Nos. 125020, 125021

IN THE SUPREME COURT OF ILLINOIS

CHRISTY RIOS, *ET AL.*, *Plaintiffs-Appellees* **v.** **BAYER CORPORATION, BAYER HEALTHCARE LLC, BAYER ESSURE INC., and BAYER HEALTHCARE PHARMACEUTICALS, INC.,** *Defendants-Appellants.*	On Appeal from the Appellate Court of Illinois, Fifth District No. 5-18-0278 There on Interlocutory Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois No. 16-L-1617 The Hon. Denis R. Ruth Judge Presiding
NICHOLE HAMBY *ET AL.*, *Plaintiffs- Appellees* v. **BAYER CORPORATION *ET AL.*,** *Defendants-Appellants.*	On Appeal from the Appellate Court of Illinois, Fifth District No. 5-18-0279 There on Interlocutory Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois No. 16-L-1046 The Hon. William A. Mudge Judge Presiding

BRIEF AND ARGUMENT OF THE *RIOS* & *HAMBY* PLAINTIFFS–APPELLEES

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Bayer's interlocutory appeal to this Court presents a basic and uncomplicated question of specific personal jurisdiction—far from the "weighty constitutional issues" Bayer contends it brings. Br. at 1. The appeal arises from two separate lawsuits (*Rios* and *Hamby*, now consolidated) that two groups of Illinois and out-of-state Plaintiffs filed against Bayer in 2016, alleging injuries caused by Essure, a Bayer permanent contraceptive device. Plaintiffs sued in this forum due to Bayer's many purposeful Essure-related past and ongoing contacts with the State of Illinois.

Bayer has maintained consistently in both cases—to two Third Judicial Circuit Courts and a panel of the Illinois Fifth District Appellate Court—that specific jurisdiction is lacking under *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773 (2017) ("*BMS*"). But despite having failed to convince five circuit and appellate judges of the merits of its position, Bayer now makes yet another attempt.

As little has changed in its latest appeal, Bayer should not succeed here either. The current brief merely echoes Bayer's prior submissions. Beyond continuing to disregard or twist the lower courts' reasoned conclusions, Bayer still ignores jurisdictional principles, including discounting the significance of its own numerous Essure-connected contacts with Illinois. Instead, it focuses improperly on the non-Illinois Plaintiffs' conduct.

The appellate court correctly held specific jurisdiction over Bayer proper in this forum. The Court should thus affirm the judgments below, allowing Plaintiffs-Appellees' litigation to proceed on the merits.

INTRODUCTION

Rather than being forthright with the Court, Bayer's Brief begins by putting its uniquely improper spin on a simple issue of specific personal jurisdiction. Br. at 2–5. Bayer's lack of candor does not aid it in the least.

For example, the introduction argues that the court of appeals erred by holding specific jurisdiction proper "over claims brought by out-of-state Plaintiffs against out-of-state Defendants for injuries suffered out of state." *Id.* at 2. And Bayer continues by claiming the appellate court's ruling found improperly that "Bayer's *nationwide* marketing, research, and training activity—which took place in dozens of states across the country, including Illinois—was sufficient to create specific jurisdiction." *Id.* (italics in original). Additionally, Bayer claims the lower court erroneously failed to require "any causal connection" for its jurisdictional holding, maintaining "there is simply no link . . . between the out-of-state Plaintiffs' claims and this forum." *Id.* at 3. Thus, according to Bayer, the appellate decisions "conflict[] with the U.S. Supreme Court's ruling in *Bristol-Myers*." *Id.* at 2.

The Brief's introduction makes one wonder if Bayer has read the two appellate orders. *See Rios v. Bayer Corp.*, 2019 IL App (5th) 180278-U, *appeal allowed*, 132 N.E.3d 341 (Ill. 2019); and *Hamby v. Bayer Corp.*, 2019 IL App (5th) 180279-U, *appeal allowed*, 132 N.E.3d 341 (Ill. 2019). In fact, both opinions correctly summarize Bayer's purposeful contacts with Illinois, and Plaintiffs' claims arising from or related to those contacts:

Here, Bayer mistakenly focuses its arguments on appeal on the actions of the plaintiffs, and whether the plaintiffs themselves were injured in Illinois, visited doctors in Illinois, or had the device implanted in Illinois. That is not the correct analysis under the case law. Instead, we must look to the conduct of Bayer that occurred in Illinois and whether the causes of action in the complaint arose from or were connected to its conduct in Illinois.

* * * *

Here, Bayer directly targeted and marketed in Illinois, conducted clinic trials in Illinois, contracted with Illinois physicians and facilities, and established a physician accreditation program in Illinois. Unlike *Bristol-Myers Squibb*, the clinical trials conducted in Illinois were for the product at issue. . . . All of Bayer's conduct cited by the plaintiffs relates to the testing, development, and marketing of the Essure product. . . . Therefore, the plaintiffs' claims. . . all arise, at least in part, from Bayer's conduct in Illinois.

Rios, 2019 IL App (5th), at ¶¶ 17, 22; *Hamby*, 2019 IL App (5th), at ¶¶ 18, 23.

In short, the two appellate orders (as well as those of the circuit courts) exemplify the lower courts' careful adherence to specific jurisdiction principles governing the facts that establish Bayer's Essure-related contacts with Illinois. Therefore, Plaintiffs-Appellees respectfully request that the Court affirm the judgments below in all respects.

ISSUE PRESENTED FOR REVIEW

Whether under novo review the Fifth District Appellate Court correctly affirmed the Madison County Circuit Courts' holdings of specific personal jurisdiction over Bayer, in light of the jurisdictional precedent to which the appellate court adhered, and the factual allegations, taken as true, of Bayer's numerous purposeful Essure-related contacts arising from or related to Plaintiffs' claims.

