

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI**

Medical Supply CHAIN, INC.,)
<i>Plaintiff,</i>)
v.) Case No. 05-0210-CV-W-ODS
NOVATION, LLC) Attorney Lien
NEOFORMA, INC.)
ROBERT J. ZOLLARS)
VOLUNTEER HOSPITAL ASSOCIATION)
CURT NONOMAQUE)
UNIVERSITY HEALTHSYSTEM CONSORTIUM)
ROBERT J. BAKER)
US BANCORP, NA)
US BANK)
JERRY A. GRUNDHOFFER)
ANDREW CESERE)
THE PIPER JAFFRAY COMPANIES)
ANDREW S. DUFF)
SHUGHART THOMSON & KILROY)
WATKINS BOULWARE, P.C.)
<i>Defendants.</i>)

Suggestion In Opposition To Curt Nonomaque And Robert Baker’s Motion To Dismiss Plaintiff’s Complaint For Lack Of Personal Jurisdiction And For Failure To State A Claim

Comes now, Medical Supply and makes the following suggestion in response to defendant Curt Nonomaque And Robert Baker’s Motions (doc.s 23, 23-1, 23-2, and 24).

1. Medical Supply’s complaint contains averments of the defendants Nonomaque and Baker’s repeated actions targeting Medical Supply in Missouri to injure and prevent Medical Supply from entering the national market for hospital supplies.
2. Curt Nonomaque’s conduct as a conspirator in the combinations and conspiracies to interdict Medical Supply’s market entry capitalization, exclude Medical Supply from the national hospital supply market and to restrain trade in the market for hospital supplies as part of a common enterprise having the goal of fraudulently overcharging Medicare, Medicaid and Champus government programs and private insurers is described at over 80 places in the plaintiff’s complaint.
3. Robert Baker’s conduct as a conspirator in the combinations and conspiracies to interdict Medical Supply’s market entry capitalization, exclude Medical Supply from the national hospital supply market and to restrain trade in the market for hospital supplies as part of a common enterprise having the goal of fraudulently overcharging Medicare, Medicaid and Champus government programs and private insurers is described at over 60 places in the plaintiff’s complaint.

4. The complaint describes the effect of Curt Nonomaque And Robert Baker's conduct on the State of Missouri from the tortious actions of the defendants contributing to higher Medicaid expenditures and the likely cuts of healthcare insurance to citizens of Missouri in ¶85 as a foreseeable result of the defendant's conduct to target Medicare, Medicaid and private health insurers with artificially inflated hospital supply costs.

ARGUMENTS AND AUTHORITIES

The long arm statute of Missouri utilized to serve process on Curt Nonomaque And Robert Baker, RSMo section 506.510 extends jurisdiction over Mr. Zollars where the plaintiff's complaint establishes a prima facie showing of sufficient contacts based on transactions for hospital supplies, tortious conduct including antitrust violations and contracts for escrow accounts and real estate RSMo section 506.500.1, .1, .2 and .3.

Determining the propriety of an exercise of personal jurisdiction over a foreign defendant is a two-step process. *Hanline v. Sinclair Global Brokerage Corp.*, 652 F.Supp. 1457, 1458 (W.D.Mo.1987). The court must determine whether the exercise comports with the requirements of the long-arm statute of the state in which it sits. See *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 653 (8th Cir.1982), *Radaszewski by Radaszewski v. Contrux, Inc.*, 891 F.2d 672 at 673 (C.A.8 (Mo.), 1989). The court also must ensure that sufficient minimum contacts exist between the defendant and the forum state for the exercise of jurisdiction not to offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945).

The defendants' motion to dismiss avoids the effect of the allegation of conspiracy both on whether Medical Supply has sufficiently pled claims against Nonomaque and Baker (claims that allege multiple instances of tortious conduct by the conspiracy in Missouri against Medical Supply) and the effect of their alleged co-conspirator's substantial and continuing business contacts with Missouri.

The plaintiff has utilized Missouri's long arm statutes to establish specific jurisdiction over Nonomaque and Baker that does not offend their constitutional rights to Due Process:

The Missouri long-arm statute permits personal jurisdiction over a foreign defendant who has committed a tortious act within the state. See Mo. Ann. Stat. § 506.500.1(3) (Vernon Supp.1988). This statute has withstood constitutional challenge. *State ex rel. Deere & Co. v. Pinnell*, 454 S.W.2d 889, 892-93 (Mo.1970) (en banc).

Radaszewski by Radaszewski v. Contrux, Inc., 891 F.2d 672 at 673 (C.A.8 (Mo.), 1989).

Nonomaque and Baker's denials of substantial contacts with the forum state are immaterial to allegations of jurisdiction based on tortious acts:

Missouri case law construes the phrase "commission of a tortious act within the state" to include extraterritorial acts that produce actionable consequences in Missouri. *Fulton v. Chicago R.I. & P. R.R. Co.*, 481 F.2d 326, 331 (8th Cir.), cert. denied sub nom. *Soo Line R.R. Co. v. Fulton*, 414 U.S. 1040, 94 S.Ct. 540, 38 L.Ed.2d 330 (1973) (citing Missouri case law). A single tortious act may be sufficient to justify a Missouri court's exercise of personal jurisdiction over a nonresident defendant. *State ex rel. Caine v. Richardson*, 600 S.W.2d 82, 84 (Mo.Ct.App.1980).

