

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

MEDICAL SUPPLY CHAIN, INC.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-CV-0210-CV-ODS
)	
NOVATION, LLC, et al.,)	
)	
Defendants.)	

**REPLY SUGGESTIONS IN SUPPORT OF CURT NONOMAQUE
AND ROBERT BAKER’S MOTION TO DISMISS PLAINTIFF’S COMPLAINT FOR
LACK OF PERSONAL JURISDICTION AND FOR FAILURE TO STATE A CLAIM**

Pursuant to Federal Rules of Civil Procedure 12b(2) and 12(b)(6), Defendants Curt Nonomaque (“Nonomaque”) and Robert Baker (“Baker”) (collectively “Defendants”) submit these Reply Suggestions in Support of their Motion to Dismiss Plaintiff’s Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim.

I. INTRODUCTION

Defendants’ Motion to Dismiss Plaintiff’s Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim (“Motion to Dismiss”) established that Defendants lacked the minimum contacts necessary for this Court’s exercise of personal jurisdiction over them. Plaintiff’s Suggestions in Response (“Plaintiff’s Response”) provides no evidence of any contacts between Defendants and Missouri; indeed, Plaintiff implicitly concedes that there are no such contacts and instead asserts several frivolous legal arguments for the exercise of personal jurisdiction over Defendants.

In fact, as shown below, Plaintiff: (1) confuses venue with personal jurisdiction; (2) focuses on an alleged conspiracy about which it lacks standing to complain; (3) advances

arguments that have been rejected as a basis for service of process under the Missouri long-arm statute; (4) completely ignores the required elements of the theories for jurisdiction it invokes; (5) relies on cases that have been expressly overruled by the U.S. Supreme Court; and, (6) relies on a statute that applies only to actions brought by the government.

II. ARGUMENT AND AUTHORITIES

A. Plaintiff Erroneously Asserts that *In Personam* Jurisdiction Exists Where Venue is Proper

In its Response, Plaintiff confuses the concept of proper *venue* with the issue of whether the Court can exercise *in personam* jurisdiction over Defendants. Specifically, on page 5 of Plaintiff's Response, Plaintiff argues that personal jurisdiction over Defendants is proper under the general *venue* statute, 28 U.S.C. § 1391. Plaintiff's argument is wholly without merit, as it fails to recognize the distinction between personal jurisdiction, which asks whether the lawsuit is in a court that has "power to exercise control over the parties," and venue, which asks primarily whether the court is a "convenient forum." See *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979). See also *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1178-1179 (9th Cir. 2004) ("It has long been recognized that the question of a federal court's competence to exercise personal jurisdiction over a defendant is distinct from the question of whether venue is proper.").

B. Plaintiff Erroneously Relies on its Conclusory, and Irrelevant, Allegations of Conspiracy

In addition, Plaintiff alleges that personal jurisdiction is proper because Defendants allegedly participated in two conspiracies with effects and/or overt acts in Missouri. First, Plaintiff alleges that Defendants participated in a conspiracy to inflate medical supply prices to defraud Medicare, Medicaid and Champus government programs and that the harmful effects of

that alleged scheme were felt in Missouri. Second, Plaintiff points to its conclusory allegations that Defendants conspired with the other parties in the case to harm Medical Supply in Missouri. Neither of these alleged conspiracies bolsters Plaintiff's claim that personal jurisdiction can be exercised over Defendants.

1. Plaintiff Lacks Standing to Complain About a Conspiracy to Artificially Inflate Prices to Defraud Medicare and Other Government Programs

First, even if Plaintiff's wholly conclusory and fanciful allegations of an alleged conspiracy to inflate medical supply costs in order to defraud Medicare and other government programs were true—and they are not—they are completely beside the point. Plaintiff, as a private company who wants to compete in the market for medical supply products simply has no standing to complain about high medical supply costs. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-40 (1990) (holding that a firm has not suffered antitrust injury where competitors have agreed to fix prices); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986) (same). Because Plaintiff is not the federal government or the government of any state, but rather a private corporation, it cannot seek redress for harm that those governmental entities suffered as a result of this alleged medical supply product conspiracy. *See Taubman Realty Group Ltd. Partnership v. Mineta*, 198 F. Supp. 2d 744, 755 (E.D. Va. 2002) (“Ordinarily, a plaintiff must claim a specific, personalized injury in order to invoke the jurisdiction of a federal court because courts do not sit to entertain generalized grievances that are shared by the public at large.”), *aff'd*, 320 F.3d 475 (4th Cir. 2003). Indeed, high medical supply costs would benefit Plaintiff, not harm it, because Plaintiff's ability to compete on price would be enhanced if its competitors were inflating their prices. Plaintiff cannot base its argument that specific jurisdiction exists in this case by focusing on a claim for which it has no standing to sue. *See Williams v. FirstPlus Home Loan Trust 1996-2*, 209 F.R.D.

