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## When Personal Jurisdiction and Alter Ego Collide

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Federal and state courts throughout the country have long grappled with questions of general and specific jurisdiction. The increasing number of foreign entities with U.S.-based wholly-owned subsidiaries virtually guarantees that issues of personal jurisdiction are not going away anytime soon.

When a party seeks to support its jurisdictional argument against a foreign entity on grounds that the U.S. subsidiary is the alter ego of its parent, it presents a new wrinkle to an already complicated issue.

Such was the case in *FDASmart Inc. v. Dishman Pharmaceuticals and Chemicals Ltd., et al.*, No. A-2800-15T3 (December 29, 2016), where a New Jersey appellate court rejected the plaintiff's attempt to establish general jurisdiction over a foreign parent company by imputing to it the contacts of its New Jersey wholly-owned subsidiary under an alter ego theory. Foreign corporations with New Jersey based subsidiaries no doubt cheered this result.

The case arose from an alleged breach of contract to sell a manufacturing facility in China. That facility was owned by a Chinese subsidiary of Dishman Pharmaceuticals and Chemicals Ltd. (DPCL). DPCL is an Indian pharmaceutical company with its principal place of business in India.

DPCL's wholly-owned U.S. subsidiary, Dishman USA, is a New Jersey corporation with its principal place of business in New Jersey. Plaintiff FDASmart (a U.S. consulting and pharmaceuticals services firm), PKM (an Indian company), and DPCL met in India and entered into a Memorandum of Understanding (MOU) regarding the potential sale.

Pursuant to the MOU, DPCL agreed to pay PKM and FDASmart for the development of a sales strategy, for visits to the plant by prospective buyers, and a success fee for a completed purchase. While DPCL was initially the contracting party for the MOU, the final agreement listed the Dishman Group as the signatory with DPCL's address. (The Dishman Group is a marketing term that refers to DPCL and all of its subsidiaries.)



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The managing director of DPCL signed the MOU. The deal points centered around India. For example, the parties agreed that a non-disclosure agreement would be signed in India; that Indian taxes would apply to any fees paid; and that invoices would be sent to DPCL in India for payment.

When a dispute arose among the parties regarding the sales efforts, DPCL decided not to sell the Chinese facility. Plaintiff FDASmart sent its final invoice to DPCL in India, alleged that DPCL had breached the MOU and threatened to commence litigation in India. Ultimately, FDASmart sued DPCL and Dishman USA in New Jersey state court, seeking \$900,000 in lost commissions and \$40,000 in unpaid invoices.

The defendants moved to dismiss, on several grounds, arguing as to DPCL that the trial court lacked general and specific jurisdiction over it. The trial court agreed that there was no specific jurisdiction — this seems reasonable inasmuch as neither the transaction nor any aspect of the dispute arose out of or was in way anyway connected to New Jersey.

But surprisingly, the trial court found that it had general jurisdiction over DPCL. It reached this result by attributing the contacts that Dishman USA had with New Jersey to DPCL for jurisdictional purposes under an alter ego theory.

There was no dispute that DPCL failed to meet the traditional test for general jurisdiction. A finding of general jurisdiction is based on a defendant's continuous and systematic activities in the forum state. *International Shoe Co. v. Washington*, 66 S.Ct. 154 (1945).

Those activities must be so "continuous and systematic" as to render the defendant at home in the forum state. Absent exceptional circumstances, a defendant is "at home" and therefore subject to general jurisdiction only in its place of incorporation and principal place of business. *Daimler AG v. Bauman*, 134 S.Ct.746 (2014).

Of course, DPCL was a foreign entity with its principal place of business in India, not New Jersey, so there was no basis for a finding of general jurisdiction. This is where the theory of alter ego came in. FDASmart argued that DPCL should be subject to general jurisdiction in New Jersey because it was the alter ego of its U.S. subsidiary, Dishman USA.

FDASmart maintained that because Dishman USA was the alter ego of DPCL, the trial court should pierce the corporate veil of DPCL, and for jurisdictional purposes, attribute all of Dishman USA's activities to its parent, DPCL. The trial court accepted this argument and denied DPCL's motion. The defendants appealed, and the Appellate Division reversed.

Under New Jersey law, to pierce the corporate veil of a parent corporation, a party must establish that: "(1) the subsidiary was dominated by the parent corporation; and (2) adherence to the fiction of separate corporate existence would perpetrate a fraud or injustice, or otherwise circumvent the law." *State, Dep. Of Env'tl Prot. v. Ventron Corp.*, 94 N.J. 473, 500 -501 (1983).

In assessing "dominance", New Jersey courts consider several factors including "common ownership, financial dependency, interference with a subsidiary's selection of personnel, disregard of corporate formalities and control over a subsidiary's marketing and operational policies." *Pfundstein v. Omnicom Grp. Inc.*, 285 N.J. Super. 245, 253-54 (App. Div. 1995).

Applying these factors to DPCL and Dishman USA, the Appellate Division found there to be “insufficient evidence to pierce the corporate veil and impute Dishman USA’s contacts to DPCL.” It found that under New Jersey law, overlapping boards of directors did not establish commonality of ownership, and financial difficulties did not equate to financial dependency as Dishman USA was able to pay both its expenses and salaries.

There was no evidence that DPCL directly interfered with Dishman USA’s selection of personnel or controlled its marketing and operational policies. In fact, DPCL and Dishman USA were shown to be separate legal entities which engaged in arms-length transactions in accordance with applicable tax laws.

Accordingly, the Appellate Division found that the trial court had erred in piercing the corporate veil and finding that Dishman USA was the alter ego of DPCL in order to assert general jurisdiction.

While dismissing the complaint as to DPCL, the Appellate Court allowed the claim against Dishman USA to go forward. It found that DPCL’s managing director’s signature on behalf of the Dishman Group was sufficient to bind all of DPCL’s subsidiaries including Dishman USA.

FDASmart is not the first case where theories of personal jurisdiction and alter ego intersect, and it’s unlikely to be the last one either. When considering a jurisdictional challenge, a non-U.S. parent company should evaluate not only the applicable law governing general and specific jurisdiction, but applicable principles of alter ego as well.

This opinion may not be New Jersey’s last word on this issue, as FDASmart apparently intends to ask the Appellate Division to reconsider its ruling. Until then, the opinion provides important guidance for a foreign entity mounting a jurisdictional challenge.