STATE OF IDAHO)
County of KOOTENAI) ss
FILED 3/23/2020
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CLERK, DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JOANNE LaMOTHE, individually, and as surviving spouse of Daniel M. LaMothe, deceased, and on behalf of I.D.L., a minor child, KATHLEEN JOHNSON, an individual, MARIA CELINE LaMOTHE, an individual, JASON LaMOTHE, an individual, DAYNA LaMOTHE, an individual, AMANDA BAKER, an individual, DAVID LaMOTHE, an individual, PATRICIA MURPHY, an individual, COLETTE LaMOTHE, an individual, CASSANDRA LaMOTHE, an individual, JOHN LaMOTHE, an individual, **Plaintiffs,** **vs.** **INTERNATIONAL LABORATORIES, LLC, a foreign limited liability company; QUALITY PACKAGING SPECIALISTS INTERNATIONAL, LLC, a foreign limited liability company; WALMART, INC., dba WALMART PHARMACY #4395, and BUSINESS ENTITIES I through X,** **Defendants.**	**Case No. CV28-19-8638** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS INTERNATIONAL LABORATORIES, LLC, AND QUALITY PACKAGING SPECIALISTS INTERNATIONAL, LLC, IRCP 12(b)(2) MOTION TO DISMISS**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This matter is before the Court on a Motion to Dismiss filed by defendants International Laboratories, LLC, (INL) and Quality Packaging Specialists International, LLC, (QPSI), on January 13, 2020.

Plaintiffs filed a Complaint for Wrongful Death and Demand for Jury Trial on December 4, 2019. Plaintiffs allege that Daniel LaMothe (Mr. LaMothe) died on

December 9, 2017, from a stroke brought on by Mr. LaMothe being "deprived of his needed and properly prescribed Clopidogrel (commonly referred to as Plavix) for a substantial amount of time." (Compl. 4-6; ¶¶ 19, 25, 30). Clopidogrel is a medication "used to prevent strokes and heart attacks in persons with heart disease." *Id.* at 4, ¶ 19. On April 22, 2017, Mr. LaMothe had been prescribed by his physician, Marek Janout, to take one 75mg tablet of Clopidogrel per day. *Id.* at ¶19, 20. Between April 22, 2017, and December 9, 2017, Mr. LaMothe had his prescription filled by defendant Walmart's Post Falls pharmacy employees or agents on three separate occasions: April 22, 2017, August 2, 2017, and November 30, 2018. *Id.* at ¶¶ 21-23. "At some point prior to December, 2017, the LaMothes noted that the shape of the Clopidogrel had changed. Up and until that point, the pills had been pink and were shaped like a capsule. The pills now looked pink and round." *Id.* at 5, ¶ 24. On January 10, 2018, the Federal Drug Administration (FDA) published an announcement stating:

> International Laboratories, LLC is voluntarily recalling Lot# 117099A of Clopidogrel Tablets, USP 75 mg, packaged in bottles of 30 tablets, to the consumer level due to mislabeling. The product is labeled as Clopidogrel Tablets USP, 75 mg but may contain Clopidogrel 75mg or Simvastatin Tablets USP 10 mg.
> Missed doses of Clopidogrel increases the risk of heart attack and stroke which can be life threatening. Patients should not stop taking Clopidogrel without talking to their prescribing physician. Additionally, unintentional consumption of simvastatin could include the common side effects associated with its use and may cause fetal harm when administered to a pregnant woman. Simvastatin occasionally causes myopathy which is a disease of the muscles. Finally, allergic reactions are also possible and could also be life threatening.

Id. at ¶ 26. On January 29, 2018, Mrs. LaMothe received a letter from Walmart addressed to Mr. LaMothe. *Id.* at ¶ 27. The letter provided information as to a voluntary recall issued by INL, that due to a mislabeling error, the manufacturer's bottle was labeled

as Clopidogrel 75 mg. but actually contained Simvastatin 10 mg., and included a picture of the pills Clopidogrel and Simvastatin. *Id.* at ¶¶ 27, 28. This was the first time the LaMothes had been notified of the error. *Id.* at ¶ 27. Plaintiffs allege that "Daniel LaMothe's stroke and ultimate death were proximately caused by the wrongful acts and omission of Defendants." *Id.* at 6; ¶ 30.

QPSI is incorporated in New Jersey and is the sole owner of INL. Decl. of Sutka Veselinovic 2. QPSI and INL "were contracted with Walmart to package Simvastatin and Clopidogrel." *Id.* QPSI, as owner of INL, repackaged Simvastatin and Clopidogrel for Walmart in 2017 at their Pennsylvania packaging center and shipped the repackaged pharmaceuticals to Walmart distribution centers in Arkansas, Indiana, California, Maryland, and Georgia. *Id.*

On December 30, 2019, counsel for defendants QPS/INL filed a Special Appearance pursuant to I.R.C.P. 4.1(b)(7) "to contest personal jurisdiction only." Special Appearance 2. On January 13, 2020, QPSI/INL filed a Motion to Dismiss, Memorandum in Support of Motion, and Declaration of Sutka Veselinovic. On January 24, 2020, Walmart filed an Answer to the Complaint.. On February 12, 2020, plaintiffs filed a Memorandum in Opposition to Motion to Dismiss. On that same day, Walmart filed a Response to its Co-Defendants' Motion to Dismiss and a Declaration of Dick Derks. On February 13, 2020, Walmart filed a Motion to File Exhibit B to the Declaration of Dick Derks Under Seal. On February 14, 2020, QPSI/INL filed a Reply to Walmart's Memorandum in Opposition of Defendants' Motion to Dismiss and a Declaration of Todd R Startzel in Support of Motion to Dismiss. Oral argument on QPSI/INL's Motion to Dismiss was held on February 19, 2020.

II. STANDARD OF REVIEW

"A motion to dismiss under Rule 12(b)(6) for failure to state a claim must be read in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim and calls for 'a short and plain statement of the claim showing that the pleader is entitled to relief' and a demand for relief." *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992) (citing I.R.C.P. 8(a)(1), (2)). In considering a motion to dismiss under I.R.C.P. 12(b), the court may examine only those facts that appear in the complaint and any facts that are appropriate for the court to take judicial notice of. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990).

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. *See Idaho Schs. For Equal Educ. v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 728 (1993); *Rim View Trout Co. v. Dep't. of Water Resources.*, 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). Complaints should not be dismissed under I.R.C.P. 12(b) unless the non-moving party can prove no set of facts which would entitle him to relief. *Dumas v. Ropp*, 98 Idaho 61, 62, 558 P.2d 632, 633 (1977). The non-moving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. *Young v. City of Ketchum,* 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002); *Idaho Schs. for Equal Educ.*, 123 Idaho at 578, 850 P.2d at 729; *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). And any doubts must be resolved in favor of the survival of the complaint. *Gardner v. Hollifield*, 96 Idaho 609, 610-11, 533 P.2d 730, 731-32 (1975). "A 12(b)(6) motion will not be granted unless it

appears beyond doubt that the [plaintiff] could prove no set of facts in support of his claim which would entitle him to relief." *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995).

The grant of a Rule12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. *See Moss v. Mid-American Fire and Marine Ins. Co.*, 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); *Eliopulos v. Idaho State Bank*, 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct. App.1996). When reviewing an order of the district court dismissing a case pursuant to Idaho Rule of Civil Procedure 12(b)(6), "The issue is not whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.'" *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (*quoting Greenfield v. Suzuki Motor Co. Ltd.*, 776 F.Supp. 698, 701 (E.D.N.Y.1991)).

Whether the State of Idaho has jurisdiction over a nonresident defendant is a question of law. *State Dept. of Finance v. Tenney*, 124 Idaho 243, 247, 858 P.2d 782, 786 (Ct. App. 1993).

III. ANALYSIS

Again, whether the State of Idaho has jurisdiction over these nonresident defendants, QPSI and INL, is a question of law. *Id.* In order for personal jurisdiction to be obtained over a nonresident defendant, two conditions must be satisfied. *Tenney,* 124 Idaho at 246, 858 P.2d at 785. First, a statutory basis must be established under I.C. § 5-514, Idaho's long-arm statute." *Id.* (footnote omitted). Second, the "constitutional requirements of the due process clause of the fourteenth amendment of the United States Constitution must be met." *Id., citing Schneider v. Sverdsten Logging Co.,* 104

Idaho 210, 211, 657 P.2d 1078, 1079 (1983). The Court's jurisdiction must not violate the out-of-state defendant's due process rights. *Gailey v. Whiting*, 157 Idaho 727, 730, 339 P.3d 1131, 1134 (2014). The Court will analyze those two criteria in that order.

Before beginning that analysis, the Court notes that none of the parties have asked for additional time to bring to light additional pertinent facts that may touch on this jurisdictional issue presented by QPSI and INL in their motion to dismiss. Little information has been presented to this Court about the size of Walmart, the size of QPSI and INL, the size of the contract between those parties (monetary value, number of prescription packages, etc.). The non-moving party should be allowed to complete discovery before being required to respond to a summary judgment motion (*Doe v. Garcia*, 126 Idaho 1036, 1044, 895 P.2d 1229, 1235 (Ct. App. 1995)), and, specifically, a party should be allowed discovery before a court rules on a motion to dismiss or summary judgment based on a lack of personal jurisdiction. *Insurance Corporation of Ireland, Ltd. Et al. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). While plaintiffs and Walmart have not made such a request, as noted above, the burden at this juncture is upon QPSI and INL. *Dumas*, 98 Idaho at 62, 558 P.2d at 633; *Young,* 137 Idaho at 104, 44 P.3d at 1159; *Idaho Schs. for Equal Educ.*, 123 Idaho at 578, 850 P.2d at 729; *Miles*, 116 Idaho at 637, 778 P.2d at 759; *Gardner*, 96 Idaho at 610-11, 533 P.2d at 731-32; and *Orthman*, 126 Idaho at 962, 895 P.2d at 563.

