

Bigelow v Hamilton Med., Inc.
2018 NY Slip Op 33658(U)
June 28, 2018
Supreme Court, Onondaga County
Docket Number: 2014EF4467
Judge: Gregory R. Gilbert
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

NOWELLE BIGELOW, Individually and as Parent
and Natural Guardian of Ryan Dashawn Robinson, II,
an infant,

Plaintiff,

Index No.: 2014EF4467
RJI No.: 33-15-0726

vs.

HAMILTON MEDICAL, INC.; HAMILTON
MEDICAL, A.G.; HOLLY PAYNE, RT;
CURRINA STONE, RN; ANNA RUSTIN, RN;
LINDSEY VALDEZ, RN; EVELYN
KHORIATY, M.D.; NEAL A SEIDBERG, M.D.,
all both individually and as agents, officers and/or
employees of PEDIATRIC SERVICE GROUP,
PLLC; PEDIATRIC SERVICES GROUP, PLLC;
MICHAEL L. KIRSCH, M.D., individually and as
agent, officers and/or employee of OURLADY OF
LOURDES MEMORIAL HOSPITAL, INC.;
JAMES STOUGHTON, M.D., individually and as
agent, officer and/or employee of OUR LADY OF
LOURDES MEMORIAL HOSPITAL, INC.; OUR
LADY OF LOURDES OF MEMORIAL HOSPITAL,
INC.; and John Doe and Mary Roe # 1 through 10,

DECISION AND
ORDER

HON. GREGORY R.
GILBERT, J.S.C.

Defendants.

FACTS

Plaintiff, an infant, was injured during the course of treatment at
SUNY University Hospital, Upstate Medical Center on November 11,

2013. The incident involved a ventilator. The ventilator, known as the Galileo, was built in Switzerland by Hamilton Medical, A.G. (HMAG) and shipped to Hamilton Medical, Inc. (HMI) with offices in Reno, NV for sale by HMI in the United States, including New York. The unit in this case (#7012) was shipped from HMAG to HMI on October 13, 2005 and was purchased by and shipped to SUNY Upstate October 27, 2005 being installed by HMI on November 14, 2005.

PROCEDURAL HISTORY

Plaintiff commenced this action against HMAG, HMI and others in November, 2014, claiming long arm jurisdiction as to HMAG. A motion to dismiss for lack of jurisdiction was filed by HMAG. In an appearance before Hon. Walter Hafner, Jr., Acting Justice of the Supreme Court, on May 21, 2015, decision was reserved to allow for all discovery relevant to the jurisdictional issue to be completed. Disclosure was delayed while confidentiality and scheduling issues were resolved.

Disclosure pertaining to jurisdiction was done and the matter was returned for further consideration by the Court on May 17, 2018. All of

the papers and proceedings previously conducted as well as those papers and arguments presented on the completed motion have been considered.

STATUTORY REFERENCE

Plaintiff invokes CPLR §302(a)(3)(ii) which provides as follows:

“(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce...”

There is no question HMAG is a non-domiciliary which manufactured and placed into the stream of commerce the ventilator that caused injury to the plaintiff here in New York. HMAG also concedes that it derives a substantial revenue in commerce on an international basis and that this prong of the statute is satisfied. The papers leave no doubt that HMAG

ventilator equipment is sold throughout the world including, but by no means limited to, the United States and New York. The remaining issue under the statute is the reasonable expectation of consequences in New York. Speaking to this issue, LaMarca v. Pak-Mor Mfg., Co., 95 NY2d 210 (2000) at pages 214-215 notes as follows:

“No one disputes the first three elements. Plaintiff has alleged that his cause of action arises from defendant's tortious acts outside the State, which caused him injury in Niagara, New York. The fourth element--contemplating "in-State consequences"--is met when "[t]he nonresident tortfeasor ... expect[s], or ha[s] reason to expect, that his or her tortious activity in another State will have direct consequences in New York" (Ingraham v Carroll, 90 NY2d 592, 598 [emphasis added]). The element "is intended to ensure some link between a defendant and New York State to make it reasonable to require a defendant to come to New York to answer for tortious conduct committed elsewhere" (Ingraham v Carroll, 90 NY2d, at 598, supra). Moreover, the defendant need not foresee the specific event that produced the alleged injury. The defendant need only reasonably foresee that any defect in its product would have direct consequences within the State (see, 12th Ann Report of NY Jud Conf, at 343-344; see generally, Siegel, NY Prac § 88, at 151 [3d ed]).”

