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Nelson v. Massachusetts General Hosp.
S.D.N.Y.,2007.
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United States District Court,S.D. New York.
Margaret D. NELSON, as Executrix of the Estate of Trevor C. Nelson, Deceased, Individually, and as Parent and Natural Guardian of Conrad B. Nelson and George R. Nelson, Plaintiff,
v.
MASSACHUSETTS GENERAL HOSPITAL, General Hospital Corporation, Massachusetts General Physicians Organization, Inc. and Partners Healthcare System, Inc., Defendants.
No. 04-CV-5382 (CM).

Sept. 20, 2007.

MEMORANDUM DECISION AND ORDER DISMISSING THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION

McMAHON, J.

***1** This action for wrongful death, medical malpractice, and fraud stems from a course of emergency care provided to the plaintiff's decedent husband, Trevor C. Nelson, at Massachussetts General Hospital (the "Hospital") on July 23 and 24, 2003. According to the allegations of the Verified Complaint, Mr. Nelson, a New Yorker on vacation in Massachusetts, was admitted to the Hospital's Emergency Room for observation at 9:56 p.m. on July 23, 2003. (Cplt. ¶¶ 5, 65) That same night, a Hospital nurse allegedly administered two controlled substances to Mr. Nelson, the psychiatric sedative Ativan and the morphine narcotic Dilaudid, without a doctor's order. (Cplt.¶¶ 18, 19). The plaintiff alleges that the administration of both Dilaudid and Ativan to the same patient is medically contra-indicated and is a known cause of respiratory depression and diminution of breathing capacity. (Cplt. ¶ 19). Defendants then left Mr. Nelson unmonitored until 5:00 a.m. when a different nurse purportedly administered the same combination of drugs upon the order of a doctor who had not examined the patient or ordered his examination or monitoring. (Cplt.¶¶ 20-22). At 6:43 a.m. on July 24, 2003, when Mr. Nelson was next observed, he had no pulse and was not breathing. (Cplt.¶ 23). After twenty to twenty-five minutes of vigorous resuscitation, a heartbeat was obtained, but Mr. Nelson was already and remained brain dead. (Cplt.¶ 24). He was taken off life support and declared dead at 9:50 p.m. on July 24, 2003, having spent just a few minutes short of 24 hours in the Hospital's care.(*Id.*)

Plaintiff further alleges that, on July 25, 2003, the defendants performed an "illegal and unauthorized autopsy" on the body of Mr. Nelson. (Cplt.¶ 59). Invoking an unspecified Massachusetts statute that mandates an independent County Medical Examiner autopsy for any patient who dies within 24 hours of admission to a hospital, plaintiff avers, *inter alia,* that defendants fraudulently misrepresented to the plaintiff and to the County Medical Examiner's office that decedent's death occurred more than 24 hours after admission. Plaintiff also alleges that defendants withheld suspicious facts surrounding Mr. Nelson's death from the Medical Examiner's office. In sum, plaintiff contends that these misrepresentations and omissions caused the Medical Examiner's office to decline the case and induced the plaintiff to consent to an autopsy performed by the defendant Hospital. (Cplt.¶¶ 63-68).

The medical records of the decedent's hospitalization as well as the report of postmortem examination conducted there demonstrate that the decedent suffered from viral meningitis. (Cplt.¶ 70). Plaintiff alleges, however, that the Hospital Report and Certificate of Death documents wrongly ascribe the decedent's death to the disease, and that the defendants' fraudulent inducement of the plaintiff's consent to an internal autopsy was intended to deprive the plaintiff of an independent and unbiased autopsy, which would have revealed that the true

cause of death was defendants' malpractice. (Cplt.¶¶ 78-81). Plaintiff claims that "the above described misrepresentations, fraud and wrongful conduct in connection with the unauthorized autopsy by the Defendants on the body of the Plaintiff's decedent ... caused damage to the plaintiff and her children ..." (Cplt.¶ 82).

***2** After several months of jurisdictional discovery, defendants The Massachusetts General Hospital (sued incorrectly as "Massachusetts General Hospital") ("TMGH"), The General Hospital Corporation ("GHC"), Massachusetts General Physicians Organization, Inc. ("MGPO"), and Partners HealthCare System, Inc. ("PHS") have moved to dismiss the Complaint in its entirety pursuant to Fed.R.Civ.P. 8(a), 9(b), 12(b)(2), (3) and (6), or in the alternative for an order transferring the case to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1406(a) or 28 U.S.C. § 1404(a).

For the reasons that follow, the court concludes that it lacks personal jurisdiction over all of the defendants. The complaint is, therefore, dismissed, without prejudice to the commencement of a lawsuit in a jurisdiction where the defendants can be sued.

I. *Jurisdictional Facts*

A. Defendants' New York Contacts

Each of the defendants is a Massachusetts non-for-profit charitable corporation with its principal and only place of business in Massachusetts. (Defs' Resp., No. 29, Mishaan Aff. Exs. 4-7). It is undisputed that none of the defendants has any offices, employees, bank accounts, phone listings or real property in New York. (Def's Resp., Nos. 1-7, 9-10, 17-25; Mishaan Aff. Exs. 4-7).

A brief overview of the four corporate defendants demonstrates that GHC owns and operates the hospital facility (Massachusetts General Hospital, hereinafter referred to as Mass General or the Hospital) where Mr. Nelson received his treatment; TMGH carries on charitable fundraising for the Hospital; MGPO employs physicians who have privileges to practice medicine at the Hospital; and PHS is a network of physicians, medical centers and hospitals in eastern Massachusetts. Plaintiff argues that these different corporate entities are "mere departments" of one another, so the New York contacts of each should be attributed to all for jurisdictional purposes.

I will begin by describing the jurisdictional contacts adduced with respect to each of the defendants.

1. *General Hospital Corporation*

GHC owns and operates a hospital in downtown Boston, Massachusetts, known as Massachusetts General Hospital. (GHC Resp., No. 29, Mishaan Aff. Ex. 5 and Ex. 7 at MA 000001347; Lesser Dec. ¶ 51). The Hospital is a tertiary acute care hospital licensed for approximately 875 beds. It serves the Boston and surrounding communities in eastern Massachusetts. (Mishaan Aff. Ex. 7 at MA 000001401.) It is incorporated in Massachusetts as a non-for-profit charitable corporation and has its principal (and as far as the court knows, its only) place of business in Boston, Massachusetts. (GHC Resp., No. 29, Mishaan Aff. Ex. 5).

GHC has no offices employees, agents, bank accounts, or phone listings in New York. (GHC Resp. No. 21-23, 29, Mishaan Aff. Ex. 5 and Ex. 7 at MA 000001411-12). GHC does not actively recruit physicians or staff in New York. (GNC Resp., No. 17(f)-(g), Mishaan Aff. Ex. 5). Nor does GHC advertise in New York. (GHC Resp., No. 17(e), Mishaan Aff. Ex. 5). Of the over five million patients treated by the Hospital during the four-year period preceding the filing of the complaint, only 0.39% (approx.) listed a New York address upon their admission to the Hospital, translating into approximately 5,000 patients per year. (Beers Aff. ¶¶ 3-10). Similarly, the treatment of patients listing a New

York address accounted for no more than 1.7% of the total revenues received for medical services provided by the Hospital in any of the four years preceding this litigation. (*Id.*) GHC has received a total of $56.4 million in revenue from the treatment of New York patients during the four fiscal years preceding this litigation (*Id*); in just one of those years (2000), the Hospital's net revenue from patient treatment exceeded $800 million.

*3 GHC has entered into four contracts with New York entities: Epigen, Applied Genetics Incorporated Dermatics, ImClone Systems, and Wyeth Research Division, Wyeth Vaccines. These contracts relate to the licensing or transfer of material for medical research. (GHC Suppl. Resp., Nos. 8, 17(i), Mishaan Aff. Ex. 9). GHC's contracts with Epigen and Wyeth contain New York choice of law provisions. (Lesser Dec. at 43).

GHC had also entered into two agreements relating to a collaborative research effort in the field of medical imaging with the General Electric Company ("GE") in Schenectady, New York. Both agreements provided for the application of Massachusetts law. Both agreements had terminated prior to the filing of the complaint in this action. (GHC Resp., No. 19, Mishaan Aff. Ex. 7).

GHC has not participated in any litigation involving a New York party for fifteen years preceding the filing of the complaint. (Mishaan Aff. Ex. 7 at MA 000001034, 1226, 1414; Def. Aug. 22, 2007 Letter at 2). Plaintiff was able to identify two actions that were recently filed against GHC-one in this court and one in the Eastern District of New York-but represents to the court that "neither case apparently advanced in any material way."(Pl. Sept. 7, 2007 Letter at 15).

From time to time, GHC distributes published material nationwide, some of which may reach New York residents. (GHC Suppl. Resp., No. 17(d), Mishaan Aff. 8).

The primary website operated by GHC is a globally-accessible site at http:// www.massgeneral.org, which permits users to search for a doctor, expedite physician referrals, research clinical trials, and learn about patient care and services. (GHC Resp., No. 2, Mishaan Aff. Ex. 5). Users can also register as patients, request appointments at the Hospital, or make donations to the MGH Fund using a credit card. (Lesser Dec., Ex. 11, 12, 13, 15).

On June 23, 2003, a cancer surgery was interactively broadcast through the GHC website, offering viewers the opportunity to submit questions by email. (Lesser Dec. Ex. 16).[FN1] The Neurology Department at the Hospital runs an interactive Internet chat board as part of its "Braintalk Communities" program, and discovery has uncovered one post by a chat board participant from New York, dated June 10, 2002. (Lesser Dec. Ex. 17).

> FN1. The plaintiff claims that GHC maintains a significant contact with the state of New York in the form of a monthly educational oncology videoconference with a New York Hospital. This argument is not supported by any evidence in the record and so must be disregarded.

Since the website became operational, GHC has received a total of eleven donations through it, for a total value of $665, from individuals or entities with a New York address. (Thompson Aff. ¶¶ 7-9).

GHC also participates in defendant PHS's medical consulting website, which is described in greater detail below. (*Id.*) Its participation is, however, insignificant: discovery has revealed that only one New York-based physician and his or her patient consulted with or was treated by a GHC physician out of the 117 patients nationwide who have utilized the PHS service since its inception in June 2001. (GHC Resp., No. 2, Mishaan Aff. Ex. 5). This transaction generated a payment of $600. (*Id.*)

*4 GHC engages in charitable fundraising jointly with TMGH, as described below.

2. *Massachusetts General Physicians Organization, Inc.*

MGPO employs more than 2,500 physicians who have privileges to practice medicine at Massachusetts General Hospital. (MGPO Resp., No. 29, Mishaan Aff. Ex. 6 and Ex. 7 at MA 000001347). It is incorporated in Massachusetts as a non-for-profit charitable corporation and has its principal place of business in Boston, Massachusetts. (MGPO Resp., No. 29, Mishaan Aff. Ex. 6). MGPO physicians primarily serve Boston and surrounding communities in eastern Massachusetts. (Mishaan Aff. Ex. 7 at MA 000001401). MGPO does not solicit or receive donations, operate a website, or secure financing for its operations. (MGPO Resp., Nos. 2, 11-12, 14-16, 25, Mishaan Aff. Ex. 6).

MGPO has no offices employees, agents, bank accounts or phone listings in New York. (MGPO Resp., No. 21-23, 29, Mishaan Aff. Ex. 6). MGPO also does not have any contracts with New York entities, does not advertise in the state, and has not participated in any material litigation with a New York party for at least the four-year period preceding the filing of the complaint. (MGPO Resp., Nos. 8, 17(d)-(e), (i), 23, Mishaan Aff. Ex. 6 and Ex. 7 at MA 000001034, 1226, 1414).

3. *The Massachusetts General Hospital*

TMGH is the sole member of GHC and MGPO. (Mishaan Aff. Ex. 7 at MA 000001346-47). A "member" is defined under Massachusetts law as "one having membership rights, whether or not designated as a member, in a corporation in accordance with the provisions of organization or by-laws."Mass Gen. Laws, Ch. 180 § 2(e). In the organizational structure of the PHS network, the members of a particular organization are affiliates who are permitted to elect the board of trustees of that organization. (Def. Aug. 22, 2007, Letter at 3). Therefore, TMGH (operating through its Board of Trustees) elects the Boards of Directors of GHC and MGPO.

TMGH is incorporated in Massachusetts as a non-for-profit charitable corporation and has its principal place of business in Boston, Massachusetts. (TMGH Resp., No. 29, Mishaan Aff. Ex. 4). Its principal activity is charitable fundraising on behalf of the Hospital. (Mishaan Aff. Ex. 7 at MA 000001346-47). TMGH is not involved in the operation of the Hospital or patient care. (TMGH Resp., Nos. 4, 29, Mishaan Aff. Ex. 4). While members of GHC's medical staff and administration participate in TMGH's fundraising activity, there is no evidence that GHC employs any development/fundraising personnel on its staff.

