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Second Circuit 2000-2001 Personal Jurisdiction Developments

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SECOND CIRCUIT 2000-2001 PERSONAL JURISDICTION DEVELOPMENTS

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During the 2000-2001 survey year, federal courts in the Second Circuit published approximately fifty personal jurisdiction opinions. The majority of the opinions handed down in federal district courts dealt with diversity matters and involved the application of New York State's long-arm statute.[1] There were, however, several significant circuit court opinions.[2] One involved the district court's premature personal jurisdiction dismissal of a matter without consideration of whether the Foreign Sovereign Immunities Act ("FSIA") applied.[3] Another involved a human rights claim under the Alien Tort Claims Act and the question of whether foreign companies were doing business in New York based on their maintenance of an Investors Relations Office in New York City.[4] A third set forth important guidelines for a district court's rejection of a personal jurisdictional challenge,[5] while another reminded the bench and bar that circuit court review of district court dismissals for want of personal jurisdiction are *de novo*.[6]

The district and circuit court opinions demonstrate that the bench

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1. *See* N.Y. C.P.L.R. 302 (McKinney 2001). C.P.L.R. 302 is New York's long-arm statute. It allows New York State courts to assert jurisdiction over non-domiciliary individuals and foreign corporations incapable of being served within the state, but having the contacts with the state that are listed in section 302. Such a defendant may be served outside the state as provided by C.P.L.R. 313. The personal jurisdiction obtained is limited by the terms of C.P.L.R. 302, as well as by constitutional considerations. C.P.L.R. 302 is a "restricted" long-arm statute, such that it does not go as far as is constitutionally permissible.

2. *See infra* Part II.

3. Reiss v. Societe Centrale Du Groupe Des Assurances Nationales, 235 F.3d 738, 747-48 (2d Cir. 2000).

4. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 93 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001).

5. Fort Knox Music, Inc. v. Baptiste, 203 F.3d 193, 196-97 (2d Cir. 2000), *vacated by* 139 F. Supp. 2d 505 (S.D.N.Y. 2001).

6. King v. Washington Adventist Hosp., No. 00-7320, 2001 U.S. App. LEXIS 981, at *5 (2d Cir. Jan. 23, 2001).

and bar of the Second Circuit devote an enormous amount of time to resolving jurisdictional disputes.[7] They also indicate a lack of uniformity in applying concepts of personal jurisdiction.[8] Finally, they suggest that judges in the circuit are willing to apply New York's long-arm statute[9] to matters involving "jurisdictional contacts" based on telephones, fax machines, and web-sites.[10]

This Survey Article will review some of the district and circuit courts' significant decisions, and comment on future trends for application of the law of personal jurisdiction in the Second Circuit. The Article concludes with a recommendation that district court judges should not grant or deny personal jurisdiction defenses until at least limited jurisdictional discovery has been granted and is completed.[11]

I. INTRODUCTION

Whether a federal court in the Second Circuit has personal jurisdiction over a given defendant in a diversity case, or in matters where there is no nationwide jurisdiction, is determined according to the law of the forum state.[12] This involves a two-step inquiry. First, the court must consider the forum state's jurisdictional statutes, and, second, the court must consider and apply federal due process standards.[13] These standards have been summarized by the Second

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7. *See infra* Parts II, III.
8. *See infra* Part III.
9. *See* N.Y. C.P.L.R. 302 (McKinney 2001).
10. *See infra* notes 106-126 and accompanying text.
11. *See infra* Part IV.
12. *See* Bensusan Rest. Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997) (dismissing for lack of personal jurisdiction where plaintiff failed to allege that the defendant committed a tortious act in New York, as required under the New York long-arm statute); A.I. Trade Fin., Inc. v. Petra Bank, 989 F.2d 76, 80 (2d Cir. 1993) (finding that breach of contract for failure to perform financial services in New York was sufficient to subject the defendant to personal jurisdiction under New York's long-arm statute); Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985) (stating that personal jurisdiction is "determined by reference to the law of the jurisdiction in which the court sits"); Arrowsmith v. United Press Int'l, 320 F.2d 219, 223 (2d Cir. 1963) (holding that in diversity actions, jurisdiction is governed by the law of the state in which the court sits). *See also* King v. Washington Adventist Hosp., No. 00-7320, 2001 U.S. App. LEXIS 981, at *4 (2d Cir. Jan. 23, 2001) (finding that federal courts must apply the personal jurisdiction laws of the forum state); Fort Knox Music, Inc. v. Baptiste, 203 F.3d 193, 196 (2d Cir. 2000), *vacated by* 139 F. Supp. 2d 505 (S.D.N.Y. 2001) (stating that federal courts must apply the personal jurisdiction rules of the forum state).
13. *See* cases cited *supra* note 12.

Circuit in *Chew v. Dietrich*.[14]

> The due process clause of the Fourteenth Amendment permits a state to exercise personal jurisdiction over a nonresident defendant with whom it has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" . . . In determining whether minimum contacts exist, the court considers "the relationship among the defendant, the forum [state], and the litigation." . . .
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> To establish the minimum contacts necessary to justify "specific" jurisdiction, [the plaintiff] first must show that [its] claim arises out of or relates to [the defendant's] contacts with [the forum state]. [The plaintiff] must also show that [the defendant] "purposefully availed" [itself] of the privilege of doing business in [the forum state] and that [the defendant] could foresee being "hailed into court" there. . . .[15]

The issue of personal jurisdiction must be determined separately for each cause of action asserted in the plaintiff's complaint.[16] Also, Second Circuit Federal District Courts have considerable discretion in deciding a pretrial motion to dismiss for lack of personal jurisdiction.[17] A court may determine the motion on the basis of affidavits alone, it may permit discovery in aid of the motion, or it may conduct an evidentiary hearing on the motion.[18] If the court does not conduct a full hearing, the plaintiff need only make a *prima facie* showing of jurisdiction; however, he must ultimately establish jurisdiction by a preponderance of the evidence at a pretrial hearing or at trial.[19] In making the *prima facie* determination, the Second Circuit has held that courts should consider the pleadings and affidavits in the light most

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14. 143 F.3d 24 (2d Cir. 1998).

15. *Id.* at 28.

16. *See* CIVIL PRETRIAL PROCEEDINGS IN NEW YORK §§ 9-4 to 9-23 (Phillip M. Halpern & Jay C. Carlisle et al. eds., West Group 2000).

17. *See infra* notes 18-21 and accompanying text.

18. *See* Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 240 (2d Cir. 1999) (permitting extensive discovery into defendants' contacts with forum state); Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999) (stating that a *prima facie* showing of jurisdiction can be satisfied with allegations in plaintiff's affidavits and supporting materials). Moreover, a court may consider matters outside the pleadings without converting the motion to dismiss into a motion for summary judgment. *See Bank Brussels Lambert*, 171 F.3d at 784.

19. Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 196 (2d Cir. 1990).

favorable to the plaintiff.[20] If no discovery has been conducted, the truth of the plaintiff's allegations will be assumed for purposes of the jurisdiction inquiry.[21]

Most Second Circuit 2000-2001 diversity *in personam* jurisdiction cases involve application of New York State law under principles of specific jurisdiction, pursuant to the New York Civil Practice Law and Rules 302 ("C.P.L.R.").[22] Several cases involve issues of general jurisdiction pursuant to C.P.L.R. 301.[23] The important practical distinction between these two concepts is that, with the former, only the plaintiff's cause of action must arise from New York related activities.[24] The question of whether there was proper notice of the commencement of the action is not discussed in this Survey.

A. General Jurisdiction: C.P.L.R. 301

The traditional basis for the exercise of jurisdiction that developed prior to the adoption of the C.P.L.R. was incorporated by C.P.L.R. 301.[25] Thus, personal jurisdiction based on physical presence,[26]

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20. *See* Jazini v. Nissan Motor Co., Ltd., 148 F.3d 181, 184 (2d Cir. 1998) (stating that a jurisdiction testing motion may be defeated by good faith allegations of jurisdiction). *See also Ball*, 902 F.2d at 197 (stating that "[a]t [the] preliminary stage, the plaintiff's prima facie showing may be established solely by allegations[,]" however, "[a]fter discovery, the plaintiff's prima facie showing . . . must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant.").

21. Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999), *cert. denied*, 531 U.S. 1052 (2000).

22. *See, e.g.*, Photoactive Prods., Inc. v. Al-Or Int'l, Ltd., 99 F. Supp. 2d 281, 287-88 (E.D.N.Y. 2000). The terms "general" and "specific" personal jurisdiction were adopted by the United States Supreme Court in *Heliocopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.2 (1984). *See also* Jay C. Carlisle, *Civil Practice*, 42 SYRACUSE L. REV. 343, 364-367 (1991) (describing reach of long-arm jurisdiction under C.P.L.R. 302) [hereinafter Carlisle1]; Jay C. Carlisle, *Civil Practice*, 39 SYRACUSE L. REV. 75, 98-100 (1988) (discussing the basis for general jurisdiction under C.P.L.R. 301) [hereinafter Carlisle2].

23. *See* Domond v. Great Am. Recreation, Inc., 116 F. Supp. 2d 368, 373 (E.D.N.Y. 2000) (rejecting claim of general jurisdiction over defendant under a "doing business" theory); Ugalde v. DynaCorp, Inc., No. 98-Civ-5459, 2000 U.S. Dist. LEXIS 1745, at *6-7 (S.D.N.Y. Feb. 21, 2000) (explaining that plaintiff established a *prima facie* showing of personal jurisdiction over defendant under a "doing business" theory).

24. Kronisch v. United States, 150 F.3d 112, 130 (2d Cir. 1998). *See also* Talbot v. Johnson Newspaper Corp., 522 N.E.2d 1027, 1028-29 (N.Y. 1988) (discussing the "arising out of" and "articuable nexus" requirements).

25. *See* Carlisle1, *supra* note 22, at 361-63.

26. There are two exceptions to the presence requirement. First, a person is not deemed present in New York for purposes of service of process if he or she is induced to

domicile,[27] consent,[28] or "doing business"[29] permits New York courts to assert jurisdiction over a defendant for any cause of action irrespective of whether it arises from the defendant's contacts with New York.[30] The "doing business" concept is frequently used to obtain jurisdiction over a foreign corporation. Although the New York Court of Appeals has stated that "the test for 'doing business' is and should be a simple and pragmatic one,"[31] a review of the cases decided during the survey year indicates that the test, while pragmatic, is far from simple.

B. Specific Jurisdiction: C.P.L.R. 302

C.P.L.R. 302 permits New York courts to assert jurisdiction over non-domiciliary individuals and foreign corporations that are not subject to C.P.L.R. 301, but instead have the state contacts listed in C.P.L.R. 302.[32] This long-arm statute is limited by the terms of C.P.L.R. 302, as well as by federal and state constitutional considerations, to claims that

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enter by fraud. Secondly, he or she is immune from process if he or she appeared voluntarily, as a plaintiff or defendant, to attend proceedings involving criminal or civil litigation. This immunity exception is not applicable if a person would be subject to long-arm jurisdiction under C.P.L.R. 302. Pavlo v. James, 437 F. Supp. 125, 127 (S.D.N.Y. 1977).

27. *See* N.Y. C.P.L.R. 313 (McKinney 2001) (stating that a New York domiciliary is subject to *in personam* jurisdiction on any claim, wherever it arises, and regardless of where the defendant is located at the time the summons is served).

28. *See* N.Y. C.P.L.R. 301 (McKinney 2001). In *Dan-Dee International, Ltd. v. Kmart Corp.*, No. 99-Civ-11689, 2000 U.S. Dist. LEXIS 13411, at *6 (S.D.N.Y. Sept. 18, 2000), the court stated that a corporation "may be subjected to suit in New York under C.P.L.R. 301(a) only if the corporation has engaged in such a continuous and systematic course of 'doing business' . . . as to warrant a finding of its 'presence' in the jurisdiction."

29. *See* Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 58 (2d Cir. 1985) (describing the "doing business" requirement as not occasionally or casually but with a degree of permanence); Bryant v. Finnish Nat'l Airline, 208 N.E.2d 439, 440 (N.Y. 1965) (stating that maintaining an office in New York City indicates that the defendant is "doing business" in the state sufficient to subject him or her to jurisdiction). *See generally* Vincent Alexander, *'Doing Business' Jurisdiction: Some Unresolved Issues*, N.Y.L.J., Mar. 19, 2001, at 3 (stating that "doing business" jurisdiction is well settled as a method of obtaining personal jurisdiction over an unlicensed foreign corporation).

30. *See* Weissman v. Seiyu, Ltd., No. 98-Civ-6976, 2000 U.S. Dist. LEXIS 509, at *16 (S.D.N.Y. Jan. 18, 2000) (stating that "[a] cause of action arises out of a defendant's New York transaction when it is sufficiently related to the business transacted such that it would not be unfair to deem it to arise out of the transacted business"); Laufer v. Ostrow, 434 N.E.2d 692, 694 (N.Y. 1982) (finding sufficient contacts within New York to be "considered systematic, regular[,] and continuous").

31. *Bryant*, 208 N.E.2d at 441.

32. CIVIL PRETRIAL PROCEEDINGS IN NEW YORK, *supra* note 16, at § 9.5.

arise from the defendant's activity related to New York.[33] C.P.L.R. 302(a)(1), covering tort, contract, and commercial matters, and C.P.L.R. 302(a)(3)(ii), covering tort and commercial tort matters, were frequently analyzed by circuit court judges during the survey year.[34] Other segments of the long-arm statute were seldom discussed.[35]

II. SECOND CIRCUIT COURT CASES

There were several significant Second Circuit personal jurisdiction cases published during the survey year. One unpublished decision was rendered. The first case is *Reiss v. Societe Centrale Du Groupe Des Assurances Nationales*,[36] where the Second Circuit held that the trial court erred in deciding whether there was personal jurisdiction when it should have decided if the Foreign Sovereign Immunities Act applied. The second case is *Wiwa v. Royal Dutch Petroleum Co.*,[37] where the Second Circuit found general jurisdiction, under C.P.L.R. 301, over a defendant who was doing business in New York through an Investors Relations Office. The third case is *Fort Knox Music, Inc. v. Baptiste*,[38] where the Second Circuit held that the district court's failure to give a reason for rejecting defendant's challenge to personal jurisdiction precluded an appellate review on other issues raised. Finally, the unpublished opinion reminded the bar that circuit court review of personal jurisdiction issues are *de novo*.[39]

A. The Reiss Case

In *Reiss*, the plaintiff-appellant appealed from a judgment entered against him in the United States District Court for the Southern District of New York by Judge Shira Scheindlin.[40] The judge dismissed his action to recover a finder's fee against defendants-appellees. The dismissal was based on a lack of personal jurisdiction, as well as for a failure to state a claim. The district court considered these objections

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33. *Id.*

34. *See infra* notes 106-126 and accompanying text.

35. No more than five cases per survey year discuss the "contracts anywhere" clause of C.P.L.R. 302(a)(1).

36. 235 F.3d 738 (2d Cir. 2000).

37. 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001).

38. 203 F.3d 193 (2d Cir. 2000), *vacated by* 139 F. Supp. 2d 505 (S.D.N.Y. 2001).