A. Idaho's Long-Arm Statute.

"A state may exercise either general or specific jurisdiction over a defendant. If a defendant's activities within the forum state are "continuous and systematic" or "substantial," the state has a sufficient relationship with the defendant to assert general

jurisdiction. *Lake v. Lake*, 817 F.2d 1416 1420 (9th Cir. 1987) *citing Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 445, 447, 72 S.Ct. 413, 418, 419, 96 L.Ed. 485 (1952).

To properly assert personal jurisdiction over an individual not subject to "general" jurisdiction in Idaho, there must be a legal basis for the assertion of extraterritorial jurisdiction. *Mann v. Coonrod,* 125 Idaho 357, 359, 870 P.2d 1316, 1318 (1994). "Idaho's long-arm statute is Idaho Code section 5–514, which provides for specific jurisdiction rather than general jurisdiction. *Id.* It grants jurisdiction over a defendant 'who in person or through an agent does any of the acts hereinafter enumerated ... as to any cause of action arising from the doing of any of said acts.' I.C. § 5–514." *Telford v. Smith County, Texas,* 155 Idaho 497, 501, 314 P.3d 179, 183 (2013). Idaho Code § 5-514 provides for the assertion of extraterritorial jurisdiction over an individual or business. *Mann*, 125 Idaho at 359, 870 P.2d at 1318 (citing *Saint Alphonsus v. Washington,* 123 Idaho 739, 743, 852 P.2d 491, 495 (1993). In order for an Idaho court to assert extraterritorial jurisdiction over a nonresident defendant, the acts giving rise to assert jurisdiction must fall within the scope of Idaho Code § 5-514. *Mann*, 125 Idaho at 359, 870 P.2d at 131, (citing) *Saint Alphonsus,* 123 Idaho at 742, 852 P.2d at 494. Idaho Code § 5-514 "must be liberally construed. The statute was designed to provide a forum for Idaho residents; as such the law is remedial legislation of the most fundamental nature." *Duignan v. A.H. Robins Co.*, 98 Idaho 134, 137, 559 P.2d 750, 753 (1977), citing *Intermountain Business Forms, Inc. v. Shepard*, 96 Idaho 538, 540, 531 P.2d 1183, 1185 (1975), *quoting Doggett v. Electronics Corp. of America*, 93 Idaho 26, 30, 454 P.2d 63, 67 (1969). "[The Idaho Supreme Court] has consistently held that an allegation that an injury has occurred in Idaho in a tortious manner is sufficient to invoke the tortious act language

of I.C. § 5–514(b). *See, e.g., Schneider v. Sverdsten Logging Co.,* 104 Idaho at 212, 657 P.2d at 1080; *Duignan v. A.H. Robins Co.,* 98 Idaho 134, 137, 559 P.2d 750, 753 (1977); *Doggett v. Electronics Corp. of Am.,* 93 Idaho 26, 454 P.2d 63 (1969)." *Saint Alphonsus,* 123 Idaho at 743, 852 P.2d at 495. "For the purpose of determining the state with jurisdiction as well as the substantive law which will govern, the state where the injury occurred and the cause of action thus accrued is generally the most logical state for adjustment of rights. This is particularly true where, as here, there are residents of at least four different states involved." *Doggett,* 93 Idaho at 28, 454 P.2d at 65.

Idaho Code § 5-514 states:

> Any person,...or corporation, whether or not a citizen or resident of this state, who in person on through an agent does any of the acts hereinafter enumerated, thereby submits said person,...or corporation,...to the jurisdiction of the courts of this state as to any cause of action arising from the doing of said acts:
> (a) The transaction of any business within this state....;
> (b) The commission of a tortuous act within this state;

The exercise of jurisdiction under Idaho Code § 5-514 is "specific" as distinguished from "general" and extends "only as to any cause of action arising from the doing of any of said acts." *Houghland Farms, Inc. v. Johnson,* 119 Idaho 72, 75, 803 P.2d 978, 981 (1990). In analyzing whether sufficient contacts exist to exercise specific jurisdiction over a nonresident defendant, only the defendants' contacts out of which the suit arises or those that relate to the suit shall be considered." *Id.*

Plaintiffs argue that jurisdiction is appropriate under Idaho Code § 5-514(a) because:

> the Complaint properly alleges that Defendants International Laboratories, LLC and Quality Packaging Specialists International, LLC committed actions, including mislabeling Mr. LaMothe's Plavix medication, that resulted

> in injury in this state. By contracting with Walmart, when liberally construing the minimal requirements of Idaho Code § 5-514 as required, it is clear that its requirements have been satisfied in this case.

Pls.' Mem. in Opp. to Defs.' Mot. in Opp. to Defs.' Mot. to Dismiss 5.

QPSI and INS seem to concede jurisdiction under Idaho Code § 5-514. QPSI and INS state, "Because I.C. § 5-514 allows a broader application of personal jurisdiction than the due process clause, this motion will analyze general and specific jurisdiction under the due process clause of the United States Constitution. *See Lake v. Lake*, 817 F.2d 1416 1420 (9th Cir. 1987)."

Whether or not QPSI and INS concede jurisdiction under Idaho Code § 5-514, this Court finds that jurisdiction is appropriate under Idaho Code § 5-514(a) and (b) because QPSI and INS have both transacted business in the state of Idaho (the factual analysis of this aspect is more fully set forth below) under Idaho Code § 5-514(a), and QPSI and INS have allegedly committed a tortious act in the state of Idaho under Idaho Code § 5-514(b). While the mislabeling (really, mispackaging, because the bottle was labeled Plavix/Clopidogrel, which is what Mr. LaMothe was prescribed, and what he thought he was taking, but was actually a bottle containing Simvastatin), occurred outside the state of Idaho, the allegedly deadly result of that mislabeling occurred in the state of Idaho. The injury occurred in the state of Idaho. There can be no doubt about that. It is uncontroverted that QPSI and INS mislabeled or mispackaged what Mr. LaMothe ingested. It is uncontroverted that QPSI and INS distributed this mislabeled or mispackaged prescription to Walmart, and that Walmart passed that mislabeled or mispackaged prescription to Mr. LaMothe. In providing the mislabeled or mispackaged prescription to Walmart, QPSI and INS transacted "any business within this state", and

committed a "tortious act within this state." As a matter of law, both Idaho Code § 5-514 (a) and (b) are satisfied under the facts of this case.

B. Due Process Under the 14th Amendment.

The parties disagree as to whether the United States Supreme Court case of *J. McIntyre Machinery, Ltd. v. Nicastro, (Nicastro)* 564 U.S. 873, 131 S.Ct 2780, 180 L.Ed. 2d 765 (2011) supplants long-standing and established Idaho appellate court case law on jurisdiction over out-of-state defendants. QPSI and INS argue *Nicastro* is the appropriate analysis. Mem. in Supp. of Defs.' INL and QPSI's IRCP 12(b)(2) Mot. to Dismiss for Lack of Personal Jurisdiction 7-15; Defs.' INL and QPSI's Reply to Pls.' and co-Def. Walmart's Mem. in Opp'n of Defs.' [QPSI/INL] Mot. to Dismiss 2-8. Walmart argues *Nicastro* does not apply. Def. Walmart Inc.'s Resp. to its Co-Defs.' Mot. to Dismiss 9-18. Plaintiff, at least in briefing, did not make any argument regarding *Nicastro*. At oral argument, counsel for plaintiffs argued *Nicastro* does not apply, but left most of that argument to counsel for Walmart.

This Court has determined it is appropriate to analyze the Due Process issues under a "traditional" analysis (pursuant to current Idaho case law) and under *Nicastro.* This Court finds that under either analysis, the Due Process requirements are satisfied, jurisdiction over QPSI and INL is appropriate. Accordingly, QPSI's and INL's Motion to Dismiss must be denied.

1. "Traditional" Due Process Analysis.

Having found jurisdiction under Idaho Code § 5-514 (a) and (b), the Court must now address whether the assertion of jurisdiction by an Idaho Court is permissible under the due process clause of the United States Constitution. *Saint Alphonsus,* 123 Idaho at

743, 852 P.2d at 495. Due process does not require that the defendant be physically present in Idaho. *Id.* However, due process prohibits an Idaho court from exerting jurisdiction over a nonresident defendant "unless that defendant has certain minimum contacts with Idaho such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.*

QPSI and INL argue that "QPSI and INL did not perform any act by which they purposefully availed themselves of the privilege of conducting business in Idaho, thus they did not invoke the benefits and protections of its laws[,]" and the plaintiffs' "claim does not arise out of or relate to QPSI and INL's forum related activities because they do not have any contacts with Idaho." Mem. in Supp. of Defs.' INL and QPSI's IRCP 12(b)(2) Mot. to Dismiss for Lack of Personal Jurisdiction 7-12. QPSI and INL argue that in light of the United States Supreme Court's holding in *Nicastro*, the cases relied upon by defendant Walmart and the plaintiffs (*Doggett, Duignan* and *Noss)* do not accurately portray the current state of the law or have facts that are distinguishable from the case at hand. Defs.' INL and QPSI's Reply 4-6.

As mentioned above, both plaintiff and defendant Walmart oppose the motion to dismiss filed by defendants QPSI/INL. Walmart argues that:

> Here, the Court needs to look no further than the Moving Defendants' voluntary recall notice which on its face evidences the fact that the Moving Defendants **knew**, not reasonably expected, but **knew**, its products would be used and distributed nationwide to all US states. Thus, the Moving Defendants argument that it does not have sufficient minimum contacts with Idaho is without merit.

Def. Walmart Inc.'s Resp. to its co-Defs.' Mot. to Dismiss 8 (bold in original). At oral argument, counsel for QPSI and INL argued that this Court cannot consider such recall

notice as it is "post-tort evidence." No legal basis was given for such an argument and the Court is unaware what legal basis would support such an argument. In its briefing, Walmart goes on to argue that:

> The Moving Defendants cannot get around the fact the they signed a written supply agreement with Walmart which demonstrates an intent to seek to supply prescription drugs to a nationwide retailer who had stores in Idaho and which gave them every reason to expect that the prescription drugs they packaged for Walmart would be distributed and sold in Idaho. Accepting the Moving Defendants' head in the sand approach when it comes to knowledge that their products, including mislabeled products, were being distributed and sold in the forum would permit them to escape personal jurisdiction in nearly every location where their produced [product] can be found.

