. Further, Novartis argues that actions of Horizon Pharmaceuticals as an agent of Novartis is insufficient for personal jurisdiction since there is no connection between Horizon's actions and the plaintiffs' exposure to a non-NPC product containing Terbutaline Sulfate. Novartis argues Horizon's action do not confer personal jurisdiction on Novartis in this action because: (1) Horizon never contacted plaintiffs or the prescribing physician and (2) the calls Horizon made to Idaho doctors to market Brethine were for asthma and respiratory relief, none were to

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<sup>5</sup> Dempsey Dec, Exhibit 10 (NPCSTIRLING000591) (includes a comment from salesperson stating: "I have had a few doctors who are currently using Brethine-nice surprise!").

<sup>6</sup> Dempsey Dec, Exhibit 10 (NPCSTIRLING000593).

<sup>7</sup> Dempsey Dec, Exhibit 12.

<sup>8</sup> Novartis Memo, p. 14.



obstetricians or gynecologists, and were made seven years before Plaintiff Michelle was prescribed Terbutaline Sulfate. Plaintiffs only response was that Novartis had already made these arguments so the Court should again deny the motion consistent with its previous decisions.

This Court agrees with Novartis. The claim against Novartis in the Second Amended Complaint for Fraud is for stating and indicating to medical professionals that Brethine was safe as a tocolytic and could be used by pregnant women despite numerous studies to the contrary. However, after significant opportunity for discovery on this issue, the Plaintiffs' evidence of contacts fails to establish that Brethine was marketed to Idaho as a tocolytic.

Important to the Court's decision is the lapse in time between the alleged contacts with Idaho (Horizon's marketing Brethine in calls in 1999) and Plaintiff Michelle's use of the generic form of Terbutaline Sulfate in 2007. This lapse in time, combined with the facts that Novartis sold the Brethine NDA in 2001 and then ceased marketing the product, support the Court finding this litigation does not arise out of the alleged marketing activities by Novartis. It finds is unreasonable that Novartis was on notice that it may be called into Idaho courts to answer for use of a generic form of Brethine as a tocolytic that was ingested six years after Novartis sold Brethine's NDA and seven years after its agent's direct marketing activity into Idaho.

Overall, the Court finds the two Brethine marketing phone calls by Novartis agents to non-OBGYN doctors in Idaho that occurred approximately seven years before Plaintiff Michelle used of a generic form of Terbutaline Sulfate are insufficient to establish the minimum contacts necessary to confer personal jurisdiction over Novartis in this case. Therefore, the Court finds dismissal of allegations in the Second Amended Complaint against Novartis Pharmaceuticals Corporation for lack of personal jurisdiction pursuant to Idaho Rules of Civil Procedure 12(b)(2) is appropriate and will enter a Judgment dismissing allegations in Count I, Fraud, of the Second Amended Complaint against Novartis Pharmaceuticals Corporation. Given the opportunities to address jurisdiction and theories of liability for Novartis before this Court, the Court finds this dismissal will be with prejudice.



## 2. 12(b)(6)—Failure to State a Claim

The Court's Memorandum Decision, September 25, 2019, held that the Amended Complaint failed to state a claim against Novartis as to each count in which Novartis was named and should be dismissed pursuant to Rule 12(b)(6), but that decision was preliminary pending determination of the Court whether this Court has jurisdiction over Novartis. Since the Court dismisses the only allegation now pending against Novartis for lack of personal jurisdiction under Rule 12(b)(2), the Court does not further consider the argument by Novartis<sup>9</sup> for dismissal pursuant to Idaho Rule of Civil Procedure 12(b)(6) for failure to state a claim for which relief could be granted.

### CONCLUSION

Based on the foregoing, Specially-Appearing Defendant Novartis Pharmaceutical Corporation's Motion to Dismiss Plaintiff's Second Amended Complaint, filed Mar. 13, 2020, is **GRANTED**. The Court will enter a Judgment dismissing Count I-Fraud of the Second Amended Complaint against Defendant Novartis Pharmaceuticals Corporation.

**ORDERED** Signed: 7/13/2020 04:46 PM

  
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Lynn Norton  
District Judge

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<sup>9</sup> Novartis also argues the fraud claim "is simply an attempt to recast its innovator liability claim" that the Court rejected as an unrecognized cause of action in Idaho Novartis Memo, p. 2.



## CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the attached to:

John J. Burke	jjb@elamburke.com	<input checked="" type="checkbox"/> E-mail
Jaclyn Terese Gans	jtg@elamburke.com	<input checked="" type="checkbox"/> E-mail
Stephen Raber Thomas	sthomas@hawleytroxell.com	<input checked="" type="checkbox"/> E-mail
Andrea Jo Rosholt	arosholt@hawleytroxell.com	<input checked="" type="checkbox"/> E-mail
Peter Eugene Thomas	peter@melawfirm.net	<input checked="" type="checkbox"/> E-mail
Robert Thomas Wetherell	rwetherell@capitolawgroup.com	<input checked="" type="checkbox"/> E-mail
Steven Ronald Kraft	steve@melawfirm.net	<input checked="" type="checkbox"/> E-mail
Terrence Scott Jones	tsj@quanelaw.com	<input checked="" type="checkbox"/> E-mail
Portia L. Rauer	contact@powersfarley.com	<input checked="" type="checkbox"/> E-mail
Steven Blaine Andersen	sba@aswdpllc.com	<input checked="" type="checkbox"/> E-mail
Jennifer Schrack Dempsey	jsd@aswdpllc.com	<input checked="" type="checkbox"/> E-mail

Phil McGrane  
Clerk of the Court

Dated: 07/13/2020

By: Janine Korsen  
Deputy Clerk