404, 412-413 (W.D. Tenn. 2002) (noting that where plaintiffs failed to allege that defendants had injured the plaintiffs, there was no basis for the exercise of specific jurisdiction).

2. Missouri is Not Alleged to be the Focal Point of the Alleged Conspiracy to Artificially Inflate Prices to Defraud Medicare and Other Government Programs

However, there is an independent reason for rejecting this basis for personal jurisdiction. Missouri was not the focal point of this alleged scheme and, therefore, personal jurisdiction by this Court would not be proper under this theory even if defrauding Medicare was properly a part of this lawsuit (which it is not) and even if Plaintiff alleged specific facts about Defendants' conduct in artificially inflating prices (which it has not).

When a plaintiff bases personal jurisdiction on the theory that tortious or wrongful activity committed out of the forum state had an effect inside the forum state, the plaintiff must establish that 1) the defendant committed an intentional tort; 2) the plaintiff felt the brunt of the harm in the forum state, such that the forum state was the focal point of the tortious activity; and 3) the defendant expressly aimed the tortious conduct at the forum such that the forum state was the focal point of the tortious activity. *Calder v. Jones*, 465 U.S. 783, 788-789 (1984). *See also Hicklin Engineering, Inc. v. Aidco, Inc.*, 959 F.2d 738, 739 (8th Cir. 1992). Plaintiff has not alleged that Missouri is the focal point for the alleged scheme to artificially raise medical supply product prices or to defraud Medicare and similar government programs. Instead, Plaintiff alleges that it was a nationwide scheme. This is fatal to jurisdiction under the *Calder* effects test. *See ESAB Group, Inc. v. Centricutt, Inc.*, 126 F.3d 617, 625 (4th Cir. 1997) (finding no personal jurisdiction over defendant because the defendant did not "manifest behavior intentionally targeted at and focused on South Carolina" but "[i]nstead, ... focused its activities more generally on customers located throughout the United States and Canada without focusing on and targeting South Carolina.").

3. Missouri Has Rejected the Imputation of Contacts with the Forum on the Basis of Conspiracy Allegations

In any event, Plaintiff cites no authority for the proposition that the Missouri long-arm statute justifies service on a non-resident merely because that non-resident is alleged to be a co-conspirator in a scheme with an impact on Missouri. In fact, Missouri courts have rejected the notion that personal jurisdiction can arise from a co-conspirator's contacts with the forum. *See State ex rel. Sperandio v. Clymer*, 581 S.W.2d 377, 383-84 (Mo. banc 1979) (holding that allegations of a conspiracy does not confer upon the court personal jurisdiction over a defendant who did not meet the minimum contacts test); *City of St. Louis v. American Tobacco Co.*, No. 982-09752, 2003 WL 23277277, *7(Mo. Cir. Dec 16, 2003) (not designated for publication)(rejecting the notion that an alleged co-conspirator's activities in the forum state can be imputed to a non-resident as "inconsistent with the due process requirement that each individual defendant must, on its own, have sufficient minimum contacts with the forum state before personal jurisdiction can be imposed.").

4. Even if Conspiracy Jurisdiction Were a Viable Theory in this Case, Plaintiff Has Failed to Adequately Allege Defendants Participated in Any Conspiracy

Moreover, Plaintiff's conclusory allegations of a conspiracy would not pass muster even in jurisdictions that, unlike Missouri, have adopted the conspiracy theory of personal jurisdiction. "To satisfy this standard, the plaintiffs must: (1) make a prima facie factual showing of a conspiracy (*i.e.*, point to evidence showing the existence of the conspiracy and the defendant's knowing participation in that conspiracy); (2) allege specific facts warranting the inference that the defendant was a member of the conspiracy; and (3) show that the defendant's co-conspirator committed a tortious act pursuant to the conspiracy in the forum." *United Phosphorus, Ltd. v. Angus Chemical Co.*, 43 F.Supp.2d 904, 912 (N.D. Ill. 1999).