39. King v. Washington Adventist Hosp., No. 00-7320, 2001 U.S. App. LEXIS 981, at *1 (2d Cir. Jan. 23, 2001).

40. *Reiss*, 235 F.3d at 745.

before the completion of discovery and failed to recognize implications under the Foreign Sovereign Immunities Act.[41] The court's jurisdictional analysis was based on C.P.L.R. 301 and C.P.L.R. 302. The court rejected the section 301 argument for personal jurisdiction through subsidiary activities for failure to allege "facts suggesting that the subsidiaries licensed in New York are agents or departments of any of the defendants."[42] Also, the court rejected the section 302 argument on the grounds that the plaintiff had not alleged sufficient facts to prove that certain defendants had engaged in any activities that clothed them with the apparent authority to make a finder's fee agreement with the plaintiff.[43]

The circuit court, speaking through Judge Roger Miner, first examined the question of whether the court had appellate jurisdiction over the appeal. Judge Miner noted, "Although neither briefed nor brought to our attention by the parties, the question arises from the fact that no final judgment ever was entered in this case."[44] Judge Miner reasoned that the plaintiff-appellant meant to appeal from a final judgment on the date an opinion and order were entered, even though no formal judgment was entered. He then turned to the issue of *in personam* jurisdiction and found error in the analysis undertaken by the district court. He stated:

> The initial question to be answered in this case is not whether there is personal jurisdiction within the meaning of the New York Civil Practice Law and Rules, but whether there is subject matter jurisdiction within the meaning of the Foreign Sovereign Immunities . . . .[45]

Judge Miner reasoned that, constrained by constitutional due process considerations, personal jurisdiction under the FSIA equals subject matter jurisdiction plus valid service of process. He noted that the district court had failed to address the issue of subject matter jurisdiction and that the parties had failed to include the actual moving papers thereto in the appendix. Judge Miner, in a thoughtful analysis of the FSIA, concluded that the district court's premature jurisdictional

41. *Id.* at 746.

42. *Id.* at 744 (quoting Reiss v. GAN, S.A., 78 F. Supp. 2d 147, 159 (S.D.N.Y. 1999)) (internal quotation marks omitted).

43. *Id.*

44. *Reiss*, 235 F.3d at 745.

45. *Id.* at 746. Judge Miner reasoned, "[S]ubject matter jurisdiction under the FSIA, an issue apparently presented to the district court but not addressed by it, must be the object of our inquiry here." *Id.*

dismissal prevented the parties from presenting evidentiary material at a hearing on the question of FSIA jurisdiction. Judge Miner instructed the district court to afford broad latitude to both sides in this regard and to resolve the disputed factual matters by issuing findings of fact.[46]

The Second Circuit's decision in the *Reiss* case was issued on December 27, 2000. It reminds the bar once again of the "hazards of an incomplete appendix."[47] It also reminds federal district court judges that there are different burdens and standards to apply with respect to personal jurisdiction defenses made before and after discovery is completed. In fact, what may appear to be an issue of personal jurisdiction may involve issues of subject matter jurisdiction.

B. The Wiwa Case

In *Wiwa v. Royal Dutch Petroleum Co.*,[48] two foreign holding companies were sued by Nigerian émigrés under the Alien Tort Claims Act ("ATCA"), alleging human right violations. The companies moved to dismiss. The United States District Court for the Southern District of New York, by Judge Kimba Wood, found that there was personal jurisdiction, but dismissed the action on *forum non conveniens* grounds. The Second Circuit, speaking through Judge Pierre Leval, held that there was general jurisdiction under C.P.L.R. 301, therefore, the doctrine of *forum non conveniens* did not apply.

The plaintiffs' complaint alleging that they and their next of kin were imprisoned, tortured, and killed by the Nigerian government, in violation of the law of nations, at the instigation of the defendants, in reprisal for their political opposition to the defendants' oil exploration activities. The complaint alleged that the Shell Nigeria Company had coercively appropriated land for oil development without adequate compensation, and caused substantial pollution of the air and water in

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46. *Id.* at 747. Judge Miner stated:

> We think it is essential for the district court to afford the parties the opportunity to present evidentiary material at a hearing on the question of FSIA jurisdiction. The district court should afford broad latitude to both sides in this regard and resolve disputed factual matters by issuing findings of fact.

Reiss, 235 F.3d at 747.

47. *Id.* at 746 (citing Kushner v. Winterthur Swiss Ins. Co., 620 F.2d 404, 407 (3d Cir. 1980)). Judge Miner reminded the bar that "[t]he parties seem to agree in their briefs that the issue was presented but the absence of the actual moving papers in the appendix impels us to warn the bar once again of the hazards of an incomplete appendix." *Id.*

48. 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001).

the homeland of the plaintiffs.

Defendants' only contacts with New York were their New York Stock Exchange listings and their maintenance of an Investor Relations Office in New York City.[49] On appeal, the defendants made four arguments: (1) these activities were not attributable to the defendants for jurisdictional purposes; (2) these New York activities cannot be considered in the jurisdictional calculus because they were merely incidental to a stock market listing, and were jurisdictionally inconsequential as a matter of law; (3) the investor relations activities were legally insufficient to confer general jurisdiction; and (4) exercising jurisdiction over the defendants would violate the fairness requirement of the Due Process Clause. The circuit court rejected each of these contentions and held that the defendants were subject to personal jurisdiction in the Southern District of New York.

Judge Leval reviewed the requirements for general jurisdiction in the Second Circuit under C.P.L.R. 301. He explained that "doing business" concepts in New York State permit a court to assert jurisdiction over a foreign corporation when it affiliates itself with a New York representative entity. Further, New York representatives render services on behalf of the foreign corporation that go beyond mere solicitation, and are sufficiently important to the foreign entity, in that the corporation itself would perform equivalent services if no agent were available. He then stated, "Both Magistrate Judge Pitman and Judge Wood found that Graspi and the Investor Relations Office were agents of the defendants for jurisdictional purposes. We agree."[50] Judge Leval rejected the defendants' arguments that there was not an agency relationship. He reasoned that the Investor Relations Office, while not directly involved with the core functions of the defendants' business, was of "meaningful importance to the defendants."[51] Thus, he

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49. *Id.* at 93. Judge Leval stated:

> While nominally a part of Shell Oil, Grapsi and the Investor Relations Office devoted one hundred percent of their time to the defendants' business. Their sole business function was to perform investor relations services on the defendants' behalf. The defendants fully funded the expenses of the Investor Relations Office (including salary, rent, electricity, mailing costs, etc.), and Grapsi sought the defendants' approval on important decisions.

Id. at 95-96.

50. *Id.* at 95.

51. *Wiwa*, 226 F.3d at 96. Judge Leval's "meaningful importance to the defendants" test significantly expands the *Frummer/Gelfand* test. Judge Leval implicitly accepted the defendants' argument that the Investors Relations Office was not essential for operation of the defendants' business in New York, but found the office

placed less emphasis on the *Frummer/Gelfand* "but for test,"[52] focusing on a pragmatic "facilitation" test which stressed the volume and value of the defendants' New York contacts in terms of constitutional considerations of due process—forseeability and fairness.

Judge Leval also relied on New York's traditional set of indicia for assertion of general jurisdiction under the C.P.L.R. His examples included

> whether the company has an office in the state, whether it has any bank accounts or other property in the state, whether it has a phone listing in the state, whether it does public relations work there, and whether it has individuals permanently located in the state to promote its interests.[53]

He also noted that "[t]he Investor Relations Office, whose activities are attributable to the defendants under the *Frummer* analysis, meets each of these tests. It constitutes a substantial 'physical corporate presence' in the [s]tate, permanently dedicated to promoting the defendants' interests."[54]

Finally, Judge Leval rejected the defendants' argument that it would violate the fairness requirement of the Due Process Clause for a New York court to exercise jurisdiction over them. Citing *Kernan v. Kurz-Hastings, Inc.*,[55] he set forth a two-part test for asserting personal jurisdiction: "the [s]tate's laws authorize service of process upon the defendant and an assertion of jurisdiction under the circumstances of the case comports with the requirements of due process."[56] Judge Leval stated:

> The required due process inquiry itself has two parts: whether a defendant has "minimum contacts" with the forum state and whether the assertion of jurisdiction comports with traditional notions of fair play and substantial justice—that is whether . . . [the exercise of jurisdiction] is reasonable under the circumstances of a particular case.[57]

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important to the maintenance of good relationships with existing investors and potential investors. The defendants also argued that if they were to perform the investor relations services themselves, it would not necessarily be in New York. Judge Leval rejected this argument as extremely weak. *Id.*

52. *Id.* at 98.
53. *Id.* (citations omitted).
54. *Wiwa*, 226 F.3d at 98 (citations omitted).
55. 175 F.3d 236 (2d Cir. 1999).
56. *Wiwa*, 226 F.3d at 99.
57. *Id.* (quoting Chaiken v. VV Publ'g Corp., 119 F.3d 1018, 1027 (2d Cir. 1997)).