STATEMENT OF FACTS

A. Procedural Background: *Rios* and *Hamby*

On July 25 and November 28, 2016, the 95-Plaintiff-Appellee *Rios* and 86-Plaintiff-Appellee *Hamby* groups filed separate lawsuits against Bayer. The *Rios* group consisted of Illinois resident Christy Rios, 8 Illinois Plaintiffs, and 85 other Plaintiffs residing in Illinois and 25 other states. The *Hamby* group was composed of Illinois resident Nichole Hamby, 12 Illinois Plaintiffs, and 73 Plaintiffs from 21 other states. All Plaintiffs-Appellees sued Defendant-Appellant Bayer in Madison County, Illinois, for injuries they suffered from Essure, Bayer's permanent female contraceptive device. *Rios*, C1–38; *Hamby*, C1–73.

Plaintiffs-Appellees filed their First Amended Complaints on October 13, 2017, following the U.S. Supreme Court's issuance of *Bristol-Myers Squibb (BMS)*, a case addressing established jurisdictional principles. The amended pleadings alleged specific jurisdiction over Defendant-Appellant Bayer, outlining in detail Bayer's substantial jurisdictional Illinois contacts related to Essure. *Rios*, C534–622; *Hamby*, C144–231. Bayer moved to dismiss the non-Illinois Plaintiffs' claims

in both amended pleadings, based on lack of specific jurisdiction, preemption, and other grounds. *Rios*, C623–64; *Hamby*, C232–72.

On April 18, 2018, after briefing and a combined *Rios-Hamby* hearing on personal jurisdiction, *Rios*, C1530–1607; *Hamby*, C1139–1216, both circuit courts issued orders denying dismissal on the basis that the exercise of specific jurisdiction over Bayer was not unreasonable. The two courts took all other briefed and argued motions under advisement. *Rios*, C1628–1635; *Hamby*, C1237–1245.

On June 28, 2018, the Fifth District Appellate Court granted Bayer's petitions for leave to file interlocutory appeals from the *Rios* and *Hamby* orders denying its motions to dismiss the non-Illinois Plaintiffs' claims. Some eleven months later, the appellate court issued two identical unpublished orders analyzing and affirming both circuit courts' holdings. The two appellate decisions held that specific personal jurisdiction over Bayer was appropriate and reasonable "because of the numerous ways in which it purposefully availed itself to [the] forum." A17.

Bayer then filed petitions for leave to appeal the *Rios* and *Hamby* appellate judgments affirming the circuit courts' holdings of specific jurisdiction. On September 25, 2019, this Court granted the Bayer petitions for leave and ordered the two interlocutory appeals consolidated. A1–2. Plaintiffs-Appellees now file their Brief and Argument.

B. Factual Background: *Rios* and *Hamby*

The background facts concerning the *Rios* and *Hamby* Plaintiff-Appellee groups are straightforward. They may be derived from the two amended pleadings'

detailed allegations. As noted above, both Plaintiff Christy Rios and Plaintiff Nichole Hamby were Madison County, Illinois residents. They and all other Illinois and non-Illinois Plaintiffs had Bayer Essure permanent contraceptive devices implanted. And each one of them suffered serious health risks and injuries arising from or related to Bayer's device. *Rios*, C534–622; *Hamby*, C144–231.

Therefore, in late July and November 2016, the *Rios* and *Hamby* Plaintiffs-Appellees sued Bayer in two Madison County Circuit Courts. Each lawsuit claimed negligence, strict products liability, breach of express and implied warranty, and fraud. *Rios*, C1–38; *Hamby*, C1–73. Both also alleged that Bayer engaged in misleading and false sales and marketing tactics for Essure. Plaintiffs' First Amended Complaints, filed on October 13, 2017, brought the same causes of action but included specific personal jurisdictional allegations. *Rios*, C534–622; *Hamby*, C144–231.

The undisputed facts concerning Bayer's Essure-related purposeful availment of this forum were set forth in detail in the *Rios* and *Hamby* First Amended Complaints. *Id.* And aside from the present record pending before this Court, the same facts concerning Bayer's jurisdictional contacts were presented to two circuit courts and the panel of the Fifth District Appellate Court.

The amended pleadings' facts that establish Bayer's Essure-related contacts may be summarized as follows:

- One of the locations Bayer chose to conduct the pivotal clinical trials for Essure was Chicago, Illinois. *Rios*, C537–41, 596; *Hamby*, C147–50.
- Bayer is still conducting Illinois clinical trials related to Essure to this day. *Rios*, C539; *Hamby*, C149.
- Data from the clinical Illinois trials was included in the Essure premarket approval material and was directly related to Essure's regulatory approval. *Rios*, C537–41, 549–550, 596; *Hamby*, C147–50.
- Bayer contracted with Illinois physicians and key opinion leaders to conduct the clinical trials for Essure. The Illinois physicians and opinion leaders also promoted Essure nationwide. *Rios*, C537–41, 549–550, 569; *Hamby*, C147–50.
- Illinois was a critical test bed for Bayer's direct-to-consumer marketing and advertising campaign for Essure; and the success of that program was utilized to conduct marketing nationwide. *Rios*, C537, 569–70; *Hamby*, C147–50.
- Bayer founded its Essure Accreditation Program (a physician training program) in Illinois, setting up websites and a call center. The Essure Accreditation Program was eventually implemented across the country. *Rios*, C537, 604; *Hamby*, C149; 213.

As the Court will see from the above summary, the First Amended Complaints' jurisdictional facts and record citations are detailed and precise. In fact, the appellate court considered them so comprehensive and specific as to include a verbatim recitation of the pleadings' allegations in each order. In the

interest of brevity, Plaintiffs-Appellees do not repeat the decisions' recitations but refer the Court to A7–8; A18–19.

Unlike Bayer's fact statement at 5-11 of its Brief—that appears to contain more argument than fact—the factual allegations in *Rios* and *Hamby* need no embellishment; they speak for themselves. The amended pleadings establish Bayer (and its predecessor Conceptus) ran Essure-related clinical trials in Chicago from at least 2000 to 2002. *Rios*, C537–41; *Hamby*, C147–50. Aside from Illinois FDA premarket approval clinical trials, Bayer also conducted a post-approval FDA-mandated study in Illinois to assess Essure's long-term safety and effectiveness. And Bayer is still conducting Illinois clinical trials to this day. Bayer's safety and effectiveness misinformation was derived from those clinical trials and studies. *Id*.

