THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **Joseph E Donahue, III, et al v NovoCure Limited, et al**
Case Number: **218-2017-CV-00058** ***218-2017-CV-00069***

Enclosed please find a copy of the court's order of December 04, 2017 relative to:

Omnibus on the Parties Motion

December 05, 2017

Maureen F. O'Neil
Clerk of Court

(595)

C: David P. Slawsky, ESQ; Christopher James Somma, ESQ; Christopher Rouse Minue, ESQ; Joshua L Crowell, ESQ; Casey E Sadler, ESQ; Danielle L Manning, ESQ; W. Daniel Deane, ESQ; Rhiana L Swartz, ESQ; Thomas L Laughlin IV, ESQ; Amanda F. Lawrence, ESQ; Sean T. Masson; Hillie R Sheppard, ESQ; Kathryn L Alessi, ESQ; Brian E Pastuszenski, ESQ; Inez H Friedman-Boyce, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

Joseph E. Donahue, III, et al.

v.

NovoCure Limited, et al.

218-2017-CV-00058

Omnibus Order on the Parties' Motions

Plaintiffs Joseph E. Donahue III, Stephen Rosen, and Susan Rosen, commenced this class action under §§ 11[1] and 15[2] of the Securities Act of 1933 ("the 1933 Act") against Defendants NovoCure Limited ("NovoCure"); William Burkoth, Asaf Danziger, William F. Doyle, Wilhelmus Groenhuysen, Timothy Langloss, Louis J. Lavigne, Jr., Kinyip Gabriel Leung, Robert J. Mylod, Jr., Yoram Palti, Charles G. Phillips, III, and William A. Vernon (the "Individual Defendants"); and J.P. Morgan Securities LLC, Deutsche Bank Securities Inc., Evercore Group LLC, Wells Fargo Securities LLC, JMP Securities LLC, and Wedbush Securities Inc., (the "Underwriter Defendants"). Defendants move to dismiss the action. Plaintiffs object and, in the alternative, request jurisdictional discovery. For the following reasons, the case is DISMISSED WITHOUT PREJUDICE and Plaintiffs' request for jurisdictional discovery is DENIED.

Facts

The following facts are drawn from Plaintiffs' Complaint. NovoCure is a commercial-stage oncology company that is attempting to develop a cancer treatment that uses low-intensity electric fields ("Tumor Treating Fields" or "TTFields") to disrupt

[1] 15 U.S.C. § 77k
[2] 15 U.S.C. § 77o

cancer cells from dividing and growing into tumors. Compl. ¶¶ 3, 17, 44.

NovoCure is organized under the laws of Jersey, a channel island in between England and France. *Id.* at ¶ 17. Its principal executive offices are located at Le Masurier House, La rue le Masurier, St. Helier, Jersey JE2 4YE. *Id.* NovoCure conducts United States operations in Portsmouth, New Hampshire.[3] *Id.* Plaintiffs do not allege that any party in this case is domiciled in the State of New Hampshire. *See Id.* at ¶¶ 12–37. On October 1, 2015, NovoCure made an Initial Public Offering (IPO) and sold 7,878,195 shares of the company, netting approximately $157.5 million. *Id.* at ¶ 2. During the relevant period, NovoCure's securities were traded on the NASDAQ stock market. *Id.* at ¶ 39. Plaintiffs estimate the total number of class members to be in the hundreds of thousands. *Id.*

The instant litigation involves the viability of NovoCure's first TTFields delivery system, the Optune System ("Optune"). *Id* at ¶¶ 4–7. Optune received FDA approval in 2011 for use as a monotherapy treatment for adult patients with glioblastoma brain cancer ("GBC"). *Id.* at ¶ 4. Optune is a cumbersome device, weighing upwards of six pounds that must be worn on a patient's head for approximately 18 hours each day. *Id.* at ¶¶ 46, 51. The device requires a shaved head as it uses adhesive patches that are applied directly to the scalp. *Id.* at ¶ 46. Optune costs approximately $21,000 per month and has an average therapy duration of nine months. *Id.* at ¶ 47.

