PREPARED BY THE COURT

ARSHAD SULTAN, Individually and as Executor of the Estate of SUMAIRA KHAN and Trustee of THE SUMAIRA KHAN REVOCABLE LIVING TRUST, and on behalf of all beneficiaries, Plaintiff, vs. KARL STORZ ENDOSCOPY-AMERICA, INC., KARL STORZ ENDOVISION, INC., KARL STORZ GMBH & CO. KG, HOWARD H. JONES, M.D., NOAH A. GOLDMAN, M.D., THE VALLEY HOSPITAL, INC., *and* JOHN DOES (1-10) *and* XYZ CORP (1-10) (such names *and* corporations being fictitious), Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-4648-17 CIVIL ACTION OPINION

Argued: **January 5, 2018**
Decided: **January 18, 2018**

Honorable Robert C. Wilson, J.S.C.

Kelly McNabb, Esq., appearing for the Plaintiff, Karl Storz, (from the law offices of Lieff Cabraser Heimann & Bernstein).

Ryan Duffy, Esq., appearing for the Defendants, Karl Storz SE & Co., KG, (from the law offices of Wilson Elser).

FACTUAL BACKGROUND

THIS MATTER arises from a products liability and medical malpractice claim brought against Defendants Karl Storz SE & Co. KG ("KST") and Karl Storz Endoscopy-America, Inc ("KSEA"), Drs. Jones and Goldman, Valley Physician Services, Inc., The Valley Hospital, Valley Health System, and Director of Risk Management. Defendant KST filed the instant motion to

dismiss for lack of personal jurisdiction pursuant to R. 4:6-2(b), seeking dismissal of claims brought specifically against KST. Having considered the submissions of the parties and oral argument, and for the reasons below, the Defendant's motion is hereby **GRANTED.**

Plaintiff Arshad Sultan, Administrator of the Estate of Sumaira Khan, alleges that a defectively designed and fraudulently marketed laparoscopic power morcellator was used during a surgical procedure to remove a uterine fibroid from Mrs. Khan on November 22, 2013. The procedure was performed at the Valley Hospital in Ridgewood, New Jersey. Subsequent to the procedure being performed, pathology reports showed that Mrs. Khan had and aggressive form of uterine cancer called leiomyosarcoma. Plaintffs allege that the use of the Storz brand morcellator resulted in this upstaged form of cancer in Mrs. Khan, requiring painful cancer treatment at Memorial Sloan Kettering in December of 2013. Mrs. Khan's battle with cancer led to her eventual death on June 5, 2016 at the age of forty-five.

Defendant KST designed, developed, and manufactured the morcellator device used during the surgical procedure performed on Mrs. Khan. KST is a German entity, and sold, marketed, and distributed the morcellator device through Defendant KSEA, which is a wholly owned subsidiary of KST incorporated in the State of California. KSEA markets and sells this morcellator, and other KST surgical instruments in the United States. KSEA operates as part of Karl Storz North America, an unincorporated grouping of KST subsidiaries formed for the North American market. KST itself is incorporated in Germany and has its principle place of business in Tuttlingen, Germany. KST is not incorporated in New Jersey, and has no place of business, employees, or bank accounts in New Jersey. Despite having developed the morcellator, KST did not design, manufacture, or distribute this product in the United States or New Jersey itself, but relied on KSEA.

KSEA engaged in advertising, employing sales representatives, and distributing KST surgical products, including the morcellator in the instant case, throughout the State of New Jersey. Of KSEA's total sales, ninety-three percent are KST products, while seven percent are third party products. In fact, KSEA maintains a distribution facility in Flanders, New Jersey. Despite this relationship, there are no written agreements between KSEA and KST.