Judge Leval explained that "once a plaintiff has made a 'threshold showing' of minimum contacts, the defendant must come forward with a 'compelling case that the presence of some other considerations would render jurisdiction unreasonable.'"[58] Judge Leval admitted that there were certain factors favoring jurisdictional dismissal but reasoned that "[t]he defendants control a vast, wealthy, and far-flung business empire which operates in most parts of the globe."[59] He stated:

> [The defendants] have a physical presence in the forum state, have access to enormous resources, face little or no language barrier, have litigated in this country on previous occasions, have a four-decade long relationship with one of the nation's leading law firms, and are the parent companies of one of American's largest corporations, which has a very significant presence in New York. New York City, furthermore, where the trial would be held, is a major world capital which offers central location, easy access, and extensive facilities of all kinds.[60]

For similar reasons, the Second Circuit reversed Judge Wood's dismissal on *forum non conveniens* grounds, holding that the case should be heard in the Southern District of New York.[61] The Second Circuit's decision in *Wiwa* would please Justice Brennan and others who advocate a flexible and pragmatic approach in the application of personal jurisdiction principles.

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58. *Id.* (quoting Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560 (2d Cir. 1996)) (internal quotation marks omitted).

59. *Id.*

60. *Wiwa*, 226 F.3d at 99. Judge Leval pointed out that the grant or denial of a motion to dismiss for *forum non conveniens* is generally committed to the district court's discretion. The deference accorded to the district court presupposes, however, that the court used "the correct standards prescribed by the governing rule of law." *Id.* (citing Guidi v. Inter-Continental Hotels Corp., 224 F.3d 142, 144-45 (2d Cir. 2000)). Judge Leval stated:

> We believe that, as a matter of law, in balancing the competing interests, the district court did not accord proper significance to a choice of forum by lawful [United States] resident plaintiffs or to the policy interest implicit in our federal statutory law in providing a forum for adjudication of claims of violations of the law of nations.

Id.

61. *Id.* at 108.

C. The Fort Knox Music, Inc. Case

In *Fort Knox Music, Inc. v. Baptiste*,[62] copyright holders brought an action for a declaratory judgment under the Copyright Act over ownership of the well-known song, the "Sea of Love." They sought a declaration that a songwriter was time-barred from commencing any action against them challenging their rights and copyright in a musical composition. The United States District Court for the Southern District of New York, in a decision by Judge John E. Sprizzo, granted a judgment on the pleadings for the plaintiffs, but denied their request for attorneys' fees. The defendant had moved to dismiss the complaint based on a lack of personal jurisdiction. Judge Sprizzo held a hearing on the defendant's motion to dismiss, allowing him to argue by telephone from Louisiana. The court then denied the motion, stating "that for the reasons set forth on the [r]ecord at [o]ral [a]rgument, defendant *pro se's* motion to quash service of the summons and to dismiss the complaint is denied."[63]

On appeal, the Second Circuit, speaking through Judge Amelia Kearse, noted that the issues of personal jurisdiction must be resolved prior to reaching either the merits of the case, or plaintiffs' cross-appeal from the denial of attorneys' fees. She explained that since the Copyright Act did not provide for nationwide service of process, the federal court must apply the forum state's—New York—personal jurisdiction rules. Judge Kearse reviewed decisions under New York's long-arm statute and stated, "In order to determine whether a party has 'transacted business' in New York, a court must look to the totality of circumstances concerning the party's connections to the state."[64]

Judge Kearse then explained:

> In the present case, plaintiffs urged upon the district court various bases for the assumption of personal jurisdiction over Baptiste. The court plainly rejected Baptiste's jurisdictional challenge, but the record does not reveal the ground of that rejection. Because the absence of an explanation prevents meaningful appellate review, we remand the matter to the district court for supplementation of the record with a statement of the factual and doctrinal

62. 203 F.3d 193 (2d Cir. 2000), *vacated by* 139 F. Supp. 2d 505 (S.D.N.Y. 2001).
63. *Id.* at 195-96.
64. *Id.* at 196.

grounds for the court's ruling on personal jurisdiction.[65]

D. The King Case

In *King v. Washington Adventist Hospital*,[66] the Second Circuit issued an unpublished opinion affirming the dismissal of the United States District Court for the Eastern District of New York by Judge Carol Bagley Amon.

In March of 1999, plaintiff King filed a Section 1983 action on behalf of himself, his wife, and his daughter. The complaint related to events that took place at the Montgomery Mall in Bethesda, Maryland. The circuit court pointed out that a review of the district court's dismissal was *de novo*. The court noted that because Section 1983 did not establish a grant of nationwide jurisdiction, federal courts hearing such claims must apply the rules of personal jurisdiction that govern the state in which the court sits. The circuit court found absolutely no grounds upon which the plaintiff had presented any facts sufficient to sustain an exercise of personal jurisdiction under the law of New York State. Thus, the district court's dismissal under Rule 12(b)(2) of the *Federal Rules of Civil Procedure* was affirmed.

III. DISTRICT COURT PERSONAL JURISDICTION OPINIONS

A. General Jurisdiction: C.P.L.R. 301

Federal district courts in the Second Circuit issued at least eleven opinions which analyzed and applied New York's general jurisdiction statute, C.P.L.R. 301.[67] Three themes emerge from these cases. First, if

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65. *Id.* at 197.

66. No. 00-7320, 2001 U.S. App. LEXIS 981, at *1 (2d Cir. Jan. 23, 2001).

67. *See infra* notes 72-97 and accompanying text. *See also* Armstrong v. Virgin Records, Ltd., 91 F. Supp. 2d 628, 639 (S.D.N.Y. 2000) (finding that general jurisdiction under C.P.L.R. 301 existed over defendants subject to their right to renew jurisdictional objections after completion of discovery); Shaheen Sports, Inc. v. Asia Ins. Co., Ltd., 89 F. Supp. 2d 500, 503 (S.D.N.Y. 2000) (holding that the plaintiffs made a *prima facie* showing of personal jurisdiction pursuant to C.P.L.R. 301); United Mizrahi Bank, Ltd. v. Sullivan, No. 97-Civ-9282, 2000 U.S. Dist. LEXIS 16157, at *8 (S.D.N.Y. Nov. 6, 2000) (stating that the plaintiff failed to allege facts sufficient to find that defendants were "doing business" under C.P.L.R. 301); Clay Paky, S.p.A. v. Vari-Lite, Inc., Nos. 99-Civ-11401, 99-Civ-11402, 2000 U.S. Dist. LEXIS 9802, at *19-20 (S.D.N.Y. July 14, 2000) (finding that the defendant was subject to general jurisdiction

a non-domiciliary corporate defendant is not licensed to do business in New York, but maintains an office with employees who solicit business in the state, use bank accounts, and have other property in the state, general jurisdiction exists.[68] Second, some courts focus less on the traditional quantity of doing business contacts, but, rather, focus more on the quality and value of those contacts.[69] Third, cases in which a corporate defendant acts through a third party have caused some difficulties.[70] When the entity not only serves the defendant's interests, but performs activities which are essential to the defendant's operations, the defendant may be deemed to be doing business in New York, but only if an inference of agency exists. In this respect, jurisdictional discovery will be granted if the plaintiff has alleged a *prima facie* case of personal jurisdiction.[71]

1. Theme I

One example of the first theme is *GMAC Commercial Credit, L.L.C. v. Dillard Department Stores, Inc.*,[72] where the district court, by Judge Constance Baker Motley, held that personal jurisdiction existed under the "doing business" provision of C.P.L.R. 301. Judge Motley stressed that the non-domiciliary corporate defendant admitted that it maintained an office and place of business in New York. She also noted the defendant was involved in an action against it in a New York State court and that the defendant derived income from its activities in New York. Judge Motley explained that the defendant's New York contacts were continuous and systematic so that it was fair to presume a corporate presence.[73] Another example of the first theme is *Gamarra v.*

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in New York under the "doing business" provision of C.P.L.R. 301); Ugalde v. DynaCorp, Inc., No. 98-Civ-5459, 2000 U.S. Dist. LEXIS 1745, at *6-7 (S.D.N.Y. Feb. 23, 2000) (stating that defendants were subject to general jurisdiction in New York under the "doing business" provision of C.P.L.R. 301).