Plaintiffs allege that NovoCure's offering materials were materially false and misleading as they did not disclose known trends, events, or uncertainties that were

[3] It appears that NovoCure has a subsidiary located in Portsmouth, New Hampshire. For the purposes of this Order, the Court assumes that NovoCure conducts United States operations at this Portsmouth location. This is, however, irrelevant to the disposition of this matter as Plaintiffs do not argue that Defendants have minimum contacts with the State of New Hampshire.

reasonably likely to have a negative impact on Optune and thus NovoCure. *Id.* at ¶¶ 92–5. Specifically, Plaintiffs allege that the offering materials were materially false and misleading and/or omitted to state:

> (1) that the company was, and would continue to be, experiencing competition from some large, high profile clinical trials that specifically excluded patients treated with Optune from enrollment; (2) that certain portions of NovoCure's prescriber base were highly skeptical of the company's product, and would likely require additional clinical trial data before prescribing the product; (3) that potential patients were repelled by the uncomfortable and intrusive nature of the product; (4) that the foregoing issues were significant barriers that would greatly hinder the growth of Optune and, given the company's lack of a viable pipeline, NovoCure's financial health; and (5) that the Company was releasing its second generation [of] Optune . . . to completely replace the first generation Optune System, which would necessarily require a $6.4 million write-off of the first generation inventory.

Id. at ¶ 7. Pursuant to the 1933 Act, Defendants were required to disclose the above information in their offering materials. As a result of this non-disclosure, Plaintiffs have suffered significant financial loss and damages as the value of NovoCure's shares has substantially declined since the IPO. *Id.* at ¶¶ 10–11.

Analysis

Defendants moves to dismiss this action for lack of personal jurisdiction, insufficient service of process, and lack of subject matter jurisdiction. The Court need only address the personal jurisdiction issue as it is dispositive.

I. Lack of Personal Jurisdiction

A *prima facie* showing of jurisdictional facts is sufficient to defeat a defendant's motion to dismiss. *Lyme Timber Co. v. DSF Investors, LLC*, 150 N.H. 557, 559 (2004). Whether personal jurisdiction is proper requires the Court to engage in a two part-inquiry. *Id.* First, the New Hampshire long-arm statute must authorize jurisdiction.

Second, the Federal Due Process clause must be satisfied. *Id.* New Hampshire's long-arm statute permits the exercise of jurisdiction to the extent permissible under the Federal Due Process Clause; thus, the Court's primary analysis relates to due process. *Id.* The Court may exercise personal jurisdiction over non-resident Defendants if they have certain minimum contacts with the State of New Hampshire such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Id.*

Jurisdiction can be general, where Defendants' contacts with New Hampshire are continuous and systematic, or specific, where the cause of action arises out of or relates to Defendants' contacts with the State of New Hampshire. *Id.* In this case, Plaintiffs assert that specific jurisdiction applies. Thus, the Court must analyze the relationship between Defendants, New Hampshire, and the litigation. *Id.* at 559–60. The Court examines whether: (1) Defendants' contacts relate to this lawsuit; (2) Defendants have purposefully availed themselves of the protections of New Hampshire law; and (3) if it would be fair and reasonable for Defendants to defend suit here. *Id.* at 560. All of these factors must be satisfied for the exercise of personal jurisdiction to be constitutional. *Id.*

A. The Inapplicability of the Fifth Amendment's Due Process Clause

Plaintiffs do not argue that Defendants have certain minimum contacts with the State of New Hampshire. Rather, they argue that the United States—not the State of New Hampshire—is the relevant forum and thus the Court should look to Defendants' contacts with the entire United States in determining whether to exercise personal jurisdiction. *See* Pl.'s Obj. to Def.'s Mot. Dismiss at 5–7. In making this argument,

Plaintiffs insist that the Fifth Amendment's Due Process Clause applies here because Plaintiffs are proceeding under a federal statute which authorizes nationwide service of process. *Id.* 5–7, 11. The Court disagrees.