Id. at 12. Walmart additionally argues that:

> Assuming arguendo that the plurality decision in *Nicastro* set the applicable test for determining minimum contacts in Idaho, that heightened test is still satisfied in this case. In *Nicastro*, the plurality concluded that the principal inquiry is "whether the defendant's activities manifest an intention to submit to the power of a sovereign." 564 U.S. at 882-83 (plurality op. Kennedy). In other words, a defendant's reasonable expectation is not sufficient. There must be evidence that the defendant "seeks to serve" or target a given State's market. *Id.* (emphasis added).

Id. at 10. Plaintiffs argue that:

> The Defendants International Laboratories, LLC and Quality Packaging Specialists International, LLC knew their products would be distributed, not only in Idaho, but likely every other state in the country, given the extensive presence of Walmart. Certainly, the great number of stores owned and operated by Walmart had to have been known by Defendants International Laboratories, LLC and Quality Packaging Specialists International, LLC. In fact, the Defendants have not come forth with any evidence that would demonstrate that it had a reasonable belief that their medication would not be sold in Idaho.

Pltfs' Mem. in Opp. to Defs' Mot. to Dismiss.

In *Doggett,* the Idaho Supreme Court reversed the District Court's grant of summary judgment to the defendants, two component part manufacturers whose parts

were in a boiler which exploded during installation, injuring Doggett. 93 Idaho at 27-28, 454 P.2d at 64-65. First, the Idaho Supreme Court held that only the injury need occur in the state of Idaho, not the tortious act as well. 93 Idaho at 28-30, 454 P.2d at 65-67. Then, the Idaho Supreme Court turned its attention to due process, and the analysis of minimum contacts under *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), and *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). 93 Idaho at 30-31, 454 P.2d at 67-68. The Idaho Supreme Court held that one contact, was sufficient:

> On the basis of the United States Supreme Court cases, we conclude that under these circumstances the one contact with Idaho, resulting as it did in injury to an Idaho resident, was sufficient to give Idaho jurisdiction over the respondents in a tort action. In placing their goods in the flow of interstate commerce, the respondents must have had the reasonable expectation that such items would be shipped indiscriminately throughout the United States. If dangerously defective goods are placed in the interstate flow of commerce, those whose negligence created the defect should be prepared to defend themselves wherever injury should occur.

93 Idaho at 31-32, 454 P.2d at 68-69. Even if this mispackaged prescription medicine was the one and only contact with QPSI and INL and the state of Idaho, jurisdiction would lie under *Doggett*. But we know this wasn't the only contact with QPSI and INL and the state of Idaho, it wasn't even the only contact between QPSI and INL and Mr. LaMothe. We know Mr. LaMothe filled his prescription for Clopidogrel on three separate occasions at the same Walmart. We know that the pharmacies of the several Walmart stores in Idaho sold many prescription medications packaged by QPSI and INL to Idaho citizens, before Mr. LaMothe's death. The facts of the present case are much stronger for this Court to exercise jurisdiction, as compared to *Doggett*, because in *Doggett*, it was a

component part of a larger device (a boiler) that failed and caused injury. There is no way the component part manufacturer would know where that boiler, or any boiler, was going to be installed. In the present case, there is no "component part." It is not the drug Clopidogrel that failed. The only thing wrong with the drug Clopidogrel in this case was the fact that it was **not** Clopidogrel in the QPSI/INL package; it was instead the drug Simvastatin. And only the negligence of QPSI and INL is responsible for that being the case.

Duignan, involved a Dalkon Shield, an intrauterine device manufactured by the defendant (a Virginia corporation) placed in Duignan by a physician in Stanford, California, which later caused injury to Duignan while she was living in Idaho. 98 Idaho at 135, 559 P.2d at 751. The Idaho Supreme Court reversed the District Court's grant of defendant's motion to dismiss. The Idaho Supreme Court noted, "The trial court reasoned: Because a tort consists of an act and an injury, and because the ultimate result of the injury (here the surgery) is not part of the tort, no 'tortious act' had been committed in Idaho." The Idaho Supreme Court held:

> The trial court's memorandum decision makes it clear that the allegation of injury in Idaho had already been made during the hearing on respondent's motion to quash service of summons:
>
> > '. . . the Plaintiff had an interuterine [sic, intrauterine] device inserted in the State of California. She then moved to the State of Idaho where the inter-uterine [sic] device is alleged to have caused infection which ultimately resulted in the removal of a fallopian tube in the Sun Valley Hospital.'
>
> This allegation brings this case squarely within the fact pattern of *Doggett*, namely, a defective product which is introduced into the stream of commerce out-of-state and which subsequently malfunctions in-state, thereby causing injury to an Idaho resident. The trial court, however, indulged the opposite presumption in finding that 'the device was inserted in California, and the injury presumably commenced at that moment.' (Emphasis added.)

98 Idaho at 137, 559 P.2d at 753. The Idaho Supreme Court then turned its attention to fairness and due process:

> Having brought herself within the statutory language, plaintiff-appellant need meet only one other test: Would the exercise of jurisdiction by an Idaho court so offend "traditional notions of fair play and substantial justice" as to violate Robins' constitutional right to due process? *See, International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).
>
> The factors which a trial court should consider in determining whether it is fair to exercise long-arm jurisdiction over a non-resident manufacturer whose product has allegedly injured a resident plaintiff of Idaho were well stated in *Phillips v. Anchor Hocking Glass*, 100 Ariz. 251, 413 P.2d 732 (1966):
>
> > 'First, the court should consider the nature and size of the manufacturer's business. As the probability of the product entering interstate commerce and the size or the volume of the business increase, the fairness of making the manufacturer defend in the plaintiff's forum increases. Second, the court should consider the economic independence of the plaintiff. A poor man . . . may not be able to afford a trip to another jurisdiction to institute suit. . . . Third, the court should consider the nature of the cause of action including the applicable law and the practical matters of trial. As the number of local witnesses increases and their availability to travel decreases, it seems fair to make the manufacturer defend in the plaintiff's forum. These factors discussed above are guidelines to assist the trial court. They are not exclusive and the court should consider all other matters it deems relevant.' 413 P.2d at 738.
>
> California's sole contact with this case is its being the location where appellant's intrauterine device was inserted. Idaho, by contrast, is the state of residence of appellant and of her physician and surgeon, as well as the location of the hospital where the medical was performed and where the medical records are kept. We can find no inconvenience or unfairness in forcing a Virginia based corporation to defend itself in Idaho rather than in California against a claim that its product has caused appellant's injury.
>
> Ours is an age of great mobility, both of people and of products. To lose sight of this fact and to engage in the kind of hair-splitting analysis urged by respondent
>
> > '. . . would tend to promote litigation over extraneous issues concerning the elements of a tort and the territorial incidence

> of each, whereas the test should be concerned more with those substantial elements of convenience and justice presumably contemplated by the legislature.' *Doggett, supra*, 93 Idaho at 28, 454 P.2d at 65, quoting *Gray v. American Radiator & Standard Sanitary Corporation*, 22 Ill.2d 432, 176 N.E.2d 761 (1961).
>
> In a products liability case, we find persuasive the analysis provided by, "In Personam Jurisdiction over Non-Resident Manufactures in Product Liability Actions," 63 Michigan Law Review 1028:
>
> > "It would seem consonant with fairness to subject to manufacturer to jurisdiction whenever his product gave rise to the cause of action within the foreign state, even though the manufacturer had no other contact in the state. As far as the manufacturer's economic objectives are concerned, his overriding purpose is to have his product consumed. Where this consumption occurs is relatively insignificant to him. This observation supports the position that the manufacturer can be summoned to defend a cause of action arising out of the use of his product wherever it may be located. Any inconvenience that may be asserted is more than balanced by his interest in defending the integrity of his product, the maintenance of which may ultimately the maintenance of which may ultimately can be no unfairness in forbidding the manufacturer to disassociate himself from his product.' *Ibid.*, at 1031-32.
>
> We therefore repeat the conclusion of *Doggett* that, "If dangerously defective goods are placed in the interstate flow of commerce, those whose negligence created the defect should be prepared to defend themselves wherever injury should occur." 93 Idaho at 31-32, 454 P.2d at 68. The trial court's order granting respondent's motions to quash the service of summons and dismiss the case for lack of jurisdiction is reversed and the cause remanded for further proceedings. Costs to appellants.

98 Idaho at 137-38, 559 P.2d at 753-54.

In the present case, QPSI and INL mispackaged a prescription medication which contained many individual pills, each of which allegedly caused Mr. LaMothe injury and resulting in his death. Thus, instead of one boiler or one intrauterine device coming to Idaho, there were multiple mispackaged pills sent directly to Mr. LaMothe in Idaho. The first factor listed above in *Duignan* (citing *Phillips v. Anchor Hocking Glass*), the "size of

the business" of QPSI and INL in the present case is obviously bigger than the boiler component manufacturers in *Doggett*, and more comparable to the Dalkon Shield made by A. H. Robbins in *Duignan*. Keep in mind that this was not one boiler...Mr. LaMothe had filled his prescription for Clopidogrel on three occasions, two occasions **prior** to the last occasion where he received the mispackaged medication. Each package contained multiple pills. If the facts in *Doggett* did not offend the notions of fair play and substantial justice, the facts in the present case certainly do not. A glimpse as to the "size" of the QPSI and INL business relationship with Walmart has been set forth by counsel for QPSI and INL"

> QPSI was incorporated in 2006 in New Jersey and operates as a contract packager. (Veselinovic Dec. ¶ 3). QPSI is the sole owner of INL. (Veselinovic Dec. ¶ 3). QPSI/INL were contracted With Walmart to package Simvastin and Clopidogrel. (Veselinovic Dec. ¶ 4). QPSI and INL were paid directly from Walmart for its packaging and labeling services. (Veselinovic Dec. ¶ 4). QPSI repackaged Simvastin and Clopidogrel drugs as the owner of INL for Walmart in 2017. (Veselinovic Dec. ¶ 4). The drugs in question were packaged by QPSI at is packaging center in Pennsylvania. (Veselinovic Dec. ¶ 5). QPSI shipped the repackaged drugs to Walmart distribution centers in the following states: (1) Arkansas; (2) Indiana; (3) California; (4) Maryland; and (5) Georgia. (Veselinovic Dec. ¶ 5). QPSI/INL'S duties under its contract With Walmart were fulfilled once it shipped the packaged drugs to the Walmart distribution centers in Arkansas, Indiana, California, Maryland, and Georgia. (Veselinovic Dec. ¶ 5). QPSI and INL have no control over where Walmart distributes the packaged drugs once they reach the distribution centers. (Veselinovic Dec. ¶ 6). Walmart independently distributes the goods as it sees fit. (Veselinovic Dec. ¶ 6).