In LaMarca, the issue was resolved by defendant's reference to a “New York Light Bar” clearly establishing knowledge that the product would

be sold in New York and, if defective in some fashion, cause injury in New York. The ventilator and associated literature contain no reference that would operate to establish the requisite knowledge. Nevertheless, if HMAG sold or knew that its ventilators were being sold in New York, then it also knew that a defect would likely cause injury in New York given the nature of the product.

POSITIONS OF THE PARTIES

HMAG provides a summary of its relationship with HMI. Based on this summary, HMAG asserts that it has insufficient contacts with the State of New York to be subject to long arm jurisdiction. In part this argument relies on counsel's affidavit rather than facts supplied by someone with direct knowledge.

HMAG notes that it created a wholly owned subsidiary, HMI, to handle all sales in the US and Canada. HMAG is the sole shareholder of HMI. These facts are not disputed by plaintiff.

HMI "purchases" HMAG products to be shipped from Switzerland to HMI in Reno, Nevada. "Title" to product shipments is said to transfer

to HMI in Switzerland. HMAG's counsel states this transfer is required for compliance with Swiss law. Compliance with Swiss product export law does not impact the jurisdictional issue.

HMAG admits to "rarely" making direct shipments to the US or Canada at the request of HMI but asserts that these shipments are paid for by HMI and "title" still transfers to HMI in Switzerland. Shipping and title arrangements have to do with compliance with Swiss law and do not bear on the jurisdictional issue. There is no proof submitted that HMAG ever made a direct shipment of ventilators to New York.

HMAG alleges that it receives no portion of HMI sales revenue. HMAG's claim has no merit. HMAG is in the business to sell ventilator equipment. In the US, HMAG makes sales through its wholly owned subsidiary, HMI. HMAG does not donate its ventilators to HMI without expectation of payment and derives a profit in the exchange with HMI.

HMAG argues that the two companies maintain separate books and accounts and pay their own taxes. This is a natural part of the corporate structure arranged by HMAG. Plaintiff does not dispute these facts.

HMAG argues that the two companies have their own employees. While HMAG does not have employees in New York, HMI has at least one employee physically in New York since at least 2011, presumably to handle New York sales and/or servicing of HMAG ventilators.

HMAG acknowledges that it creates marketing materials, technical and product manuals and trains technicians for HMI. These facts are not disputed by plaintiff.

HMAG acknowledges that HMI serves as its compliance agent in FDA regulatory matters. HMAG and HMI are both required to maintain certain complaint and investigation records and to report to the FDA all incidents required under FDA regulations. These facts are not disputed by plaintiff.

HMAG ventilators are sold in the US and Canada solely by HMI. The distributorship agreements between HMAG and HMI show that this arrangement is exclusive and HMI sells no other products, product lines or related equipment. Plaintiff does not dispute that the distributorship of HMI is exclusive with HMAG and raises other points to consider.

Plaintiff points out that Robert Hamilton is president and Andres Wieland is secretary/treasurer of HMI. Hamilton is the grandson of the founder of HMAG. From 2005 to 2008 Wieland was president of both HMAG and HMI at the same time. Hamilton and Wieland are directors of HMAG. None of this is disputed by HMAG.

The service manual for the ventilator contains an “event log check and export” to “inform HAMILTON MEDICAL AG... of a technical problem” and also provides, “This combination is of particular value in communicating with HAMILTON MEDICAL AG technical support when a GALILEO is not using the English or German language setting”. None of this is contested by HMAG by fact affidavit.