TMGH concentrates its fundraising efforts in Massachusetts. (Mishaan Aff. Ex. 7 at MA 000001401; Thompson Aff. ¶ 11), but it does not limit its solicitation to residents of that state. Fundraising letters are sent by TMGH primarily to former patients of the Hospital (Thompson Dep. 52), and some of those patients reside in New York. Of the nearly half million form fundraising letters mailed by TMGH on behalf of GHC in 2003 (the only year for which such data is available), fewer than one percent were mailed to New York addresses. (Thompson Aff. ¶ 6; Thompson Dep. at 52:1-9). The New York response rate was 1.7%, representing approximately 3% of the total dollar value raised through these direct mail solicitations. The total amount raised from New Yorkers via direct mail was $5,140. (Thompson Aff. ¶ 6).

***5** In addition to soliciting from former patients, TMGH has, on occasion, purchased lists of outside donors, but it "targets" only the Boston-based individuals on those lists, not New Yorkers or residents of other states.(*Id.* at 51). I interpret this to mean that no fundraising letters were sent to the New Yorkers whose names might appear on those lists.

Of the tens of thousands of donations received by TMGH for the benefit of GHC over the past four fiscal years, approximately 3% came from individuals or entities located in New York. Aside from those who gave in response to the former patient direct mail campaign, those New York donors were

generous. New York-based donors gave between 10% and 20% of the total dollar value received from fundraising during the past four years; during the four-year period that preceded the commencement of this lawsuit, the revenue from New York donations was $51,366,783 or 15.3% of TMGH's total fundraising dollars. (Thompson Aff. ¶¶ 2-5; Lesser Dec. ¶ 23).

Looking specifically at fiscal year 2003, out of 45,544 donations from individuals and organizations across the country, only 829 came from New Yorkers. But the total amount realized from these New York donations was $12.1 million, representing approximately 10% of the total of $115,433,829 raised nationwide. (Lesser Dec. Ex. 29 at 2).

During the four-year period preceding the filing of the complaint, representatives of TMGH made more than 1,200 fundraising trips around the country. Only ten of those trips were to New York, and only one of the ten trips resulted in an overnight stay. (Thompson Aff. ¶ 10). However, James Thompson, the Chief Development Officer employed by TMGH, testified that this figure represented only those trips that were made solely by members of the development staff. It did not include so-called "events" at which physicians from the Hospital (GHC) would travel to speak to interested donor parties at the prospective donors' behest. (Thompson Dep. at 29-30). There is no evidence in the record of how many such "events" took place or how many physicians and/or administrators from GHC were present at them.

Thompson testified that meetings between TMGH personnel and potential donors were "more often than not" (though he did not quantify the matter) the result of invitations from individuals or large foundations whose staff members were interested in learning more about the Hospital's programs and providing charitable support. Thompson facilitates the process that results in donations for the benefit of the Hospital, by putting individuals or foundations that express an interest in giving in touch with the Hospital's faculty, or by following up when the faculty brings an individual's or a foundation's interest in making a donation to his attention. (*Id.* at 37). He testified that, overall, only "a very small number" of the individuals and entities that have expressed an interest in supporting the Hospital are based in New York. (*Id.* at 46). Thompson similarly testified that he would "guess" that the ratio of New York donations to donations nationwide did not change from year to year because

***6** there's just very little activity that we conduct in New York, and there are foundations that have had a long-term interest in supporting the hospital's mission that will make contributions to the hospital. Sometimes those contributions are relatively large, but it really is a result of ... no proactive work that the MGH development office fosters.

(*Id.* at 55).

With respect to fundraising activity in New York, Thompson testified that one large foundation based in New York contributed approximately $2.5 million in the years immediately preceding the commencement of this lawsuit. (*Id.* at 33). An employee of the foundation, whose family member had received treatment at the Hospital, invited the Hospital's physician leadership to present a proposal for support at a meeting in New York. (*Id.* at 34-35). Two follow-up meetings with foundation representatives were held in Boston. (*Id.*).

In contrast to the states like Massachusetts, where TMGH focuses its fundraising activities, TMGH has never held any public fundraising events or functions in New York. (Thompson Dep. at 46).

Since 1955, TMGH has been registered with the State of New York as a charitable organization pursuant to Executive Law § 172 et seq. and files the required reports with the secretary of state on an annual basis. (Mishaan Aff. Ex. 12; Lesser Decl. Ex. 33). New York is one of four states in which TMGH has registered to engage in charitable fundraising, and is the second of four listed in its disclosures to the IRS as a state in which a copy of its

tax return is filed. (Lesser Dec. ¶ 28).

Like GHC, TMGH has no offices, employees, bank accounts, or phone listings in New York. (TMGH Resp., Nos. 21-23, 29, Mishaan Aff. Ex. 4). Nor does TMGH advertise in New York. (TMGH Resp., No. 17(e), Mishaan Aff. Ex. 4). TMGH does not operate a website or secure commercial financing for its operations. (TMGH Resp. Nos. 2, 14, 21, 25, Mishaan Aff. Ex. 4). TMGH also has not entered into any contracts with New York entities or engaged in any material litigation with a New York party for at least the four year period preceding the filing of the complaint. (TMGH Resp., Nos. 8, 17(i), 23, Mishaan Aff. Ex. 4 and Ex. 7 at MA 000001034, 1226, 1414).

4. *Partners Healthcare System, Inc.*

PHS is a network of Massachusetts-based primary care and specialty physicians, academic medical centers (including GHC), community and specialty hospitals and community health centers. (Mishaan Aff. Ex. 7 at MA 000001344 and PHS Resp., No. 29). PHS entities serve primarily Boston and surrounding communities in eastern Massachusetts. (Mishaan Aff. Ex. 7 at MA 000001401). It is incorporated in Massachusetts as a non-for-profit charitable corporation and has its principal place of business in Boston, Massachusetts. (PHS Resp., No. 29, Mishaan Aff. Ex. 7). With approximately 36,000 full-time equivalent employees, PHS is one of the largest private employers in Massachusetts. (Mishaan Aff. Ex. 6 at MA 000001344).

*7 PHS is the sole member of TMGH. (*Id.*)As noted above, this means that the Board of Directors of PHS elects the Board of Directors of TMGH.

Like the other defendants, PHS has no offices, employees, agents, bank accounts, or phone listings in New York (PHS Resp., Nos. 21-23, 29, Mishaan Aff. Ex. 7). Nor does PHS advertise in New York or distribute marketing materials, newsletters, or other published material there. (PHS Resp., No. 17(d)-(e), Mishaan Aff. Ex. 7; PHS Suppl. Resp., No. 13, Mishaan Aff. Ex. 11). PHS has not participated in any litigation involving a New York party. (Mishaan Aff. Ex. 7 at MA 000001034, 1226, 1414).

Of the relatively few donations received by PHS over the four year period preceding the filing of the complaint, fewer that 5% are from New York entities, representing approximately 4.3% of the total dollar value. (PHS Supp. Resp. Nos., 11-12; Mishaan Aff. Ex. 11; Andrews Aff. ¶¶ 2-5). In particular, in fiscal year 2003, PHS received five donations from New York (out of a total of 119 donors nationwide). (Lesser Dec. Ex. 29 at 2). Of the approximately 100 fundraising trips made by PHS representatives during this time, four trips were made to New York, two of which were day trips and two of which included overnight stays of one night. (Andrews Aff. ¶ 6). The most charitable revenue that PHS derived from New York residents in any of the relevant four years was $111,500. (*Id.* at ¶ 5).

PHS provides a variety of corporate services for its member institutions (the "partners"), including finance/treasury, personnel/human resources, asset management, real estate, legal and marketing. Some of these activities touch on New York.

For example, PHS uses the services of approximately 50 investment managers located throughout the country, five of whom hold custody of PHS assets in New York. (PHS Resp., No. 21, Mishaan Aff. Ex. 7; Donovan Aff. ¶ 2). As of September 30, 2004, PHS managed approximately $4.7 billion in assets, including pension and non-pension fund accounts. (PHS Resp., No. 21, Mishaan Aff. Ex. 7; Donovan Aff. 2, Ex. 1). Of those assets, 5.55% (approximately $265 million) is "custodied" (which I assume means is physically located) in New York. (PHS Resp., No. 21, Mishaan Aff. Ex. 7; Donovan Aff. 2, Ex. 1). In addition, as of the end of the 2003 fiscal year, approximately $600 million in defendants' pension and non-pension fund accounts were managed by six New York investment banks or

firms. In sum total, approximately $900 million, representing approximately 19% of defendants' total assets of $4.7 billion, were in New York for custodianship or management at fiscal year end 2003. Since 2000, PHS has paid tens of millions of dollars in fees to the New York firms that manage its money.[FN2](Lesser Dec. ¶¶ 16, 21). Members of PHS's financial staff speak once or twice a month to each of their New York asset managers. (Donovan Dep. at 21, 28, 38, 49, 51, 53).

> FN2. The plaintiff contends the total figure is $35 million, while defendants represent it to be $25 million. Neither side has pointed the court to evidence in the record. It is, in the end, irrelevant.

PHS has obtained financing via six bond issuances during the seven years preceding the instigation of this lawsuit, the last three of them through the Massachusetts Health and Educational Facilities Authority. (PHS Resp., No. 14, Mishaan Aff. Ex. 7). The bond issues were not targeted specifically to New York residents; purchasers of the bonds reside throughout the United States.*Id.* The total raised through the six bond offerings was $1,151,435,000. Some of the underwriters, brokers and law firms associated with these offerings have offices in New York, although counsel for the obligor and counsel for PHS are located in Boston, Massachusetts, as are the trustee and paying agent bank. (Mishaan Aff. Ex. 7 at MA 000000932, 1108, 1344). PHS representatives did not make any trips to New York in support of the offerings. (PHS Suppl. Resp., No. 16, Mishaan Aff. Ex. 11). In connection with certain of these offerings, PHS entered into several interest rate swap transactions with its New York underwriters, JPMorgan Chase Bank and Bear, Stearns Capital Markets, Inc. (Mishaan Aff. Ex. 7 at MA 000001168, 1356).

***8** Although plaintiffs do not indicate which of the four defendants were signatories to the three dozen contracts and other agreements with New Yorkers the defendants produced, it appears that PHS was the signatory to all but the four GHC intellectual property contracts described above. (Lesser Dec. 44, Ex. 7). The contracts with New York companies are for money management, bond insurance, or interest rate swaps. (Lesser Dec. ¶ 42). Twenty-six of the contracts entered into by PHS contain New York choice of law provisions and two contain New York choice of forum provisions. (Lesser Dec. ¶¶ 44-45).

PHS is also a limited partner in two New York limited partnerships run by Venrock Associates III, L.P. (Lesser Dec. ¶ 46). In addition to including a New York choice of law provision, PHS's two contracts with Venrock Associates III contain provisions stating that New York is the principal place of the partnership's business.

PHS operates its primary website at http://www.partners.org. Through that site, PHS operates a physician-to-physician second opinion consultation service. (PHS Resp., No. 2, Mishaan Aff. Ex. 7). The service is available internationally and does not purposefully target physicians or their patients residing in the state of New York. (*Id.*) Douglas McClure, Corporate Manager of Technical Services for PHS Telemedicine, testified that this site "solicits and provides medical care and services to patients and physicians in the state of New York and elsewhere," and that it seeks to do business "in New York and the rest of the world."(McClure Dep. at 29). The site has generated very little business: only 117 patients nationwide have utilized the service since its inception in June 2001. Seven of those "hits" involved New York-based physicians and/or patients. As noted above, only one involved a GHC physician.(*Id.*) The seven New York consultations generated payments totaling $1,450. (PHS Resp., No. 7, Mishaan Aff. Ex. 7).

Finally, through the PHS website, users can link to "Partners Premiere," a health assistance program of which GHC is a member. Partners Premiere provides such services as assigning a Medical Liaison to clients, coordinating referrals among physicians, travel and emergency assistance, and the maintenance of a "virtual health file." It offers ac-

cess "24 Hours a Day, Anywhere in the World."(Lesser Dec. Ex. 14). There is no indication in the record that any New York resident has ever utilized this feature of PHS's website, or that such use has generated any revenue for any of the defendants.

B. Relationship Among the Defendants

Because plaintiff argues that the four corporations should be treated as one for jurisdictional purposes, the defendants have adduced the following evidence of the corporate defendants' relationships to one another and their independent corporate existence:

PHS is a network of Massachusetts-based primary care and specialty physicians, academic medical centers, including the Hospital, community and specialty hospitals and community health centers. PHS is the sole member of TMGH. PHS has its own employees and observes corporate formalities, including separate management teams, boards and by-laws from those of GHC, TMGH and MGPO. (*Id.* at MA 000000963, 1023-29). PHS and its affiliates produce consolidated financial statements consistent with Generally Accepted Accounting Principles.(*Id.* at MA 000000969-70). PHS has its own outstanding long term indebtedness. (*Id.* at MA 000000966). PHS receives revenue from its affiliates by providing certain centralized administrative services and derives additional income from its own investments. (*Id.* at MA 000000988). PHS utilizes a centralized cash management system for the institutions in the network, which segregates its affiliates' accounts and tracks its affiliates' funds separately. (Ortiz Dep. at 11-12, 17-18, 50).

