

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

MEDICAL SUPPLY CHAIN, INC.,)
<i>Plaintiff,</i>)
v.) Case No. 05-2299-KHV
NOVATION, LLC) Formerly W.D. MO. Case No. 05-0210
NEOFORMA, INC.) Attorney Lien
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>)

**MOTION FOR LEAVE TO JOIN ADDITIONAL DEFENDANTS
UNDER FED.R.CIV.P. 20(A)**

Comes now the plaintiff Medical Supply through its attorney Bret D. Landrith and respectfully makes this motion under under Fed.R.Civ.P. 20(a) for leave to join additional parties as defendants in the interest of justice and the economy of the court.

STATEMENT OF FACTS

1. The plaintiff’s earlier action on federal claims against General Electric Company and its subsidiaries GE Transportation Systems Global Signaling,L.L.C., General Electric Capital Business Asset Funding Corporation and Jeffrey R. Immelt (herein “GE defendants”)has been dismissed.
2. The plaintiff’s state based law claims were expressly dismissed without prejudice.
3. The GE court declined to combine this action with the remaining post remand sanctioning of Medical Supply’s counsel for correctly making Jeffrey Immelt an antitrust defendant.
4. The Tenth Circuit did not acknowledge or address *Dagher v. Saudi Refining, Inc.*, 2004 WL 1191941 (9th Cir. 2004), a precedent behind Medical Supply’s claims in the current action.
5. The Tenth Circuit also did not acknowledge or address common parties to both actions where they were not named as defendants.

6. The plaintiff first sought to combine both actions following the Tenth Circuit's remand, despite the disadvantage of the albeit narrow issue preclusion resulting from the prior courts' orders.
7. The GE defendants did not object to the consolidation but asserted that the previous action could not be amended by the plaintiff to include additional claims.
8. Medical Supply opposed this assertion by filing a motion citing to current Tenth Circuit authority controverting the defendants assertion.
9. The defendants did not reply.
10. The prior action's court made no findings of fact or law on the motion to consolidate or the motion with current Tenth Circuit authority, stating they were "Moot."
11. Conduct by the GE defendants against Medical Supply occurring after the filing and amending of the complaint in the earlier action has given rise to new federal question claims that are not precluded by the dismissal.
12. The chargeable subsequent conduct is alleged by Medical Supply to be in conspiracy with the present defendants and to include all the current action's federal claims except those alleged against the current defendants to have occurred before Medical Supply amended its complaint against the GE defendants to include Jeffrey Immelt.

MEMORANDUM IN SUPPORT

The plaintiff seeks to join the group of defendants in *Medical Supply Chain, Inc. v. General Electric, et al.* to the present action where they are identified as co-conspirators but were not named as defendants. Medical Supply did not charge the GE defendants during the pendency of the prior appeal.

The Tenth Circuit upheld the trial court's express refusal to exert jurisdiction over the actions pendent state claims which are the subject of the present action. Furthermore, an averment of obstruction of justice against the GE defendants contained in the earlier action has risen to a predicate act in a later discovered and identified pattern and practice of a RICO conspiracy under federal law with the present defendants.

Plaintiff's proposed joinder is based on new factual allegations and transactions between the parties. *Zhu v. Countrywide Realty Co., Inc.*, 160 F.Supp.2d 1210 at 1224 (Kan., 2001).

Finally, the GE defendants are co-conspirators in the antitrust claims against the current defendants on conduct that the GE defendants committed after the amended complaint had been filed in the previous action.

“Under Fed.R.Civ.P. 20(a), joinder is appropriate when a "right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." The Court's discretion is limited by two prerequisites of the rule: a right to relief must be asserted which arises from the same transaction or occurrence, and a question of law or fact common to all the defendants must arise in the action. See *Green Constr. Co. v. Kan. Power & Light Co.*, No. 87-2070-S, 1989 WL 117440, at *1 (D.Kan. Sept. 11, 1989).”

Zhu v. Countrywide Realty Co., Inc., 160 F.Supp.2d 1210 (Kan., 2001)

In a suit to enjoin a conspiracy not all the conspirators are necessary parties defendant. See *Waterman v. Canal-Louisiana Bank Co.*, 215 U.S. 33, 49 , 30 S.Ct. 10, 14; *United Shoe Mach. Co. v. United States*, 258 U.S. 451, 456 , 42 S.Ct. 363, 365; *Hopkins v. Oxley Stave Co.*, 8 Cir., 83 F. 912, 915, 916; *Rocky Mountain Bell Tel. Co. v. Montana , Federation of Labor, C.C.*, 156 F. 809, 811, 812. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247 , 60 S.Ct. 811, 855.¹

In *Laker Airways*, the court explored its discretion to require parties in an antitrust case and found the rule of permissive joinder usually applied:

“*Temple v. Synthes Corp.*, 498 U.S. 5, 7, 111 S.Ct. 315, 316, 112 L.Ed.2d 263 (1990) ("It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.... The Advisory Committee Notes to Rule 19(a) explicitly state that a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability.") (citations and quotations omitted).”