However, KST and KSEA share the same brand marketing and KST supplied "Brand Identity Guidelines." Additionally, KST drafts and approves all marketing, training, and sales materials for the marketing of morcellators in the United States, which are then reviewed by KSEA to ensure regulatory compliance. Further, KST purchases global insurance policies which cover KSEA, and trains KSEA employees in Germany. KSEA executives travel to Germany twice a year to discuss business operations. These include, product pipeline, focus, revenue objectives, and marketing strategies.

The structures of both KST and KSEA show a clear parent-subsidiary relationship. KSEA's Vice President of Global Quality Management & Regulatory Affiars was Mr. Serkan Sezer, who held the same position at KST. Dr. Sybil Storz, has at all times been the sole managing director of KST. She was also the President of KSEA from 1996 to 2005, and CEO of KSEA until 2007, when, as acting Chairman of the Board of KSEA she did not reappoint herself. During the relevant time period, KSEA had a three member board. Dr. Sybil Storz held one seat, her son held a second, while the third was vacant.

Defendant KST now moves this Court to dismiss the claims against it, arguing pursuant to R. 4:6-2(b), that this Court lacks personal jurisdiction over the German entity which is not "at home" in New Jersey and does not maintain the requisite minimum contacts with this state.

Further, KST argues that KST and KSEA are separate corporate entities and that therefore personal jurisdiction cannot be exercised over KST through its subsidiary KSEA.

MOTION TO DISMISS STANDARD

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id.

Under the New Jersey Court Rules, a Complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

RULE OF LAW AND DECISION

The Due Process Clause of the Constitution of the United States protects defendants from the reach of state courts when those defendants do not have at least certain minimum contacts with the state. See, e.g., Waste Management, Inc. v. Admiral Ins. Co., 138 N.J. 106, 122 (1994). The required minimum contacts "must be of a nature and extent 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" Baanyan Software Services, Inc. v. Kuncha, 433 N.J. Super. 466, 473-74 (App. Div. 2013) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). "'[T]he quality and nature of the [defendant's] activity in relation to the fair and orderly administration of the laws' must be examined on a case-by-case basis to determine if the minimum contacts standard is satisfied." Charles Gendler & Co. v. Telecom Equipment Corp., 102 N.J. 460, 470 (1986) (citing Lebel v. Everglades Marina, Inc., 115 N.J. 317 (1989)). Thus, a defendant who lives or operates primarily outside of a forum jurisdiction has a due process right to be free from the judgments of that foreign forum. See Patel v. Karnavati America, LLC, 437 N.J. Super. 415, 423 (App. Div. 2014).

Pursuant to the Constitution of the United States, this Court's authority to exercise jurisdiction over a named defendant is limited by the Due Process Clause, and interpretive case law. "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Lebel v. Everglades Marina, Inc., 115 N.J. 317, 322 (1989) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotations omitted)). "The purpose of the minimum-contacts test is to insure the fairness and reasonableness of requiring a non-resident to defend a lawsuit in the forum state." Id. at 317.

A court's personal jurisdiction may arise over a defendant in one of two ways, referred to as specific jurisdiction and general jurisdiction. A court has specific jurisdiction "[w]hen a controversy is related to or 'arises out of' a defendant's contacts with the forum." Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984) (internal citations omitted). That "'relationship among the defendant, the forum, and the litigation is the essential foundation of in personam jurisdiction.'" Id. However, "[e]ven when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the [defendant] to its in personam jurisdiction when there are sufficient contacts between the State and the [defendant]. Id. (citing Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952)). Those sufficient contacts create general jurisdiction if they are "so continuous and substantial as to justify subjecting the defendant to the forum's jurisdiction." Mische v. Bracey's Supermarket, 420 N.J. Super. 487, 491-92 (App. Div. 2011).