***9** GHC owns and operates the Hospital. GHC was specially incorporated as a subsidiary of TMGH in 1980. (*Id.* at MA000001001). It is part of the PHS network (at times defendants say it is a "member" of PHS, but that is apparently not the same sort of "membership" discussed above, since GHC does not elect PHS's Board). GHC has approximately 5,000 staff members. GHC observes corporate formalities; its management teams, board and by-laws are separate from those of PHS. (*Id.* at MA 000001023-9; Def Sept. 4, 2007 Letter at 4-5, Ex. A).[FN3] GHC is a large recipient of research funding from the federal government, and is a principal teaching affiliate of Harvard Medical and Dental Schools. (*Id.* at MA 000000963). GHC has its own Statement of Operations and Changes in Unrestricted Net Assets, which are audited by PricewaterhouseCoopers, LLP. (*Id.* at 000001002). GHC (together with TMGH) has its own outstanding long term indebtedness. (*Id.* at MA 000000967).

> FN3. Thompson testified at his deposition that GHC does not have its own Board of Directors, but this evidence is contradicted by the By-Laws of GHC, which provides that GHC shall have its own Board of Trustees. I do not understand plaintiff to contend otherwise; rather, I understand her to argue that the Boards of the four defendant institutions have so many common members, are otherwise so overlapping, that they should be considered an indicium of their being "mere departments" of each other.

TMGH was founded by a special act of the Massachusetts legislature in 1811.(*Id.* at MA 000001001).TMGH's primary function is charitable fundraising.(*Id.* at MA 000000963). TMGH is the sole member of GHC and MGPO as well as The McLean Hospital Corporation, The MGH Institute of Health Professionals, Inc ., North End Community Health Committee, Inc., and The Spaulding Rehabilitation Hospital Corporation. (*Id.* at MA 000000963). TMGH observes corporate formalities, including having its own board of trustees and by-laws.(*Id.* at MA 000001027). Four members of the Board are appointed by the Governor of Massachusetts. (Ex. A).

Defendant MGPO employs over 900 doctors and other health care professionals, most of whom are full-time staff physicians at GHC. Approximately

two-thirds of the members of the active staff at the Hospital are participating clinicians with MGPO. (Mishaan Aff., Ex. 7 at MA 000001389). MGPO personnel provide medical, surgical and other health care services to patients of GHC and other affiliated institutions, and supervise other professional and technical personnel of GHC and other affiliated institutions. (Mishaan Aff., Ex. 7. at MA 000000963, 1012). MGPO contracts with managed care organizations on behalf of its own employed physicians as well as other medical staff who are MGPO participating clinicians. (*Id.* at MA 000000963). MGPO observes corporate formalities, including having its own Board of Trustees and by-laws. (Ex. B). MGPO's income from operations was $1.3 million in 2000. An expansion of contracted services with other hospitals both within PHS and outside of the system contributed an additional 8% to other operating revenue. MGPO's operating expenses grew 8.4% during that time, slightly less than its operating revenue growth. (*Id.* at MA 000000987).

The plaintiff responds with the following evidence of the interrelated nature of the corporate defendants' activities:

According to the organizational chart in PHS's bond prospectus, PHS appears to be a holding company that sits at the top of a network of affiliates, which includes the other three corporate defendants in this action. (*Id.* at MA 00000961). The plaintiff contends that membership is synonymous with ownership. Thus, when defendants represent that TMGH is the sole member of defendants GHC and MGPO, and defendant PHS is the sole member of defendant TMGH, (Mishaan Reply Aff. 5, 22), they are actually confirming that PHS owns the remaining defendants and is, in turn, owned by them. Sara Andrews, Director of Development for PHS testified that PHS "owns" the affiliated hospitals in its network. (Andrews Dep. at 7).

***10** Thompson, the person designated as knowledgeable about the defendants' relationship to one another, testified that "the board of Partners Healthcare System has the overall responsibility for all of the other boards within Partners Healthcare System including the Massachusetts General Hospital and the Massachusetts General Physicians Organization."(Thompson Dep. at 62). In contracts that PHS makes available on the second opinion website, PHS describes itself as "a corporation in Massachusetts that operates an integrated healthcare delivery system which includes The General Hospital Corporation (d/b/a Massachusetts General Hospital ..." (McClure Dep. Ex. 11). In bond prospectuses, PHS states that it "operates" the hospitals in its network and that it

has centralized many functions and currently provides a number of services for its affiliates, including finance, human resources, information systems, treasury, legal, real estate, and marketing. The Finance Committee of the PHS Board of Trustees serves all of Partners' constituents and has centralized the operating and capital budget process. Partners' cash and investments are managed centrally under policies developed by the PHS Investment Committee and overseen by the Finance Commitee. Partners also coordinates research and medical education programs of its affiliates.

(Mishaan Aff. Ex. 6 at MA 000000960). Stephen Ortiz, the Director of Treasury Services for PHS, testified that the legal department for the Hospital is "the Partners Office of General Counsel," that the PHS treasury office has access to investment funds and directs investment for each of the affiliates, and that the human resources function as well as purchasing, to some extent, are likewise "centralized" at PHS. (Ortiz Dep. 22, 23, 51). Ortiz further testified, however, that separate checking account ledgers are maintained at PHS for its different affiliates, and that any payments made on an affiliate's behalf by PHS are immediately reimbursed. (Ortiz Dep. 12-17).

Debra Sloan, the Director of Capital Markets for PHS, testified that since PHS was formed in 1994, TMGH and GHC have not issued any bonds because such external financing activity has been

centralized at PHS. (Sloan Dep. at 37). For instance, $55 million of the $174 million in bond proceeds from an April 1, 2001 PHS offering was intended to finance a portion of the construction of a new Ambulatory Care Facility for GHC. (Mishaan Aff., Ex. 7 at MA 000001033).

In its securities disclosures, PHS uses language that blurs the line between its function and those of its affiliates. For instance, PHS states, "Partners was the first in the world to use a dedicated Magnetic Resonance Imaging (MRI) system for use in minimally invasive surgery and other procedures (*Id.* at MA00000991) and, "A fundamental value of Partners is its commitment to provide quality care for everyone regardless of their ability to pay."(*Id.* at 000001023).

***11** In its tax returns filed with the IRS, TMGH indicates that its primary exempt purpose is to "support the General Hospital Corporation" and that it is "related (other than by association with a statement or nationwide organization) through common membership, governing bodies, trustees, officers, etc." to PHS and its affiliates. (Lesser Dec. Ex. 8, MA 0000001528, 1531, 1547). TMGH likewise lists in its tax returns grants made to GHC and PHS of more than $2 million and $1 million respectively during the 2002 tax year.(*Id.* at MA 000001543).

Finally, one of GHC's loans is collateralized by a lien on the unrestricted gross receipts of the Hospital and TMGH on a parity with their outstanding indebtedness. (Mishaan Aff. Ex. 7 at MA 000001351). PHS has issued guaranties that support the obligations of GHC on its Series P Loan, and the Hospital and TMGH have issued joint and several guaranties that support a number of PHS's obligations in connection with its loans and bonds. (*Id.*) The Hospital is part of PHS's "Acute Care Sector," and accounts for nearly half of the total operating revenue for the sector. (Mishaan Aff. Ex. 6 at 00000974-984, 990, 1365). The Acute Care Sector "tends to drive the financial performance and represents the majority of the financial strength of Partners."(*Id.* at 000001365).

C. Additional Facts

At the time the complaint in this action was filed the plaintiff resided in New York, and she remains a New York domiciliary to this day. (Pl. Aff. Re: Domicile and Location of Witnesses ¶ 2). For a period of time, after the commencement of this litigation, the plaintiff and her two sons were staying in Seattle, Washington so that she could help take care of her ailing mother, as well as enjoy the emotional support of family and close friends in Seattle.(*Id* . at 6). As of September 18, 2006, plaintiff was residing in Westport, Connecticut. (Pl. Sept. 18, 2006 Ltr.). It is undisputed that plaintiff's decedent was a resident and domiciliary of New York at the time of his death.

On July 20, 2006, plaintiff filed a complaint in the Commonwealth of Massachusetts seeking relief for the conduct alleged in the present action to preserve her legal claims in the event this court dismisses her complaint. The defendants in that action are 23 health care professionals allegedly employed at the Hospital (by whom they are employed-GHC, MGPO or PHS-is not clear). None of the corporate defendants in this action is named as a defendant in the Massachusetts complaint. The court is not aware of the progress of that action.

II. *Discussion*

A. Introduction

The defendants move to dismiss this action for lack of personal jurisdiction and improper venue or, in the alternative, to transfer it to the District of Massachusetts pursuant to 28 U.S.C. § 1404(a). The motion raises a host of complex procedural questions, whose resolution will have immediate real-world implications.

***12** While the Second Circuit has instructed district

court judges to settle jurisdictional issues first, *see Arrowsmith v. United Press, Int'l,* 320 F.2d 219, 221 (2d Cir.1963), we are permitted to, and often do, transfer cases that obviously belong elsewhere without ever resoving jurisdictional questions. *See Sutton v. Rehtmeyer Design Co.,* 114 F.Supp.2d. 46, 49 (D.Conn.2000) (citing *Volk Corp. v. Art-Pak Clip Art Serv.,* 432 F.Supp. 1179, 1181 & nn. 4-5 (S.D.N.Y.1977) and *Corke v. Sameiet M.S. Song of Norway,* 572 F.2d 77, 80 (2d Cir.1978) (adopting Judge Weinfeld's statement of the law in *Volk*)). At first blush, transfer seemed an appealing option. There is little reason for a case against four Massachusetts corporations, grounded on allegations of malpractice and fraud that took place entirely in Massachusetts, to proceed in a New York court-especially since (1) New York choice of law rules would require this court to apply Massachusetts law to the facts, *Barkanic v. People's Republic of China,* 923 F.2d 957, 962-63 (2d Cir.1991) (discussion of Neumeier Rule 2), and (2) there is a companion action pending in the Commonwealth of Massachusetts, in which the plaintiff seeks relief for the same conduct alleged in the present case against the personnel who allegedly perpetrated it. Given that, why not dispense with the thorny jurisdictional questions the parties present in favor of a simpler resolution?

The short answer is that plaintiff filed this action in New York for a specific tactical reason. Under Massachusetts law, specifically M.G.L. Ch. 231 § 85K (" § 85K"), a plaintiff's recovery in tort against a charitable institution such as GHC (but not, I gather, against doctors and nurses employed by such an institution) is limited to $20,000-a fraction of the value of the plaintiff's claims of malpractice and fraud. New York, by contrast, does not recognize charitable immunity or permit any cap on damages against a charitable institution, and has long considered such statutes to be contrary to public policy. Article 16 of the State Constitution cements New York's commitment to this principle, declaring in no uncertain terms that a claim "to recover damages for injuries resulting in death shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitations ."As long ago as *Bing v. Thunig,* 2 N.Y.2d 656, 666, 163 N.Y.S.2d 3, 143 N.E.2d 3 (N.Y.1957), the New York Court of Appeals refused to find a charitable hospital immune from liability for the negligence of its employees, holding that the "rule of nonliability is out of tune with the life about us, at variance with modern day needs and with concepts of justice and fair dealings."It is therefore clear-the plaintiff does not deny-that GHC and the other defendants have been sued in New York in the hope of giving the plaintiff an opportunity to recover substantial damages from these institutional (i.e., deep pocket) defendants.

The choice of law questions in this case are not without their own complications. Clearly, when a tortfeasor's conduct occurred in the place of his/its domicile, New York applies the law of the state where the tortious conduct occurred-in this case, Massachusetts. The charitable immunities statute is part of Massachusetts law. Application of that law would be repugnant to the State of New York as a matter of public policy, and New York has long recognized a public policy exception to implementing an otherwise applicable choice of law. *Loucks v. Standard Oil Co.,* 224 N.Y: 99, 110, 120 N.E. 198 (1918). More recently, however, the New York Court of Appeals has applied the limitation on damages of a *charitable* corporation's state of incorporation to allegedly tortious conduct, even though that limitation was repugnant to New York's constitutionally enshrined public policy. *Schultz v. Boy Scouts of America,* 65 N.Y.2d 189, 198, 200-03, 491 N.Y.S.2d 90, 480 N.E.2d 679 (N.Y.1985). In *Schultz,* the Court of Appeals expressly declined to balance the repugnance to New York public policy with New Jersey's particular interest in protecting locally-chartered charities from liability. (New Jersey law, including the limitation on damages, was ultimately applied because of the paucity of contacts between the litigants and New York) So the relationship between limitations on damages and New York's choice of law rules appears to remain open, at least where charitable corporations are de-

fendants. *Cf. Kilberg v. Northeast Airlines,* 9 N.Y.2d 34, 38-42, 211 N.Y.S.2d 133, 172 N.E.2d 526 (N.Y.1961) (Massachusetts limitation on damages in wrongful death case not applied as against a non-charitable corporation). It is, therefore, far from a foregone conclusion that this court, were it to retain the case, would decline to enforce the Massachusetts charitable immunity statute. But a district court sitting in Massachusetts, if confronted with this open issue, would almost certainly refuse to resolve an unsettled issue of New York law in a way that ignores the public policy of the state in which it sits.[FN4] Therefore, as the plaintiff has candidly stated, getting this action into a court where Massachusetts' charitable immunity statute might not be applied is "the whole ball game" in this lawsuit. (Pl. Br. at 46). It thus behooves this court to grapple with the jurisdictional issue.