68. *See infra* notes 72-76 and accompanying text.
69. *See infra* notes 77-81 and accompanying text.
70. *See infra* notes 82-97 and accompanying text.
71. *Id.*
72. 198 F.R.D. 402 (S.D.N.Y. 2001).
73. *Id.* at 406. Judge Motley stated:

> Defendant, in its verified answer to the complaint in the state action, admits to maintaining an office and place of business at that address in New York. Based upon this admission, this court finds that defendant is "doing business" in New York for the purposes of satisfying C.P.L.R. 301 and that defendant's contacts with New York are sufficient to satisfy the requirements of due process.

Id.

Alamo Rent-A-Car, Inc.,[74] where the district court, by Judge John Elfvin, held that there was no personal jurisdiction under the "doing business" provision of C.P.L.R. 301.[75] Judge Elfvin stated:

> Given that defendants Horan or Cooze are not domiciliaries of New York and otherwise have no physical presence in the United States, do not own any property in New York[,] and have not engaged in any activities in New York which might qualify them as doing business within the meaning of C.P.L.R. 301, there is no basis on which this [c]ourt may, under such section, exercise personal jurisdiction over defendants.[76]

2. *Theme II*

One example of the second theme is *Photoactive Productions, Inc. v. AL-OR International, Ltd.*,[77] where the district court, by Judge Arthur Spatt, held that a manufacturer was engaged in a continuous and systematic course of doing business in New York so as to warrant a finding of its presence in New York for purposes of general jurisdiction under C.P.L.R. 301. The defendant argued that it had "no offices, warehouses, employees[,] or residences within New York."[78] Also, the defendant claimed it did not maintain any officers, agents, or business representatives in New York; did not own any real or personal property in New York; and did not maintain any telephone numbers or directory listings in New York. Its primary contacts with the Empire State were solicitations by way of telephone contact from La Jolla, California.[79] Finally, the defendant argued that sales of its products to retailers within

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74. No. 99-Civ-411, 2001 U.S. Dist. LEXIS 1146, at *1 (W.D.N.Y. Jan. 4, 2001).

75. *Id.* at *2. Plaintiff commenced his action in the New York State Supreme Court, Erie County, seeking redress for injuries allegedly sustained in an automobile accident that occurred in the Province of Ontario, Canada. The action was removed on diversity of citizenship grounds to the federal district court. *Id.*

76. *Id.* at *5. The district court also rejected personal jurisdiction on C.P.L.R. 302 grounds because any alleged tortious conduct and its resulting injury occurred in Canada. *Gamarra*, 2001 U.S. Dist. LEXIS 1146, at *5.

77. 99 F. Supp. 2d 281 (E.D.N.Y. 2000).

78. *Id.* at 285.

79. *Id.* The defendant also argued, "New York is an inconvenient forum because all the evidence, documents, witnesses[,] and principals are located in California." *Id.* In addition, defendant claimed that none of its employees or representatives had ever traveled to New York to negotiate, discuss, or enter into a contract with the plaintiff. Hence, the defendant argued it did "not have sufficient minimum contacts with New York to justify a finding of [personal] jurisdiction in the Eastern District of New York." *Photoactive Prods., Inc.*, 99 F. Supp. 2d at 285.

New York represented only three to five percent of its total sales.

Judge Spatt recognized that the defendant's solicitation of business alone could not justify a finding of presence in New York pursuant to C.P.L.R. 301. Nonetheless, relying on *A.I. Trade Finance, Inc. v. Petra Bank*,[80] he explained that, in the context of a motion to dismiss, he must view the facts in a light most favorable to the plaintiff. He then stated:

> [T]he [c]ourt notes that the plaintiff has made a [*prima facie*] showing of jurisdiction by alleging that AL-OR solicits business in New York; advertises in New York; conducts a large number of sales in New York; and receives considerable revenue from sales in New York.[81]

Judge Spatt focused on the fact that the defendant's advertising schedule contemplated expenditures of more than $650,000 in New York for 1999. This jurisdictional analysis is practical and pragmatic. It avoids reliance on the traditional factors for a finding of general jurisdiction, and it focuses on the benefits the non-domiciliary defendant receives from New York. If the benefits are substantial, it is fair and reasonable for the defendant to expect to be hailed into New York to defend the lawsuit.

3. Theme III

Several cases illustrate the third theme. In *Dorfman v. Marriott International Hotels, Inc.*,[82] the plaintiff octogenarian sought to recover five million dollars in damages for personal injuries she suffered upon exiting an unleveled elevator located in the Budapest Marriott Hotel. The complaint gave rise to a "spate of defensive motions," one of which, by Otis Felvono ("OF"), was to dismiss for lack of jurisdiction. The United States District Court for the Southern District of New York, by Judge Charles Haight, stated, "The [c]ourt will first consider the threshold question of whether this [c]ourt has personal jurisdiction over OF."[83] Judge Haight explained that the plaintiff had not alleged that OF directly conducted business in New York within the meaning of C.P.L.R. 301; however, under New York law, jurisdiction could be obtained over a foreign company if it is a "mere department" of an

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80. 989 F.2d 76 (2d Cir. 1993).
81. *Photoactive Prods., Inc.*, 99 F. Supp. 2d at 288.
82. No. 99-Civ-10496, 2001 U.S. Dist. LEXIS 642, at *1 (S.D.N.Y. Jan. 29, 2001).
83. *Id.* at *8.

entity that is present in New York.[84] Since the plaintiff had alleged the inference of an agency,[85] Judge Haight reviewed the Second Circuit's requirements.

> In *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft*, . . . the [c]ourt announced the factors to consider in determining whether to assert jurisdiction over a related foreign corporation. The "essential factor," which by itself is not determinative is common ownership. . . . Here it is uncontested that OF is wholly owned by OE. . . . Three other factors to consider are the financial dependency of the subsidiary on the parent, the degree to which the parent interferes in personnel and fails to observe corporate formalities, and the degree of control over marketing and operations by the parent over the subsidiary. . . .[86]

In response to OF's motion to dismiss, the plaintiff submitted pages from *www.otis.com*, a web-site of OF's parent corporation, which was doing business in New York. The web-site advertised that the parent had employees in 1700 worldwide locations, that eighty percent of its employees were non-Americans, and that eighty percent of its revenues were generated abroad. Judge Haight held that the facts recited on the parent's corporate web-site raised legitimate questions as to the level of control exercised by the parent with respect to OF, and, further, that the questions raised by the *Beech* factors should be addressed after discovery had occurred. Accordingly, the district court allowed the plaintiff limited discovery to ascertain the jurisdictional facts necessary to establish whether the court had general personal jurisdiction over OF, pursuant to C.P.L.R. 301.[87]

It is questionable whether Dorfman had shown a *prima facie* case of personal jurisdiction, which the Second Circuit requires prior to granting jurisdictional discovery.

In *Aerotel, Ltd. v. Sprint Corp.*,[88] the United States District Court for the Southern District of New York, by Judge Shira Scheindlin, held that if evidence existed that a nonresident defendant corporation and its

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84. *Id.*

85. *Id.* at *10-11.

86. *Dorfman*, 2001 U.S. Dist. LEXIS 642, at *11 (citations omitted). Judge Haight stated, "Where a plaintiff must, as here, establish jurisdiction by a preponderance of the evidence, the court is wise to allow this discovery." *Id.* at *14 (citing Filus v. Lot Polish Airlines, 907 F.2d 1328, 1332 (2d Cir. 1990)).