Plaintiff's bare assertions regarding either the Medicare fraud conspiracy or the

conspiracy allegedly directed at Plaintiff do not come close to meeting this test. Plaintiff's Complaint does not contain, and Plaintiff's Response does not cite, any allegation or evidence regarding Defendants' state of mind regarding any alleged conspiracy occurring in or directed toward Plaintiff or the state of Missouri. There is simply no allegation that Messrs. Baker or Nonomaque even communicated with anyone who committed any tortious or wrongful act in Missouri, or were even aware of such conduct. See *Lehigh Val. Industries, Inc. v. Birenbaum*, 527 F.2d 87, 93-94 (2nd Cir. 1975) (noting that "the bland assertion of conspiracy or agency is insufficient to establish jurisdiction" and holding that there is personal jurisdiction where there are no allegations of specific facts which would connect the defendant to the activity within the forum).

C. Plaintiff's Arguments that Jurisdiction Exists under RICO Rely on Overruled Precedent

Plaintiff then turns to its RICO allegations and argues that the RICO claim justifies this Court's exercise of personal jurisdiction over Defendants and that the Court can exercise pendent personal jurisdiction over the other claims. However, Plaintiff has failed to allege, much less prove, that Nonomaque or Baker engaged in, authorized, ratified, or even knew about, any acts of racketeering. Plaintiff tries to plug that gap by arguing that the absence of racketeering acts is no obstacle to its racketeering claim against Defendants. Specifically, Plaintiff argues that "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 Plaintiff's Response, at p. 4 (citing *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143 (5th Cir. 1997), *cert. granted and vacated as moot*, 119 S.Ct. 442 (1998); *Schiffels v. Kemper Financial Services*, 978 F.2d 344 (7th Cir. 1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989)).

However, what Plaintiff fails to tell this Court is that the U.S. Supreme Court, in *Beck v. Prupis*, 529 U.S. 494 (2000), overruled those three cases, by name, and held that an overt act that is not an act of racketeering does not give rise to a RICO conspiracy claim. *Id.* at 500, 505.

D. Plaintiff's Argument that the Sherman Act Justifies the Exercise of Personal Jurisdiction over Defendants Relies on a Statute that Applies only to Cases Brought by the Government

Plaintiff's final gambit is to argue that a subsection of the Sherman Act allows an individual to be summoned into court whether they reside in the district or not if the "ends of justice" require such an exercise of jurisdiction. *See* Plaintiff's Response, at p. 6 (relying on 15 U.S.C. § 5). However, as this Court has already informed Plaintiff in its April 20, 2005 Order denying Plaintiff's Motion for Service under this Statute, this statute applies only to actions brought by the government and is not relevant in this case. *See also Albert H. Cayne Equipment Corp. v. Union Asbestos & Rubber Co.*, 220 F. Supp. 784, 789 (S.D.N.Y. 1963) (noting that Section 5 of the Sherman Act is expressly limited to suits by the government).

III. CONCLUSION

WHEREFORE, for all of the foregoing reasons, Defendants Nonomaque and Baker pray that this Court dismiss Plaintiff's claims against them and for all other relief to which they are entitled.

Respectfully Submitted

s/ John K. Power

John K. Power
Husch & Eppenberger, LLC
1200 Main Street, Suite 1700
Kansas City, MO 64105
816-421-4800
816-421-0596
john.power@husch.com

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2005, I electronically filed 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::

Andrew M. DeMarea
Jonathan H. Gregor
Kathleen Ann Hardee
Bret D. Landrith
Mark A. Olthoff
Logan Wade Overman

ademarea@stklaw.com
jgregor@stklaw.com
khardee@stklaw.com
landrithlaw@cox.net
molthoff@stklaw.com
logan.overman@stklaw.com

/s/ John K. Power

John K. Power