> FN4. It is not altogether clear that a Massachusetts court, even one constrained to apply New York law on transfer, would be constrained to apply New York public policy (not law) that is repugnant to its own state's public policy (as expressed in the charitable immunity statute).

***13** There is another reason why this court should decide the jurisdictional question first. Where the possibility of transfer lurks behind a jurisdictional motion to dismiss, choice of law principles are implicated. If the court in which an action was originally filed lacked personal jurisdiction over one or more defendants in the lawsuit, any transferee court would apply its own choice of law rules as against any defendant who was not amenable to suit in the original jurisdiction. As a result, if I transferred this case to Massachusetts, the first thing the Massachusetts judge would have to do is decide whether this court had personal jurisdiction over any or all of the defendants. *See, e.g., Hatfill v. Foster,* 415 F.Supp. 353, 364 (S.D.N.Y.2005). Transferring the case would only burden our sister court in Massachusetts with deciding the jurisdictional question-to which the law of New York, not Massachusetts, would apply.

For these reasons, this court will decide whether there is personal jurisdiction over the defendants.

B. Motion to Dismiss for Lack of Personal Jurisdiction

1. *Standard of Review*

A court must dismiss an action against a defendant over whom it has no personal jurisdiction. *See*Fed.R.Civ.P. 12(b)(2); *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.,* 26 F.Supp.2d 593, 597 (S.D.N.Y.1998). Plaintiffs bear the ultimate burden of establishing, by a preponderance of the evidence, that the court has jurisdiction over each defendant. *See Kernan v. Kurz-Hastings, Inc.,* 175 F.3d 236, 240 (2d Cir.1999); *Robinson v. Overseas Military Sales Corp.,* 21 F.3d 502, 507 (2d Cir.1994); *Falik v. Smith,* 884 F.Supp. 862, 866 (S.D.N.Y.1995). At the pretrial stage, a plaintiff ordinarily carries this burden by pleading in good faith legally sufficient allegations of jurisdiction. *See Jazini v. Nissan Motor Co.,* 148 F.3d 181, 184 (2d Cir.1998); *Koehler v. Bank of Bermuda, Ltd.,* 101 F.3d 863, 865 (2d Cir.1996). However where, as here, the parties have conducted several months of jurisdictional discovery, plaintiffs bear the burden of proving that personal jurisdiction exists by a preponderance of the evidence. *Landoil Resources v. Alexander & Alexander Servs., Inc.,* 918 F.2d 1039, 1043 (2d Cir.1990). All pleadings and affidavits must be construed in the light most favorable to the plaintiff, and where doubts exist, they must be resolved in the plaintiff's favor. *See Hoffritz for Cutlery, Inc. v. Amajac, Ltd.,* 763 F.2d 55, 57 (2d Cir.1985).

2. *New York Law on Personal Jurisdiction*

A district court may exercise personal jurisdiction in a diversity action over any defendant "who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is

located,"Fed.R.Civ.P. 4(k)(1)(a), provided that the exercise of jurisdiction comports with the Fifth Amendment's Due Process Clause. *See Mario Valente Collezioni, Ltd. v. Confezioni Semeraro Paolo, S.R.L.*, 264 F.3d 32, 36 (2d Cir.2001). Thus, "In assessing whether personal jurisdiction is authorized, 'the court must look first to the long-arm statute of the forum state, in this instance New York.' " *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 208 (quoting *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir.1997)). In deciding a motion to dismiss for lack of personal jurisdiction, the court must consider a defendant's contacts with the forum state "at the time the lawsuit was filed." *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 52 (2d Cir.1991).

***14** New York subjects a foreign corporation to general jurisdiction if it is "doing business" in the state. *See*N.Y.C.P.L.R. § 301 (McKinney 2002); *Aerotel Ltd. v. Sprint Corp.*, 100 F.Supp.2d 189, 191 (S.D.N.Y.2000) (interpreting N.Y.C.P.L.R. § 301). Under this test, "a foreign corporation is amenable to suit in New York if it is 'engaged in such a continuous and systematic course' of 'doing business' here as to warrant a finding of its 'presence' in this jurisdiction."*Aerotel*, 100 F.Supp.2d at 191-92 (quoting *Frummer v. Hilton Hotels Int'l Inc.*, 19 N.Y.2d 533, 536, 281 N.Y.S.2d 41, 227 N.E.2d 851 (N.Y.1967)).

To determine whether a foreign corporation is doing business in New York, courts have focused on a traditional set of indicia: (1) whether the company has an office in the state; (2) whether it has any bank accounts or other property in the state; (3) whether it has a phone listing in the state; (4) whether it does public relations work there; and (5) whether it has individuals permanently located in the state to promote its interests. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 98 (2d Cir.2000) (citing *Hoffritz*, 763 F.2d at 58;*Frummer*, 19 N.Y.2d at 537, 281 N.Y.S.2d 41, 227 N.E.2d 851),*cert. denied*,532 U.S. 941, 121 S.Ct. 1402, 149 L.Ed.2d 345 (2001). Casual or occasional activity does not constitute doing business; rather, § 301 requires a showing of "continuous, permanent, and substantial activity in New York."*Landoil*, 918 F.2d at 1043.

Moreover, the term "doing business" refers to "the ordinary business which the corporation was organized to do ... It is not the occasional contact or simple collateral activity which is included."*Bryant v. Finnish Nat'l Airline*, 22 A.D.2d 16, 253 N.Y.S.2d 215, 219-20 (1st Dep't 1964) (internal citation omitted), *rev'd on other grounds*,15 N.Y.2d 426, 260 N.Y.S.2d 625, 208 N.E.2d 439 (N.Y.1965); *see also Daniel v. Am. Bd. of Emergency Med.*, 988 F.Supp. 127, 218 (W.D.N.Y.1997) ("Activities which are incidental to a defendant's primary business do not carry the same jurisdictional weight as the solicitation of such primary business itself.")."The 'doing business' standard is a stringent one because a corporation which is amenable to the Court's *general* jurisdiction 'may be sued in New York on causes of action wholly unrelated to acts done in New York.' " *Jacobs v. Felix Bloch Erben Verlag fur Buhne Film und Funk KG*, 160 F.Supp.2d 722, 731 (S.D.N.Y.2001) (quoting *Ball v. Metallurgie Hoboken-Overpelt S.A.*, 902 F.2d 194, 198 (2d Cir.1990) (emphasis added).

It is well established that solicitation of business alone will not justify a finding that a foreign corporation is "doing business" in New York. *See Laufer v. Ostrow*, 55 N.Y.2d 305, 310, 449 N.Y.S.2d 456, 434 N.E.2d 692 (N.Y.1982). However, if the solicitation of business is substantial and continuous, then personal jurisdiction may be found to exist as long as the defendant engages in other activities of substance in the state. *See Landoil*, 918 F.2d at 1043-44. Under this "solicitation-plus" rule, "once solicitation is found in any substantial degree, very little more is necessary to a conclusion of 'doing business.' " *Id.* at 1044.In evaluating the existence of other activities of substance, courts "tend to focus on a physical corporate presence," *Artemide SpA v. Grandlite Design & Mfg. Co.*, 672 F.Supp. 698, 703

(S.D.N.Y.1987), such as solicitation "from a permanent locale within the state." *Beacon Enters., Inc. v. Menzies,* 715 F.2d 757, 763 (2d Cir.1983). However, a permanent physical presence in the state is not an absolute precondition for "doing business" in New York. *Landoil,* 918 F.2d at 1045.

***15** Finally, the courts have instructed that, "Contacts with the forum state should not be examined separately or in isolation. There is no talismanic significance to any one contact or set of contacts that a defendant may have with a forum state; courts should assess the defendant's contacts as a whole."*Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.,* 84 F.3d 560, 570 (2d Cir.1996).

Alternatively, a court may exercise jurisdiction over a foreign defendant pursuant to New York's long-arm statute, § 302(a), which permits specific jurisdiction over a defendant when the plaintiff's claim relates directly to the defendant's New York contacts, however limited those contacts are. *See Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) (specific jurisdiction is proper "[w]hen a controversy is related to or 'arises out of a defendant's contacts with the forum' ") (quoting *Shaffer v. Heitner,* 433 U.S. 186, 204, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977)), § 302(a) provides that "a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent: (1) transacts any business within the state or contracts anywhere to supply goods or services in the state; or (2) commits a tortious act within the state ...; or (3) commits a tortious act without the state causing injury to person or property within the state ..., if he [or she] (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or (4) owns, uses or possesses any real property situated within the N.Y.C.P.L.R. § 302(a) (1)-(4).

Either way, the court must decide whether an exercise of jurisdiction comports with the requirements of due process. *Whitaker,* 261 F.3d at 208 (citing *Bensusan,* 126 F.3d at 27). Due process requires that a defendant have "minimum contacts" with the forum state such that the maintenance of the action does not offend "traditional notions of fair play and substantial justice."*International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (*quoting Milliken v. Meyer,* 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). The defendant's activity in the state should be such that it would be fair and reasonable to require him to defend himself in that state. *See Kulko v. Superior Court,* 436 U.S. 84, 92, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978).

3. *The Court Lacks Specific Jurisdiction over the Four Corporate Entities under § 302(a)(3)*

As a preliminary matter, the court can easily dispense with plaintiff's § 302(a)(3) argument. There is no basis for the exercise of specific jurisdiction in this case.

The New York long arm statute authorizes personal jurisdiction over non-domiciliaries under several circumstances, *see*N.Y.C.P.L.R. § 302(a), including those cases where the non-domiciliary "commits a tortious act [outside] the state causing injury to person and property within the state, [among other requirements]."N.Y.C.P.L.R. § 302(a)(3) (McKinney's 2001)."Courts determining whether there is injury in New York sufficient to warrant § 302(a)(3) jurisdiction must generally apply a situs-of-injury test, which asks them to locate the 'original event which caused the injury.' " *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 171 F.3d 779, 791 (2d Cir.1999) (citation omitted). "The situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are felt by the plaintiff." *Mareno v. Rowe,* 910 F.2d 1043, 1046

(2d Cir.1990) (internal citations and quotation marks omitted). So, for example, in *Mareno,* where the plaintiff lived in New York and sued his New Jersey employer for wrongful discharge, situs of injury was location of events which caused injury, i.e., New Jersey, not place where economic consequences were felt, i.e., New York. *Id.* More to the point, the court in *Hermann v. Sharon Hosp., Inc.,* 135 A.D.2d 682, 522 N.Y.S.2d 581, 583 (2d Dep't 1987), held that the situs of injury in a medical malpractice action is the place where plaintiff received medical treatment, not where the effects of the doctor's negligence were felt.

***16** Moreover, "The occurrence of financial consequences in New York due to the fortuitous location of plaintiffs in New York is not a sufficient basis for jurisdiction under § 302(a)(3) where the underlying events took place outside New York."*United Bank of Kuwait v. James M. Bridges, Ltd.,* 766 F.Supp. 113, 116 (S.D.N.Y.1991). Thus, while the plaintiff may have suffered financial hardships in New York as a result of the decedent's death, the situs of the injury remains the location of the decedent's death. *Bookstaver v. Saintfort,* 2004 U.S. Dist. LEXIS 6043, *8 (S.D.N.Y. Apr. 8, 2004) (situs of injury in wrongful death action was in New Jersey, where the fatal automobile accident occurred, not in New York where the decedent's family was domiciled); *see also In re Ski Train Fire in Kaprun, Aus. on Nov. 11, 2000,* 2003 U.S. Dist. LEXIS 22139, *27 (S.D.N.Y. Dec. 9, 2003) (situs of the injury was the place where the allegedly wrongful deaths had occurred; "the focus of the analysis is where the first effect of the original event is located, not, for instance, the residency of the victims.")

Plaintiff attempts to impugn this authority by citing to a dissenting decision in *Ingraham v. Carroll,* 90 N.Y.2d 592, 601-05, 665 N.Y.S.2d 10, 687 N.E.2d 1293 (N.Y.1997) and two other decisions finding § 302(a)(3) jurisdiction appropriate under factually distinguishable circumstances. *Rx USA International, Inc. v. Superior Pharmaceutical Co et al.,* 2005 U.S. Dist. LEXIS 34255 (E.D.N.Y. Dec. 6, 2005); *Reyes v. Sanchez-Pena,* 191 Misc.2d 600, 742 N.Y.S.2d 513 (Sup.Ct. Bronx Cty.2002). I find plaintiff's argument unpersuasive. None of the cases she cites addressed the scenario at bar, in which the only basis for asserting that the injury stemming from a wrongful death occurred in New York is the plaintiff's decedent's pre-death residence in this state.[FN5] That scenario is precisely the one disposed of by the authorities discussed above.