Institutional Food Marketing Associates, Ltd. v. Golden State Strawberries, Inc., 747 F.2d 448 at 453 (C.A.8 (Mo.), 1984.)

The defendants use *Enterprise Rent-a-Car Company v. U-Haul Intern., Inc.* for its business contacts analysis. While an important case in defining forum jurisdiction over operators of web sites, the case is not a useful tool for determining the defendants' business contacts with Missouri where Medical Supply's complaint alleges common enterprise, conspiracy and combination with codefendants having continuing and sustained business contacts in Missouri. US Bank alone has many offices doing thousands of transactions a day in Missouri in addition to the specific transactions where the complaint alleges US Bank refused to deal with Medical Supply, filed a malicious USA PATRIOT Act report against Medical Supply and through Shughart Thomson and Kilroy, formed a plan to obstruct justice through the intimidation and harassment of Medical Supply's counsel. *Enterprise* lacks utility in resolving the allegations in the complaint that the defendants targeted Medical Supply in Missouri and committed tortious actions against Medical Supply in Missouri but does affirm long arm jurisdiction over these purposeful directed tortious acts:

"A party may anticipate being haled into court in a particular jurisdiction if it "purposefully directed" its activities at residents of the forum, and the litigation results from alleged injuries that "arise out of or relate to" those activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)."

Enterprise Rent-a-Car Company v. U-Haul Intern., Inc., 327 F.Supp.2d 1032 at 1037 (E.D. Mo., 2004).

The complaint alleges Nonomaque and Baker participated in a conspiracy to monopolize the market for hospital supplies. Medical Supply has stated a prima facie case that Nonomaque and Baker acquired and maintained their monopoly through numerous unlawful acts and that their success is not a

result of their performance in the distribution of hospital supplies. The defendants' conclusion that elements of the many claims pled against Nonomaque and Baker are insufficiently stated because they don't allege every action as the individual conduct of Nonomaque or Baker is an incorrect understanding of the effect of allegations of conspiracy:

"There is no statement of the individual appellees' market power in the complaint. However, it appears that Baxley DeLamar actually pleaded a conspiracy to monopolize, rather than a number of individual attempts to monopolize. It pleaded the necessary elements of conspiracy in violation of Sec. 2 of the Sherman Act--conspiracy, specific intent to monopolize, and overt acts in furtherance of the conspiracy. *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 795 (2d Cir.), cert. denied, --- U.S. ----, 107 S.Ct. 3188, 96 L.Ed.2d 676 (1987). Since Baxley-DeLamar did plead a cause of action, it is not necessary to dismiss Count II merely because it is titled incorrectly. See *Terre du Lac Association, Inc. v. Terre du Lac, Inc.*, 772 F.2d 467, 474 (8th Cir.1985), cert. denied, 475 U.S. 1082, 106 S.Ct. 1460, 89 L.Ed.2d 718 (1986)."

Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n, 843 F.2d 1154 at 1157 (C.A.8 (Ark.), 1988).

Medical Supply has made claims against Nonomaque and Baker under state and federal Antitrust and RICO theories of action. Medical Supply's complaint alleges that Nonomaque and Baker committed these violations against Medical Supply in combinations and conspiracies with other defendants as a common enterprise with the goal of defrauding Medicare, Medicaid, Champus and private insurers with artificially inflated hospital supply prices. Medical supply has sufficiently stated claims against Nonomaque and Baker:

"The appellee trade associations are alleged to have participated in the conspiracy by recommending the restrictive rules complained of. Baxley-DeLamar has alleged (albeit minimally) "facts constituting the conspiracy, its object and accomplishment." *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 273 (5th Cir.1979). Therefore, Baxley-DeLamar satisfied the minimal pleading requirements of Rule 8. *Mountain View Pharmacy v. Abbott Laboratories*, 630 F.2d 1383, 1386-88 (10th Cir.1980)."

Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n, 843 F.2d 1154 at 1156 (C.A.8 (Ark.), 1988).

The RICO allegations of conspiracy against Nonomaque and Baker further frustrate the defendants' theory that sufficient averments of predicate racketeering acts against Nonomaque and Baker as individuals to state a claim have not been made. Three circuits have ruled that any plaintiff injured by an overt act may bring a RICO conspiracy claim, whether or not the overt act also is a racketeering act. See *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 152 (5th Cir. 1997), cert. granted and

vacated as moot, 119 S. Ct. 442 (1998); *Schiffels v. Kemper Financial Services*, 978 F.2d 344, 348 (7th Cir. 1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1168-1169 (3d Cir. 1989).