Next, in 2004 Conceptus began an Essure consumer marketing campaign in Chicago. *Id*. The campaign included radio, print, and direct mail advertisements, scheduled to arrive weekly at Chicago physicians' offices. *Id.* The Chicago-area campaign was used to "predict national results" of Bayer's marketing plan. This campaign led to the rolling out of its direct-to-consumer marketing plan to the *Rios* and *Hamby* Plaintiffs-Appellees and others. *Id.*

Finally, the pilot program for the Essure Accreditation Program (Bayer's physician training program) that Conceptus had created was carried out in the Chicago area. This program was eventually rolled out nationwide, including to

Plaintiffs-Appellees' implanting physicians. *Rios*, C537–48, 570; *Hamby*, C147–48.

The courts below carefully considered the above-cited facts in determining specific jurisdiction over Bayer was reasonable and proper. This Court should review the case-specific facts as well, and reach the same conclusion.

STANDARDS OF REVIEW

Bayer moved to dismiss the non-Illinois Plaintiffs' claims for lack of personal jurisdiction. A plaintiff generally bears the burden of establishing a prima facie basis for the exercise of personal jurisdiction over a nonresident defendant. *Russell v. SNFA*, 2013 IL 113909, ¶ 28, 987 N.E.2d 778. Because the circuit court determined personal jurisdiction solely on the documentary evidence before it, this Court's review is de novo. *See Kowal v. Westchester Wheels, Inc.*, 2017 IL App (1st) 152293, ¶ 14, 89 N.E.3d 807.

Only if Bayer presents uncontradicted evidence may Plaintiffs' prima facie case possibly be overcome. Not only has that not happened, this Court will resolve any conflicts in pleadings and affidavits in Plaintiffs' favor. *See Aspen Am. Ins. Co. v. Interstate Warehousing, Inc.*, 2017 IL 121281, ¶ 11, 90 N.E.3d 440. And since Bayer's appeal arises from the denial of its motion to dismiss under 735 Ill. Comp. Stat. § 5/2-619, the amended complaint's well-pled factual allegations will be accepted as true. *See, e.g.*, *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8, 953 N.E.2d 415.

ARGUMENT

A. OVERVIEW OF AUTHORITY SUPPORTING THE DENIAL OF DISMISSAL FOR LACK OF PERSONAL JURISDICTION

A personal jurisdiction analysis is not at all complicated. It begins by looking at "the relationship among the **defendant**, the **forum**, and the **litigation**." *See Walden v. Fiore,* 571 U.S. 277, 284 (2014) (emphasis added). But under the Due Process Clause of the Fourteenth Amendment, a forum state's exercise of personal jurisdiction over a non-resident defendant, compelling it to litigate in that state, must be "reasonable." *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

The courts below were well aware of the established jurisdictional principles and authority they were required to consider and apply before ruling on Bayer's motion to dismiss for lack of specific personal jurisdiction. First, the appellate court's order correctly held that "Bayer mistakenly focuses its arguments on appeal on the actions of plaintiffs. . . . This is not the correct analysis under the case law. Instead, we must look to the conduct of Bayer that occurred in Illinois and whether the causes of action in the complaint arose from or were connected to its conduct in Illinois." A13 at ¶ 18; A24 at ¶ 17. Further, the appellate court noted the following two-fold analysis regarding non-resident corporate defendants:

> To exercise specific personal jurisdiction against an out-of-state corporate defendant: (1) defendant must have certain minimum contacts with the forum that (a) it purposefully directed its activities toward the forum, and (b) the suit must directly arise from or be connected to defendant's purported wrongful conduct within the

> forum state; and (2) it must be reasonable to require defendant to litigate within the forum state.

A10–11 at ¶ 13; A21 at ¶ 12 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

The circuit courts' decisions, and the appellate court's affirmance of those decisions, were correct in all respects. This Court's review of the legal analysis and facts included in the orders denying dismissal for lack of specific personal jurisdiction establishes that it should also affirm.

B. THIS COURT SHOULD AFFIRM BECAUSE THE LOWER COURTS APPLIED SPECIFIC JURISDICTION PRINCIPLES AND BAYER-RELATED JURISDICTIONAL FACTS

1. Bayer Ignores the "Case-Specific" Principle of Personal Jurisdiction

To convince the Court to reverse the lower courts' denial of its motion, Bayer pays no heed to a fundamental jurisdictional principle. The present litigation pertains only to specific personal jurisdiction. And the law is unequivocal on that issue: "**Specific jurisdiction is case-specific**." *See Aspen Am. Ins. v. Interstate Warehousing, Inc.*, 2017 IL 121281, ¶ 14, 90 N.E.3d 440 (emphasis added) (citing *Russell v. SNFA*, 2013 IL 113909, ¶ 40, 987 N.E.2d 778; *see also Torio v. Davidson Surface/Air, Inc*., 2018 IL App (5th) 160061-U, ¶ 14.

Putting it another way, "[i]n determining whether sufficient minimum contacts exist, courts should . . . **look to the facts and circumstances of each individual case**." *See Capital Assocs. Dev. Corp. v. James E. Roberts-Ohbayashi Corp*., 138

Ill. App. 3d 1031, 1036, 487 N.E. 7 (1st Dist. 1985) (emphasis supplied). Likewise, the Fifth District has held that "the determination as to what constitutes sufficient minimum contacts depends upon the facts of each case." *See Unterreiner v. Pernikoff*, 2011 IL App (5th) 110006, ¶ 5, 961 N.E.2d 1 (Illinois patient's single return phone call to Missouri physician who practiced and had treated her in Missouri held insufficient for specific jurisdiction).