> FN5. While plaintiff may remain *domiciled* in New York, on the record before me she clearly *resides* elsewhere, and so is feeling the financial impact of her husband's death in another jurisdiction (presently, Connecticut).

The same is true of plaintiff's claim that she was fraudulently induced at the Hospital in Massachusetts to consent to an allegedly unauthorized autopsy of her husband. "In the case of fraud ... committed in another state, the critical question is [ ] where the first effect of the tort was located that ultimately produced the final economic injury."*Bank Brussels,* 171 F.3d at 792;*see also Int'l Telecom. Inc. v. Generadora Electrica del Oriente, S.A.* 2002 U.S. Dist. LEXIS 5023, *14-15 (S.D.N.Y. Mar. 27, 2002) (an alleged injury as a result of fraud "does not occur within the state simply because [plaintiff] ultimately may have suffered remote economic consequences in New York.") In the case at bar, it is clear that the alleged fraudulent misrepresentations, which caused the plaintiff's injury, occurred in Massachusetts-where the plaintiff was rendered unable to have a coroner, rather than a respresentative of the Hospital, conduct the autopsy of her husband. The inability to have an independent autopsy is the harm that resulted from the alleged fraud; that harm is the "first effect" of the tort, and it occurred in Massachusetts.

***17** The court thus lacks specific jurisdiction over the defendants under § 302(a)(3).

I therefore turn to each of the four corporate de-

fendants to see whether any of them is subject to general jurisdiction in New York. I do this because, if none of the corporations can be sued in New York, plaintiff's argument that their individual New York contacts should be attributed to the other defendants necessarily fails. *See infra* at 62.

4. *The Court Lacks General Jurisdiction over Defendant GHC*

Plaintiff has failed to establish that GHC's New York contacts rise to the level of "doing business" in New York state through its own activity.

GHC operates the Hospital in Boston, and has no offices, employees, agents, bank accounts, real property or phone listings in New York. GHC does not actively recruit physicians or staff members in New York and does not advertise in the state. Within the four-year period preceding the filing of the complaint, GHC's, contacts with the state of New York included: (i) the treatment of approximately 5,000 New York residents per year at the Hospital, amounting to no more than 1.7% of the Hospital's total revenue for medical services provided in any given year and $56.4 million in revenue overall for the four years; (ii) hiring physicians who may have attended New York medical schools; (iii) the nationwide distribution of publications, some of which may reach New York residents; (iv) four licensing agreements with New York entities; (v) operation of universally accessible websites; (vi) a single internet-based consultation by a GHC physician with a New York physician through the PHS second opinion service; and (vii) the receipt of charitable contributions from New York residents as a result of fundraising activity conducted in conjunction with TMGH.

While the plaintiff correctly notes that these jurisdictional contacts must be viewed in the aggregate-with no one contact having talismanic significance-simply adding up contacts that carry little or no jurisdictional weight in and of themselves does not provide an adequate basis for jurisdiction. "The court must ... analyze a defendant's connections to the forum state 'not for the sake of contact-counting, but rather for whether such contacts show a continuous, permanent and substantial activity in new York.' " *Landoil,* 918 F.2d at 1043 (quoting Weinstein, Korn & Miller, *New York Civil Practice,* ¶ 301.16, at 3-32). While a non-New York domiciliary can be sued here on any matter if it does sufficient business in New York, defendants rightly point out that activities ancillary to a defendant's primary business ought not carry the same jurisdictional weight in the § 301 analysis as solicitation of primary business.

Furthermore, under the "solicitation plus" formulation, a court must find that a defendant has engaged in *substantial* and *continuous* solicitation of business before it can consider whether there are sufficient additional activities of substance to support the exercise of general jurisdiction. *See Beacon,* 715 F.2d at 762;*see also Stark Carpet Corp. v. M-Geough Robinson, Inc.,* 481 F.Supp. 499, 505 (S.D.N.Y.1980).

***18** Examples of how these principles play out can be found in the cases cited by the parties. In *Thompson Med. Co., Inc. v. Nat'l Ctr. of Nutrition, Inc.,* 718 F.Supp. 252 (S.D.N.Y.1989), the court held that general jurisdiction under the "solicitation-plus" doctrine existed when defendant's nationwide advertising campaign in 21 publications generated revenues from New York representing about 8.5% of its total sales: New York callers accounted for 12% of the total nationwide calls to defendant's toll-free phone number; defendant prepared a lengthy feasibility study for at least one New York hospital; and defendant dispatched sales representatives to New York on a number of occasions to solicit the business of hospitals located within the state. In *Purdue Pharma L.P. v. Impax Labs, Inc.,* 2003 U.S. Dist. LEXIS 15428, *6-7 (S.D.N.Y.2003), a case relied upon heavily by the plaintiffs, the court found that the foreign corporation's solicitation of business in New York was substantial and continuous where the company made

regular sales calls to its customers in New York via telephone, e-mail and face-to-face communication; advertised its products in trade catalogs and journals that were distributed in New York; mailed product brochures to its New York customers; maintained a universally accessible website; *and* the combined effect of these various marketing activities was to garner significant revenue from New York sales. In *Laufer,* 55 N.Y.2d at 311, 449 N.Y.S.2d 456, 434 N.E.2d 692, the New York Court of Appeals sustained jurisdiction over a defendant corporation that had no office, telephone or bank account in New York, relying instead on the fact that the defendant used sales representatives located in New York to solicit and service New York accounts, and that the president of the defendant corporation-who exercised supervisory control over those sales representatives-visited them in New York approximately eight to ten times a year.

In *Landoil,* by contrast, the Second Circuit concluded that a foreign defendant whose employees made thirteen short and "sporadic" business trips to New York over a period of eighteen months was not engaged in "substantial" and "continuous" solicitation of business in New York. The trips were made by different employees, to service different accounts, and the record contained no suggestion that the defendant's representatives conducted their business from a permanent locale or were provided office space in New York. The Court of Appeals ruled these contacts "insufficient to establish the systematic and continuous presence within the state that New York law requires."*Landoil,* 918 F.2d at 1042. The Circuit further ruled that jurisdiction was lacking even after considering the fact that the English defendant had placed some insurance business in New York, saying, "Those transactions must be considered not in isolation, but against a background of multi-national entities doing a much larger business of which these transactions were but a small part."*Id.*

***19** Bearing these background principles and precedents in mind, I conclude that GHC is not present or "doing business" in New York state.

An important precedent for our purposes is *Daniel v. Am. Bd. of Emergency Med.,* 988 F.Supp. 127, 218 (W.D.N.Y.1997). In *Daniel*-a case the plaintiff repeatedly strives to distinguish-a New York district court dismissed antitrust claims against 23 out-of-state hospitals for lack of personal jurisdiction. However, the court declined to dismiss the claims against one hospital, Johns Hopkins. All of the hospitals had myriad, if fleeting, contacts with New York. To cite a representative example: the Medical College of Pennsylvania ("MCPA") had (1) participated in bond offerings with New York underwriters; (2) derived revenue from the treatment of New York patients; (3) received payments from New York-based insurance companies and charitable contributions from New York residents; (4) engaged in nationwide solicitation of charitable contributions, including New York; (5) attended a job fair at a New York nursing school and mailed recruiting brochures to New York medical students; (6) purchased a mailing list for the purposes of recruiting, which included New York residents; (7) participated in nine trials and research projects with New York hospitals or medical centers; (8) participated in the accreditation of New York state medical facilities; and (9) sent representatives to professional meetings in New York. *Id.* at 209-10.None of these activities, singly or in the aggregate, gave MCPA a sufficient presence in New York to render it generally amenable to suit there.

Hopkins's contacts with New York were, for the most part, indistinguishable from those of MCPA or the other hospitals sued. Like all the hospitals, it had treated patients from New York, raised capital and charitable contributions in New York and from New Yorkers, and maintained a number of professional contacts with hospitals in New York. But there was one critical difference: Hopkins alone, among all the hospitals sued, had a permanent office with two permanent employees and a bank account in New York. The office was used to manage its fundraising efforts in the northeastern United

States, which generated millions of dollars in funding for the hospital. *Id.* at 201-207.That was the difference that made a difference, and rendered Hopkins amenable to suit under N.Y.C.P.L.R. § 301. *See also Zucker v. Baker,* 35 Misc.2d 841, 231 N.Y.S.2d 332, 334-36 (Sup.Ct. Queens Cty.1962) (Massachusetts Institute of Technology amenable to suit in New York because it solicited funds from a fundraising headquarters located in New York that was the "nerve center" of its ongoing fund drive in the metropolitan area).

Other courts have given preeminence to the presence or absence of an office in New York in deciding whether entities have subjected themselves to the state's general jurisdiction. For example, the Second Circuit concluded that the significant fundraising and proselytizing activities of the Palestinian Liberation Organization from an office in New York, taken together with other PLO contacts in New York (exclusive, of course, of its activities connected to its Permanent Observer status at the United Nations), might be enough to allow a court to find that the PLO was "doing business" in the state. *See Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria* 937 F.2d 44, 52 (2d Cir.1991). On remand, in *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria* 795 F.Supp. 112, 114 (S.D.N.Y.1992), the district court found that general jurisdiction could properly be exercised over the Palestinian Liberation Organization based on those very activities, stating, "To some extent, which cannot be estimated on this record, the assets, facilities and personnel of the PLO in New York assisted in those activities."The district court further concluded that these activities demonstrated a presence in New York that was neither occasional nor casual, but had a fair measure of permanence and continuity. The district court clearly gave substantial weight to the activities of the PLO's New York office-a traditional indicium of "doing business" for jurisdictional purposes.

***20** By contrast, in *Krepps v. Reiner,* 414 F.Supp.2d 403, 409 (S.D.N.Y.2006), the court held that the foreign defendant (an educational institution) was not engaged in a "continuous and systematic course of business" in New York just because it raised funds from New Yorkers from its out-of-state location. One employee of the defendant in question (Insead) was assigned responsibility for focused fundraising activity throughout the United States and Canada. Insead was not based in New York, but visited New York approximately nineteen times to meet with individuals and twenty-one times to meet with corporations. *Id.* Likewise insufficient to predicate a finding of "doing business" was Insead's "broad appeal for donations through the Insead Alumni Fund," which sent several letters and placed an annual phone call to each of its alumni throughout the world, including those alumni who resided in New York. *Id.*

The focus of these courts on physical presence in New York does not mean that the existence of a permanent office in New York is a prerequisite to the exercise of general jurisdiction. *Landoil* makes it clear that that is not the case. But it does mean that it will be difficult to convince a court that a constellation of jurisdictionally insignificant contacts (like those listed above) qualifies as sufficiently "permanent" or "continuous" for jurisdictional purposes.

With this in mind, I turn to the contacts between GHC and New York, as identified by plaintiff.

Revenues from New York patients: Plaintiff first argues that jurisdiction can properly be exercised over defendant GHC because some 20,000 New York residents were treated at the Hospital over the course of the four years preceding the complaint, providing the Hospital with more than $50 million in revenue. Even if this business revenue could be considered substantial-a doubtful proposition given that New York residents accounted for no more than 1.7% of GHC's total revenue from medical services for any given year-and even if the plaintiff had proffered evidence that this business was act-

ively solicited, it is well established that treatment of New York residents in Massachusetts does not constitute "doing business" in New York.

The *Daniel* court, confronting precisely the same question, held that it was irrelevant whether a defendant hospital somehow solicited the business of New York residents. What was relevant was that, "The services rendered were performed outside of New York state, after the New York resident voluntarily traveled elsewhere to benefit from the services offered or [like plaintiff's decedent] were treated on an emergency basis."988 F.Supp. at 222. Numerous cases are in accord. *See Wolf v. Richmond County Hospital Authority,* 745 F.2d 904, 911 (4th Cir.1984) (citing *Gelineau v. New York University Hospital,* 375 F.Supp. 661, 667 (D.N.J.1974) ("the residence of a recipient of personal [physician or hospital] services rendered [outside the forum] is irrelevant")). Moreover, "Accepting numerous [New York] patients in [defendant] hospital and treating them ... over the years is not a business activity within [New York]," as the hospital performed no services within New York, and did not avail itself of the privileges or benefits of New York laws. *Walters v. St. Elizabeth Hospital Medical Center,* 543 F.Supp. 559, 560 (W.D.Pa.1982); *Rogers v. Furlow,* 699 F.Supp. 672, 677 (N.D.Ill.1988) ("the defendants treat people, not states, and therefore they are not invoking the protection of the laws of Illinois by treating residents of Illinois exclusively in Minnesota").