The Court is cognizant of the fact that when a Plaintiff proceeds in *federal court* pursuant to a federal statute, and thus under the Fifth Amendment, "the Constitution requires only that the defendant have the requisite 'minimum contacts' with the United States, rather than with the particular forum state . . ." *United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1085 (1st Cir. 1992) (citations omitted). This is because "each *federal court* exercises the 'judicial power of the United States' not a judicial power constitutionally limited by the boundaries of a particular district." *Federal Trade Com. v. Jim Walter Corp.*, 651 F.2d 251, 256 (5th Cir. 1981) (emphasis added). Notwithstanding, this is not a federal court and the Fifth Amendment's Due Process Clause does not determine the limits of this Court's personal jurisdiction.

As a matter of constitutional law, "the Fifth Amendment Due Process Clause . . . applies only to actions of the federal government—not to those of state or local governments." *Martinez-Rivera v. Ramos*, 498 F.3d 3, 8 (1st Cir. 2007). Indeed, the Fifth Amendment's Due Process Clause has never been incorporated and applied to the States through the Fourteenth amendment, nor would such incorporation be rational. *See McDonald v. City of Chicago*, 561 U.S. 742, n. 12 (2010) (not listing the Fifth Amendment Due Process Clause as a right that has been incorporated through the Fourteenth Amendment); *see also Washington-Pope v. City of Philadelphia*, 979 F. Supp. 2d 544, n. 1 (E.D. Pa. 2013) ("[T]he idea that the Fourteenth Amendment's Due

Process Clause incorporates the Fifth Amendment's Due Process Clause is unsustainable because the phrase 'due process of law' used in the Fourteenth Amendment to restrain action by the states means substantially the same as the phrase of the Fifth Amendment, restraining action by the Federal government.").

Put plainly, the Fifth Amendment's Due Process Clause has never been thought applicable to the States, *See Barron v. City of Baltimore*, 32 U.S. 243, 247 (1833) ("[T]he fifth amendment must be understood as restraining the power of the general government, not as applicable to the states."), hence, the United States adopted the Fourteenth Amendment's Due Process Clause in the aftermath of the Civil War. *Compare* U.S. CONST. amend. V ("nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .); *with* U.S. CONST. amend XIV ("nor shall any *state* deprive any person of life, liberty, or property, without due process of law . . .") (emphasis added). Thus, the Court finds the Fifth Amendment's Due Process Clause inapplicable and Plaintiffs' citation to numerous federal district court cases applying the same, unpersuasive. *See* Pl.'s Obj. to Def.'s Mot. Dismiss at 6–7.

B. The Fourteenth Amendment's Due Process Clause

Unlike the Fifth Amendment, "the prohibitions of the [Fourteenth Amendment] extend to *all* action[s] of the State[s]," *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) (citing *Ex parte Virginia*, 100 U.S. 339, 347 (1880)), including "[all] manifestations of State authority in the shape of laws, customs, or judicial or executive proceedings." *id.* (citing *Civil Rights Cases*, 109, U.S. 3, 11, 17 (1883)). "It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts. Because a state court's assertion of jurisdiction exposes defendants to the State's coercive power . . ."

Id. (quotations and alterations omitted). *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1779 (2017) (citations omitted).

"[R]estrictions on personal jurisdiction are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Id.* at 1780 (quotation omitted). This is due to "limitations inherent in concepts of sovereignty." *Jim Walter Corp.*, 651 F.2d at 256. In other words, "in enacting and enforcing laws, each state exercises a sovereign function." *Id.* This sovereignty, however, may only be exercised against those who have submitted themselves to the sovereign through jurisdictional contacts. *See Id.* The law is clear: "even if [Defendants] would suffer minimal or no inconvenience from being forced to litigate before the tribunals of [New Hampshire]; even if [New Hampshire] has a strong interest in applying its law to the controversy; even if [New Hampshire] is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest [New Hampshire] of its power to render a valid judgment." *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780–81 (quotation and bracket omitted).