Bayer is disinterested in the personal jurisdiction rule of case-specificity, however. Rather, it urges the Court to follow the holdings of *BMS* and several other cases—simply because those courts dismissed other claims for lack of personal jurisdiction. Br. at 14–17. The specific facts of each opinion—whether dissimilar or not to the facts here—are immaterial to Bayer.

But other courts' dismissals for lack of specific jurisdiction do not serve as precedent for this Court, as Bayer would have it believe. Facts in each decision are neither fungible nor transferable with respect to a specific personal jurisdiction analysis. They are specific to each case, as the analysis by the appellate court, before affirming the circuit court's denial of Bayer's motion to dismiss, made clear.

In short, courts do not rely blindly on other specific jurisdiction decisions as precedent. Rather, each court engages in a fact-specific analysis to determine whether the "minimum contacts" requirement of specific personal jurisdiction was met. Depending on the facts, that may or may not happen.

To that end, Plaintiffs–Appellees now provide the Court with varied state and federal decisions—as examples, not precedent—concerning forum state

connections or contacts. Due to the facts of the cases below, the contacts were held insufficient for the exercise of specific jurisdiction. *See, e.g., John Crane, Inc. v. Shein Law Ctr., Ltd*., 891 F.3d 692 (7th Cir. 2018) (incidental communications with Illinois resident concerning previous litigation in other states insufficient for specific jurisdiction); *Livingston v. Hoffmann-La Roche Inc*., 293 F. Supp.3d 760 (N.D. Ill. 2018) (no specific jurisdiction: corporate defendants' conduct occurred outside Illinois); *Harlem Ambassadors Prods., Inc. v. ULTD Entm't LLC*, 281 F.Supp.3d 689 (N.D. Ill. 2017) (no personal jurisdiction over one defendant: only contacts were payroll and financial information sent to the plaintiff's Illinois office; and his driving a tour bus once to the state); *Robertsson v. Misetic*, 2018 IL App (1st) 171674, ¶ 24, 116 N.E.3d 205 ("Illinois has no interest in adjudicating the dispute between a New York resident and a Swedish resident concerning matters that did not occur or arise in Illinois."), *Ulmer Berne LLP v. Ascendiant Capital Mkts. LLC*, 2018 IL App (1st) 170655-U (non-resident company's sole contact with Illinois was email return of retainer agreement to Illinois attorney for representation in Florida); *Young v. Ford Motor Co*., 2017 IL App (4th) 170177, 90 N.E.3d 647 (lack of minimum contacts with Illinois by holding company and Chinese companies: no contracts with state businesses, no advertisements, no solicitation or assistance of Illinois customers).

Not surprisingly, Bayer's brief either avoids fact-specific analyses or maintains the facts of this case are indistinguishable from those of others. The Court should reject Bayer's meritless legal position and affirm the appellate court's orders

holding the exercise of specific jurisdiction over Bayer proper under the facts presented.

2. *BMS* Provides No Grounds for Reversal

a. Overview of Bayer's view of *BMS*

Peppered throughout Bayer's brief is its argument that the lower courts' orders conflict with *BMS*. Bayer even goes so far as to insist the orders "[are] indistinguishable from [the California court's] decision" rejected in *Bristol-Myers*. Br. at 28. But *BMS* provides Bayer with absolutely no legal or factual support for the reversal it seeks.

To argue that *BMS* mandates dismissal for lack of specific jurisdiction in this case, Bayer distorts the opinion's legal holdings. Although the lower courts' orders establish they correctly followed *BMS* and the established jurisdictional authority *BMS* stressed, Bayer either pays lip service to that authority, alters it, or disregards it.

Further, Bayer relies improperly on *BMS*'s facts, asserting they are indistinguishable from those presented here. But the circuit courts distinguished the facts in this case from the inapposite facts of *BMS*, and the appellate court agreed. Having done so, the lower courts reached the correct conclusion. They ruled that unlike the circumstances presented by *BMS*, the exercise of specific jurisdiction over Bayer is proper here.

b. *BMS* legally supports specific personal jurisdiction over Bayer

BMS did not change principles of specific personal jurisdiction at all. To underscore that legal continuity, the Supreme Court stressed the following: "**Our settled principles regarding specific jurisdiction control this case**." 137 S. Ct. at 1781 (emphasis supplied). To that end, *BMS* continued by relying on holdings of several previous Supreme Court opinions on personal jurisdiction. Among them are: *Walden v. Fiore*, 571 U.S. 277 (2014); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

The personal jurisdiction principles that *BMS* re-emphasizes and incorporates apply directly to this case. They may be summarized as follows:

- "The primary focus of our personal jurisdiction inquiry is the **defendant's relationship to the forum State**." *BMS*, 137 S. Ct. at 1779 (citing *Walden*, 571 U.S. at 283–86) (emphasis added).
- "In order for a state court to exercise specific jurisdiction, the *suit* must '**aris[e] out of or relat[e] to the defendant's contacts** with the '*forum*.'" *Id.* at 1780 (quoting *Daimler*, 571 U.S. at 127) (alterations in original; emphasis added).
- "[T]here must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'" *Id.* at 1780 (quoting *Goodyear*, 564 U.S. at 919) (alteration in original)).

- "When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id.* at 1781 (citing *Goodyear*, 564 U.S. at 931 n.6).
- In other words, *BMS's* fact-specific analysis led it to reject the California courts' "sliding scale approach" to specific personal jurisdiction—*i.e.*, extensive unrelated forum contacts—as being "difficult to square with [U.S. Supreme Court] precedents." *Id.*

Those straightforward holdings destroy Bayer's argument in support of reversal.

By contrast, Bayer's reliance on *BMS* is shaky. As a glaring example, Bayer seeks reversal by deviating from *BMS's* holdings, claiming that "under established Supreme Court law, Plaintiffs have not shown the constitutionally required substantial connection between Bayer's limited Illinois contacts and the **'specific claims' of the non-Illinois Plaintiffs**." Br. at 2 (citing *BMS*, 137 S. Ct. at 1781). That is obviously not the law: *BMS* actually concluded that "what is missing. . .is a connection between the forum and the specific claims at issue"—**not the non-residents' specific claims**. Undeterred, Bayer continues by asserting that "there is simply no link. . . between the out-of-state Plaintiffs' claims and this forum." *Id*. at 3. And it argues as well that *BMS* ruled "each plaintiff must 'identify[] an[] adequate link between the State' and her own 'specific claims.'" *Id.* at 27 (again citing *BMS*, 137 S. Ct. at 1781).