***21** *Physician recruiting:* None of GHC's other New York contacts constitutes either substantial business solicitation or additional activities of substance under the "solicitation plus" rule. It is undisputed that GHC does no active recruiting in the State of New York. The fact that some of the physicians employed by GHC may have attended New York medical schools is of no moment. The *Daniel* court flatly rejected the same argument, directed toward a number of the defendant hospitals in the case before it, as "totally inconsistent with Fourteenth Amendment due process requirements."988 F.Supp. at 222. As the *Daniel* court noted, a hospital's employment of physicians to perform services outside the state does not demonstrate any purposeful availment of the benefits and protections of New York law. *Id.* at 222-23.

Advertising: GHC does not advertise in New York. GHC does occasionally distribute published material nationwide, and some of these materials may reach New York residents. But no evidence suggests that this published material is targeted at New York or New Yorkers. Nor does the evidence suggest that the published material is either intended, to or has the effect of, soliciting any business for GHC. In any case, as the *Stark Carpet* court pointed out, advertising communication by mail "weighs lightly when determining jurisdictional contacts."*Stark Carpet,* 481 F.Supp. at 505. In *Hutton v. Piepgras,* 451 F.Supp. 205, 209 (D.C.N.Y.1978), the court summarily rejected nationwide circulation of free medical publications as a basis for general jurisdiction. The same result obtains here.

Contracts with New York Entities: The plaintiff's reliance on GHC's four contracts with New York entities relating to the licensing or transfer of material for medical research is equally unavailing. The *Daniel* court rejected jurisdiction over several hospital defendants that had contractual relationships with New York entities. These included Oregon Health Sciences University Hospital, which had participated in four clinical studies with New York organizations (including the University of Rochester) and maintained contractual relationships related to those studies with each New York entity, as well as The Ohio State University Hospital, which had contracted with Supplemental Health Care Services Ltd., a New York agency, to provide temporary registered nurse staffing for four years. 988 F.Supp. at 213. The *Daniel* court's rejection of those contractual relationships as a significant basis for jurisdiction is unsurprising in light of the well-established rule that, "The existence of contractual relationships with entities that happen to have oper-

ations in New York does not establish § 301 jurisdiction, because it does not show extensive conduct directed toward or occurring in New York."*Reers v. Deutsche Bahn AG,* 320 F.Supp.2d 140, 150 (S.D.N.Y.2004); *see also Mantello v. Hall,* 947 F.Supp. 92, 98 (S.D.N.Y.1996) (rejecting general jurisdiction over a foreign theatrical producer based on the defendant's licensing agreements with New York residents and membership in a New York professional organization). The evidence in the present case, as in *Reers,* does not show that GHC conducted any ongoing course of business in New York relating to the four licensing agreements, or even that GHC solicited or executed the contracts in New York state. *Reers, supra.*, 320 F.Supp.2d at 150.

***22** *Websites:* GHCs operation of universally accessible interactive websites likewise does not support a finding that GHC is "doing business" in New York. This court is aware of no case where a finding of substantial solicitation under the general jurisdiction statute was predicated on the operation of an interactive website that has generated a small amount of activity and a *de minimis* amount of revenue in the forum state. There is, however, considerable authority to the contrary. *See, e.g., Spencer Trask Ventures v. Archos S.A.,* 2002 U.S. Dist. LEXIS 4396, *22 (S.D.N.Y. Mar. 18, 2002) ("The fact that a foreign corporation has a website accessible in New York is insufficient to confer jurisdiction under CPLR § 301"); *Northrop Grumman Overseas Serv. Corp. v. Banco Wiese Sudameris,* 2004 U.S. Dist. LEXIS 19614, *26-28 (S.D.N.Y. Sept. 29, 2004) (website which permits users to conduct banking transactions online is insufficient to confer general jurisdiction)."Were it otherwise, every entity or individual that ran a highly interactive website from anywhere in the world could be sued for any reason in New York."*In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000,* 230 F.Supp.2d 376, 383 (S.D.N.Y.2002); *see also Novak v. Petsforum Group, Inc.,* 2005 WL 1861778, *2 (E.D.N.Y.2005).

In this case, the single transaction on PHS's "second opinion" website that involved a New York-based physician and patient and GHC resulted in a minuscule amount of revenue for the Hospital, and the eleven charitable donations made by New York residents online were insignificant in amount and represented less than 1% of the charitable donations received through GHC's website. In *Novak,* the court rejected the receipt of funds from the forum state through "Paypal" as a basis even for specific jurisdiction over the out-of-state defendant, holding, "The collection of donations from the general population of Internet users does not show commercial activity directed at New York."2005 WL 1861778 at *2. Nor does the single posting by a New York resident on the "Braintalk Communities" chat board support a finding that GHC's interactive websites generated any substantial amount of business in New York state.

Fundraising: Finally, plaintiff argues that the fundraising activities that GHC conducts in conjunction with TMGH constitute "substantial solicitation" in New York state.

The only fundraising that GHC engages in on its own appears to be through its website, which offers visitors the opportunity to donate. As noted above, that activity, and the amount of money it generates, are insignificant.

Nearly all of the fundraising for GHC (the medical facility) is done by defendant TMGH, whose principal activity is to conduct charitable fundraising on behalf of the hospital. James Thompson, the Chief Development Officer charged with overseeing fundraising on behalf of the Hospital is employed by TMGH, not GHC. (Thompson Dep. at 8). Thompson explicitly testified that GHC does not employ a head of development (*id.* at 27), and plaintiff has not countered defendants' assertion that GHC employs no development or fundraising staff at all. Thus, it appears from the record that TMGH spearheads all development activity on behalf of the Hospital, and GHC plays only a supporting role, by sending doctors who practice at Mass General to New York or hospital administrators to

meet with prospective donors.

***23** However, there is no question that GHC supports TMGH's fundraising efforts on its behalf. Therefore, GHC solicits charitable contributions in New York state. And since the Hospital draws nearly one-sixth of its charitable support (albeit not its income) from New York, the amount raised is not insignificant. But that does not mean that New York is a "locus of [GHC's] business operations." *New World Capital Corp. v. Poole Truck Line, Inc.* 612 F.Supp. 166, 171 (S.D.N.Y.1985).

The "doing business" standard refers, first and foremost, to the ordinary business that the defendant was organized to do, and not to collateral enterprises in support of that business. The "business" of GHC is the provision of medical services, not charitable fundraising; any charitable fundraising activities in which GHC engages are ancillary to the Hospital's core function. As such, those activities do not carry the same weight in the jurisdictional analysis as the solicitation of medical business would. *See Daniel, supra.*, 988 F.Supp. at 218. GHC's limited involvement in fundraising activity conducted by TMGH does not confer New York general jurisdiction over the hospital defendant in the absence of meaningful and ongoing contacts with this state that relate directly to the hospital's primary business activities-of which, on the record before me, there are none.

The conclusion that ancillary fundraising activity by GHC does not subject it to general jurisdiction in New York accords with authority. For example, in *Clarke v. Fonix,* 1999 WL 105031, at *5 (S.D.N.Y. Mar.1, 1999) the court held that the foreign defendant's solicitation of investment capital in New York, taken together with other activities, was insufficient to subject it to general jurisdiction under N.Y.C.P.L.R. § 301-this despite the fact that Fonix's employees traveled to New York to attend "trade shows and symposia, where they promoted Fonix-manufactured products and attempted to recruit New York distributors," and the fact that Fonix filed a certificate qualifying it to do business in New York. According to the defendant's 10K, Fonix was a research and development company. Therefore, the court ruled that, "[T]he solicitation of funds is not Fonix's business," so that Fonix was not "doing business" in New York by raising money there. *Id.*

Similarly, in *Crucible Ventures, Inc. v. Futurestat Indus., Inc.,* the court rejected general jurisdiction over an out-of-state defendant based on approximately 25 in-person visits to New York by defendant's President between 1984 and 1986 to negotiate and consummate various loans with Crucible Capital Management, indicating that "This Court has considerable doubts as to whether the solicitation and occasional execution of business loans in this State, without more, could ever constitute 'doing business' for jurisdictional purposes within the present context. As with most businesses-and in the absence of any evidence to the contrary-we presume that the borrowing of money is an activity incidental to Futuresat's primary business. Thus, apart from the frequency of defendant's visits here, we do not think the solicitation of business loans in the instant case carries the same jurisdictional weight as the solicitation of business itself (e.g. the solicitation of sales orders)."1990 WL 16140, at *2 (S.D.N.Y. Feb.15, 1990).

***24** A charitable organization's fundraising efforts can similarly be characterized as collateral activity that enables the organization to conduct its primary business-which, in the case of GHC, is the provision of medical services. This court is hard-pressed to see any meaningful distinction between the capital-raising activities of these for-profit ventures and the solicitation of charitable contributions to support the work of Mass General. Both are ancillary activities that permit the organization to conduct the primary business for which it was organized.

Daniel, Klinghoffer, Zucker and other cases discussed above suggest that the bar for a finding of "substantial solicitation" based on a defendant's charitable fundraising in New York state has been set high. In every case known to this court where a

defendant was subjected to general jurisdiction in New York based on its fundraising activities, the defendant was raising money out of a permanent office located in New York. By contrast, not-for-profit defendants who solicited funds from New Yorkers from out of state have repeatedly been found not to be "doing business" in New York. GHC's limited fundraising activity-which consists in its entirety of (1) the maintenance of a website that permits users to make donations, (2) occasional (number unspecified) forays by Massachusetts physicians into New York to meet with potential funders, and (3) ostensible participation in nationwide mail solicitations carried out by TMGH-does not meet the exacting standard New York courts have established for a finding that a foreign organization is "doing business" here.

5. *The Court Lacks General Jurisdiction over Defendant MGPO*

MGPO employs doctors who practice at the Hospital, which is in Massachusetts.[FN6] It has no contacts with New York whatsoever. Its physicians do not do their work in New York. MGPO does not receive donations, operate a website or secure financing. It has no offices, employees, agents, bank accounts or phone listings in New York. Nor does MGPO have any contracts with New York entities or advertise in New York. In short, there is not a scintilla of evidence from which the court could find that it has personal jurisdiction over defendant MGPO.

> FN6. I do not understand MGPO to employ anyone except physicians. Other health care professionals appear to be employed either by GHC or by PHS-it is not entirely clear which. Plaintiff argues that some or all of the people who work at Mass General may in fact be employees of PHS rather than of GHC, and I suspect that some of them are (but perhaps not the doctors, who appear to be employees of MGPO), and urges that, if employees of PHS committed malpractice or fraud, PHS may be vicariously liable for their conduct. (Pl. Letter of September 7, 2007 at 14). The issue becomes important only when trying to ascertain whether any viable claim would lie against any of defendants other than GHC if they should be doing business in New York. Since I conclude that they are not, the question is moot.

6. *The Court Lacks General Jurisdiction over Defendant TMGH*

The traditional indicia of doing business in New York are also lacking where TMGH is concerned. Like GHC, TMGH has no offices, employees, bank accounts, or phone listings in New York, nor does TMGH advertise in New York. TMGH does not operate a website or secure commercial financing for its operations. TMGH also has not entered into any contracts with New York entities or engaged in any litigation in New York.

Nonetheless, the plaintiff argues that this court can exercise general jurisdiction over TMGH because TMGH regularly and systematically solicits charitable contributions on behalf of the Hospital in New York.

Charitable fundraising on the Hospital's behalf is the principal business activity of TMGH. Because the people who run Mass General have chosen to "outsource" what would otherwise be an ancillary activity (if it were being performed by GHC) to a separate corporation whose only business is fundraising. I must analyze whether TMGH's fundraising activity in New York rises to the level of "doing business" in New York-fundraising being to TMGH what sales are to a widget maker or the provision of medical services is to GHC.

***25** The amount of charitable support TMGH has derived from New York is substantial, both in absolute terms and as a percentage of its total fundraising revenue. Aggregated for the four years preceding the filing of the complaint in this action, the

revenue from New York donations was $51,366,783 or 15.3% of the hospital's take from charitable fundraising. In other words, in the years immediately preceding this lawsuit almost one-sixth of the money raised by TMGH came from New York. While this is but a small fraction (about 1 %) of the GHC's total income,[FN7] there is no discounting the significance of the figure in terms of TMGH's business activity.

> FN7. GHC's total operating revenue for fiscal year 2000 was $1,162,674,000. (Mishaan Aff. Ex. 7 at MA 000001003). Most of that income-well in excess of $800,000,000-came from fees charged to patients. Most of the rest came from government and private research grants. *Id.* For purposes of the analysis in the text, I divided the $51 million in donations by four and assumed that roughly an equal amount of money (just under $13 million) was raised by TMGH each year.