In the instant matter, where a "defendant challenges an action for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that the defendant's contacts with the forum state are sufficient to confer personal jurisdiction on the court." Jacobs v. Walt Disney World, Co., 309 N.J. Super. 443, 454 (App. Div. 1998) (citing Giangola v. Walt Disney World Co., 753 F. Supp. 148, 154 (D.N.J. 1990)). "Once … defendants have shown that they have no territorial presence in this state, the burden shifts, as it were, to … plaintiff, who must then demonstrate their amenability, nonetheless, to an exercise of in personam jurisdiction based on minimum contacts." Citibank, N.A. v. Estate of Simpson, 290 N.J. Super. 519 (App. Div. 1996). "[I]t is the party asserting the adequacy of defendant's contacts to support specific jurisdiction who bears the burden of persuasion on that issue." Id. "The question of in personam jurisdiction … if timely raised, must be resolved before the matter may proceed." Id. at 532.

The assertion of personal jurisdiction by a New Jersey Court over a party must be "…consistent with [] due process of law." Bayway Ref. Co. v. State Utils., Inc., 333 N.J. Super. 420, 428 (App. Div.), certif. denied, 165 N.J. 605 (2000). A New Jersey court may exercise personal jurisdiction over a non-resident defendant to the "outermost limits permitted by the United States Constitution." Avdel Corp. v. Mecure, 58 N.J. 264, 268 (1971); see also R. 4:4-4(b)(1). The United States Constitution permits a state to exercise jurisdiction over an out-of-state defendant only where "…the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

While the controlling principles [of personal jurisdiction] can be articulated with disarming ease, the difficulty is in their application to concrete disputes. Creative Business Decisions, Inc. v. Magnum Communications, Ltd., 267 N.J. Super. 569, 567 (App. Div. 1993). The plaintiff needs only to make a *prima facie* demonstration of personal jurisdiction. Jacobs v. Walt Disney World, Co., 309 N.J. Super. 443, 454 (App. Div. 1998). However, when a defendant asserts lack of personal jurisdiction, "the plaintiff bears the burden of demonstrating that the defendant's contacts with the forum state are sufficient to confer personal jurisdiction on the court." Id.

The plaintiff must establish defendant's contacts with the jurisdiction through the use of "sworn affidavits, certifications, or testimony." Catalano v. Lease & Rental Management Corp., 252 N.J. Super. 545, 547-48 (Law Div. 1991) (citations omitted). When a jurisdictional defense is raised, it is the plaintiff who bears the burden of demonstrating that the defendant's contacts are sufficient for purposes of recognizing a court's personal jurisdiction. Citibank v. Estate of Simpson, 290 N.J. Super. 519, 533 (App. Div. 1996).

I. General Jusrisdiction over KST is Improper because KST is not at Home in the State of New Jersey.

This Court cannot exercise general jurisdiction over KST because KST lacks the continuous and systematic contacts which would make it "at home" in New Jersey. As stated above, New Jersey Appellate Courts have explained that a corporation is at home where it has its principal place of business, or where it is incorporated. Dutch Run-Mays Draft, LLC v. Wolf Block, LLP, 450 N.J. Super. 590, 600 (App. Div. 2017). The United States Supreme Court has held similarly, writing that a corporation is subject to general jurisdiction where "the corporation is fairly regarded as at home." Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780 (2017). More specifically, in Daimler AG v. Bauman, the Supreme Court further rejected arguments that parent companies could be properly subject to a court's general jurisdiction "wherever they have an in-state subsidiary or affiliate." Daimler AG v. Bauman, 134 S. Ct. 746, 749, 187 (2014).

In the instant case, KST cannot be subject to this Court's general jurisdiction. KST is incorporated in Germany and has its principal place of business in Tuttlingen, Germany. Thus, none of the traditional indicators of a company being at home in New Jersey are present. Further, KST does not have such continuous and systematic contacts with New Jersey for this Court to determine that general jurisdiction is proper. KST is not a New Jersey corporation, nor has its principal place of business in New Jersey. It has no physical place of business, employees, or bank accounts in New Jersey. KST did not design, manufacture, or distribute the morcellator in the United States or New Jersey. Instead, it was KSEA who sold the morcellators in the United States, and more specifically in New Jersey. The Supreme Court of the United States has explained this parent-subsidiary relationship is not sufficient for the exercise of general jurisdiction. Daimler AG, 134 S. Ct. at 749.