This Court understands the holdings of *BMS*; and they do not resemble Bayer's interpretation. In short, Bayer presents no law on specific jurisdiction that would support reversal.

c. *BMS's* material factual distinctions support specific personal jurisdiction over Bayer

Adhering to the jurisdictional precedent *BMS* reiterated, the circuit courts concluded, and the appellate court affirmed, that the exercise of specific jurisdiction over Bayer was proper. In so doing, the lower courts considered, as required, the facts specific to *BMS*. Those facts differ on all counts from the facts in this case, and provide another reason to eradicate Bayer's insistence that the orders contravene *BMS*.

In summary, *BMS* involved nearly 700 plaintiffs—a minority of whom were Californians—who had sued non-resident pharmaceutical company Bristol-Myers in California. All plaintiffs brought claims against the company arising from their use of Plavix, a Bristol-Myers prescription blood thinner/anti-coagulant. They alleged the company's drug had caused them various health problems. *See generally BMS*, 137 S. Ct. at 1777–78.

BMS presents undisputed facts that Bristol-Myers engaged in business in California, and that Plavix was sold in the state though a California distributor. But the Supreme Court held such contacts insufficient for the exercise of specific personal jurisdiction over the company. In so holding, the Court summarized the material jurisdictional facts it considered:

> **BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California.**[1]

Id. at 1778 (emphasis supplied). Given those jurisdictional facts, the Supreme Court concluded that "**all the conduct giving rise to the nonresidents' claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction**." *Id.* at 1782 (emphasis supplied). Opposite to this case, therefore, no jurisdictional ties existed between the state and the plaintiffs' claims.

On their face the facts recited in *BMS* about Bristol-Myers' conduct in California concerning Plavix differ drastically from the record of Bayer's Essure activities in Illinois. Contrary to the Bristol-Myers connections or contacts that *BMS* held unrelated to the plaintiffs' claims, the complained-of conduct concerning Essure arose from, or was related to, Bayer's contacts with Illinois.

First, Bayer undisputedly conducted clinical trials in Illinois to develop the Essure contraceptive device. By contrast, Bristol-Myers "conducted research in California on matters unrelated to Plavix." *Id.* at 1781. Further, Bayer worked with Illinois physicians and investigators to achieve regulatory approval of Essure—again unlike the facts in *BMS*. Thus, as opposed to Bristol-Myers' California

[1] Bayer claims that the Court should disregard this finding in *BMS* because it was in the "factual background" of the Supreme Court's decision, and not a legal standard. Br. at 13. But looking at the facts of each case is precisely the inquiry a court must undertake to determine if specific personal jurisdiction exists over a non-resident defendant. The only way that Bayer can make *BMS* support its claims is by asking this Court to ignore the facts that make it distinguishable, which is not proper in a jurisdictional analysis.

activities in *BMS*, the claims of all Plaintiffs relate to, or arise from, Bayer's activities in Illinois. Without Bayer's Illinois connections and contacts, Plaintiffs would not have had their Essure contraceptive devices implanted. That is not in any way the case with Plavix.

And Bayer also created an Essure marketing strategy in Illinois. A host of false and misleading marketing tactics can be tied to that strategy, which eventually spread nationwide. C537-541, 573-577. [2] Again, Bayer's fraudulent and misleading marketing would not have been possible were it not for its Illinois contacts—also not an allegation found anywhere in *BMS*.

Finally, Bayer's Essure-related contacts with Illinois included, for example, its testing, labeling, advertising, marketing, and promoting the device. Those contacts were integral to Bayer's ability to distribute the Essure device to all Plaintiffs and their implanting physicians. Nothing similar occurred in *BMS*.

Nonetheless, in an effort to persuade the Court that *BMS* controls this consolidated appeal, the Bayer Brief glosses over—or simply disregards—the wealth of its undisputed and purposeful jurisdictional contacts or connections with Illinois. *See* facts recited above at 2, 4–7. Those contacts are either related to Plaintiffs' claims, or Plaintiffs' claims arose from the contacts. Bayer's attempt is futile because the facts in *BMS* and this litigation are case-specific: although

[2] Clearly, the marketing strategy went far beyond a woman or her physician in Illinois viewing a commercial or print ad for Essure.

Bristol-Myers' contacts are unrelated to the *BMS* plaintiffs' claims, the precise opposite is true here.

3. Bayer's "But For" Causality Argument Fails

Bayer takes yet another tack to persuade the Court that its contacts with Illinois do not satisfy specific personal jurisdiction standards. This time, according to its argument, the lower courts' orders were based solely on "but-for" causal relationship between Bayer and the forum. Br. at 19–22. But this argument is as lacking in merit as is Bayer's others.

Even a cursory reading of the appellate court's orders establishes that the court's legal rationale was not confined solely to "but for" causation, as Bayer contends. Indeed, the appellate order never refers to "but for" at all. To the contrary, the court engaged in a thorough analysis before properly concluding that "[a]ll of Bayer's conduct cited by the plaintiffs relates to the testing, development, and marketing of the Essure product." A14 at ¶ 23; A25 at ¶ 22. Bayer's Brief ignores the court's actual analysis and tries to convince this Court that the appellate court's well-reasoned opinions amount to nothing more than "but for" causation. The lower courts' reasoning and conclusions were correct; Bayer just doesn't like the result.