But TMGH does not generate this money from a New York office or by using New York-based personnel. Indeed, despite the substantial amount of money realized from New York donors, TMGH's Chief Development Officer, James Thompson, testified that TMGH does not consider New York a "focus" of its fundraising activity. TMGH does not hold major fundraising events in New York. Its development staff visited the state only ten times in the course of the four years preceding the filing of the complaint in this action, which constituted fewer than 1% of TMGH's 1,200 fundraising trips nationwide. Former patients who live in New York, like former patients everywhere, receive direct mail solicitations from TMGH, but they are sent from Boston and yield little income. Most of the money received from New York sources comes, not via solicitation (whether in person or by mail), but from individuals or entities in New York who have taken the initiative in showing support for the work of Mass General, like the executive at a New York based foundation who was pleased with the care received by a relative at Mass General. (*See supra* at 10-11).

The record also shows that while TMGH may not have initiated contact with all of its New York donors, it responded actively to the inquiries of prospective New York donors, facilitated contact between interested donors and physicians who worked at the hospital, and orchestrated at least one visit, by TMGH personnel and Hospital physicians, to present a funding proposal to the above-mentioned foundation. And the result is the receipt of an impressive amount of money.[FN8]

> FN8. James Thompson of TMGH actually declined to characterize his activity in New York as "solicitation," at least to the extent that it consisted of following up on a contact initiated by a potential New York donor. This court does not take so restrictive a view. In *Wiwa, supra.*, 226 F.3d at 98, the Second Circuit cautioned courts not to take too restrictive a view of what activities by a defendant constitute "solicitation:" it need not take the form of an offer and acceptance, and courts should consider more broadly whether a defendant, through its activities, encourages residents of the forum "to spend money on its behalf."*Id.* at 98.By that definition, TMGH's activity in New York qualifies as "solicitation."

The question for this court is whether TMGH's receipt of significant charitable revenues from New York sources, without more, can justify a finding of "doing business" in New York. The answer is no-at least where the fundraising is done from out-of-state and the defendant has no permanent physical presence in New York.

The solicitation of funds is TMGH's business, and in deciding whether solicitation of business in New York is "substantial and continuous," courts "frequently look to the percentage of a company's revenue attributable to New York business ..."*Over-*

seas Media, Inc. v. Skvortsov, 407 F.Supp.2d 563, 569 (S.D.N.Y.2006) (citations omitted). Cases are legion in which courts found a defendant's solicitation of funds to be insubstantial because the defendant derived only a small percentage of its overall revenue from New York business. *See, e.g., Aqua Products, Inc. v. Smartpool, Inc.*, 2005 WL 1994013, at *4 (S.D.N.Y. Aug.18, 2005) (no substantial solicitation where sales in the forum state comprise only 2% of a company's total income); *Gross v. Bare Escentuals, Inc.*, 2005 WL 823889, at *5 (S.D.N.Y. Apr.8, 2005) (3-4% of total product sales "insufficient to constitute substantial solicitation"); *Stemcor v. Sharon Tube Co.*, 2001 WL 492427, at *2 (S.D.N.Y. May 8, 2001) (where New York orders under 1% of total invoices in the requisite time period, no jurisdiction); *Hennigan v. Taser International, Inc.*, 2001 WL 185122, at *2 (S.D.N.Y. Feb.26, 2001) (3% of total nationwide sales insufficient); *Pieczenik v. Dyax Corp.*, 2000 WL 959753, at *3 (S.D.N.Y. Jul. 11, 2000) (insufficient showing where New York sales were 1.3% of world-wide sales, 1.9% of domestic sales). Conversely, in *Katz Agency, Inc. v. Evening News Ass'n*, 514 F.Supp. 423, 427-428 (S.D.N.Y.1981), the court concluded that the activities attributable to the defendant amounted to substantial and systematic solicitation "most importantly" because these activities in New York regularly generated one-third of the defendant radio station's advertising revenues.

***26** Obviously, TMGH's solicitation of funds are "substantial" under these precedents; between one tenth and one fifth of TMGH's annual revenues came from New Yorkers in the years immediately preceding this lawsuit.[FN9]

> FN9. TMGH's revenue is the relevant comparator, even though TMGH gives the money to GHC, where these charitable donations are but a drop in the bucket of that corporation's total revenue.

However, TMGH does nothing more than solicit funds, and it does so without maintaining any permanent physical presence in New York. Under the solicitation-plus rule, there is no "plus" where TMGH is concerned. Put otherwise, TMGH conducts no additional activities of substance in New York state so as to justify a finding of "doing business." Indeed, on the record before this court, it conducts no additional activities in New York at all-substantial or otherwise. Since solicitation of business by an out-of-state entity from out-of-state location is not enough to confer general jurisdiction, this court lacks jurisdiction over TMGH.

Plaintiff has identified one other contact between TMGH and New York: TMGH has long been registered as a charitable institution in New York pursuant to Executive Law § 172. Unfortunately for plaintiff, a defendant's compliance with statutory registration requirements is not a basis for exercising jurisdiction.

In *Feldman v. Silverleaf Resorts, Inc.*, 2000 U.S. Dist. LEXIS 1005 (E.D.N.Y. Jan. 31, 2000), the court rejected jurisdiction over a Texas corporation that was in the business of selling resort time shares to the public. The court found that Silverleaf had engaged in substantial solicitation activities in New York through a variety of what Silverleaf itself described as "aggressive" marketing tactics, which netted Silverleaf $2 million in net sales from New York residents in 1998. *Id.* at *3-5.Nevertheless, the court found that Silverleaf was not doing business in New York because it had not conducted any additional activities of substance besides the "mere solicitation" of sales. Among the proffered contacts beyond solicitation that the court rejected was the defendant's filing of a prospectus with the Secretary of State so that it could solicit business in New York lawfully. The court held that compliance with statutory registration requirements is not an adequate basis for asserting general jurisdiction. *Id.* at *10.

TMGH is required, under Executive Law § 172, to register in New York as a charitable organization if it conducts any charitable fundraising in the state, regardless of the amount of activity or proceeds

generated. TMGH does not conduct any activities in the state beyond "mere solicitation" by complying with a registration requirement that renders its solicitation lawful.

7. *The Court Lacks General Jurisdiction over Defendant PHS*

PHS is incorporated in Massachusetts as a not-for-profit charitable corporation and has its principal place of business in Boston, Massachusetts. PHS has no offices, employees, agents, real property or phone listings in New York. Nor does PHS do any advertising in New York. The plaintiff submits that PHS is doing business in New York for purposes of § 301 because it: (1) receives charitable contributions from New York residents; (2) raised capital funds via six bond issues during the seven years preceding the filing of the complaint; (3) uses New York investment managers to keep custody of and manage certain PHS funds and investments in New York; (4) contracts with New York-based financial institutions; (5) is a limited partner in two New York based limited partnerships; and (6) operates the interactive "second opinion" website.

***27** Two of these contacts can readily be dismissed as jurisdictionally insignificant. Unlike TMGH, PHS does not engage in any significant charitable fundraising activity directed at New Yorkers, and the minuscule amount of charitable revenue PHS received from New Yorkers-no more than $100,000 in a given year-gives the court no reason to consider PHS's fundraising activity a significant contact for jurisdictional purposes.

Nor does PHS's maintenance of an interactive website through which physicians around the world can seek second opinion consultations render it amenable to the general jurisdiction of New York. This website is not specifically targeted at New York physicians or patients, but is universally accessible. Only 7 of the 117 patients and physicians who utilized this second opinion consultation service since its inception in June 2001 were from New York, and their consultations resulted in a mere $1,450 in revenue. A universally accessible website that generates a small amount of New York activity is not a basis for exercising general jurisdiction over PHS. *See In re Ski Train Fire in Kaprum, Austria on November 11, 2000 (Siemens Austria),* 230 F.Supp.2d 403, 408 (S.D.N.Y.2002); *Drucker Cornell v. Assicurazioni Generali S.p.A.,* 2000 WL 284222, at *2 (S.D.N.Y. Mar.16, 2000).

But what of PHS's other contacts with New York?

Neither the plaintiff nor the defendants has precisely defined the principal business of PHS. The omission is significant, because the jurisdictional weight of PHS's contacts with New York depends on what the business of the organization is. Saying that PHS is an "integrated health system" or a "network" of Massachusetts-based institutions begs the question.

If PHS's primary business consists of spearheading and coordinating patient care and research initiatives among its member institutions, then its floatation of bond issues, custodianship of funds in New York accounts, contacts with investment professionals, and numerous contracts with New York financial entities are only ancillary activities, and are therefore inadequate to support the exercise of general jurisdiction-especially since it is well-settled that "raising financing" through the use of New York institutions is not "doing business" in New York. *See In re Ski Train Fire in Kaprun,* 2003 WL 1807148, at *4-5;*Clarke,* 1999 WL 105031, at *5;*Crucible Ventures, Inc.,* 1990 WL 16140, at *2.

On the record before me, however, it appears that PHS's business is not so limited. Instead, the record leads me to conclude that PHS's activity in New York's capital markets and its other financial activity here is integral to its core business activity, which is to serve as a centralized "corporate affairs" office for the numerous hospitals and institutions that are part of its "integrated network ."

As PHS represented in its bond prospectus:

Since its formation, Partners has centralized many functions and currently provides a number of services for its affiliates, including finance, human resources, information systems, treasury, legal, real estate and marketing. The Finance Committee of the PHS Board of Trustees serves all of Partners' constituents and has centralized the operating and capital budget process. Partners' cash and investments are managed centrally under policies developed by the PHS Investment Committee and overseen by the Finance Committee. Partners also coordinates research and medical education programs of its affiliates.

***28** (Mishaan Aff. Ex. 7 at MA 000000960.) In other words, PHS does everything for Mass General/GHC (and its other institutional affiliates) *except* provide patient care (which comes from GHC) and charitable fundraising (TMGH). As with fundraising, GHC has "outsourced" the administrative/corporate/finance functions of a hospital to a separate entity-PHS-which provides these services, not only to Mass General, but to the other "partners" who are affiliated with PHS.

Almost all of these back-office functions appear to be performed in Massachusetts. For example, the PHS in-house Legal Department, located in Massachusetts, provides legal advice to affiliated institutions. The hospitals' real estate is located in, and managed from, Massachusetts. Since all personnel at the PHS affiliates work in Massachusetts, the personnel function is situated in and runs from that state. Likewise, each affiliate's information technology system is located in Massachusetts. And inter-institutional coordination is entirely a Massachusetts affair, since all the PHS partner institutions are located in Massachusetts.

Many of the financial/treasury functions that would otherwise fall on GHC and the other PHS "partners" have also been outsourced to PHS, and for the most part they, too, are performed in Massachusetts. Stephen Ortiz, the Director of Treasury Services for PHS, testified that the PHS treasury office has access to investment funds and directs investment for each of the affiliates; since all of PHS's employees are located in Massachusetts, the Treasury Services personnel obviously performs that function from Massachusetts.

But at least some of PHS's money is raised and/or managed in New York. Debra Sloan, the Director of Capital Markets for PHS, testified that TMGH and GHC have not issued bonds since PHS was formed in 1994, because such financing has been centralized at PHS. Six such bond issues were floated in recent years, and while counsel for the obligor, counsel for PHS, the trustee, and the paying agent bank were all located in Massachusetts, the bonds were underwritten by New York institutions and were placed for sale on New York's capital markets, where commitments were made by various New York insurers, Financial Security Assistance Company and MBIA. (Sloan Dep. at 29-30). PHS raised $1,151,435,000 from these six bond issues, a significant portion of which was used by GHC.

Additionally, at the time this lawsuit was filed, nearly 20% of the assets of PHS and its affiliates were being managed by, or were in the custody of, various New York investment managers. PHS employees spoke to representatives of each of these New York managers or custodians approximately once a month.

In connection with the above-described financial activity, PHS entered into nearly three dozen contracts with entities that have offices in New York, including law firms, investment banks, rating agencies, and brokers. The record does not reveal that any of the contraparties to these contracts-the underwriters, lawyers, insurers or asset/investment managers who dealt with PHS on these matters-are employees of PHS. Rather, they are independent institutions who contracted with PHS for the performance of the specialized services that these New York entities offer.

***29** On this court's reading of the record, issuing bonds, contracting with New York financial entities, and shepherding affiliates' investment funds are an important part of PHS's core business function. Nonetheless, I cannot conclude that PHS does business in New York by retaining New York-based underwriters and asset managers to raise capital and manage assets on its behalf.

That is because PHS does not solicit any business in New York.

"Solicitation plus" requires, first and foremost, that the defendant solicit *its own* business in New York on a substantial and continuous basis-i.e., that defendant regularly market the products it makes or the services it performs to New Yorkers. PHS is in the business of providing administrative support and coordination for hospitals and other medical institutions. It is not in the business of underwriting bonds or giving investment advice generally. Moreover, PHS does not offer to perform its services for New York-based health care institutions. There is no evidence that PHS has ever attempted to add a New York "partner" to its network of affiliates. PHS exists simply and solely to service the needs of hospitals and similar institutions *in Massachusetts.*The fact that PHS does not solicit its own business in New York is fatal to plaintiff's effort to bring it into this court pursuant to N.Y.C.P.L.R. § 301.