Here, the State of New Hampshire is the sovereign that created this Court. Thus, the Court's ability to exercise personal jurisdiction over Defendants is limited to cases and controversies arising out of Defendants' contacts with the State of New Hampshire. Plaintiffs' argument that the Court may look to national contacts because they are proceeding under a federal statute is therefore unavailing. It is the sovereign that created the court, not the sovereign that created the statute that determines the limits of this Court's personal jurisdiction. Thus, regardless of the statute being applied, the

Court may only exercise personal jurisdiction over Defendants if they have certain minimum contacts with the State of New Hampshire.

C. The Applicability of the 1933 Act's Nationwide Service of Process Provision

Nevertheless, Plaintiff argues that the 1933 Act's nationwide service of process provision establishes that the United States is the relevant forum here. *See* Pl.'s Obj. to Def.'s Mot. Dismiss at 11. Curiously, Plaintiffs utilized New Hampshire service procedures when attempting to serve Defendants in this case. Again, the Court disagrees and finds the 1933 Act's nationwide-service-of-process provision inapplicable in New Hampshire state courts.

At the outset, the Court notes that although "personal jurisdiction and service of process are distinguishable, they are inextricably intertwined, since service of process constitutes the vehicle by which the court obtains jurisdiction." *United Elec., Radio & Mach. Workers*, 960 F.2d at 1085. A number of federal statutes, such as the 1933 Act, provide for nationwide service of process. *See e.g.*, 15 U.S.C. § 77v(a) (the Securities Act); 15 U.S.C. § 5 (the Sherman Act); 15 U.S.C. § 25 (the Clayton Act); 18 U.S.C. § 1965 (RICO). The 1993 Act's nationwide service of process provision provides in relevant part:

> The *district courts* of the United States and United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the *district* wherein the defendant is found or is an inhabitant or transacts business, or in the *district* where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other *district* of which the defendant is an inhabitant or wherever the defendant may be found . . .

15 U.S.C. § 77v(a) (emphasis added).

From the above, Plaintiffs argue that the 1933 Act permits nationwide service of process in state court. In support of this contention, Plaintiffs cite dicta in *Lakewood Bank & Trust Company v. Superior Court*, which suggests that nationwide service of process is available in state court. 129 Cal. App. 3d 463, 470 (Cal. Ct. App. 1st Dist. 1982). Admittedly, there is a dearth of case law on this specific issue; yet, other courts have rejected *Lakewood*'s dicta. *See e.g.*, *Niitsoo v. Alpha Natural Resources*, Inc., No. 12-C-149, 2015 WL 356970, at 4 (W. Va. Cir. Ct. Jan 8, 2015) (*Lakewood* "does not support Plaintiffs proposition, as the defendants in Lakewood were *in-state* defendants." (citation omitted, emphasis in the original); *Kelly v. McKesson HBOC, Inc.*, No. CIV.A. 99C–09–265WCC, 2002 WL 88939, at 18–20 (Del. Super. Ct. 2002); *Negin v. Cico Oil & Gas Company*, 46 Misc.2d 367, 368 (N.Y. Civ. Ct. 1965).

The Court is persuaded by the Delaware Superior Court's analysis of this precise issue in *Kelly*, which found the 1933 Act's nationwide-service provision inapplicable in state court. 2002 WL 88939, at 18–20. Like *Kelly*, this Court finds that the service language contained in 15 U.S.C. § 77v(a) is clearly written in a federal context. *Id.* at 19. "The words 'district', not state, are used and clearly [reference] the federal judicial districts into which the federal court system is divided." *Id.* That the statute is written in the federal context becomes clearer when the Court considers that the 1933 Act's nationwide-service-of-process provision was enacted prior to the United States Supreme Court's decision in *International Shoe Company v. Washington* 326 U.S. 310, 66 (1945). *Id.* Prior to *International Shoe*, the United States Supreme Court's holding in *Pennoyer v. Neff*, 95 U.S. 714 (1877) was the law of the land. During the *Pennoyer* era,

"States were held to be unable to extend their process beyond their territorial limits . . . Any extra-territorial reach by a state's courts was viewed as an encroachment on the rights of the other states and was to be resisted as usurpation." *Chattanooga Corp. v. Klingler*, 528 F. Supp. 372, 375 (E.D. Tenn. 1981) (internal quotation marks omitted). It is therefore unthinkable that Congress, during the *Pennoyer* era, would have passed legislation allowing for nationwide service of process in state courts without explicitly doing so. *Kelly*, 2002 WL 88939 at 19.