When a court undertakes an analysis to determine if the defendant's contacts with the forum state relate to the plaintiff's claims, it undertakes a fact-intensive inquiry to determine whether the relationship between the defendant's contacts and the claims is "intimate enough to keep . . . personal jurisdiction reasonably foreseeable." *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 430 (7th Cir. 2010)

(quoting *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 323 (3d Cir. 2007)). The lower courts undertook this fact-intensive inquiry, and the appellate court correctly held that "[a]ll of Bayer's conduct cited by the plaintiffs relates to the testing, development, and marketing of the Essure product. Therefore, the plaintiffs' claims . . . all arise, at least in part, from Bayer's conduct in Illinois." A14 at ¶ 23; A25 at ¶ 22.

Bayer's interpretation of its Illinois connections is unrecognizable when compared to the true nature of its Essure-related contacts. Not only did Bayer conduct clinical trials in Illinois, but a **principal investigator** of the Essure Pivotal Trial—designed to evaluate the safety and effectiveness of Essure—was based in Illinois. *Rios*, C537–41; *Hamby*, C147–50. Further, Bayer's inadequate five-year follow-up of these trial participants is directly related to the true safety profile of Essure being hidden from Plaintiffs and their physicians for years. *Id.* These contacts, coupled with the Illinois-based physician training program and the marketing strategy developed exclusively in Illinois, certainly make it foreseeable that Bayer would be called to answer in Illinois for Essure's shortcomings.

The present facts, taken as true, do have a "sufficient link" to Plaintiffs' claims. The record establishes that absent Bayer's contacts with Illinois for almost two decades—which continue to this day—the Essure contraceptive device would not have been researched, developed and investigated, marketed, sold, purchased, and implanted in Plaintiffs. And presumably, therefore, this litigation would not have been brought. *See* A14 at ¶ 23; A25 at ¶ 22.

4. Case-Specific Decisions on Personal Jurisdiction Further Weaken Bayer's Effort at Reversal

a. *M.M. ex rel. Meyers*

Bayer cannot circumvent the undisputed lack of Bristol-Myers' jurisdictional contacts in *BMS*—a legally consequential absence of facts supporting Plaintiffs' position that *BMS* does not govern their case. But at the same time, Bayer must also deal with another unsurmountable obstacle. It cannot escape recent Illinois specific jurisdiction law that the lower court properly considered in denying dismissal. *See M.M. ex rel. Meyers v. GlaxoSmithKline LLC*, 2016 IL App (1st) 151909, 61 N.E.3d 1026, *appeal denied*, *M.M. v. GlaxoSmithKline LLC*, 65 N.E.3d 842 (Ill. 2016), *cert. denied*, No. 16-1171, 138 S. Ct. 64 (2017) ("*M.M.*"). Trying to steer the Court away from the decision, therefore, Bayer makes a futile attempt to diminish its significance.

The Cook County Circuit Court and the First District Appellate Court considered circumstances in *M.M.* analogous in many ways to those here. Having done so, both courts considered that the facts supported the exercise of specific personal jurisdiction over the pharmaceutical company (GSK) as to the non-Illinois plaintiffs' claims.

Affirming the circuit court's denial of dismissal for lack of personal jurisdiction, the appellate court summarized its decision as follows:

> [P]laintiffs' injuries allegedly arose from acts of omission during the clinical trials and the resulting inadequate warning labels. . . . Defendant GSK has failed to overcome plaintiffs' *prima facie*

> showing that their claims arose from or related to defendant GSK's Illinois activities.

2016 IL App (1st) 151909, at ¶72. And it continued by considering the *Russell* due process factors concerning whether requiring GSK to litigate in Illinois was reasonable. Having weighed the factors, the court concluded that the exercise of specific jurisdiction over GSK was not unreasonable, and affirmed the lower court's decision. *Id.* at ¶¶ 74–78. This Court went on to deny review, as did the U.S. Supreme Court.

The lower courts viewed *M.M.* favorably, because in many respects the decision was similar to this case, then pending before them. Not surprisingly, Bayer almost completely avoids addressing the facts of *M.M.*, simply because it has no answer for a case directly on point. Although Bayer furnishes the Court with two grounds to challenge *M.M.*, neither is successful.

First, Bayer contends that the Illinois *M.M.* decision "predates" rulings in *BMS* and "conflicts with the subsequent, binding precedent" of *BMS*. Thus, Bayer concludes, *M.M.* "predates and conflicts with [*BMS*]." Br. at 25. Bayer's position on *M.M.* is erroneous in two respects.

As an initial matter, the lower courts' post-*BMS* favorable reference to *M.M.* is correct for all reasons set out in this brief. In short, *BMS* did not alter specific personal jurisdiction one whit; and Bristol-Myers' jurisdictional contacts did not relate to the plaintiffs' claims. Thus, requiring the company to litigate in California

was unreasonable under those specific circumstances. So, *M.M*. does not conflict with *BMS* and is still "good law."

In addition, Bayer improperly ignores *M.M*.'s procedural history: (1) denial by the circuit court of GSK's motion to dismiss for lack of jurisdiction; (2) affirmance of the denial by the Illinois First District Appellate Court; (3) denial of leave to appeal by the Illinois Supreme Court; and (4) denial of certiorari by the U.S. Supreme Court. *See* above at 22 for citations.

Given that history, the circuit court's decision to follow *M.M*. ("an Illinois appellate case, which has not been reversed") was entirely proper. But its decision is reinforced by the Supreme Court's failure to exercise its "GVR" power in *M.M*., *i.e*., its authority to grant certiorari, vacate, and remand in a petition before it. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (per curiam). A GVR is issued under certain circumstances, *e.g*., "to assist[] the court below by flagging a particular issue that it does not appear to have fully considered"; or to "procure the benefit of the lower court's insight before. . .rul[ing] on the merits." *Id.* at 167. It was not issued here.