Plaintiff points to a limited warranty in the Operator’s Manual that it claims is from HMAG. HMAG responds that the limited warranty is from HMI. Both have it wrong as the limited warranty is simply stated to be from “Hamilton Medical”. Such ambiguity does not favor HMAG.

Plaintiff points out the various requirements of the distributorship agreement that require HMI to maintain and provide to HMAG detailed

customer information. HMAG responds that this has nothing to do with jurisdiction as it is a matter of compliance with FDA regulations.

Plaintiff points to HMI literature prepared by HMAG which has HMAG's logo and contact information in Switzerland. It is noted that the distinctive HMAG logo appears even on HMI paperwork, including the HMI service report for a ventilator at University Hospital. HMAG asserts that HMI provides all service, maintenance and training.

Plaintiff shows that HMAG and HMI share a computer database of HMI's sales activities. HMAG asserts that at no time did HMAG know what sales were made by HMI or where.

Plaintiff states that HMAG closely tracked ventilator complaints. HMAG concedes that it did but asserts that this was only in compliance with FDA regulations. Plaintiff has shown that HMAG responded to a routine complaint from University Hospital about a log buffer overflow that resulted in some missing data. HMAG's claim that it tracked this type of matter as part of FDA compliance is not established.

There also remains the fact statement by plaintiff's counsel that he

saw “no less than ten Hamilton ventilators between the Golisano Children’s Hospital and that [sic] State University Hospital Upstate Medical Center”. This is an observation that HMAG does not dispute.

HMAG also does not dispute that it had the generalized intent of expanding it’s market share of the ventilator equipment business in the US and Canada, to include New York. Plaintiff’s showing of a general intent on the part of HMAG does not include sales specific to New York.

The Court notes that the Distributorship Agreement contains a warranty from HMAG to HMI, indemnification between the parties as to third party claims and a covenant that HMI would in no way compete with HMAG. These provisions also need to be considered.

DECISION

As noted earlier, HMAG lacks direct contacts with New York to provide a predicate for personal jurisdiction other than through use of the long arm statute. Plaintiff has the burden on the motion to establish a proper basis for the exercise of long arm jurisdiction. See Coast to Coast

Energy, Inc. v Gasarch, 149 A.D.3d 485 (1st Dept 2017).

A clear example where the long arm statute would not apply is the case, Williams v. Beemiller, Inc., 159 AD3d 148 (4th Dept 2018). As the Court in Williams held, even when a defendant is reasonably aware that its product may cause injury in New York, CPLR §302(a)(3)(ii) always involves consideration of federal due process requirements. In Williams, an Ohio gun dealer was found not to have sufficient minimum contacts to establish long arm jurisdiction. The contact of the gun dealer (Brown) with New York was the sale to customers (Bostic and Upshaw) in Ohio at a gun show of 181 firearms. A statement was made at the time of sale that the customers intended to return to New York with at least some of firearms for the purpose of re-sale. There was also proof that Brown was aware that “a significant number” of guns that he had sold had been used in criminal activity in Buffalo, New York.

The distinction with the Williams matter is that HMAG/HMI have a distribution agreement to serve the market for ventilators in all of the US, including New York. HMI did not make a unilateral decision to sell

HMAG ventilators to University Hospital here in New York. This was done as part and parcel of HMAG's marketing strategy that HMI was to use "best efforts" to further.

Plaintiff relies on the case, Darrow v. Hetronic Deutschland, 119 AD3d 1142 (3rd Dept 2014). Hetronic Deutschland, a German company making remote control devices created Hetronic USA, Inc. as exclusive distributor in the US. Hetronic USA then created a network of regional distributors one of which serviced New York. A remote control Hetronic device was sold in New York and caused injury in New York. Hetronic-D was seen to have knowledge of the New York regional distributor. Jurisdiction was held properly established under CPLR §302(a)(3)(ii).

