IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT BOSCH LLC, Plaintiff, v. ALBEREE PRODUCTS, INC., API KOREA CO., LTD., SAVER AUTOMOTIVE PRODUCTS, INC., and COSTCO WHOLESALE CORPORATION, Defendants.	)	Civil Action No. 12-574-LPS
COSTCO WHOLESALE CORPORATION, Counter-Plaintiff, v. ROBERT BOSCH LLC and ROBERT BOSCH GMBH, Counter-Defendants.	)	

REDACTED PUBLIC VERSION

MEMORANDUM ORDER

At Wilmington this **17th** day of **March, 2016**:

Having reviewed the parties' briefing (D.I. 200, 209, 223) on API Korea Co., Ltd.'s ("API") Renewed Motion to Dismiss the Second Amended Complaint for Lack of Personal Jurisdiction (D.I. 200), **IT IS HEREBY ORDERED** that API's motion to dismiss is **DENIED**.

1. On September 29, 2014, the Court denied without prejudice API's Motion to Dismiss the Second Amended Complaint for Lack of Personal Jurisdiction, and granted Robert

Bosch LLC's ("Bosch" or "Plaintiff") request for jurisdictional discovery with respect to API. (D.I. 76, 77) In its Memorandum Opinion issued that day, the Court set out the factual background and applicable legal standards, which the Court will not repeat in full here.[1] *See Robert Bosch, LLC v. Alberee Prods., Inc.*, 70 F. Supp. 3d 665, 670-77 (D. Del. 2014). With regard to API, the Court concluded:

> Although Bosch argues there is an agency relationship between API and Alberee or Saver, Bosch does not offer any significant evidence of such relationships. Bosch's only support for its position is that (1) Albert Lee, the owner of Alberee, and Choon Bae Lee, the owner of API, jointly applied for a patent related to wiper blades in Korea and are co-inventors on a U.S. Patent; (2) API sells millions of components to Alberee; and (3) Saver has represented itself as having manufacturing facilities in Korea. API is a Korean company with no evident relationship with Saver or Costco. Alberee takes possession of the API-manufactured components in Busan, Korea, importing them to the United States through Los Angeles, California.
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> Nor has Bosch met its burden to demonstrate personal jurisdiction over API under the dual jurisdiction theory. . . . API sold components to a Maryland company, which assembled and sold them to another Maryland company, which in turn sold them to a national distributor. Aside from the components appearing in Delaware as finished products, there is no evidence that API has any ties to Delaware other than this suit. Examining the limited evidence presented, it is insufficient to establish that API had the requisite intent to serve Delaware.

Id. at 680 (internal citations omitted).

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[1]Bosch continues to bear only a prima facie burden for establishing personal jurisdiction over API, as there has not been a jurisdictional hearing regarding jurisdictional discovery, and the parties have not indicated that the jurisdictional facts are undisputed. *See Celgard, LLC v. SK Innovation Co.*, 2015 U.S. App. LEXIS 11536, at *9 (Fed. Cir. July 6, 2015) ("In this case, jurisdictional discovery was conducted and the district court did not conduct a jurisdictional hearing, but we see no indication that the parties agreed that the jurisdictional facts were not in dispute. . . . As such, Celgard must make a prima facie showing of jurisdiction.").

2. Plaintiff argues that jurisdictional discovery has revealed evidence that API has an agency relationship with Alberee and Saver.[2] Under agency theory, a defendant company may be subject to personal jurisdiction under Delaware's long-arm statute based on contacts attributed to the defendant company's affiliate. *See Intellectual Ventures I LLC v. Nikon Corp.*, 935 F. Supp. 2d 787, 793 (D. Del. 2013); *C.R. Bard, Inc. v. Guidant Corp.*, 997 F. Supp. 556, 559-60 (D. Del. 1998). Agency theory may be applied not only to parents and subsidiaries, but also to companies that are "two arms of the same business group," operate in concert with each other, and enter into agreements with each other that are nearer than arm's length. *See Cephalon, Inc. v. Watson Pharm., Inc.*, 629 F. Supp. 2d 338, 348 (D. Del. 2009); *Wesley-Jessen Corp. v. Pilkington Visioncare, Inc.*, 863 F. Supp. 186, 188-89 (D. Del.1993). Among the factors for determining whether an agency relationship exists are: "[1] the extent of overlap of officers and directors, [2] methods of financing, [3] the division of responsibility for day-to-day management, and [4] the process by which each corporation obtains its business." *Eastman Chem. Co. v. AlphaPet Inc.*, 2011 WL 6004079, at *12 (D. Del. Nov. 4, 2011) (internal citation omitted).