II. Specific Jurisdiction over KST is Improper because KST does not maintain the Required Minimum Contacts with New Jersey.

This Court cannot exercise specific jurisdiction over KST because KST does not maintain the requisite minimum contacts with New Jersey. As explained above, a court can exercise specific jurisdiction "[w]hen a controversy is related to or 'arises out of' a defendant's contacts with the forum." Helicopteros Nacionales de Colombia, 466 U.S. at 414. When the cause of action does not arise from or relate to the contracts within the state, due process is not offended by a State's subjecting the [defendant] to its in personam jurisdiction when there are sufficient contacts between the State and the [defendant]. Id. (citing Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952)). Finally, the exercise of specific jurisdiction "must be of a nature and extent 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" Baanyan Software Services, Inc, 433 N.J. Super. at 473-74 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

Here, where KST has no contacts with the State of New Jersey aside from its parent-subsidiary relationship with KSEA, it cannot be said that there are minimum contacts sufficient for the exercise of specific jurisdiction over it. Plaintiff contends that there are sufficient interactions by KST's parent-subsidiary relationship with KSEA for New Jersey to assert jurisdiction directly over KST. However, this conclusion would directly reject the fundamental principle of corporate law which KST relied on when creating that relationship. Specifically, that a corporation is a separate and distinct legal entity from its shareholders. Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 198 (App. Div. 2006). Thus, such a holding would also fail to comport with traditional notions of fair play and substantial justice. As a result, the

parent-subsidiary relationship cannot be used to impute the required jurisdictional contacts between KST and New Jersey.

As previously explained, KST itself has no contacts with the State of New Jersey. KST is not incorporated or registered in, nor has its principal place of business in New Jersey. KST did not manufacture or have any physical location, employees or accounts in New Jersey. It did not distribute or advertise the morcellator in New Jersey. All of these activities were undertaken instead by KSEA. In order to impute the contacts of the subsidiary to the parent corporation, one must show "more than mere ownership." FDASmart, Inc. v. Dishman Pharm. & Chems. Ltd., 448 N.J. Super. 195, 203 (App. Div. 2016). Courts have allowed "alter ego" jurisdiction when two criteria are present. First, the parent must so dominate the subsidiary such that "it had no separate existence but was merely a conduit for the parent." State, Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 501 (1983). Second, there must be some abuse of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise circumvent the law. Id.

Here, there has not been any showing of either dominance or abuse. The parent-subsidiary relationship allows for a certain level of coordination. Here, KST promulgated certain marketing and sales objectives, provided for training certain KSEA employees, and had certain directors and officers who retained similar roles in KSEA. However, this does not rise to the level of dominance required under New Jersey law. Moreover, there are no signs that KSEA is abusing corporate formalities. KSEA is a fully capitalized corporation. It retains and compensates its own staff, maintains its own corporate departments and has an independent executive committee. Day to day KSEA operations are managed by KSEA employees, who are in turn managed by KSEA's own human resources department. KST's represented at oral argument that KSEA is a fully insured corporation, which is ready to proceed with litigation. There have been no indications that KSEA

is anything but a legitimately incorporated subsidiary of KST. Thus, there has been no showing of the dominance or abuse of corporate formalities required for alter ego jurisdiction under New Jersey law.

The above lack of minimum contacts makes it clear that this Court cannot exercise its specific jurisdiction over KST. In the absence of any grounds for either general or specific jurisdiction over KST, this Court must accordingly grant the defendant's motion to dismiss as to Defendant KST only.

For the aforementioned reasons, Defendant's Motion to Dismiss the Plaintiff's Complaint as to Defendant KST is **GRANTED**.

It is so ordered.