In this case, HMAG created HMI to be its exclusive distributor in the US. Although this matter does not involve a regional distributor that serviced New York, the Court concludes that HMAG indirectly sought to and did, in fact, market ventilator equipment in New York through HMI as its exclusive distributor. Kappas v. TW Kutter, Inc., 192 AD2d 402 (1st Dept 1993); Adams v. Bodum, Inc., 208 AD2d 450 (1st Dept

1994); and Kernan v. Kurz-Hastings, Inc., 175 F3d 236 (2nd Cir 1999).

This is to say that HMAG placed ventilator equipment into the stream of commerce through HMI and HMAG ventilators were sold in New York.

HMAG argues, and the Court agrees, that something more than the placement of a single product into the stream of commerce is needed as shown by J. McIntyre Machinery, Ltd. v. Nicastro, 564 US 873 (2011).

Plaintiff, Nicastro, was injured by metal shearing equipment in New Jersey manufactured by a British company. The lower courts had found that J. McIntyre did not have a single contact with New Jersey apart from the single machine that injured Nicastro. The Supreme Court held that this single isolated sale was not sufficient as a basis for long arm jurisdiction as a minimum contact under due process. This “stream of commerce plus” requirement appears satisfied in the Darrow case by the regional distributor servicing New York known by Hetronic.

In this case, plaintiff has provided a copy of a technical e-mail from HMAG that was directed to University Hospital. Plaintiff shows that HMAG has direct contacts with end users of its ventilators in New

York through its product literature that contain its name, address, e-mail, phone number and logo. The 2001 product brochure makes reference to HMAG twice, HMI twice while referring to “Hamilton Medical” nine times and “Hamilton Group” once. The 2004 product brochure refers to “Hamilton Medical” nineteen times, while “Hamilton” is only mentioned once, as is HMAG, and HMI is mentioned twice. The operator’s manual for 2006 refers to “Hamilton Medical” sixty five times, “Hamilton” only once, HMAG twice and HMI not at all. The 2005 service manual refers to “Hamilton” or “Hamilton Medical” sixty three times and HMI only once while referring to HMAG two hundred eighty three times. Further, the service manual repeatedly and consistently directs the user to contact HMAG and makes no reference to HMI in that respect.

The case involves more than a single isolated sale in New York. There are nine ventilator units just in one Syracuse, New York hospital. There is more to plaintiff’s jurisdictional claim than the placement of a single ventilator into the stream of commerce which then winds up in New York.

A further detailed appreciation of the J. McIntyre case is in order. There was an independent distributor who was completely unaffiliated with J. McIntyre that agreed to sell the machine in the US. There was no allegation that the distributor was controlled by J. McIntyre in any way or that J McIntyre was aware of product sales. The distributorship was not exclusive. J McIntyre and the distributor had no “commonality of ownership or management”. There are significant differences between this matter and the J. McIntyre case that have a bearing on due process.

HMI was created by and is a wholly owned subsidiary of HMAG. This parent-subsidary affiliation was completely lacking between the distributor and J. McIntyre. There is no jurisdictional defense for HMI which has an employee in New York and this makes it difficult to see a jurisdictional defense on the part of HMAG as parent of HMI.

Robert Hamilton and Andres Wieland are respectively president and secretary/treasurer of HMI at this time. From 2005 to 2008 Wieland was president of both HMAG and HMI at the same time. Hamilton and Wieland are also presently directors of HMAG. HMAG is the Hamilton

family business first organized in 1983 with HMI being formed in 1984. Plaintiff has shown a “commonality of ownership and management” that was completely lacking in the J. McIntyre case. Corporate decisions by HMI are made, in part, by the same people directing HMAG. HMI, by Hamilton and Wieland, is already involved in the litigation. Hamilton and Wieland testified on behalf of HMAG on the issue of jurisdiction. There would not seem to be unfairness from a due process perspective to continuing their participation on behalf of HMAG.