Mem. in Supp. of Defs.' INL and QPSI's IRCP 12(b)(2) Mot. to Dismiss for Lack of Personal Jurisdiction 3. There has been no evidence of the number of Walmart stores in the United States, and such evidence would certainly give insight as to the "size" of the business relationship between Walmart and QPSI and INL. However, the "size" of that

relationship, even only as it pertains to Mr. LaMothe, is huge. That is because Walmart itself is huge, even in Mr. LaMothe's locale prior to his death, and QPSI and INL packaged the product Walmart sold to Mr. LaMothe. This Court can take judicial notice of the adjudicative fact that there are three Walmart Superstores within a fifteen-minute drive of the courthouse in Kootenai County, and one of those, located at 6405 West Pointe Parkway in Post Falls, Idaho, is where Mr. LaMothe got his prescription filled. *Id.* 2. There are two more Walmart Superstores within an hour drive and one more within a ninety-minute drive. Each of those five Walmart Superstores within an easy drive of Mr. LaMothe has a pharmacy. The Court takes such notice pursuant to I.R.E. 201(b)(1) and (2) (a fact that is not subject to reasonable dispute and is generally known within the trial court's territorial jurisdiction, or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned). The Court may take such notice on its own (I.R.E. 201(c)(1)), and does so. Any party to this case is entitled to be heard if the Court takes judicial notice before notifying a party. I.R.E. 201(e). As noted above, in considering a motion to dismiss under I.R.C.P. 12(b), the court may examine only those facts that appear in the complaint and any facts that are appropriate for the court to take judicial notice of. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990).

This Court has reviewed the "Turn-Key Supply Agreement", which has been filed under seal, as Exhibit B to the Declaration of Dick Derks. While that Turn-Key Supply Agreement does not give any specifics as to the "size" of the business relationship between Walmart and QPSI and INL, some information can be gleaned from it. First, it states Walmart is a Delaware corporation with an address in Arkansas and INL's address

is in Florida. Decl. of Dick Derks in Supp. of Walmart Inc.'s Resp. to Defs.' Mot. to Dismiss 3, ¶ 6; Ex. B, 1. It is apparent from the Turn-Key Supply Agreement, that INL is supplying more prescription medications than just Clopidogrel to Walmart. Obviously, INL was also packaging the prescription Simvastatin to Walmart, or this lawsuit would not exist. What is not known is whether INL (and QPSI) supply all the Clopidogrel to Walmart that Walmart requires nationwide. The agreement does not state that it is an exclusive agreement, but there is language that would support such inference. Inferences are to be drawn at this point against QPSI and INL (the non-moving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. *Young,* 137 Idaho at 104, 44 P.3d at 1159) and QPSI and INL have not come forward with any evidence that their relationship with Walmart is limited in any way, either geographically (less than nationwide), or as to the type of drug. "'**Packaging**' shall only apply to pharmaceutical products purchased by Wal-Mart to be repackaged by Supplier [INL] pursuant to this Agreement. '**Packaging**' shall not apply to pharmaceutical products purchased by Wal-Mart from pharmaceutical manufacturers where such pharmaceutical manufacturers arrange for repackaging pursuant to Wal-Mart specifications." Ex. B, 2 (bold in original). "Purchase and Sale. During the Term, Supplier shall produce, package, ship, and sell to Wal-Mart any Packaging requested in an Order..." *Id.* (underlining in original). "Orders. Pursuant to the terms and conditions of this agreement, Supplier agrees to use diligent and commercially reasonable efforts to meet Wal-Mart's forecasts and purchase orders (each an '**Order**') for Packaging to be sold and distributed by Wal-Mart in the Territory." *Id.,* at 3. "'Territory' shall mean all of the United States." *Id.,* at 2.

Forecasts/Purchase Orders.
(a) Each month during the term of this Agreement, Wal-Mart shall provide Supplier with a non-binding twelve (12) month rolling forecast of the monthly amount of Packaging it anticipates purchasing from Supplier (the "**Forecast**").
(b) Wal-Mart shall submit to Supplier firm written Orders for Packaging per the agreed upon led time of at least eight (8) weeks. Such Orders shall set forth the amount and type of Packaging ordered, identify the drug to be packaged, the required delivery date and any other pertinent details as Wal-Mart may deem appropriate. Supplier will confirm in writing receipt of the Forecast. Supplier will confirm each Order within five (5) days of receipt, including whether it can meet the requirements defined by Wal-Mart in such Order.
(c) Supplier shall not be responsible for any delays in delivery or production of Packaging arising out of or related to Wal-Mart's or its supplier's failure to deliver the applicable drugs to Supplier on a timely basis. In the event, Supplier cannot meet the Forecast or the requirements of an Order due to such failure, the parties shall mutually agree on an equitable adjustment to the Forecast or the Order, as applicable.

Id., at 3 (bold and underling in original). "Capacity Management. Supplier will allocate capacity and raw material inventory to Wal-Mart based on the forecast set forth in Section 2.2. hereof. Supplier will ensure it is able to supply up to 110% of the monthly requirements as defined in the 12 month rolling forecast." *Id.* (underlining in original). "Shortages. (b) Capacity Allocation. In the event Supplier, upon receiving a Forecast or after confirming receipt of an Order is, or anticipates that it will be, unable to meet such Forecast or Order, either in whole or in part, then Supplier shall give Wal-Mart written notice of such inability or potential inability as soon as possible, but at least within five (5) days of receipt of such Forecast or confirmation of such Order. Supplier and Wal-Mart shall meet within such five (5) day period to consider and agree upon alternatives for meeting the terms of the Forecast or Order." *Id.*, at 3-4 (underlining in original). A reasonable interpretation (requiring no inference) of this Turn-Key Supply Agreement is that QPSI and INL are contractually bound to provide Walmart with all drugs Walmart

orders, nationwide. A reasonable inference is that other than those situations where the manufacturer of the drug packages and sells directly to Walmart, QPSI and INL do all other packaging of all drugs for Walmart. That is the inference this Court has made.

The other factors set forth in *Duignan* (citing *Phillips v. Anchor Hocking Glass*) indicate jurisdiction over QPSI and INL is appropriate. The second factor listed in *Duignan* is the financial independence of the plaintiff. QPSI and INL have not set forth the financial independence of Mr. LaMothe or his heirs. The third factor listed in *Duignan* is the number of local witnesses. The Court finds there are many heirs who will need to testify at least as to damages. QPSI and INL admit that, "The majority of the plaintiffs are Idaho residents. (Plaintiffs' Complaint ¶s 1-12)." Mem. in Supp. of Defs.' INL and QPSI's IRCP 12(b)(2) Mot to Dismiss for Lack of Personal Jurisdiction 3. QPSI and INL admit that, "Defendant Walmart is engaged in business in Idaho. (*Id.* ¶ 15)." *Id.*

A glimpse of the "size" of the business relationship between Walmart and QPSI/INL can be obtained by looking at the recall sent by QPSI/INL to the LaMothes, *after* Mr. LaMothe had ingested the wrong medications. The Court has reviewed INL's "January 9, 2017 press release regarding the recall of Lot #117099A of Clopidogrel Tablets USP, 75 mg, which was received by Walmart." Decl. of Dick Derks in Supp. of Walmart Inc.'s Resp. to Defs' Mot. to Dismiss 2, ¶ 5; Ex. A. That recall notice has the heading:

> International Laboratories, LLC Issues Voluntary **Nationwide**
> Recall of one (1) Lot of Clopidogrel Tablets USP,
> 75 mg packaged in bottles of 30 tablets
> Due to Mislabeling

Id. (emphasis added). The notice then explains that Simvastatin may have been

distributed rather than Clopidogrel. *Id.* The notice then states: "The product was distributed nationwide and delivered to the **distribution centers in Arkansas, Georgia, Indiana, California and Maryland, and <u>distributed to retail stores in all US States</u>**." (bold in original, underlining added). It is the underlined portion of the recall that tells this Court all that is needed to be known about the "size" of the business relationship between Walmart and QPSI/INL. It is a nationwide business. It is the underlined portion of the recall that tells this Court all that is needed to be known about minimum contacts with Idaho. As a result of this nationwide business relationship between Walmart and QPSI/INL, the mispackaged drug went to Walmart and then to LaMothe in Idaho. It is the underlined portion of the recall that tells this Court all that is needed about whether it is fair to hail QPSI and INL into an Idaho court. This Court finds *Duignan* and *Doggett* correctly state the current law in Idaho. This is a case where "a defective product which is introduced into the stream of commerce out-of-state and which subsequently malfunctions in-state, thereby causing injury to an Idaho resident." *Duignan*, 98 Idaho at 137, 559 P.2d at 753, *citing Doggett.* Every bit of the following logic from Duignan applies to the present case:

> "It would seem consonant with fairness to subject to manufacturer to jurisdiction whenever his product gave rise to the cause of action within the foreign state, even though the manufacturer had no other contact in the state. As far as the manufacturer's economic objectives are concerned, his overriding purpose is to have his product consumed. Where this consumption occurs is relatively insignificant to him. This observation supports the position that the manufacturer can be summoned to defend a cause of action arising out of the use of his product wherever it may be located. Any inconvenience that may be asserted is more than balanced by his interest in defending the integrity of his product, the maintenance of which may ultimately the maintenance of

> which may ultimately can be no unfairness in forbidding the manufacturer to disassociate himself from his product.' *Ibid.*, at 1031-32.
>
> We therefore repeat the conclusion of *Doggett* that, "If dangerously defective goods are placed in the interstate flow of commerce, those whose negligence created the defect should be prepared to defend themselves wherever injury should occur." 93 Idaho at 31-32, 454 P.2d at 68.