87. *Id. See also* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 713 (9th Cir. 1992) (finding that "where pertinent facts bearing on the question of jurisdiction are in dispute, discovery should be allowed.").

88. 100 F. Supp. 2d 189 (S.D.N.Y. 2000).

resident subsidiaries shared overlapping management, though insufficient to pierce the corporate veil and establish the court's personal jurisdiction over the parent, it was sufficient to avoid pretrial dismissal for lack of jurisdiction. Judge Scheindlin stated:

> Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, . . . legally sufficient allegations of jurisdiction. At that preliminary stage, the plaintiff's *prima facie* showing may be established solely by allegations. After discovery, the plaintiff's *prima facie* showing necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant. At that point the *prima facie* showing must be factually supported.[89]

Two district court opinions illustrate how difficult the *Beech* four-part test is to apply. In *Cornell v. Assicurazioni Generali S.p.A, Consolidated*,[90] the United States District Court for the Southern District of New York, by Judge Michael Mukasey, dismissed a class action suit against twenty European insurance companies for lack of personal jurisdiction, and denied plaintiff's motion for jurisdictional discovery.[91] First, Judge Mukasey referred to the four factors in *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft*,[92] and explained that it was the parent corporation who was doing business in New York, which the plaintiff sought to impute to the subsidiary. Judge Mukasey found a parent/subsidiary relationship was not enough for an assertion of general jurisdiction. Absent an agency relationship, which Judge Mukasey held did not exist, there was no general jurisdiction. Judge Mukasey also denied plaintiffs' requests for jurisdictional discovery. He relied on

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89. *Id.* at 194.

90. Nos. 97-Civ-2262, 98-Civ-9186, 2000 U.S. Dist. LEXIS 11991, at *1 (S.D.N.Y. Aug. 10, 2000).

91. *Id.* at *4-5. Judge Mukasey explained that the plaintiffs' complaint stated, without any supporting facts, that the defendants participated in a multinational insurance arrangement within the state of New York. He reasoned that these legal conclusions presented as factual allegations were not facts and could not substitute for facts. Judge Mukasey noted that conclusory non-fact-specific jurisdictional allegations were not sufficient to establish even a *prima facie* showing of personal jurisdiction under C.P.L.R. 301. *Id.*

92. 751 F.2d 117 (2d Cir. 1984). *Beech* set out four factors: (1) common ownership, which is essential; (2) financial dependency of the subsidiary on the parent corporation; (3) the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities; and (4) the degree of control over the marketing and operational policies of the subsidiary exercised by the parent. *Id.* at 120-22.

Jazini v. Nissan Motor Co.,[93] for the rule that if the plaintiffs did not establish a *prima facie* case showing that the district court had jurisdiction over the defendant, the court would not err in denying discovery on that issue.[94]

In *Jerge v. Potter*,[95] the United States District Court for the Western District of New York rejected plaintiff's argument that a subsidiary doing business in New York could be imputed to its parent corporation. The court analyzed the four factors derived from *Beech*, concluding that the Second Circuit's requirement that accounting principles require parent corporations to consolidate financial statements if the parent corporation owns more than fifty percent of a subsidiary's stock meant the consolidation was non-dispositive of the jurisdictional issue.[96] The court also pointed out that having common directors and officers is a normal business practice of a multinational corporation, and absent complete control, there is no justification to labeling a subsidiary a mere department of the parent corporation.[97]

B. Long-arm Jurisdiction: C.P.L.R. 302

1. Initial Observations

Federal district courts in the Second Circuit issued approximately fifty opinions analyzing and applying New York's long-arm statute—C.P.L.R. 302.[98] In about one-half of the opinions, federal district court

93. 148 F.3d 181 (2d Cir. 1998).

94. *Id.* at 186.

95. No. 99-CV-0312E, 2000 U.S. Dist. LEXIS 11648, at *1 (W.D.N.Y. Aug. 11, 2000).

96. *Id.* at *3.

97. *Id.* at *4.

98. *See In re* Sumitomo Copper Litig., 120 F. Supp. 2d 328, 335 (S.D.N.Y. 2000) (stating that under New York's long-arm statute, the court had specific personal jurisdiction over officers and directors of broker in RICO action); Mario Valente Collezioni, Ltd. v. Confezioni Semeraro Paolo, 115 F. Supp. 2d 367, 372 (S.D.N.Y. 2000) (finding that long-arm jurisdiction exists under C.P.L.R. 302(a)(1)'s "contracts anywhere" clause); Scholastic, Inc. v. Stouffer, No. 99-Civ-11480, 2000 U.S. Dist. LEXIS 11516, at *5 (S.D.N.Y. Aug. 14, 2000) (finding that long-arm jurisdiction in intellectual property cases exists under C.P.L.R. 302(a)(1)); Credit Suisse First Boston Corp. v. Continental Sav. Bank, No. 99-Civ-2792, 2000 U.S. Dist. LEXIS 793, at *2 (S.D.N.Y. Jan. 31, 2000) (holding that a commercial tort did not occur within New York for purposes of C.P.L.R. 302(a)(2) jurisdiction); Weissman v. Seiyu, Ltd., No. 98-Civ-6976, 2000 U.S. Dist. LEXIS 509, at *4 (S.D.N.Y. Jan. 18, 2000) (holding that long-arm jurisdiction exists because of the activities of defendant's agents in New York State).

judges found personal jurisdiction.[99] In the other half of the opinions, they found no personal jurisdiction.[100] A review of these survey year cases indicates that the district courts have focused almost exclusively on C.P.L.R. 302(a)(1)'s "transaction of business" contract and tort cases, and on C.P.L.R. 302(a)(3)(ii) tort matters.[101] A review of the cases reveals several interesting trends.

First, in diversity cases and in matters where there is no nationwide jurisdiction, a federal district court must determine if personal jurisdiction exists based on the law of the forum state. Every survey case referred to in this Article is from a New York Federal District Court. The majority of these opinions rely almost exclusively on other federal opinions interpreting New York State substantive law. There is little direct reference to recent personal jurisdiction decisions by New York State appellate courts. New York's long-arm statute is restricted and does not go as far as is constitutionally permissible. In addition to being constrained by the Due Process Clause of the Fourteenth Amendment, it is also restricted by Article I, Section six, of the New York State Constitution. Federal district court judges who fail to rely on

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See also Plunket v. Doyle, No. 99-Civ-11006, 2001 U.S. Dist. LEXIS 2001, at *1 (S.D.N.Y. Feb. 22, 2001) (finding that a dispute over works of Sir Arthur Conan Doyle, author of the Sherlock Holmes stories, did not fit within C.P.L.R. 302(a)(3)(ii), therefore, jurisdictional discovery denied, but the plaintiff was given an opportunity to replead, and if sufficient facts were plead, then limited jurisdictional discovery would be permitted); Arista Tech, Inc. v. Little Enters., 125 F. Supp. 2d 641, 651 (E.D.N.Y. 2000) (stating that there was no long-arm jurisdiction because of plaintiff's failure to allege tortious acts outside New York, as required by C.P.L.R. 302(a)(3)(ii)); Domond v. Great Am. Recreation, Inc., 116 F. Supp. 2d 368, 372 (E.D.N.Y. 2000) (holding that a New Jersey amusement park owner was not subject to long-arm jurisdiction in a personal injury action because C.P.L.R. 302(a)(1) and 302(a)(3)(ii) requirements not satisfied); Maldonado v. Rogers, 99 F. Supp. 2d 235, 238 (N.D.N.Y. 2000) (finding no jurisdiction under C.P.L.R. 302(a)(3)(ii) when accident occurred outside New York; although plaintiff suffered consequences of injuries in New York); Best Cellars, Inc. v. Grape Finds at Dupont, Inc., 90 F. Supp. 2d 431, 444 (S.D.N.Y. 2000) (stating that in a federal question case, personal jurisdiction over nonresident defendants was determined by looking to law of jurisdiction in which federal court sits; long-arm jurisdiction existed under subsection (a)(1), but not under (a)(3) of C.P.L.R.); Barricade Books, Inc. v. Langberg, No. 95-Civ-8906, 2000 U.S. Dist. LEXIS 18279, at *3 (S.D.N.Y. Dec. 19, 2000) (finding no long-arm jurisdiction under C.P.L.R. 302(a)(1) or (a)(2); however, C.P.L.R. 302(a)(3)(ii) requirements satisfied); Cornell v. Assicurazioni General, S.p.A., Consol., No. 97-Civ-2262, 2000 U.S. Dist. LEXIS 11004, at *2 (S.D.N.Y. Aug. 7, 2000) (finding that the plaintiff failed to show long-arm jurisdiction under C.P.L.R. 302(a)(1), and did not allege facts sufficient to warrant limited jurisdictional discovery).