Consistent with the above, Plaintiffs have been unable to cite any federal or state court decision other than *Lakewood* that has reasoned that the nationwide service provision of the 1933 Act applies in a state court action. Indeed, this Court has found at least one case suggesting the contrary in an analogous setting. *See e.g.*, *Haught v. Agricultural Prod. Credit Ass'n*, 39 S.W.3d 252, 257–58 (Tex. App. 2000) (finding the RICO statute's nationwide service of process provision "applicable only in federal court." (citing *Tafflin v. Levitt*, 493 U.S. 455, 466 (1990)). Thus, the Court finds the 1933 Act's nationwide-service-of-process provision inapplicable. Such provision, therefore, cannot support Plaintiffs' nationwide contacts theory of personal jurisdiction. Consequently, the case is DISMISSED WITHOUT PREJUDICE as Plaintiffs' have not argued that any Defendant has sufficient minimum contacts with the State of New Hampshire.

II. Plaintiffs' Request for Jurisdictional Discovery

Plaintiffs requested jurisdictional discovery midway through the hearing on this motion. "Where there is an issue about whether or not jurisdiction exists, limited jurisdictional discovery may be appropriate." *Heller v. DiCecca*, No. 2014-CV-344, 2014 N.H. Super. Lexis 10, at 8 (N.H. Super. Ct. July 18, 2014) (citation omitted). "[A] diligent

Plaintiff who sues an out-of-state corporation and who makes out a colorable case for the existence of *in personam* jurisdiction *may* well be entitled to a modicum of jurisdictional discovery if the corporation interposes a jurisdictional defense." *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 625 (1st Cir. 2001) (quotation and citation omitted, emphasis in the original). "However, that entitlement is not absolute." *Id.* (quotation omitted). "A plaintiff must be diligent in preserving his or her rights." *Id.* (citation omitted). "This includes the obligation to present facts to the court which show why jurisdiction would be found if discovery were permitted." *Id.* at 626.

Here, Plaintiffs have not presented a colorable claim for the existence of personal jurisdiction, nor have they been diligent in preserving their right to jurisdictional discovery. Thus far, Plaintiffs have insisted that Defendants' contacts with the United States are the only contacts which are relevant. Other than conclusory allegations, Plaintiffs have not identified one contact by Defendants with the State of New Hampshire that relates to this litigation. Thus, the Court finds that they have not presented a colorable claim for the existence of personal jurisdiction.

Moreover, Defendants have not diligently preserved their rights. First, their request for jurisdictional discovery is untimely. Such request was made, for the first time, midway through the hearing on this motion and after it became apparent that Plaintiffs nationwide-contacts theory was unpersuasive. Second, their request is insufficient—they have not alleged the specific contacts with the State of New Hampshire that they wish to uncover via jurisdictional discovery. *See id.* at 626–27 ("Failure to allege specific contacts, relevant to establishing personal jurisdiction, in a jurisdictional discovery request can be fatal to that request." (citation omitted)).

Consequently, given Plaintiffs' overall unpersuasive case for personal jurisdiction, the untimeliness of Plaintiffs' request for jurisdictional discovery, and Plaintiffs' failure to allege the specific contacts they wish to uncover, Plaintiff's request for jurisdictional discovery is DENIED. *See id.* at 627.

Conclusion

For the reasons set forth above, the case is DISMISSED WITHOUT PREJUDICE and Plaintiffs' request for jurisdictional discovery is DENIED.

So Ordered.

December 4, 2017
DATE

David A. Anderson
Presiding Justice