There is the element of knowledge seen in Darrow that was lacking in J. McIntyre. On the initial jurisdictional motion date, Robert Hamilton submitted an affidavit stating:

“...HAMILTON MEDICAL, INC., has never been under any contractual obligation to provide HAMILTON MEDICAL, AG with information as to the number of HAMILTON MEDICAL, INC.’s sales to customers in New York State. To the best of my knowledge, HAMILTON MEDICAL, AG has not asked HAMILTON MEDICAL, INC. For information as to HAMILTON MEDICAL, INC’s customers in the State of New York.”

Contrary to the affidavit, the HMAG Distributorship Agreement states

that HMI was to:

“- Keep books and records relating to sales, customers installation and customer complaints according to 21CFR821 (USA)...Such records must be kept according to serial and batch number, upgrades, versions etc. and the expiration date whenever applicable. DISTRIBUTOR’s customer invoices are to include these numbers of the PRODUCTS sold.

- Make these books and records available to Hamilton at any time.”

The 1986 HMAG Distributorship Agreement with HMI had a HMAG warranty that provided:

“...It is explicitly [sic] agreed that any warranty is void in the event the Distributor fails to forward to the Supplier the serial number of the products, the address, phone and fax number of customer (hospital) immediately after installation of products...”

At deposition Hamilton provided the following testimony:

“Q. In 2008 generally was there a warranty that followed ventilators manufactured by HMAG?

MR. WOOLSEY: Objection to the form of the form of the question.

You’re talking about a warranty extended by HMAG?

MR. KIRRANE: Yes.

MR. WOOLSEY: If you know from a general standpoint, you can answer.

A. HMAG at that point in time would have offered a

warranty on ventilators sold to HMI.”
(Page 90 Line 16 to Page 91 Line 5)

Although the HMAG warranty to HMI does not appear in later versions of the Distributorship Agreements, Mr. Hamilton’s testimony shows that the warranty was continuing and there is no indication in the record that HMI procedures of immediate report of the name, address and phone/fax number of the customer (hospital) were ever changed.

HMAG papers are silent on the reporting of customer information for warranty purposes but argue that keeping customer information was only for the purpose of 21 CFR §821 and solely to comply with federal (FDA) requirements as opposed to any New York State requirements. Even if the Court accepts the argument, the issue is one of knowledge on the part of HMAG and not how and why that knowledge was acquired. 21 CFR 821.1 et. seq. requires that the manufacturer of a device, such as a ventilator, must be able to trace each device through the entire chain from distributor, retailer, renter, or other commercial enterprise to device user facilities. In other words, HMAG is required to know the name,

address, phone and fax number of each and every customer (hospital) of each and every ventilator sold by HMI.

Hamilton was asked about New York sales documents and ERP in his deposition as follows:

“Q. Did they maintain any type of records showing how many of the products were sold in New York?

A Yes. That would have been in the ERPs, Enterprise Resource Planning.

Q Can you briefly describe what Enterprise Resource Planning is?

A It would be a system used to log sales, inventory, anything that has to do with the standard day-to-day running of the business.

Q The information that's collected in the ERPs, is that stored?

A It is stored.

Q What is the retention policy for that information?

A I'm not aware of any specific policy. That's run through shared services through Hamilton Company, but they do retain that as far as I know.

Q Who is Hamilton Company?

A Hamilton Company is a separate business that runs, sells liquid handling equipment. And they basically lease us space or rent space to us. And also we have shared services with them, meaning we pay for accounting services to be run through their group, as well as standard just maintenance, those kind of things, utilities.

Q. Is HMI a subsidiary of HMAG?

A. We are a wholly owned subsidiary of HMAG, HMI is, yes.

Q. Is Hamilton Company a subsidiary of HMAG?

A. No, it is not.

Q. Is it related to HMAG?

A. It is not.

Q. Earlier I think you said that EPGs were sent to Hamilton Company?

A. ERP?

Q. Sorry, ERP. Let me ask it again. Were the ERPs sent to Hamilton Company?

A. ERP is a system.

Q. I'm sorry. The information that was collected through the ERPs, was that transmitted to HMAG?

A. That information can be sent to HMAG potentially, yes. Whether or not it was transmitted, I don't know.

MS. MacPHERSON: Could be or would be?