98 Idaho at 138, 559 P.2d at 754.

In addition to *Duignan* and *Doggett*, this Court has also been cited to its own November 2, 2002, decision in *David R. Noss v. Avatar Technology, Inc.*, Kootenai County Case No. CV2001-1391, WL 32103156. Def. Walmart Inc.'s Resp. to its Co-Defs.' Mot. to Dismiss 1-7, 10; Plfs.' Mem. in Opp. to Defs.' Mot. to Dismiss 8; Defs.' International Laboratories, LLC, and Quality Packaging Specialists International, LLC's Reply to Plfs' and Co-Def. Walmart's Mem. in Opp. of Defs.' Mot. to Dismiss 4-6. This Court has re-read its decision written nearly eighteen years ago. The Court finds the analysis equally applicable to the present case. As such, the analysis of that decision is incorporated into this decision. In *Noss*, the defendant *Avatar Technology, Inc.* (AT), sold speakers for computers, and distributed some of them through Fred Meyer's stores in the Pacific Northwest, specifically, 247 such computers in Idaho. Mem. Decision and Order on Plf.'s Mot. to Assume Jurisdiction, Defs.' Mot. to Quash Service of Summons for Lack of Personal Jurisdiction, and Def.'s Mot. to Strike 1-3, 7-8. This Court stated:

> All indications are that AT is in the business of manufacturing and selling these computers. We know they advertise on the world wide web and can assume they sell them on a national basis through others than Fred Meyer. It would be very surprising if an Idaho citizen called up AT wanting to buy a computer, and the response was "I am sorry, we are not selling in Idaho as we want to avoid having a presence for purposes of personal jurisdiction."

Id. at 13-14. The same applies in the present case. When businesses such as QPSI and

INL choose to enter into a contract to sell Walmart all the medications that Walmart wants, and knows in advance those medications are going to every single state, then it is entirely fair for businesses such as QPSI and INL to be hailed into court in Idaho to defend themselves for injuries their product (or their mispackaging) caused an Idaho citizen. For that not to be the case, businesses such as QPSI and INL would have had to say to Walmart, "You know, we are afraid of being sued in Idaho, we are amending our contract to sell as many packaged drugs as Walmart wants, except that Walmart can't sell those drugs in Idaho." That isn't what happened in this case, and that is never going to happen. That would never be a discussion with Walmart; it would not occur with Amazon or any other business which sells in every state in the United States. In the *Noss* decision, this Court quoted the portion of *Duignan* which reads, "Ours is an age of great mobility, both of people and of products. 98 Idaho at 138 [559 P.2d at 754]. That was true 25 years ago, and is more so today." *Id.* 9. *Duignan* was issued in 1977. *Noss* was written in 2002. It is now 43 years after *Duignan* was penned, and the mobility of people and products has changed in ways the Idaho Supreme Court could not have envisioned in 1977, nor even this Court in 2002.

Finally, even if this Court were to grant QPSI and INL its motion to dismiss, the litigation would remain between LaMothes and Walmart. That being the case, QPSI and INL are contractually bound to indemnify Walmart; thus, a different additional litigation would result between Walmart and QPSI/INL. The Turn-Key Supply Agreement reads:

> Indemnification by Supplier. Except as otherwise specifically provided herein, Supplier shall indemnify Wal-Mart and its officers, directors, agents, employees, Affiliates, and Licensees against all claims, actions, losses, damages, personal injuries (including death), defects, costs, expenses (including court costs and reasonable attorneys" fees on a full indemnity

basis) or other liabilities ("Liabilities") whatsoever in respect of:
(b) any product liability claim with respect to Packaging, to the extent such claim resulted solely from Supplier's negligent acts or omissions;
(d) any Packaging that fails to comply with the Specifications and/or that contains a Significant Deviation, or any defect or latent defect;
(e) any actual or alleged negligence, gross negligence, or willful misconduct (or actual or alleged passive negligence), secondary liability, vicarious liability, strict liability, or breach of a statutory or non-delegable duty, by Supplier in the packaging, storage, handling or shipping of Packaged Product;
(f) the material default or breach by Supplier in the performance of any obligation of or agreement made by Supplier in this Agreement.

Decl. of Dick Derks in Supp. of Walmart Inc.'s Resp. to Defs.' Mot. to Dismiss, 3, ¶ 6; Ex. B, 8. In *Deutsch v. West Coast Machinery Company*, 497 P.2d 1311, 80 Wash.2d 707 (Wash. 1972), the Washington Supreme Court held that its long-arm statute does not discriminate between first-and third-party actions. 497 P.2d at 1318, 80 Wash.2d at 719. "In the instant case the injury to the plaintiff is claimed to be a result of the primary negligence of the manufacturer, the third party defendant. The third party plaintiff under our law, therefore, is entitled to indemnification from the manufacturer, and to the benefit of the long-arm statute." 497 P.2d at 1318, 80 Wash.2d at 718. Thus, in the present case, Walmart is entitled to the benefit of the Idaho long-arm statute as against QPSI and INL. In *Deutsch*, Jerry Deutsch was an employee of Boeing, and was severely injured at work by a 110-ton press. 497 P.2d at 708-09, 80 Wash.2d at 1312-13. Boeing bought the press from West Coast Machinery Company, a Washington corporation, which installed the press. *Id.* West Coast bought the press from Marubeni America, a New York corporation, which bought the press from Marubeni Japan, a Japanese Corporation, who bought the press from Kansai, a Japanese Corporation which manufactured the press. *Id.* Marubeni America brought a third-party suit for indemnification against Kansai.

Similar to the present case, in *Deutsch*, "Kansai manufactured, packaged and shipped the press according to Boeing Company specifications." 497 P.2d at 711, 80 Wash.2d at 1314. The Washington Supreme Court held:

> We do not regard it as offensive to fair play or substantial justice or an undue burden on foreign trade to require a manufacturer to defend his product wherever he himself has placed it, either directly or through the normal distributive channels of trade. If it is clearly foreseeable as a result of trade with a foreign state that injury from a defective product (if it occurs) would occur in that state, the hardship of defending the product in that state in our judgment must be assumed as an attribute of foreign trade.
>
> In the case of *Benn v. Linden Crane Co., Supra*, the foreign manufacturer was in the country of Sweden. In that case a crane was sold to a purchaser in Connecticut, but the manufacturer did not know, as the manufacturer did in the instant case, where it was ultimately to be used in the United States. The court held, however, that the knowledge it was to be ultimately used in the United States was sufficient to constitute the foreign manufacturer doing business within the state of Pennsylvania, under the Pennsylvania long-arm statute, where the crane was ultimately used, and that the extension of jurisdiction by the Pennsylvania court over the Swedish corporation did not offend 'notions of fair play and equal justice.' The court stated:
>
> > Linden-Alimak had reason to know that the crane would be resold for ultimate use and operation in the United States. The crane, while being operated in Pennsylvania, allegedly injured plaintiff by reason of a malfunction claimed to be caused by the negligence of the manufacturer and others. Under these facts, I find that Linden-Alimak made an 'indirect shipment of goods' into Pennsylvania and was 'doing business' within the definition of the Pennsylvania statute. Linden-Alimak is thereby rendered subject to the jurisdiction of this Court.
> >
> > '. . . When a manufacturer voluntarily chooses to sell his product in a way in which it will be resold from dealer to dealer, transferred from hand to hand and transported from state to state, he cannot reasonably claim that he is surprised at being held to answer in any state for the damage the product causes.'
> >
> > . . . I find that there were sufficient contacts between defendant and Pennsylvania at the time this action was instituted to come within the broad constitutional limits of due process as set forth in *International Shoe Company v. State of Washington, Supra*, and later cases. Under the facts of

> this case, it is unnecessary to decide just how far the term 'shipping of merchandise directly or indirectly into or through' Pennsylvania may extend within the constitutional limits of 'due process'. As applied to the facts herein disclosed and the statute as herein interpreted, the extension of jurisdiction over the Swedish corporation, Linden-Alimak, I find does not violate 'due process' nor offend the 'notions of fair play and equal justice'.
>
> (Italics ours.) *Benn v. Linden Crane Co.*, 326 F.Supp. 995, 997 (E.D.Pa.1971).
>
> We agree with the reasoning of the courts in *Duple* and *Benn*, and are satisfied that the traditional notions of fair play and substantial justice have not been violated as applied to Kansai, the third party defendant, in this case.

497 P.2d at 715-16, 80 Wash.2d at 1316-17. All of that language and analysis by the Washington Supreme Court applies in the present case. Most importantly, in the present case, the situation isn't just one crane as in *Benn* or one hydraulic press as in *Deutsch*; this is many bottles of the wrong prescription medicine and many more individual pills of that wrong prescription medicine being distributed all across the United States, including Idaho. This Court denies QPSI and INL's Motion to Dismiss because QPSI and INL have certain minimum contacts with Idaho such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Id.* QPSI and INL knowingly placed the prescription drugs they packaged in the interstate flow of commerce for distribution nationwide through Walmart. Under the Turn-Key Agreement, QPSI and INL were obligated to supply Walmart with all the drug packages that Walmart demanded for its nationwide distribution. Given the facts of this case, it is entirely fair for "those whose negligence created the defect [QPIS and INL] should be prepared to defend themselves wherever injury should occur." *Doggett*, 93 Idaho at 31-32, 454 P.2d at 68; *Duignan*, 98 Idaho at 137-38, 559 P.2d at 753-54.