Laker Airways v. British Airways, 182 F.3d 843at 847 (11th Cir., 1999). However, the court found there were circumstances where a ojoint and several tortfeasor’s presence was required:

“Laker's antitrust claims necessarily require that a court evaluate ACL's conduct in relation to Laker, thereby substantially implicating ACL's interests. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92, 105-06 (C.D.Cal.1971) (while under Rule 19 there are some cases which state that antitrust co-conspirators need not be joined, here, joint tortfeasor still had interests covered by Rule 19(a) and therefore had to be joined), aff'd, 461 F.2d 1261 (9th Cir.1972). In order to prove its antitrust claims, Laker would be required to show that ACL acted in other "than an independent manner." Such a ruling would surely implicate the interests of ACL because the United Kingdom's enabling legislation, ASAR, requires that the Secretary of State for Transport withdraw its approval of an appointed coordinator if its behavior is not neutral. ASAR, 4(3). Likewise, in *Boles v. Greeneville Housing Authority*, 468 F.2d 476 (6th Cir.1972), the Sixth Circuit determined that the Department of Housing and Urban Development (HUD) was an "indispensable party" when

¹ As part of the Kansas District Court and Tenth Circuit’s secession from US Law applicable to hospital supply monopolization, these three US Supreme court cases were overruled by the Kansas District Court on this point of law in the two previous Medical Supply Chain cases and plaintiff’s counsel was sanctioned.

plaintiffs "indirectly attacked" HUD's approval of a development plan. *Id.* at 479.6 *Doty v. St. Mary Parish Land Co.*, 598 F.2d 885, 887 (5th Cir.1979) ("A district court may refuse to proceed with the action if prejudice would result to either the absent party or to parties already joined.")"

Laker Airways v. British Airways, 182 F.3d 843 at 848 (11th Cir., 1999). The GE defendants are not necessary parties but a potential for prejudice in their absence exists.

The Tenth Circuit resolved an issue over whether to apply Rule 19 based on if a party was necessary and determined that since earlier in the action the party was not indispensable than the party is still unnecessary:

"Our conclusion that Deseret News is not an indispensable party is bolstered, but not determined, by the fact that no party in the case considered Deseret News to be indispensable at the time the action commenced. Cf. *Burka*, 87 F.3d at 483 (supporting conclusion that party joined under Fed. R. Civ. P. 25(c) was not indispensable by reference to "appellants' failure to seek joinder [of the party] as a defendant at an earlier stage of this case"). In ruling on the motions to join Deseret News, the district court observed that "[n]one of the parties contend that Deseret News Publishing was an indispensable party at the time the original Complaint was filed."

Salt Lake Tribune Publishing, Co. LLC v. AT & T Corp., 2003 C10 243 at ¶96 (USCA10, 2003)

Analysis Under Rule 19(b)

If a necessary party cannot be joined, the court must then proceed to Rule 19(b) and consider whether in "equity and good conscience," the suit should proceed without the necessary party. The court balances four factors in this analysis: (1) how prejudicial a judgment would be to the nonjoined and joined parties, (2) whether the prejudice could be lessened depending on the relief fashioned, (3) whether the judgment without joinder would be adequate, and (4) whether the plaintiff would have any alternative remedies were the case dismissed for nonjoinder. See *Wymbs v. Republican State Executive Comm.*, 719 F.2d 1072 at 1079 (11th Cir.1983).

If joinder of the GE defendants in the present action is denied, this action may require dismissal without prejudice until all current defendants can be prosecuted with the GE defendants in the Western District of Missouri US District court where Medical Supply will bring the new action.

CONCLUSION

Whereas the plaintiff has new federal claims against the GE defendants General Electric Company and its subsidiaries GE Transportation Systems Global Signaling,L.L.C.,General Electric Capital Business Asset Funding Corporation and Jeffrey R. Immelt for conduct subsequent to the previous action, in addition to untried state law claims that arise out of the transactions identifying the GE parties in the present case;

the plaintiff Medical Supply respectfully requests the court grant leave to join the GE defendants in the interests of justice and the economy of the court's resources.

Respectfully Submitted

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Certificate of Service

I certify that on September 15th, 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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