THE WITNESS: It could be.”

(Page 63 Line 17 - Page 65 Line 20)

“Q. Mr. Hamilton, I'm going to show you a document that I have marked as Plaintiff's Exhibit 4, the first page saying Exhibit C and underneath that says HMI Sales Report Re: New York. It's a multi-page document. I don't want you to look at anything in particular. I want you to take a look through this document, I want to know if you recognize it.

MR. KIRRANE: I will represent to all counsel it's a document which was Exhibit C from the amended response to plaintiff's first set of interrogatories for Defendant Hamilton Medical, Inc. dated April 15, 2016.

Q. Do you recognize that document?

A. I recognize this document.

Q. What is this document?

A. It appears to be a sales report for the State of New York.

Q. How is this document generated?

A. This would be generated out of our ERP system.

(Page 70 Line 23 through Page 71 Line 22)

Q. And on the left-hand side it says February 4, 2016, at 8:57.

That's when she would have done that?

A. That's correct.

Q. Then it says shipment history. Is it fair to say that what follows on this page is now a list of different shipments that were made in the New York market?

A. That is correct. That's a list of all the sales that are shipped to New York.

(Page 73 Line 12 - 21)

Q. Then the next column, going back to the five columns, says product. And there are various numbers underneath that. Is that basically the product number?

A. Yes. That would be the part number.”

(Page 75 Line 6 - 11)

Andres Wieland also testified about the ERP system (although he didn't seem to recognize the HMI New York Sales Report) as follows:

“MR. PARISI: In the context of Mr. Hamilton. He testified to something that -- there's something called ERPs, enterprise resource planning.

Q. Are you aware of that?

A. Yes.

Q. Okay. And what generally is enterprise resource planning?

A. It's an EDP system.

Q. And what does that mean, can you explain it?

A. You do planning of material, planning of resources, cost accounting, so that's the general system.

Q. And is that the general system that Hamilton AG uses throughout the corporation?

A. Yes.

Q. And with respect to that, Hamilton AG uses that system to, among things, see if it has enough materials for its distributors, enough inventory for its distributors, things like that?

A. Correct.

(Page 206 Line 5 - Page 207 Line 2)

Despite the warranty requirements, FDA regulatory requirements, the ERP system shared by HMAG and HMI, and the New York sales report, Hamilton testified at his deposition as follows:

“Q. Do you know or do you have any way of telling me, as you sit here today, how many ventilators were actually sold in New York in 2013?

A. I would not have a way to tell you the exact number.

Q. Could you tell me how many ventilators were sold in New

York for any year between 2008 and 2014?

A. I would not be able to do that.”

(Page 82 Line 9 - 18)

Wieland likewise testified at his deposition as follows:

“Q. And do you -- and my question is, in order to determine the sales in New York, okay --

A. Yes.

Q. -- what would an individual need to do?

MR. WOOSLEY: Objection to the form.

Where? Well, objection to the form. You can answer the question.

A. The sales department of HMI, they -- I'm sure they know and they have more details.

Q. And -- and is the sales of vents in the United States, is that sales information available to HMI -- HMI AG -- HM -- Hamilton Medical AG?

A. I don't know.

(Page 133 Line 2 - 14)

The claim that HMAG did not know or could not determine a basic and relevant fact such as the number of HMAG ventilators sold in New York at any given time is not credible, a finding not present in J. McIntyre.

The distribution agreement between HMI and HMAG is exclusive.

HMI has no product line or stream of revenue other than sale/servicing of HMAG equipment. The agreement further provides:

“The DISTRIBUTOR shall not develop, manufacture, distribute, advertise, sell, represent or market products which will compete with HAMILTON PRODUCTS.”

This makes HMI entirely dependent on HMAG, a dependency that was lacking in J. McIntyre. HMAG is the dominant party in the relationship with HMI and this factor reduces concern over the application of long arm jurisdiction as applied to HMAG.