Medical Supply's claims that the defendants controlled and caused tortious conduct targeted against Medical Supply in Missouri provide this court with jurisdiction under 28 U.S.C. § 1391:

"[T]he general venue statute, 28 U.S.C. § 1391(b), which provides for venue in the district where the claim arose, supplements the Clayton Act and can provide for venue in situations where the provisions of the Clayton Act alone would not. The Missouri defendants agree, Supplemental Brief of Missouri Appellees at 10, as they must, because we have long recognized that special venue statutes in general, and section 12 of the Clayton Act in particular, are supplemented by the venue provisions applicable to all civil cases. *Board of County Comm'rs. v. Wilshire Oil Co.*, 523 F.2d 125, 130 (10th Cir.1975); 15 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3818 at 175 (2d ed. 1986) ("[I]t is now clear beyond any doubt that the general venue statutes apply to antitrust cases."); *Pure Oil Co. v. Suarez*, 384 U.S. 202, 204-05, 86 S.Ct. 1394, 1395-96, 16 L.Ed.2d 474 (1966) (special venue statutes are supplemented by more liberal general venue statute, absent specific contrary indication)."

Monument Builders of Greater Kansas City, Inc. v. American Cemetery Assn. of Kansas, 891 F.2d 1473 (C.A.10 (Kan.), 1989). Medical Supply's complaint provides for jurisdiction over the defendants under either Section 12 or of 28 U.S.C. § 1391:

"The question in *Go-Video* was whether the special venue provision in Section 12 is the only source of venue for a federal antitrust suit, or whether the general venue provisions of 28 U.S.C. § 1391 are also available. We refused to read Section 12 as "an integrated whole," *Go-Video*, 885 F.2d at 1408, holding that the special venue provision of Section 12 is supplemented by the general venue provisions of § 1391 for federal antitrust plaintiffs. *Id.* at 1413. *Accord In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 296-97 (3d Cir. 2004); *Delong Equip. Co. v. Wash. Mills Abrasive Co.*, 840 F.2d 843, 855 n. 16 (11th Cir. 1988). *Contra GTE New Media Serv. Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1350-51 (D.C. Cir. 2000); *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 581 (2d Cir. 1961), *rev'd on other grounds*, 369 U.S. 463 (1962). Under *Go-Video*, venue is proper in a federal antitrust suit if the venue requirements of either Section 12 or 28 U.S.C. § 1391 are satisfied."

Action Embroidery Corporation v. Atlantic Embroidery, Inc., No. 02-56770 at 5 (Fed. 9th Cir. 5/27/2004) (Fed. 9th Cir., 2004). While Medical Supply's state law claims allege tortious conduct, breach of contract and fiduciary duty committed by the defendants in the state of Missouri with co-conspirators having significant and continuing contacts with the state, jurisdiction also exists over the state claims based on the doctrine of pendant personal jurisdiction:

"Many of our sister circuits have adopted the doctrine of "pendent personal jurisdiction." Under this doctrine, a court may assert pendent personal jurisdiction over a defendant with respect to a claim for which there is no independent basis of personal jurisdiction so long as it arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction. See, e.g., *United States v. Botefuhr*, 309 F.3d 1263, 1272-75 (10th Cir. 2002); *Robinson* 223 F.3d 445, 449-50 (7th Cir. 2000)' *Eng'g Co., Ltd. Pension Plan & Trust v. George*, 223 F.3d 445, 449-50 (7th Cir. 2000); *ESAB Group*, 126 F.3d at 628-29; *IUE AFL-CIO Pension Fund v.*

Herrmann, 9 F.3d 1049, 1056-57 (2d Cir. 1993); *Oetiker v. Werke*, 556 F.2d 1, 5 (D.C. Cir. 1977); *Robinson v. Penn Cent. Co.*, 484 F.2d 553, 555-56 (3d Cir. 1973). Pendent personal jurisdiction is typically found where one or more federal claims for which there is nationwide personal jurisdiction are combined in the same suit with one or more state or federal claims for which there is not nationwide personal jurisdiction.”

Action Embroidery Corporation v. Atlantic Embroidery, Inc., No. 02-56770 at 10-11 (Fed. 9th Cir. 5/27/2004) (Fed. 9th Cir., 2004).

Alternatively, the plaintiff’s federal antitrust allegations provide a basis for exerting jurisdiction over Nonomaque and Baker for causing antitrust injury to Medical Supply in Missouri. The court may employ the second Sherman Act long arm statute § 5 Sherman Act, (15 U.S.C. § 5) which expressly states individuals may be brought before this forum even though they reside in other districts:

§ 5 Sherman Act, 15 U.S.C. § 5, Bringing in additional parties

Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

This court could consequently assert jurisdiction over Curt Nonomaque And Robert Baker if their presence would facilitate the adjudication of this matter.

CONCLUSION

Whereas for the above stated reasons, the plaintiff respectfully requests the court deny Curt Nonomaque And Robert Baker’s motion to dismiss on the basis of a lack of jurisdiction, recognizing that this court does indeed have specific and general jurisdiction over Curt Nonomaque And Robert Baker. That does not violate their right to Due Process. Or, in the alternative, the plaintiff respectfully requests that the court bring in Curt Nonomaque And Robert Baker as an additional parties under 15 U.S.C. § 5.

Respectfully Submitted

S/Bret D. Landrith

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Certificate of Service

I certify that on April 11th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

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