PHS's lack of solicitation of business in New York contrasts with the facts in *Purdue Pharma v. Impax Laboratories, Inc.,* 2003 U.S. Dist. LEXIS 15428 (S.D.N.Y. Sept. 4, 2003), a case on which plaintiff relies heavily. In *Purdue Pharma,* the court deemed it appropriate to exercise general jurisdiction over defendant Impax, a Delaware corporation with its principal place of business in California. The fact that Impax had sought investment capital in New York's markets was deemed jurisdictionally significant, was not because it constitutes *solicitation*-rather, seeking New York investors was the "additional activity of substance" that constituted the "plus" in the "solicitation plus" test. *Id.* at *8. Impax's activity in the financial markets subjected it to general jurisdiction in New York *only* because Impax was engaged in substantial and continuous marketing of its pharmaceutical products in New York. Absent the solicitation of pharmaceutical sales, it is clear that the court would have reached a different result; the judge specifically stated that Impax's looking for investment capital in New York "is insufficient by itself to establish jurisdiction pursuant to N.Y.C.P.L.R. § 301."*Purdue Pharma,* at *8.[FN10]

> FN10. The court also noted that judicial economy would be served by a finding that jurisdiction existed, since it was handling eight other identical patent cases involving the drug oxycodone. *Purdue Pharma,* 2003 U.S. Dist. LEXIS 15428 at *11. The court recognized that considerations of judicial economy are insufficient to confer jurisdiction where none exists, but went on to discuss those considerations in any event.

Nothing in *Purdue Pharma* suggests that PHS's use of New Yorkers to underwrite and market its bonds and to manage its assets constitutes the solicitation of business in New York. And that sort of activity is PHS's only activity in New York.

There are numerous cases in which corporations that raised capital or maintained investments in New York were not deemed subject to general jurisdiction under N.Y.C.P.L.R. § 301. In *Daniel,* the court held that defendant hospitals' use of New York companies in issuing bonds to raise capital, their use of New York investment advisors, and their retention of other professionals (including attorneys retained to defend lawsuits) were insufficient to warrant a conclusion that the hospitals were "doing business" in New York. *Daniel,* 988 F.Supp. at 223. In *In re Ski Train Fire in Kaprun Austria,* the court declined to exercise jurisdiction over one of the named defendants, AHP (Austria's largest electricity producer), even though it had utilized financial contacts in New York while engaging in nine cross-border leasing transactions-which, the

court emphasized, were "merely a means of financing for AHP."2003 WL 1807148 at *4. AHP's maintenance of bank accounts in New York "for the limited purpose of receiving the proceeds of the leasing transactions before transferring them to accounts outside the United States," and its retention of advisors or counsel in New York to assist with the transactions, were also rejected as bases for exercising jurisdiction.*Id.* at *5.

***30** Even where commercial financing and investment activities are at the core of an out-of-state defendant's business (as is arguably the case with PHS), courts have been loath to find that retaining the services of New York professionals or accessing New York's unique capital markets constitutes "doing business" in New York so as to confer general jurisdiction over an out-of-state entity. Indeed, the Second Circuit has squarely held that, "A business relationship with a New York entity does not provide a sufficient basis for jurisdiction at least in the absence of a showing that the company has become an agent or division of the company over which the plaintiff seeks to exercise personal jurisdiction."*Landoil,* 918 F.2d at 1046.

In a case with facts analogous to this one, *Bush v. Stern Bros. & Co.* 524 F.Supp. 12, 14 (S.D.N.Y.1981), the defendant bank conducted no activity in New York from any permanent locale in the state, either on its own or through an agent. However, defendant's business, which was trading and dealing in securities, involved many contacts with brokers, underwriters, rating services and attorneys located in New York. *Id.* at 13-14.Plaintiff argued that the "cumulative significance" of these contacts met the "doing business" standard. The *Bush* court disagreed, holding, "[T]he location in New York of firms, such as law firms and investment services, which perform services for Stern Bros. for a fee does not represent activity by Stern Bros. in New York for jurisdictional purposes. *Id.* at 14.

There are, of course, cases that go the other way. In *United Rope Distrib. Inc. v. Kimberly Line,* 785 F.Supp. 446, 450 (S.D.N.Y.1992), this court asserted general jurisdiction over a Liberian corporation with its principal place of business in Greece, based solely on the corporation's maintenance of a New York bank account. However, the account was used "for the receipt of substantially all of the income" of the foreign corporation and "for the payment of substantially all of its business expenses"-in short, all the corporation's financial affairs were handled through this account. *Id.* at 450.The court emphasized that, by using a New York bank as its financial locus of activity, the defendant "chose to avail itself of the special advantages of conducting its business through a New York bank and thus deliberately invoked the benefits and protections of New York's laws ."*Id.*

In *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000 (Siemens AG),* 230 F.Supp.2d 376, 383-384 (S.D.N.Y.2002), the court-while recognizing that each of the defendant Sieman AG's New York contacts, considered separately, was insufficient to confer jurisdiction-concluded that the defendant was "doing business" in New York when those contacts were aggregated:

In addition to conducting sales in New York over the Internet, being listed on the New York Stock Exchange and conducting related activities here, and buying a New York company, Siemens AG also utilizes the services of a New York law firm to register U.S. patents of which it holds 7,000, employs a press contact here, and has sued in New York. Siemens AG's glowing proclamation that the United States has been an integral part of its business for fifty years indicates the permanent and systematic-as opposed to occasional and random-nature of these contacts.

***31** And in *Kingsepp v. Wesleyan University,* 763 F.Supp. 22, 27 (S.D.N.Y.1991), the court found that, while Dartmouth was not licensed to do business in New York, maintained no office in New York, and listed no telephone number in New York, it was nevertheless "doing business" in the state by sending representatives to approximately 44 sec-

ondary schools in the state a year to solicit students. The court also noted that Dartmouth had other contact with New York; it owned real property in the state, and had also engaged in substantial commercial activity in the state, including maintaining at least two bank accounts in Chase and issuing bonds in New York through Goldman Sachs on at least four separate occasions. Under the solicitation-plus test, these activities were enough to qualify as the "plus" over and above the College's solicitation of students.

All these cases are easily distinguished. Unlike the defendant in *United Rope,* PHS does not have substantially all of its financial assets in New York, FN11 and it certainly does not conduct "substantially all" of its business through New York, as the *United Rope* defendant did. *See also Semi Conductor Materials v. Citibank Intern. PLC,* 969 F.Supp. 243, 246 (S.D.N.Y.1997) (declining to find jurisdiction based on New York bank accounts alone where defendant did not "transact 'substantially all' of its business through its New York bank accounts.)

> FN11. It is unclear from the record what percentage of PHS's financial assets are physically located in New York (which I assume is what is meant by being "custodied" in New York). It appears, however, to be no more than 20%.

Nor can this court see any distinction between PHS's sporadic use of New York-based law firms, investment banks, rating agencies, and brokerage firms-as evidenced by the contracts between PHS and those entities-and the *Bush* defendant's contacts with similar service-providers. The *Bush* court explicitly noted that the defendant (an investment bank) had a business that necessarily involved contact with such entities, but held that their performance of services for a fee on Bush's behalf did not represent activity *by the defendant* in New York for jurisdictional purposes. This accords with the Second Circuit's observation in *Landoil, supra.,* 918 F.2d at 1046, that a business relationship with a New York entity generally does not provide a sufficient basis for an assertion of general jurisdiction.

Unlike the defendant Siemens in *Siemens AG,* PHS does not have any significant contacts with New York *other than* those relating to capital financing and asset management on behalf of Massachusetts institutions. It does not own a New York-based company or maintain a press contact here; it has never commenced a lawsuit here and so purposefully availed itself of the protection of our courts.

And unlike Dartmouth College, PHS does not solicit business here.

PHS does have some property in New York: some $265 million in investment assets are "custodied" in New York. However, this carries little jurisdictional weight. In *Colson Servs. Corp v. Bank of Baltimore,* 712 F.Supp. 28, 32 (S.D.N.Y.1989), the court held that it was not appropriate to exercise general jurisdiction over a Maryland bank that maintained custodial accounts in New York, into which securities purchased for the defendant by the Federal Home Loan Bank System and the Central Fidelity Bank of Lynchburg, Virginia were deposited for safekeeping. The court found that holding securities in a bank did not amount to conducting a continuous and systematic course of business.*Id.* Similarly unavailing was the fact that the bank had seven investments that were serviced in New York by the plaintiff.

***32** PHS is, in short, not present in New York in any meaningful way by virtue of its use of New York-based institutions to help it carry out its core business function.

PHS's participation as a limited partner in two New York-based investment vehicles, and forum selection and choice of law provisions in some of PHS's contracts are equally unavailing. Plaintiff has pointed to no case, and this court has found none, where such contacts were considered relevant for purposes of *general,* as opposed to *specific,* jurisdiction. *See Cutco Indus., Inc. v. Naughton,* 806 F.2d 361, 367

(2d Cir.1986); *JN Realty LLC v. Estate of Marvin,* 268 F. Supp. 2d 231, 235-37 (S.D.N .Y.2003). Limited partners are generally passive investors; it is the general partner who is conducting the business of the partnership. There is no evidence in the record suggesting that PHS is anything other than a passive investor in these particular investment vehicles.

8. *In View of the Foregoing, There is No Need to Reach the "Mere Department," "Piercing the Corporate Veil" or Agency Arguments*

While plaintiff maintains that each of the four corporate defendants in this action has sufficient contacts with New York to satisfy the "doing business" test-a proposition I have rejected-she argues in the alternative that all four entities should be considered as a single entity and their contacts with New York aggregated for jurisdictional purposes, because their purported existence independent of one another is nothing but "a corporate shell game." (Pl. Br. at 19).

It is quite true that if, for example, GHC were a "mere department" of PHS, then PHS's contacts with New York would be attributable to GHC for jurisdictional purposes, and vice versa. *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.,* 751 F.2d 117, 120 (2d Cir.1984). Unfortunately for plaintiff, neither *Volkswagenwerk* nor any other case of which this court is aware supports the proposition that contacts among a parent and its subsidiaries, or among a number of affiliates, can be aggregated for jurisdictional purposes when New York lacks jurisdiction over any of the separate corporate entities. Rather, a concession or a finding that one of the defendant entities is "doing business" in New York is predicate to any analysis of whether jurisdictional contacts can be attributed to its affiliates under the "mere department" rule. *See, e.g., Caldor, Inc. v. Logan Co.* 1991 WL 60373, *2 (S.D.N.Y. Apr.8, 1991) (A foreign company "may be found to be doing business in New York if it is a 'mere department' of an entity *that is present* in New York") (emphasis added). Put otherwise, only if one of the defendants were found to be "doing business" in New York would this court decide whether it was appropriate to attribute that defendant's New York contacts to another defendant who was not doing business in New York.[FN12] Since I have concluded that none of the four corporate defendants is subject to general jurisdiction in New York on a "doing business" theory, the "mere department" analysis ends.

> FN12. Plaintiff's emphasis on "mere department" analysis merely confirms this court's intuition that the idea behind naming all four corporations as defendants is to get GHC into court in New York by attributing to it the activities of TMGH and/or PHS.

***33** Neither would it be jurisdictionally relevant if the court were able to pierce the corporate veils between these corporations. Since none of them is individually amenable to suit in New York, the aggregation of the four entities (or any subset thereof) is also not amenable to suit in New York.

Finally, the court *sua sponte* raised with counsel the question of whether jurisdiction would attach to GHC (the real defendant in interest) on an agency theory if I concluded that either PHS or TMGH were "doing business" in New York on GHC's behalf. Since asking that question, however, I have concluded that this court lacks general jurisdiction over both PHS and TMGH. Therefore, my inquiry about agency falls by the wayside.

III. *Conclusion*

Plaintiff's counsel would have this court believe that plaintiff's injury will go unredressed if this court does not retain jurisdiction over this case. That is patently untrue. The professional defendants in the pending Massachusetts action are not cloaked with charitable immunity, so if they failed to administer proper care to plaintiff's decedent or per-

petrated a fraud on the bereaved family, compensation will be forthcoming.[FN13] *See Morrison v. Lennett,* 415 Mass. 857, 616 N.E.2d 92, 96 (Mass.1993).

> FN13. If this court (1) did have jurisdiction over any of the defendants and (2) deemed it inappropriate to transfer the case to Massachusetts for public policy reasons, I would-as matter of comity and judicial economy-stay all proceedings here pending resolution of the Massachusetts lawsuit against the health care professionals and other hospital personnel. In that way, the issues of malpractice and fraud would be resolved in the forum where the torts were allegedly committed, and where everyone involved in the care and the autopsying of plaintiff's decedent are located.

Moreover, nothing in this decision precludes a New York court from exercising jurisdiction over these defendants in a case where transactional jurisdiction exists. But it does not exist in this case.

For the foregoing reasons, defendants' motion to dismiss the complaint for lack of personal jurisdiction is granted.

This constitutes the decision and order of the court.

S.D.N.Y.,2007.
Nelson v. Massachusetts General Hosp.
Slip Copy, 2007 WL 2781241 (S.D.N.Y.)

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