HMAG owns all of the stock of HMI. The reasonable inference is that it provided the initial capitalization for HMI. When HMAG states that HMI “purchases” ventilator units and other equipment from it, the funds to do so originated from the wellspring of HMAG. “Purchase” as that term is applied between HMAG and HMI is not well defined. The Court observes from the testimony that HMAG sets “prices” and HMI can attempt to “negotiate” the same but to imply that these are entirely arms length transactions between completely independent entities has no

merit. The situation here is entirely different than that in J. McIntyre.

The end user or any third party can read the limited warranty for the ventilators to be given by HMAG. Whether this was HMAG's intent in creating the product literature or the product of inadvertence is of little import, the ambiguity was created by HMAG. The construction of the warranty given by plaintiff is given consideration on the motion and was not an issue present in J. McIntyre.

A broad indemnification clause is in the distributorship agreement in which HMAG and HMI agree to hold each other harmless for claims by third parties. If, as HMAG suggests, the two companies were entirely separate, distinct and independent entities (ignoring that they are jointly represented at present), HMI would undoubtedly invoke the clause to have HMAG step into its shoes in defense of the infant plaintiff's claims in New York. The clause has no jurisdictional limit to its application. An indemnification clause was not present in J. McIntyre.

A warranty is provided by HMAG to HMI and is considered in the context of the HMAG/HMI relationship. Assuming HMAG and HMI are

truly independent, which has not been shown, HMI would rightfully turn to HMAG to enforce a warranty claim as an addition to indemnification when sued by a third party for a ventilator defect. The warranty has no jurisdictional limitation. There was no express warranty and the potential impact of warranty with the distributor was not considered in the case of J. McIntyre. Once again, HMAG has a place at the table with plaintiff here in New York.

On the totality of the record developed, plaintiff meets the burden on the motion to show HMAG's purposeful and direct contacts with New York that are sufficient to provide a basis for long arm jurisdiction as considered in J. McIntyre Machinery, Ltd. v. Nicastro, 564 US 873 (2011). "Traditional notions of fair play and substantial justice" are not offended based on the record presented. International Shoe Co. v. State of Washington, 326 US 310 (1945).

The sale of the ventilator injuring plaintiff was part of HMAG's indirect effort through HMI, a wholly owned and controlled subsidiary acting as it's exclusive distributor, to serve the New York market. This

considered with the other nine ventilators at University Hospital, the direct and indirect contacts of HMAG with University Hospital and HMI's New York employee shows "continuous and systematic" activity in New York as required by Goodyear Dunlop Tires Operations, SA v. Brown, 564 US 915 (2013) particularly given the reluctance of HMAG to confirm the number of units sold in New York during relevant time periods. Ultimately, this case is no different than Darrow v. Hetriconic Deutschland, 119 AD3d 1142 (3rd Dept 2014) except for the fact that HMI was a distributor servicing New York with at least one employee rather than creating a regional distributor to service New York. In the end, the fundamental unfairness that creeps into the jurisdictional issue lies not with HMAG, but with the infant plaintiff who is only connected to Switzerland by use of a ventilator that was made there.

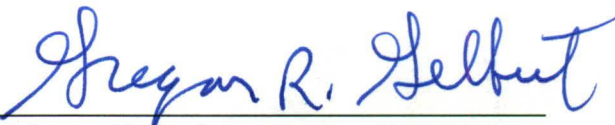
Other issues are raised by plaintiff as to whether HMI was in an alter ego relationship with or the agent of HMAG based on the operative facts as set forth above. The Court finds it unnecessary to reach these issues as plaintiff has adequately supported the exercise of long arm

jurisdiction as to HMAG.

Based upon all of the foregoing, it is

ORDERED, that the motion of the defendant, Hamilton Medical, AG to dismiss the complaint pursuant to CPLR §3211(a)(8) for lack of personal jurisdiction shall be and the same is hereby respectfully DENIED in all respects.

Dated: June 28, 2018
Syracuse, New York


HON. GREGORY R. GILBERT
SUPREME COURT JUSTICE