99. *See* cases cited *supra* note 98.

100. *See* cases cited *supra* note 98.

101. *See* cases cited *supra* note 98.

recent state appellate decisions may not be complying with the spirit of the Second Circuit's ruling in *Arrowsmith v. United Press International*,[102] and its progeny.[103]

Second, if a personal jurisdiction objection is made by a defendant, it is clear that the plaintiff need only initially make a *prima facie* showing of jurisdiction. Although the district court can decide the motion on affidavits alone, some courts permit jurisdictional discovery. In a majority of the personal jurisdiction district court cases, decisions were made without the benefit of discovery. This is unfair, particularly when the plaintiff has requested jurisdictional discovery. Also, district court judges do not request *sua sponte* that parties engage in jurisdictional discovery. Jurisdictional discovery enables the plaintiff to gather information to assist him in meeting his ultimate burden—to establish jurisdiction by a preponderance of the evidence at a pretrial hearing or at trial. The standards used for determining if plaintiffs have made out a *prima facie* case for purposes of obtaining discovery vary in the circuit. Some district court judges are more willing to permit jurisdictional discovery than others. This lack of uniformity is unfair. It leads to increased appellate burdens on the Second Circuit. Also, it is well-known that a favorable jurisdictional decision for a plaintiff is tantamount to a favorable settlement. What settles before one district court judge may be appealed, dropped, or settled for less before another district court judge.

Third, there are at least fifteen district court decisions where long-arm jurisdiction is based on phone calls, faxes, and web-sites.[104] These decisions indicate an increase in the judicial business of Second Circuit

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102. 320 F.2d 219 (2d Cir. 1963).

103. *See* cases cited *supra* note 12.

104. *See infra* notes 106-126 and accompanying text. *See also* Telebyte, Inc. v. Kendaco, Inc., 105 F. Supp. 2d 131, 134 (E.D.N.Y. 2000) (stating web-site not sufficient for personal jurisdiction under C.P.L.R. 302(a)(1), (a)(2), or (a)(3)); On Line Mktg., Inc. v. Norm Thompson Outfitters, Inc., No. 99-Civ-10411, 2000 U.S. Dist. LEXIS 95036, at *3 (S.D.N.Y. Apr. 20, 2000) (finding telephone and fax contacts with New York insufficient for long-arm jurisdiction); Nader v. Getshaw, No. 99-Civ-11556, 2000 U.S. Dist. LEXIS 14308, at *5 (S.D.N.Y. Sept. 29, 2000) (finding no C.P.L.R. 302(a)(1) or (a)(3) long-arm jurisdiction because telephone and mail contacts of defendant were not sufficient for purposes of statute); Stewart v. Vista Point Verlag & Ringier Publ'g Co., No. 99-Civ-4225, 2000 U.S. Dist. LEXIS 14236, at *5 (S.D.N.Y. Sept. 29, 2000) (stating that a web-site is not sufficient for purposes of long-arm jurisdiction, therefore, jurisdictional discovery denied); Pieczenik v. Dyax Corp., No. 00-CV-243, 2000 U.S. Dist. LEXIS 9533, at *1 (S.D.N.Y. July 11, 2000) (stating web-site not sufficient for long-arm jurisdiction).

courts. Few of these cases are filed in New York State courts.[105] Finally, two district court cases involve the application of sanctions and the law of *res judicata*.

2. Cases Highlighted

In *Cello Holdings, L.L.C. v. Lawrence-Dahl Companies*,[106] the United States District Court for the Southern District of New York, by Judge Denny Chin, held that the court had personal jurisdiction over an internet registrant. The defendant was a California domiciliary who had diluted a trademark by registering the mark as an internet domain name and telephoning the holder in New York with an offer to sell the domain name rights. Judge Chin found personal jurisdiction under C.P.L.R. 302(a)(3)(ii). Judge Chin pointed out that the plaintiff had alleged that the defendant committed a tortious act outside the state ("cybersquatting") that caused injury to the plaintiff within the state. In addition, the defendant expected or reasonably should have expected his actions to have consequences in New York, and he derived substantial revenue from interstate or international commerce. "He had a web-site offering domain names for sale and he in fact sold two domain names."[107] Judge Chin also concluded that the exercise of personal jurisdiction over the defendant would not violate the Due Process Clause of the Constitution. He stated, "Storey [the defendant] purposefully availed himself of the benefits of doing business in New York. He telephoned Cello [the plaintiff] twice and sent an e-mail to Cornell, and thus he 'reached out' and 'originated' contacts with New York."[108]

In *Mason Tayler Medical Products Corp. v Qwikstrip Products,*

105. This Survey author has lectured annually since 1989 on personal jurisdiction before the New York State Trial Lawyers Institute and notes that most of the recent fax, phone, and web-site jurisdiction reported cases are in federal court. For an instructive and scholarly review of the issues, see *Hearst Corp. v. Goldberger*, No. 96-Civ-3620, 1997 U.S. Dist. LEXIS 2065, at *1 (S.D.N.Y. Feb. 26, 1997) (discussing long-arm jurisdiction based on nonresident's internet contacts with New York).

106. 89 F. Supp. 2d 464 (S.D.N.Y. 2000).

107. *Id.* at 470.

108. *Id.* At all pertinent times, for purposes of considering whether personal jurisdiction existed, Storey was a citizen and resident of California. He never resided in, or had been a citizen of, New York. He never owned any real property, or maintained any offices, bank accounts, or telephone listings in New York. He had not personally visited New York in almost thirty years. After registering his domain name, however, Storey sent electronic mail messages to at least nine individuals or companies he had targeted to sell items. *Id.*

L.L.C.,[109] the United States District Court for the Western District of New York, by Judge John Elfvin, found that the defendant transacted business in New York under C.P.L.R. 302(a)(1) by making telephone, fax, and internet contacts to the Empire State. He reminded the bar that the New York long-arm statute is a single contact statute and that so long as the relevant cause of action arises from the contact there is jurisdiction. Judge Elfvin also reminded the bar, "It is well settled that a defendant need not be physically present in New York to be found to have transacted business here."[110] Similarly, in *Toledo Peoria & Western Railway Corp. v. Southern Illinois Railcar Co.*,[111] the United States District Court for the Northern District of New York, by Judge Kahn, held that a defendant's renewal of lease terms via telephone and facsimile communications constituted sufficient contact with New York to subject the defendant to personal jurisdiction of the court. Judge Kahn stated, "[I]t is also clear that the physical presence, in this cellular and digital age, is not necessary. The substance of those communications dominates, not their quantity or form."[112]

Judge Kahn qualified his opinion by noting that, despite modern advances in technology, jurisdiction "conveys a sense of limits and boundaries of the appropriate balance between states and the federal government dictated by federalism."[113] This is a position which the United States Supreme Court, arguably, repudiated long ago.[114]

In *Haddad Brothers, Inc. v. Little Things Mean A Lot, Inc.*,[115] the United States District Court for the Southern District of New York, by Judge Alan Schwartz, held that personal jurisdiction existed over a Utah corporation engaged in the business of producing, marketing, and selling various lines of christening clothing for babies. Judge Schwartz found general jurisdiction but stated, "Even if the 'doing business' test were not applicable here, the court would still have jurisdiction over

109. No. 99-CV-0177E, 2000 U.S. Dist. LEXIS 5170, at *1 (W.D.N.Y. Apr. 14, 2000).

110. *Id.* at *4.