2. Analysis under *Nicastro*.

Eighteen years ago, this Court in *Noss* discussed the United States Supreme Court's decisions on long-arm jurisdiction, which it made after *World-Wide Volkswagen, v. Woodson*, 100 S.Ct. 559, 444 U.S. 286, 62 L.Ed.2d 490 (1980). Mem. Decision and Order on Plf.'s Mot. to Assume Jurisdiction, Def.'s Mot. to Quash Service of Summons for Lack of Personal Jurisdiction, and Def.'s Mot. to Strike, 12-17. This included *Insurance Corporation of Ireland, Ltd., et al. v. Compagnie Des Bauxites*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d (1982), which this Court interpreted as "making it easier for courts to find minimum contacts" (*Id.* at 15), and then *Ashai Metal Industry Co. LTD v. Superior Court of California*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), which this Court stated "seems to have tightened up on the minimum contacts requirement, holding that at least in a products liability component parts action (the Japanese manufacturer of a defective valve later used in a motorcycle tire), the Due Process clause requires 'something more than that the defendant was aware of its products entry into the forum State through the stream of commerce in order for the State to exert jurisdiction over the defendant.' 480 U.S. at 111, 107 S.Ct. at 1031." *Id.*, at 15-16.

Almost nine years ago, the United States Supreme Court issued *J. McIntyre Machinery, Ltd. v. Nicastro, (Nicastro)* 564 U.S. 873, 131 S.Ct. 2780, 180 L.Ed.2d 765 (2011). "Robert Nicastro seriously injured his hand while using a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre). The accident occurred in New Jersey, but the machine was manufactured in England, where J. McIntyre is incorporated and operates." 564 U.S. at 878, 131 S.Ct. at 2786. J. McIntyre sold one machine in the United States and did so through an independent contractor. 564 U.S. at 887-88, 131

S.Ct. at 2791 (concurring decision). Nicastro sued in New Jersey state court. The trial court found it had jurisdiction over the manufacturer, J. McIntyre, and the United States Supreme Court reversed. In a plurality decision, the lead opinion concluded, "At no time did petitioner [McIntyre] engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws." 564 U.S. at 887, 131 S.Ct. at 2791. That decision held that the "stream of commerce" doctrine does not "displace" the "general rule" that a court has jurisdiction only if the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 564 U.S. at 877, 131 S.Ct. at 2785, *citing Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). The decision was authored by Justice Kennedy, and was joined by Chief Justice Roberts, Justice Scalia and Justice Thomas. Justice Breyer wrote a concurring opinion which Justice Alito joined. That opinion agreed in the result (that jurisdiction did not exist) but found that decision could be made on prior United States Supreme Court case precedent, and found no reason to change the law as the lead decision tried to do. 564 U.S. at 887-893, 131 S.Ct. at 2791-94. That decision seemed to key on the fact that this was a single sale through an independent contractor. That decision viewed this as more of a traditional products liability case, and not a case that would "implicate modern concerns." 564 U.S. at 890, 131 S.Ct. at 2792. Justice Breyer wrote:

> The Supreme Court of New Jersey adopted a broad understanding of the scope of personal jurisdiction based on its view that "[t]he increasingly fast-paced globalization of the world economy has removed national borders as barriers to trade." *Nicastro v. McIntyre Machinery America, Ltd.,* 201 N.J. 48, 52, 987 A.2d 575, 577 (2010). I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But

> this case does not present any of those issues. So I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.
>
> In my view, the outcome of this case is determined by our precedents. Based on the facts found by the New Jersey courts, respondent Robert Nicastro failed to meet his burden to demonstrate that it was constitutionally proper to exercise jurisdiction over petitioner J. McIntyre Machinery, Ltd. (British Manufacturer), a British firm that manufactures scrap-metal machines in Great Britain and sells them through an independent distributor in the United States (American Distributor). On that basis, I agree with the plurality that the contrary judgment of the Supreme Court of New Jersey should be reversed.

564 U.S. at 887-88, 131 S.Ct. at 2791. Justice Ginsburg wrote the dissenting opinion which Justice Sotomayor and Justice Kagan joined. 564 U.S. at 893-910, 131 S.Ct. at 2794-2804.

There are two sentences in the lead opinion written by Justice Kennedy worth noting: "The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State." (564 U.S. at 882, 131 S.Ct. at 2788), and, "These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market." 564 U.S. at 886, 131 S.Ct. at 2790. Again, the lead opinion is critical of the thought that a manufacturer, simply by placing its goods into the "stream of commerce", submits to the jurisdiction of any particular state in which the product winds up. With that in mind, this Court turns its attention to the language and concern of the lead opinion.

In the present case, Justice Kennedy's proclamation that, "it is not enough that the defendant **might** have predicted that its goods will reach the forum State" is satisfied in

the present case. "Might" is the operative word. The word "might" was used by Justice Kennedy in arriving at that legal proclamation because he felt the New Jersey Supreme Court was wrong in finding jurisdiction because, "its products are distributed through a nationwide distribution system that **might** lead to those products being sold in all fifty states." 564 U.S. at 879, 131 S.Ct. at 2786 (bold added). There is no "might" in the present case. QPSI and INL did not think for a moment that their product "might" end up in all fifty states; QPSI and INL knew for a fact their product would end up in every state because QPSI and INL knew their product would be in every Walmart store in every state in the United States. QPSI and INL did not just "guess" or "predict" that its products would wind up in every state, including the State of Idaho; QPSI and INL knew for a "certainty" the fact that its products would wind up in Idaho. There can be no other interpretation. The contract was to supply Walmart with all of the various types of drugs, in packages, that Walmart wanted, to be distributed "nationwide" through all of Walmart's stores, which are located in every state.

QPSI and INL "purposefully availed itself of the [Idaho] market." Unlike the up to four items sold in New Jersey in *Nicastro*, QPSI and INL did not simply place their goods into the stream of commerce, not knowing where their product would go. Instead, QPSI and INL placed their goods (hundreds of thousands of pills) into the stream of commerce knowing for a fact that their product would wind up in Idaho, because they intended their product to wind up in Idaho, and they desired their product to wind up in Idaho. Most importantly, their product did wind up in Idaho specifically in the hands of Mr. LaMothe, just as QPSI and INL intended, when Mr. LaMothe on three different occasions filled his prescription at Walmart.

QPSI and INL did not, with their own employees, take each of its prescription packages and place them in the hands of consumers such as Mr. Lamothe. However, QPSI and INL certainly directly injected its products into the state of Idaho and all other states because QPSI and INL directly injected those prescription packages into the Walmart distribution centers of Arkansas, Indiana, California, Maryland, and Georgia (Decl. of Sutka Veselinovic 2), knowing full well that QPSI and INL's prescription packages would then be distributed "nationwide" by Walmart to its stores at various locations throughout the nation. QPSI and INL knew they were contractually bound to provide Walmart with as much of the product packages as Walmart needed based on what Walmart told QPSI and INL every month. QPSI and INL knew the extent of Walmart's distribution. Walmart has thousands of pharmacies located throughout the United States, and dozens of pharmacies located in Idaho alone. The Turn-Key Supply Agreement for distribution of the repackaged drugs which stated "Supplier agrees to use diligent and commercially reasonable efforts to meet Wal-Mart's forecasts and purchase order (each, and "Order") for Packaging to be sold and distributed by Wal-Mart in the Territory." Derks Decl., Ex. B ¶ 2.2. "Territory" is defined as "all of the United States." *Id.*, Ex. B ¶ 1.6. Finally, INL's voluntary recall notice stated that "[t]he product was distributed nationwide and delivered to the distribution centers in Arkansas, Georgia, Indiana, California and Maryland, and distributed to retail stores in all US States." *Id.* at Ex. A.

This Court finds that QPSI and INL clearly performed an act which purposefully availed themselves of the privilege of conducting business in Idaho by signing the Turn-Key Supply Agreement with Walmart and then fulfilling that agreement. In signing that agreement, QPSI and INL **knew** their packaged drugs would be distributed to every state.

This Court need not go any further than this to find that QPSI/INL had minimal contacts with Idaho, even under the heightened *Nicastro* standard purported by QPSI and INL.

Justice Breyer and Justice Alito in their concurring opinion found that the plaintiff had:

> not otherwise shown that the British Manufacturer "purposefully avail[ed] itself of the privilege of conducting activities" within New Jersey, or that it delivered its goods in the stream of commerce "with the expectation that they will be purchased" by New Jersey users. *World–Wide Volkswagen, supra*, at 297–298, 100 S.Ct. 559 (internal quotation marks omitted).

564 U.S. at 889, 131 S.Ct. at 2792. In the present case, QPSI and INL delivered its goods into the stream of commerce, not just with the "expectation" that their goods would be purchased by Idaho users, but with the express and undeniable knowledge that their goods would be purchased by Idaho users in Idaho stores owned by Walmart.

Nicastro is distinguished from the case at hand in several important ways. QPSI/INL is not a company based in a foreign country seeking to enter into an agreement for general sales into the United States market. QPSI/INL is a company incorporated in New Jersey, which repackaged pharmaceuticals in Pennsylvania, and distributed them to Walmart distribution centers in Arkansas, Indiana, California, Maryland, and Georgia. All of this was done after signing a contract with Walmart (the Turn-Key Supply Agreement) that expressly and specifically stated the products QPSI/INL had repackaged would be distributed "nationwide", which can only mean to every state in the United States. Decl. of Dick Derks in Supp. of Walmart Inc.'s Resp. to Defs' Mot. to Dismiss 2, ¶ 5; Ex. B. This is a far cry from the situation in *Nicastro*, where, unknowingly to the defendant, four of the defendant's products ended up distributed to buyers in New Jersey. In the case at hand, QPSI/INL had at least "constructive" knowledge that their products would be distributed

nationwide through Walmart's vast distribution network. It would be disingenuous for QPSI and INL to even make the claim that they had no "actual" knowledge, given the contract language and scope of the Turn-Key Supply Agreement. The contract calls for QPSI and INL to satisfy all of Walmart's **nationwide** requirements. Whatever Walmart asks QPSI and INL to supply, they have to supply it. The actual knowledge of QPSI and INL is also proved by the "Voluntary Nationwide Recall" notice they sent. *Id.,* Ex. A. Walmart obviously has records of where its QPSI and INL packages end up, because the parties know that Mr. LaMothe filled his prescription for Clopidogrel on three occasions. This Court can think of no reason why QPSI and INL would not have access to that same information as a matter of course, or at least if they would have asked. QPSI and INL purposefully availed themselves of the privileges of conducting business in Idaho through contracting with a national distributor (Walmart) and cannot now seek shelter from being hailed into Idaho courts for their tortious actions.