But the Supreme Court did recently exercise its GVR authority to grant post-*BMS* certiorari in another case. *See Lawson v. Simmons Sporting Goods, Inc.*, __S.W.3d___, 2018 Ark. App. 343. Specifically, the Court granted certiorari, vacated the judgment, and "remanded [the case] to the Court of Appeals for further consideration in light of [*BMS*]." *Simmons Sporting Goods, Inc. v. Lawson*, 138 S. Ct. 237, 237 (2017). Therefore, the high court's choice not to utilize its GVR power

in *M.M.* after *BMS* provides another significant reason rendering *M.M.* proper authority for the lower courts.[3]

Second, Bayer maintains too that the Fifth District's reliance on *M.M.* is misplaced, "because the alleged connection between the clinical trial activities in the forum state and the plaintiffs' claims was significantly closer in that case." Br. at 25. Little need be said to counter this argument, as courts "look to the facts and circumstances of each individual case." *See* above at 22. This Court's review of the facts and circumstances of the present case, as well as those in *M.M.*, will establish that the Fifth District's order affirming the denial of Bayer's jurisdictional motion to dismiss was proper here, as was the ultimate result denying jurisdictional dismissal in *M.M.*

b. Additional post-*BMS* jurisdictional decisions

At least two post-*BMS* decisions use the same jurisdictional analysis that the circuit courts, the Fifth District, and the courts in *M.M.* employed. Those opinions, both with facts parallel to the facts here, support the denial of jurisdictional dismissal in this case.

For instance, a California district court held the following in *Cortina v. Bristol-Myers Squibb Co.*:

[3] Bayer confuses the Supreme Court's GVR authority with a denial of a petition for review. Br. at 16 n.8. The fact that the Supreme Court denied review is not what is important. The fact that it could have exercised its GVR authority to flag *M.M.* for re-review in light of *BMS* and did not, especially given its choice to do so in *Lawson*, provides additional support for the lower courts' favorable reliance on *M.M.*

> Lastly, the Court notes that the United States Supreme Court recently held in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, that the fact that a defendant had research and laboratory facilities, sales representatives, and sale and marketing operations in a forum state was insufficient to justify the exercise of specific jurisdiction in the absence of an "adequate link between the State and the nonresidents' claims." [*BMS* citation omitted]. The present case is distinguishable from *Bristol-Myers*. . . . In this case, Plaintiff alleges that "nearly every pivotal clinical trial necessary for NDA approval involved studying of the Saxagliptin drugs throughout the State of California," and that "but for the pre-NDA development of the Saxagliptin drugs within the State of California, the drugs would not have been sold and marketed throughout the U.S. nor ingested by Plaintiff."

No. 17-cv-00247-JST, 2017 WL 2793808, at *4 (N.D. Cal. June 27, 2017). Plaintiffs also refer the Court to another decision reaching the identical conclusion, issued by the same district court regarding another non-California Plaintiff. *See Dubose v. Bristol-Myers Squibb Co.*, No. 17-cv-00244-JST, 2017 WL 2775034, at *4 (N.D. Cal. June 27, 2017). Both relied on the jurisdictional facts before them.

And an Illinois district court held it had specific personal jurisdiction over a group of non-resident defendants selling GMO corn products to corn farmers from multiple states. It analyzed the case the same way that the courts did in this case, *M.M.*, and the opinions cited above. *See In re Syngenta Mass Tort Actions*, 2017 WL 2117728, No. 3:16-cv-00255-DRH (S.D. Ill. May 15, 2017). Thus, in denying a motion to dismiss for lack of specific jurisdiction over the non-Illinois plaintiffs, the court held the following: "Plaintiffs have sufficiently pled jurisdictional facts

showing that the Syngenta defendants purposely availed themselves of the benefits and protections of Illinois laws." *Id*. at *4 (citation omitted).[4]

The same holds true here. The above decisions all stand on the purposeful jurisdictional contacts the plaintiffs alleged, and the same controlling authority on specific jurisdiction. Nothing is different in the circuit court's analysis in this litigation.

c. Bayer's focus on immaterial issues

As Plaintiffs have pointed out, the law on specific personal jurisdiction is clear. Each analysis is case-specific, since it depends upon an evaluation of the overall context and nature of the case in question. And a determination for specific jurisdiction purposes of what constitutes "sufficient minimum contacts depends on the facts of each case." *See Unterreiner*, cited above at 12. It does not depend on the elements of every cause of action.

But in its attempt to persuade this Court to reverse the circuit court's ruling, Bayer ignores that established precept. Instead, it devotes three pages of its brief, containing overly long footnotes, to string-cites of decisions finding no specific jurisdiction. Br. at 15 & n.7.

In fact, Bayer makes Plaintiffs' point for them on the requisite case-by-case personal jurisdiction analysis. To do so, it cites several decisions concerning the

[4] Bayer ignores this case, offering pure conjecture that jurisdictional analyses will differ depending on whether a case is in state or federal court. That is absurd. The jurisdictional analysis is the same; and as repeated throughout this brief, it is the fact-intensive inquiry that determines whether a court has personal jurisdiction over an out-of-state defendant.

pharmaceutical product Xarelto, in which an Illinois district court "rejected virtually identical arguments that Illinois courts have personal jurisdiction." *See, e.g.*, *Roland v. Janssen Research & Dev. LLC*, No. 3:17-cv-00757-DRH, 2017 WL 4224037 (S.D. Ill. Sept. 22, 2017); *BeRousse v. Janssen Research & Dev., LLC*, No. 3:17-cv-00716-DRH, 2017 WL 4255075 (S.D. Ill. Sept. 26, 2017); *Douthit v. Janssen Research & Dev., LLC*, No. 3:17-cv-00752-DRH, 2017 WL 4224031 (S.D. Ill. Sept. 22, 2017). That is not so, however.

According to Bayer, "multiple clinical trials" in those cases (and a few others like them) did not amount to personal jurisdiction. Rather, the *Janssen* plaintiffs "failed to allege ingestion of Xarelto in Illinois, or. . .injuries caused by Xarelto in Illinois." But Bayer's position turns a blind eye to authority holding that jurisdictional contacts must be decided in the context of the litigation at issue.