111. 84 F. Supp. 2d 340 (N.D.N.Y. 2000).

112. *Id.* at 343.

113. *Id.*

114. *See* Ins. Corp. of Ireland v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 702 n.10 (1982). The Due Process Clause itself makes no mention of federalism concerns. "Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement." *Id.*

115. No. 00-Civ-0578, 2000 U.S. Dist. LEXIS 11035, at *1 (S.D.N.Y. Aug. 4, 2000).

Little Things under New York's long-arm statute."[116] Key to this conclusion was the fact that the defendant's online store also offered products to New York customers.[117] Similarly, in *Cable News Network, L.P. v. Gosms.Com, Inc.*,[118] the United States District Court for the Southern District of New York, by Lawrence McKenna, held that the defendant was subject to long-arm jurisdiction under C.P.L.R. 302(a)(3)(ii). With respect to the expectation requirement of the long-arm statute, Judge McKenna stressed that the defendant had used mobile telephone service for its worldwide market. This was sufficient under the Second Circuit's *Kerman v. Kurz-Hastings, Inc.*[119] rule, to satisfy the statutory requirements.

An instructive web-site case is *Hsin Ten Enterprise, USA, Inc. v. Clark Enterprises*,[120] where the United States District Court for the Southern District of New York, by Judge Shira Scheindlin, thoughtfully analyzed the question of when web-site contacts are sufficient for jurisdiction purposes.[121] The judge pointed out that the Second Circuit has made it clear that personal jurisdiction over a defendant is not appropriate simply because the defendant maintains a web-site, which residents of New York may visit. Rather, Judge Scheindlin stated, "[C]ourts must examine the nature and quality of commercial activity that an entity conducts over the internet."[122]

Judge Scheindlin reminded the bar that courts considering the issue of the amount of internet activity sufficient to trigger personal jurisdiction must examine a number of facts.[123] First, at the lower end of the spectrum are passive web-sites, which primarily make information available to viewers but do not permit an exchange of information.[124] Such web-sites do not confer personal jurisdiction. Judge Scheindlin expanded:

> At the other end of the spectrum are cases in which the defendant clearly does business over the internet, such as where it repeatedly transmits computer files

116. *Id.* at *5.
117. *Id.* at *4.
118. No. 00-Civ-4812, 2000 U.S. Dist. LEXIS 16156, at *1 (S.D.N.Y. Oct. 30, 2000).
119. 175 F.3d 236 (2d Cir. 1999).
120. No. 00-Civ-5878, 2000 U.S. Dist. LEXIS 18717, at *1 (S.D.N.Y. Dec. 28, 2000).
121. *Id.* at *11-15.
122. *Id.* at *13 (internal quotation marks omitted).
123. *Id.*
124. *Clark Enters.*, 2000 U.S. Dist. LEXIS 18717, at *14.

> to customers in other states.... Occupying the middle ground are 'interactive' web-sites, which permit the exchange of information between the defendant and web-site viewers.... Generally, an interactive web-site supports a finding of personal jurisdiction over the defendant.[125]

Judge Scheindlin found C.P.L.R. 302(a)(1) "transaction of business" specific jurisdiction because "Clark's [w]eb-sites enabled the viewer to purchase the [e]xercise [m]achine online, download an order form, download an application to become an 'independent affiliate,' and ask questions of an online representative. At the very least, the [w]eb-sites are highly interactive."[126] The court concluded that the "arising out of" requirement was satisfied, and that there were minimum contacts for purposes of satisfying the Due Process Clause of the Constitution.

3. Final Cases

a. Rule 11

In *Roberts-Gordon, L.L.C. v. Superior Radiant Products, Ltd.*,[127] the United States District Court for the Western District of New York, by Judge Richard Acara, held that sanctions could not be imposed on an Ontario manufacturer for challenging jurisdiction.

The plaintiff moved for sanctions against the defendant, arguing that its motion to dismiss for lack of personal jurisdiction was predicated on false and misleading statements contained in an affidavit that it submitted. The plaintiff argued that the affidavit falsely stated that the defendant had no end-user customers in New York State, that defendant's New York distributors were not authorized to contract on behalf of the company, and generally denied that the defendant had sufficient contacts with New York to entertain jurisdiction.[128]

Judge Acara, who adopted a report from Magistrate Judge Leslie Foschio, reminded the bar that Rule 11 sanctions are to be imposed when it appears that a competent attorney could not form the requisite reasonable belief as to the validity of what is asserted in a pleading or motion. He also stated, "A violation of Rule 11 requiring the imposition of sanctions occurs where it is patently clear that a claim has absolutely

125. *Id.* at *14-15.
126. *Id.*
127. 85 F. Supp. 2d 202 (2d Cir. 2000).
128. *Id.* at 219.

no chance of success . . . . A subjective claim of good faith does not provide a 'safe harbor' from the threat of this rule."[129] Judge Acara then found that sanctions were not warranted because the record supported a finding that the motion was not frivolous when made as the complaint alluded to jurisdiction based on the presence of the defendant's interactive web-site and distributors in New York.[130]

b. Res Judicata

The final survey year case is *1 Five O, Inc. v. A. Schulman*,[131] where the United States District Court for the Western District of New York, by Judge John Elfvin, held that a state court ruling regarding personal jurisdiction was binding on the defendant. The plaintiff had filed a state court action and later moved to strike the defendant's jurisdictional defenses. The Supreme Court of New York denied the plaintiff's motion to strike and specifically held that the plaintiff had failed to establish that the defendant had minimum contacts with New York under C.P.L.R. 302(a)(1). The parties later entered into a stipulation to discontinue that suit without prejudice to recommencement in a court of proper jurisdiction. On the same day, plaintiff commenced his federal lawsuit.[132]

The defendant moved to dismiss the federal claims on the grounds of issue preclusion—collateral estoppel—arguing that the issue of personal jurisdiction was adequately litigated and adjudicated in the prior state proceeding. The plaintiff argued that because the state court ruling was not dispositive of the state action on jurisdictional grounds, it was not binding on the district court. The plaintiff had not been given an opportunity to litigate whether jurisdiction existed under C.P.L.R. 302(a)(2) or (a)(3).[133]

Judge Elfvin noted that federal courts must give to a prior state court decision the same preclusive effect, either claim preclusion or issue preclusion, that the courts of New York would give to it. He then reviewed the narrow doctrine of issue preclusion as applied in state courts, and concluded that it should be applied. Judge Elfvin disregarded plaintiff's argument that the state court had not considered

129. *Id.* (internal quotation marks omitted).
130. *Id.*
131. No. 99-Civ-0354E, 2000 U.S. Dist. LEXIS 7938, at *1 (W.D.N.Y. May 31, 2000).
132. *Id.*
133. *Id.* at *2.

whether jurisdiction existed under C.P.L.R. 302 (a)(2) or (a)(3).[134] The result confuses claim preclusion with issue preclusion. The fact that the state court judge made a jurisdictional determination solely based on C.P.L.R. 302(a)(1) should not preclude the plaintiff from relitigating the issue of personal jurisdiction under C.P.L.R. 302(a)(2) or (a)(3).

IV. CONCLUSION

This year's Survey on personal jurisdiction cases demonstrates that the judges of the Second Circuit devote an enormous amount of their valuable time to questions of whether they have power over non-domiciliary defendants. One can only speculate as to how many of the district court opinions discussed in the Survey will be appealed to the Second Circuit. The nation's federal appellate courts' dockets are crowded. Federal district court judges should require at least limited jurisdictional discovery prior to granting or denying personal jurisdiction defenses. Discovery is required because the plaintiff must ultimately establish jurisdiction by a preponderance of the evidence and because facts bearing on the question of jurisdiction are usually in dispute.

134. *Id.*