3. Plaintiff does not point to any overlap of officers or directors. With respect to financing methods, Plaintiff contends that sales to Alberee, which constitute [redacted] provide capital for API (*see* D.I. 210 Ex. 1 at 42-43, 97), and that API has relied on photos of Saver and Alberee products in a loan application (*see id.* at 79-81, 92-94; D.I. 210 Ex. 2 at API0021856-61). The Court disagrees that either of these circumstances leads to a

[2]Although Plaintiff also argues for an "alter ego" relationship, it does not point to any fraud or inequity which would allow the Court to "pierce the corporate veil." *See Applied Biosystems, Inc. v. Cruachem, Ltd.*, 772 F. Supp. 1458, 1463 (D. Del. 1991) ("Under the alter ego or piercing the corporate veil doctrine, courts will ignore the corporate boundaries between parent and subsidiary if fraud or inequity is shown.").

conclusion that API's method of financing reflects an agency relationship as opposed to an arms-length buyer-seller relationship. (*See* D.I. 210 Ex. 1 at 45-46) (API's 30(b)(6) witness stating "[t]hey [Alberee] are our largest customer, so that would be the relationship") With respect to involvement in day-to-day management, Plaintiff points to: (1) a bank report for Alberee and Saver referring to [redacted] (2) an email from a non-officer Saver employee referring to [redacted] (3) Alberee's involvement in design and product quality issues via multiple visits per year by Alberee CEO Albert Lee to API's plant in Korea (*see* D.I. 210 Ex. 1 at 52-54); and (4) API's use of the name "Saver" at its manufacturing plant and in its domain name, which API's 30(b)(6) witness has testified was chosen because API wanted – but was unable – to sell finished products under the Saver brand in Korea (*id.* at 71-74; D.I. 210 Ex. 2 at API0021847). Here too, the Court disagrees that any of these circumstances should result in a finding of an agency relationship. Neither the bank report nor the email from a non-official employee are admissions by API. While the latter may create a factual dispute regarding API's representation that Alberee is API's customer (*compare* D.I. 210 Ex. 4 at SAVER0188970 *with* D.I. 210 Ex. 1 at 45-46), it cannot be viewed as reflecting Alberee's involvement in API's "day-to-day management." *Godfrey v. United States*, 748 F.2d 1568, 1575 (Fed. Cir. 1984) (describing day-to-day management as including daily office visits, making personnel decisions, ordering materials and supplies, conducting correspondence, setting job prices, negotiating contracts, preparing invoices, disbursing and signing checks, making bank deposits, using business address, and being on the payroll). The same goes for Mr. Albert Lee's occasional visits to API's plant. *See id.* Although API's use of the brand name Saver suggests a closer than arms-

length relationship, API has provided an adequate explanation for the use of the brand name, which Plaintiff does not appear to dispute. Finally, with respect to obtaining business, Plaintiff emphasizes that [redacted] involves a long-term arrangement to supply components to Alberee (*see* D.I. 210 Ex. 1 at 97), which, in turn, receives most of its components for the accused products from API (*see* D.I. 210 Ex. 3 at 9). Alberee's business is primarily aimed at supplying Saver, and Saver obtains its business from nationwide retailers such as Costco. (*See* D.I. 210 Ex. 1 at 46-48, 120-21) While this fourth factor could weigh in favor of a finding of agency, it is insufficient in the totality of the circumstances to allow the Court to conclude that an agency relationship exists. Accordingly, the Court will not attribute Alberee or Saver's jurisdictional contacts to API.

4. Next, Plaintiff argues that jurisdictional discovery has revealed additional facts in support of a finding of dual, or stream-of-commerce, jurisdiction based on subsections c(1) and c(4) of Delaware's long-arm statute. *See* 10 Del. C. § 3104. Under this approach, jurisdiction exists when a defendant displays "an intent to serve the Delaware market" and "this intent results in the introduction of [a] product into the market and . . . plaintiff's cause of action arises from injuries caused by that product." *Belden Techs., Inc. v. LS Corp.*, 829 F. Supp. 2d 260, 267-68 (D. Del. 2010). Here, jurisdictional discovery has shown that API is not only aware that the components it ships to Alberee are used in wiper blade products sold in the United States through a U.S. distribution chain involving Alberee, Saver, and Costco (*see* D.I. 210 Ex. 1 at 33, 48-49, 110-13, 120-21), but also knows that Costco is "one of the largest distributors in the U.S." (*id.* at 121). Furthermore, the finished wiper blade products have actually been sold by Costco in Delaware. (*See* D.I. 40 at ¶ 3) In the absence of any evidence that API intended to exclude

Delaware from the U.S. distribution of the finished wiper blade products containing the API components, the Court finds that API had an intent to serve the Delaware market, and it is undisputed that this cause of action arises from injuries caused by those products. Accordingly, the Court may exercise dual jurisdiction over API pursuant to Delaware's long-arm statute.