QPSI and INL have made some arguments that are baseless, if not intentionally misleading. QPSI and INL claim, "They do not make sales in Idaho or receive profits from Idaho." Mem. in Supp. of Defs.' INL/QPSI Mot. to Dismiss 13. This would be true only if QPSI and INL give all the prescription medication to Walmart for free. The Turn-Key Supply Agreement shows that is not the case. QPSI and INL package prescription medications as specified by Walmart, as much of that medication as Walmart wants, and then Walmart sells that medication nationwide. QPSI and INL know some of that product will be sold in Idaho; that is inevitable. Thus, the claim, "They do not make sales in Idaho or receive profits from Idaho," is patently false.

QPSI and INL claim, "Second, QPSI and INL are the equivalent of a component

part manufacturer and did not sell or manufacture the entire product. QPSI and INL only labeled and repackaged the Clopidogrel." Defs. INL and QPSI Reply to Pls. and Co-Def. Walmart's Mem. in Opp'n of Defs.' Mot. to Dismiss 5-6. While not false, this is horribly misleading. How is QPSI and INL not the manufacturer when the only task QPSI and INL are paid to perform is to package the drug as specified by Walmart? QPSI had one job to do: put the right drug in the right bottle. Due to the recall notice, we know for a fact that they failed to do that one task correctly. QPSI and INL did not manufacture each pill, but they manufactured the container and were the only entities charged with putting the right pill in the right container. To argue, "QPSI and INL only labeled and repackaged the Clopidogrel," is to again ignore the fact that this was their **only** task, that this is what they did wrong, and that this is what allegedly killed Mr. LaMothe. While QPSI and INL did not "manufacture" the pill, there was absolutely nothing wrong with the manufacturing of the pill. It is uncontroverted that QPSI and INL "manufactured" the very thing that allegedly resulted in Mr. LaMothe's death...QPSI and INL "manufactured" the package, filled the package, shipped the package to Walmart, knowing their packages would be sold in all states.

There is much debate over how much weight to give Justice Breyer's decision in *Nicastro.* The most in-depth summary this Court could find on this subject is found in the Supreme Court of Vermont's decision in *State of Vermont v. Atlantic Richfield Co.*, 142 A.3d 215, 201 Vt. 342 (Vt. 2016):

> ¶ 18. The debate in the Supreme Court over the scope of *World–Wide Volkswagen's* stream-of-commerce doctrine continued twenty-four years later in *J. McIntyre Machinery, Ltd. v. Nicastro.* That case also involved a products liability action against a foreign manufacturer. The Court divided once again, issuing a four-justice plurality opinion, a two-

justice concurring opinion, and a three-justice dissent. The plurality opinion reversed a decision of the New Jersey Supreme Court concluding that the British manufacturer of scrap metal machines was subject to personal jurisdiction in New Jersey even though it had not advertised in, sent goods to, or otherwise particularly targeted the forum state. *McIntyre,* 564 U.S. at 877, 131 S.Ct. 2780. In so ruling, the plurality opinion noted and rejected the broader stream-of-commerce analysis in Justice Brennan's concurring opinion in *Asahi. Id.* at 883–84, 131 S.Ct. 2780.

¶ 19. The controlling concurring opinion, authored by Justice Breyer and joined by Justice Alito, concluded that the facts—(1) one machine sold on one occasion in New Jersey; (2) the manufacturer's desire to have its American distributor sell its machines to anyone in America willing to buy them; and (3) the manufacturer's attendance at trade shows in cities outside New Jersey—demonstrated neither a regular flow of its product, nor a regular course of sales in New Jersey, nor something more such as special state-related designs or advertising. *Id.* at 887–88, 131 S.Ct. 2780 (Breyer, J., concurring). While joining the plurality's mandate, the concurring opinion cited both the plurality and concurring opinions in *Asahi* in support of its position. *Id.* at 889, 131 S.Ct. 2780. The three dissenters, relying heavily on *World–Wide Volkswagen* and Justice Brennan's concurrence in *Asahi,* included an appendix demonstrating that federal and state courts confronting facts similar to that case had "rightly rejected the conclusion that a manufacturer selling its products across the USA may evade jurisdiction in any and all States, including the State where its defective product is distributed and causes injury." *Id.* at 906, 910–14, 131 S.Ct. 2780. (Ginsburg, J., dissenting). While not carrying the day in that case, the dissenters took "heart that the plurality opinion does not speak for the Court." *Id.* at 910, 131 S.Ct. 2780.

¶ 20. Hence, *World–Wide Volkswagen's* stream-of-commerce analysis is the governing law on the stream-of-commerce doctrine, given the failure of the competing factions on the U.S. Supreme Court since that decision to garner a majority of votes to limit or expand the doctrine. "Because neither Justice Brennan's nor Justice O'Connor's test garnered a majority of the votes in *Asahi,* neither test prevailed as the applicable precedent." *AFTG–TG, LLC v. Nuvoton Tech. Corp.,* 689 F.3d 1358, 1362 (Fed.Cir.2012). Moreover, "the crux of Justice Breyer's concurrence [in *McIntyre*] was that the Supreme Court's framework applying the stream-of-commerce theory—including the conflicting articulations of that theory in *Asahi*—had not changed, and that the defendant's activities in [*McIntyre*] failed to establish personal jurisdiction under any articulation of that theory." *Id.* at 1363; see *McIntyre,* 564 U.S. at 890, 131 S.Ct. 2780 (Breyer, J., concurring) (stating that, on record presented, "resolving this case requires no more than adhering to our precedents"). "Because

McIntyre did not produce a majority opinion," courts "must follow the narrowest holding among the plurality opinions in that case," which is Justice Breyer's determination "that the law remains the same after *McIntyre*." *AFTG–TG, LLC,* 689 F.3d at 1363; accord *Ainsworth v. Moffett Eng'g, Ltd.,* 716 F.3d 174, 175 (5th Cir.2013); see also *In re Chinese–Manufactured Drywall Prods. Liab. Litig.,* 753 F.3d 521, 541 (5th Cir.2014) (stating that "the law remains the same after *McIntyre,* and that circuit courts may continue to attempt to reconcile the Supreme Court's competing articulations of the stream of commerce test").

¶ 21. Accordingly, we reject TPRI's argument that both the plurality and concurring opinions in *McIntyre* preclude the exercise of personal jurisdiction over a defendant based solely on the defendant's introduction of its product into a national distribution system aimed at bringing the product into the forum state among others. Indeed, as noted, the fundamental principle articulated in *World–Wide Volkswagen* is that although neither random nor fortuitous acts can create personal jurisdiction, "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." 444 U.S. at 297–98, 100 S.Ct. 559; cf. *Hedges v. W. Auto Supply Co.,* 161 Vt. 614, 614–15, 640 A.2d 536, 537 (1994) (mem.) (stating that, even absent evidence that product was sold in Vermont, defendant's sale of product to distributor for national marketing, including in Vermont, was sufficient to establish personal jurisdiction over defendant); *Pasquale v. Genovese,* 136 Vt. 417, 421, 392 A.2d 395, 398 (1978) (finding personal jurisdiction based "upon the defendant's active, planned participation in the Vermont market, through a chain of manufacture and distribution set up for the purpose, and through eventual sale of the [product] in Vermont").

142 A.3d at 222-23, 201 Vt. 352-54. The Supreme Court of Washington, *en banc*, arrived at a similar analysis in *State v. LG Electronics, Inc.* 375 P.3d 1035, 1041-42,186 Wash.2d 169, 180-82 (Wash. 2016). *See also, Hart v. Bed Bath & Beyond, Inc.*, 48 F.Supp.3d 837, 842 (D.Md.2014). This is consistent with the decisions supplied by counsel for Walmart: *Align Corp. Ltd. v. Boustred*, 421 P.3d 163 (Colo. 2017) and *Brooks & Baker, L.L.C. v. Flambeau, Inc.*, 2011 WL 4591905 (E.D. Texas 2011). Not. of Suppl Authority 2. This Court finds Judge Kennedy's opinion in *Nicastro* is not controlling, but

Justice Breyer's opinion is controlling. This Court finds Justice Breyer's opinion does nothing to change Idaho's case law or United States Supreme Court case law existing prior to *Nicastro*. This Court agrees with the conclusion reached by the Colorado Supreme Court, that *World-Wide Volkswagen* controls in a stream of commerce case, such as the present case, and that Brennan's concurrence in *Ashai* and Breyer's concurrence in *Nicastro*, show *Nicastro* "followed and did not alter this approach. Therefore, in stream of commerce cases, World-Wide Volkswagen and its stream of commerce test continues to bind this court in determining whether a non-resident defendant has sufficient minimum contacts with [Idaho] Colorado for a court to assert personal jurisdiction." *Align Corp.*, 421 P.3d at 171. But even if Justice Breyer's decision in *Nicastro* creates such a change, jurisdiction over QPSI and INL under Justice Breyer's opinion is proper. In the present case there is the "something more" which QPSI and INL argue Judge Breyer's decision in *Nicastro* mandates. That "something more" is the uncontroverted fact that drugs packaged by QPSI and INL will find their way into the state of Idaho in each of the Walmart stores located within the state. This will occur repeatedly, every day, until their contract with Walmart expires. This occurred on three occasions with Mr. LaMothe alone.