The argument contains two significant omissions:

First, Bayer neglects to inform the Court of the *Janssen* court's reasoning, which follows:

> **Under these facts**—in regard to non-Illinois plaintiffs' allegations—there is no connection between Illinois and the underlying Xarelto controversy, which in itself is unconnected to Illinois but for plaintiff Roland.

See Roland, 2017 WL 4224037, at *5 (emphasis supplied).[5] And a verbatim holding is found in *BeRousse*, 2017 WL 4255075, at *4, and in *Douthit*, 2017 WL 4224031,

[5] Importantly, the *Roland* complaint includes jurisdictional allegations amounting to little more than a paragraph. Plaintiffs have included far more jurisdictional allegations than those asserted in the *Xarelto* cases.

at *5. Last, in the interest of brevity Plaintiffs represent to the Court that the other opinions Bayer cites in n. 7 include identical "**under these facts**" language and reasoning at Bayer's noted page references.

Second, *In re Syngenta*, a decision exercising specific jurisdiction over the defendant GMO product sellers, as discussed above, is significant for two reasons: (1) its jurisdictional holding is confined properly to the facts of that litigation; and (2) the **same Illinois district court** (Hon. David Herndon) issued *Syngenta* shortly before it handed down the *Janssen* opinions. *See* above at 27. But the brief makes no mention of those undisputed facts.

Last, Plaintiffs note that Bayer also cites decisions from Missouri state and federal courts, emphasizing their importance to this case. In other words, the brief suggests that the Court not follow its Illinois sister-court's decision in *M.M.*—an opinion resembling the lower courts'—but rather adhere to the holdings of another jurisdiction. Beyond the fact that to reach their jurisdictional holdings the Missouri courts presumably looked to the unique Missouri facts before them—not the facts in Illinois—that is not a suggestion the Court should follow.

In short, the case law Bayer relies on does not help it. For this reason too, the Court should affirm the lower court's judgment.

5. Because the Exercise of Specific Jurisdiction Comports with Due Process It Is Reasonable

Plaintiffs' Brief provides the Court with an overview of the lower courts' strict adherence to all principles of specific personal jurisdiction. But the appellate

court also expanded upon the reasonableness requirement at the order's end. It held specific jurisdiction proper over Bayer under the Supreme Court's four-pronged test in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

The *World-Wide Volkswagen* factors determining the constitutional "reasonableness" of specific jurisdiction over a non-resident include: (1) the burden on the defendant's having to litigate in a foreign forum; (2) the forum state's interest in resolving the dispute; (3) the plaintiff's interest in obtaining relief; and (4) the interests of the state in question and other states in the efficient judicial resolution of the dispute and the advancement of substantive social policies. *See id*. Having considered those factors, the Fifth District concluded correctly that it did "not find that litigating in Illinois would be unreasonable." A14 at ¶ 26; A25 at ¶ 25. As shown below, the same factors defeat Bayer's arguments as well.

For instance, Bayer asserts—presumably to complain Illinois is not the correct forum—that Plaintiffs have filed "duplicate complaints in California"; and that Essure clinical trials were "conducted across the country" in "dozens of other states." But "the relevant inquiry is whether the plaintiff's choice of forum is a *proper* place for personal jurisdiction, not whether it is the best one." *See Cortina*, 2017 WL 2793808, at *4. Further, the Fifth District held that "regardless of whether the out-of-state plaintiffs' claims are dismissed, this case will move forward in Illinois as there are also in-state plaintiffs who joined this suit." A14 at ¶ 26; A25 at ¶ 25. *See also In re Syngenta*, 2017 WL 2117728, at *5 (same, regarding "piecemeal litigation in different forums"). Additionally, the order properly held that as in

M.M., "Illinois has an undeniable interest in resolving a dispute arising, in part, from clinical trials held in Illinois, by Illinois doctors, in Illinois facilities." A14 at ¶ 26; A25 at ¶ 25.

Bayer's Brief does nothing to refute those holdings. For yet another reason, therefore, Bayer fails to establish any justification for reversal.

CONCLUSION

For all reasons above, the Bayer Defendants-Appellants have presented this Court with no legal or factual basis for reversing the judgment denying Bayer's motion to dismiss for lack of specific personal jurisdiction. Therefore, Plaintiffs-Appellees respectfully request that the Court affirm the orders of the Fifth District Appellate Court.

DATED: December 4, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

Under the penalties as provided by law pursuant to section 1 -109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, and that a copy of the foregoing document was electronically submitted to the Supreme Court of Illinois Circuit Clerk's Office and served upon the following attorneys of record by electronic mail on this 4th day of December, 2019.

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Nos. 125020, 125021

IN THE SUPREME COURT OF ILLINOIS

CHRISTY RIOS, *ET AL.*, *Plaintiffs-Appellees* **v.** **BAYER CORPORATION, BAYER HEALTHCARE LLC, BAYER ESSURE INC., and BAYER HEALTHCARE PHARMACEUTICALS, INC.,** *Defendants-Appellants.*	On Appeal from the Appellate Court of Illinois, Fifth District No. 5-18-0278 There on Interlocutory Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois No. 16-L-1617 The Hon. William A. Mudge Judge Presiding
NICHOLE HAMBY *ET AL.*, *Plaintiffs- Appellees* v. **BAYER CORPORATION *ET AL.*,** *Defendants-Appellants.* .	On Appeal from the Appellate Court of Illinois, Fifth District No. 5-18-0279 There on Interlocutory Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois No. 16-L-1617 The Hon. William A. Mudge Judge Presiding

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 341(C)

Ann E. Callis, being of adult age and under no legal disability, upon her sworn oath certifies as follows:

I certify that this Plaintiffs-Appellees' Brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding pages contained in the Rule

341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters appended to the answer under Rule 342(a) is 32 pages.

FURTHER, AFFIANT SAYETH NAUGHT.

STATE OF ILLINOIS §
§
COUNTY OF MADISON §

SUBSCRIBED AND SWORN to before me on this 4th day of December, 2019, Ann E. Callis, personally known to me or proved to me on the basis of satisfactory evidence to be the person who appeared before me.

(SEAL)

Signature