5. The Court must next determine whether such an exercise of jurisdiction comports with the requirements of Due Process. In *Asahi Metal Industry Co. v. Superior Court*, the Supreme Court was divided on the question of whether "mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes 'minimum contacts' between the defendant and the forum State," such that the requirements of Due Process were satisfied. 480 U.S. 102, 105 (1987). Justice Brennan, writing for four justices, took the view that "jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause;" for, "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Id.* at 117 (plurality opinion). Justice O'Connor, also writing for four justices, rejected Justice Brennan's approach and wrote instead:

> The "substantial connection" between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.

Id. at 112 (plurality opinion) (internal citation omitted). The Federal Circuit has emphasized that "[i]f [the Defendant] is able to satisfy Justice O'Connor's test, there [is] no need to address

whether the less restrictive test proposed by Justice Brennan should be the standard . . . under the due process clause." *Commissariat A L 'Energie Atomique v. Chi Mei Optoelectronics Corp.*, 395 F.3d 1315, 1324 (Fed. Cir. 2005); *see also Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1566 (Fed. Cir. 1994). The O'Connor test is satisfied when a party engages in "[a]dditional conduct . . . indicat[ing] an intent or purpose to serve the market in the forum State, for example . . . marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi*, 480 U.S. at 112.

6. Here, jurisdictional discovery has revealed evidence supporting an inference "that the distribution channel formed by [API, Alberee, Saver, and Costco] was intentionally established, and that defendants knew, or reasonably could have foreseen, that a termination point of the channel was [Delaware]." *Beverly Hills Fan*, 21 F.3d at 1564. API's CEO and 30(b)(6) witness, Choon Bae Lee, testified that API develops products with a view toward their feasibility in the U.S. market, as the finished products sold by Alberee incorporating the API components are sold in the United States. (*See* D.I. 210 Ex. 1 at 100-04) To this end, API makes components for finished products that are protected by a U.S. patent (*see id.* at 109-10), and Mr. C.B. Lee attends a yearly trade show in the United States to observe wiper blade products (*id.* at 13-14, 35-36). Indeed, Mr. C.B. Lee acknowledged that API was "targeting the U.S. market." (*Id.* at 103) This goes beyond evidence of mere foreseeability that API's components would be sold in Delaware. Rather, API had knowledge that its components were used by Alberee in finished products sold to Saver for distribution through nationwide retailers such as Costco. API "purposefully shipped the accused [product] into [Delaware] through an established distribution channel [and] [t]he cause of action for patent infringement is alleged to arise out of these

activities." *Beverly Hills Fan*, 21 F.3d at 1565.[3] That API does not know either where Delaware is (*see* D.I. 210 Ex. 1 at 45) or whether the finished products are actually sold in Delaware (*see id.* at 118-20) does not alter this conclusion.

7. The Court's conclusion is not inconsistent with the Federal Circuit's determination in *Celgard, LLC v. SK Innovation Co.*, 2015 U.S. App. LEXIS 11536 (Fed. Cir. July 6, 2015), that personal jurisdiction based on stream-of-commerce could not be exercised over the defendant there. In *Celgard*, the

> evidence fail[ed] to show that [defendant]'s separators actually have been found in North Carolina, much less that [defendant could] foresee that its [products would] make their way there. Celgard's inability to show that [defendant could] foresee that its separators will make their way to North Carolina also necessarily implies that [defendant] did not also have "something more," a purposeful availment of the privileges and laws of North Carolina, as required by Justice O'Connor's formulation of the stream-of-commerce test.

Id. at *20-21 (citing *Asahi*, 480 U.S. at 112). Here, by contrast, the finished products were actually sold in Delaware (D.I. 40 at ¶ 3) and, as discussed above, API purposefully availed itself of the privileges and laws of Delaware by designing products for the U.S. market – products that enjoy U.S. patent protection and are partly based on knowledge of the U.S. market obtained through trade shows. Hence, here, unlike in *Celgard*, exercising personal jurisdiction over API based on stream-of-commerce comports with Due Process.

This Memorandum Order is issued under seal because several of the parties' filings were

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[3]As stated in the Court's previous Memorandum Opinion, the fact that API supplies only components and not the final assembly does not insulate API from jurisdiction. *See generally LG.Phillips LCD Co., Ltd. v. Chi Mei Optoelectronics Corp.*, 551 F. Supp. 2d 333, 339 (D. Del. 2008).

filed under seal. (*See, e.g.*, D.I. 209, 223) The parties shall meet and confer and shall, no later than March 21, 2016, provide the Court with a proposed redacted version of this Memorandum Order. Thereafter, the Court will issue a publicly-available version.

HONORABLE LEONARD P. STARK
UNITED STATES DISTRICT COURT