The "something more" found in *Ashai* and in Justice Breyer's opinion in *Nicastro* is present in this case. Every day QPSI and INL **know** that their products will be sold in every state in all of Walmart's pharmacies. There is no uncertainty about that fact. There is no guesswork. There is no "might" given the Turn-Key Supply Agreement. That is the "something more" than just injecting ones goods into the stream of interstate commerce, not knowing where they will wind up. QPSI and INL know where its packaged goods will

wind up.

We know that Mr. LaMothe's purchase of Clopidogrel packaged by QPSI and INL and sold by Walmart, was not a single, isolated purchase. We know that because Mr. LaMothe had twice before filled his Clopidogrel from Walmart. *Hart v. Bed Bath & Beyond, Inc.*, 48 F.Supp.3d 837 (D.Md.2014) discusses *Nicastro* in the stream of commerce context. Rebecca and Michael Hart were injured when a "Firelite", an outdoor citronella firepot filled with "pourable eco-fuel gel" sold by Bed Bath and Beyond (BBB) exploded. 48 F.Supp.3d at 839. The injury occurred in Maryland and the Harts sued BBB in federal court. *Id.* BBB sued Losorea for indemnification. *Id.* Losorea, under the label of Napa Home & Garden packaged the fuel-get and firepot. *Id.* The district judge denied Losorea's motion to dismiss for lack of personal jurisdiction. After analyzing the plurality opinion in *Nicastro*, the district court held:

> The Court holds that, under appropriate fact patterns, a forum state may exercise personal jurisdiction over an out-of-state manufacturer of products that are sold in the forum state by third party distributors.
>
> BBB asserts that it sold 1,992 bottles of fuel gel either manufactured or bottled by Losorea in Maryland by BBB. BBB Second Supplemental Br. in Opp. Ex. 30 (Paper No. 98) (showing 763 bottles sold of "gel fuel" and 1,229 bottles sold of "citro gel" in 17 different cities in Maryland). While Losorea argues that BBB has provided no documentation relating to these sales and cannot substantiate the accuracy of those figures, Losorea, for its part, has provided the Court no documentation undermining BBB's assertions, and there is nothing in the record that suggests that the fuel gel purchased by the Stephens was a "single isolated sale," *McIntyre,* 131 S.Ct. at 2792 (J. Brennan). *See also Ainsworth,* 716 F.3d at 179 (finding personal jurisdiction over non-resident defendant who sold 203 forklifts—through a distributor—to customers in Mississippi, consisting of approximately 1.55% of defendant's sales during that period).
>
> This is not a case in which it was merely foreseeable to Losorea that the fuel gel might wind up in Maryland. For jurisdictional purposes at least, the Court finds that Losorea knew that the fuel gel would ultimately be distributed by BBB, a national retailer. Losorea packaged and labeled

bottles of fuel gel with BBB's price tag on them. *See* BBB Second Supplemental Br. in Opp. (Paper No. 98) at Ex. 9 (picture of the fuel gel with BBB sticker affixed); Ex. 12 (Fragnoli Dep. 22:13–23:1, 47:5–48:8) (Losorea's owner admitted that BBB stickers were affixed to fuel gel when *843 Losorea applied the Fire Gel label); Ex. 6 (Hammond Dep. 232:19–233:13) (Losorea's owner received an e-mail stating that Napa was selling the fuel gel to BBB and the labels will have to be modified accordingly); Ex. 25 (e-mail to Ryan Dailey, Losorea employee and current CyCan Industries President, requesting a shipment be prepared for BBB). Losorea concedes that it affixed labels containing BBB's name on the bottles of fuel gel, and while it argues that this knowledge at most shows that it was foreseeable to it that the product would be sold to customers in Maryland, as opposed to showing a targeting of the forum, Tr. 24:14–20, 25:4–16, Apr. 17, 2014 (Paper No. 72), the Court disagrees.

Losorea misapprehends the thrust of *McIntyre.* The present case is not one in which a lone item or just a few items happened to wind up in this state. Instead, this case folds into the scenario portrayed by Justice Breyer, where a defendant, "instead of shipping the products directly, ... consigns the product through an intermediary ... who then receives and fulfills the orders." *McIntyre,* 131 S.Ct. at 2793.

Not only is this case distinguishable from *McIntyre;* it is in harmony with the only case from this District that has considered personal jurisdiction in the "stream of commerce" context post-*McIntyre, Windsor v. Spinner Indus. Co., Ltd.,* 825 F.Supp.2d 632 (D.Md.2011). In *Windsor,* Judge Bredar found that jurisdiction did not lie over a Taiwanese manufacturer where the court had "no details about the particular chain of distribution that brought the allegedly defective" product to the Maryland store where it was purchased by plaintiffs, and where the third party distributors and manufacturers had "no connection whatever to this case." *Id.* at 639.

In contrast to the foreign manufacturer in *Windsor,* in this case Losorea relied on a clearly defined network of distributors for the ultimate sale of the fuel gel in Maryland, and in doing so "invoke[ed] the benefits and protections of the laws of the state." *Lesnick,* 35 F.3d at 946. BBB, in sum, has shown that Losorea had an ongoing and intentional commercial relationship with Fuel Barons, and through Fuel Barons, with Napa and BBB. At a minimum, Losorea bottled and packaged the fuel gel knowing that BBB would sell the fuel gel in its stores, and BBB in fact sold 1,992 bottles of fuel gel in Maryland. "From these ongoing relationships, it can be presumed that the distribution channel formed by [Losorea, BBB and others] was intentionally established, and that defendant[ ] knew, or reasonably could have foreseen, that a termination point of the channel was [Maryland]." *Beverly Hills Fan Co. v. Royal Sovereign Corp.,* 21 F.3d 1558, 1564 (Fed.Cir.1994); *AFTG–TG, LLC,* 689 F.3d at 1363, 1365 (adhering to *Beverly Hills Fan* precedent post-*McIntyre*). Losorea cannot

> disavow the clearly defined chain of distribution it established in this state in order to avoid having to be haled into court here.
>
> The Court finds that it has specific jurisdiction over Losorea.

48 F.Supp.3d at 842-843 (footnotes omitted). In the present case, Walmart is a gigantic third party distributor, and QPSI and INL are the "manufacturer" or the packager for that giant distributor. QPSI and INL must supply all that Walmart orders. While exact numbers of packages have not been provided to this Court, using the language of *Hart*, "This is not a case in which it was merely foreseeable to [QPSI and INL] that the [packaged drug] might wind up in [Idaho]. For jurisdictional purposes at least, the Court finds that [QPSI and INL] knew that [packaged drug] would ultimately be disturbed by [Walmart] a national retailer." The present case is the exact scenario described by Justice Breyer in *Nicastro,* where one consigns the product be sold through an intermediary, rather than shipping the products directly. It is consistent with *Nicastro* to hold QPSI and INL subject to litigation in Idaho.

QPSI and INL also argue that the exercise of jurisdiction over QPSI and INL does not comport with fair play and substantial justice because: (1) they have not injected themselves into the affairs of Idaho; (2) it would be a burden for QPSI and INL to defend in Idaho, (3) the most efficient judicial resolution of the dispute is in Pennsylvania; and (4) an alternative forum exists. Mem. in Supp. of Defs.' INL/QPSI Mot. to Dismiss 13. The arguments made by QPSI and INL in this regard are exceptionally conclusory and unsupported by any facts. *Smalley v. Kaiser,* 130 Idaho 909, 913, 950 P.2d 1248 (1997), outlines the the factors to consider in regards to whether personal jursdiction comports with fundamental fairness once a court determines that minimum contacts have been met. 130 Idaho 909, 913, 950 P.2d 1248 (1997). The factors are:

> [1] "the burden on the defendant,"
> [2] "the forum State's interest in adjudicating the dispute,"
> [3] "the plaintiff's interest in obtaining convenient and effective relief,"
> [4] "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and
> [5] the "shared interest of the several States in furthering fundamental substantive social policies."

Id. (citing) *Western States Equip. Co. v. American Amex Inc.,* 125 Idaho 155, 158-59, 868 P.2d 483, 486-87 (1994).

In the present case, this Court finds that the balance of the analysis provides that fundamental fairness is met by allowing personal jurisdiction in Idaho courts. The resources of QPSI and INL are not known, but if they can satisfy Walmart's demand for packaged prescription drugs, their resources are not slight. The plaintiffs' interest in this matter, in obtaining convenient and effective relief, clearly outweighs the burden on QPSI and INL to litigate an out-of-state action. QPSI and INL state that Florida or Pennsylvania would be proper states for the action. This indicates that they have the ability to litigate such an action across state lines. Additionally, the Court in *Doggett* held that:

> On the basis of the United States Supreme Court Cases, we conclude that under these circumstances the one contact with Idaho, resulting as it did in injury to an Idaho resident, was sufficient to give Idaho jurisdiction over the respondents in a tort action. In placing their goods in the flow of interstate commerce, the respondents must have had the reasonable expectation that such items would be shipped indiscriminately throughout the United States. If dangerously defective goods are placed in the interstate flow of commerce, those whose negligence created the defect should be prepared to defend themselves wherever the injury should occur.

93 Idaho at 33-32 (1969). For the reasons outlined in *Doggett*, it is in Idaho's interest to adjudicate a dispute such as this where one of its citizens died as a result of the alleged

tortious actions of QPSI/INL. Similarly, it is in the shared interest of the several states in furthering the substantive social policy of having such tortious actions adjudicated in the plaintiffs' forum state. Finally, while QPSI/INL argue that it is more efficient to try the case where the packaging was performed, this does not weigh heavily against the similar costs and inefficiency the majority of the plaintiffs, as well as witnesses in Idaho, would suffer in having to travel to QPSI/INL's preferred forum states of Pennsylvania or Florida.

III. CONCLUSION AND ORDER.

For the reasons set forth above, defendant QPSI and INL's Motion to Dismiss is denied.

IT IS HEREBY ORDERED that defendant QPSI/INL's Motion to Dismiss is DENIED.

Entered this 23rd day of March, 2020.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 23rd day of March, 2020, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail, email or facsimile to each of the following:

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