

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER T. BORN, M.D., : CIVIL ACTION
UNIVERSITY ORTHOPAEDIC :
SPECIALISTS, and :
SOUTH JERSEY MEDICAL :
MANAGEMENT COMPANY :
 :
v. :
 :
WILLIAM IANNAcone, M.D., :
ROBERT DALSEY, M.D., :
LAWRENCE DEUTSCH, M.D. :
JOHN CATALANO, M.D., and :
THE COOPER HEALTH SYSTEM :
d/b/a COOPER HOSPITAL/ :
UNIVERSITY MEDICAL CENTER : NO. 97-5607

MEMORANDUM AND ORDER

HUTTON, J.

June 3, 1998

Presently before the Court are Defendant Cooper Health System's Motion to Dismiss for Improper Venue, or, in the Alternative, to Transfer Venue (Docket No. 5), Plaintiffs' Opposition (Docket No. 8) and Supplemental Opposition (Docket No. 10) thereto, and Defendant Cooper Health System's Reply Brief (Docket No. 12) and Supplemental Affidavit of Albert R. Tama, M.D. (Docket No. 13). Also before the Court are Defendants' Renewed Motion to Dismiss (Docket No. 24) and Plaintiffs' Opposition (Docket No. 27) and Affidavit of Plaintiff Christopher T. Born (Docket No. 28).¹ For the reasons that follow, the Defendants' motions and renewed motions are denied.

¹ This second round of motions pertains to Plaintiffs' First Amended Civil Action Complaint, filed with the Court on February 9, 1998.

I. BACKGROUND

Plaintiffs Christopher T. Born, University Orthopaedic Specialists ("UOS"), and South Jersey Medical Management Company ("SJMMC") charge the various defendants with violations of sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 & 2 (1994), the Federal Trade Commission Act, 15 U.S.C. § 11 (1994), the False Claims Act, 31 U.S.C. § 3730 (1994), and with numerous violations of New Jersey law, in connection with a transaction in which The Cooper Health System (Cooper) acquired UOS and SJMMC and allegedly excluded Dr. Born from his medical practice.

Dr. Born, a Pennsylvania resident, is an orthopaedic surgeon and was a one-fifth partner in UOS, a medical partnership. He is an adjunct professor of orthopaedic surgery at both the University of Pennsylvania School of Medicine ("Penn") and at Jefferson Medical College ("Jefferson"). Until the events giving rise to this action, he was Assistant Division Head for Orthopaedic Surgery at Cooper Hospital/University Medical Center (the "Hospital"), a hospital owned and operated by Defendant Cooper. UOS was a New Jersey general partnership, of which Dr. Born and Defendants William Iannacone, Robert Dalsey, and Lawrence Deutsch were partners,² and

² UOS had a total of five partners, all orthopaedic specialists. The fifth partner was Dr. William G. DeLong.

John Catalano was an employee (the "Individual Defendants"). SJMMC was a New Jersey limited liability company that UOS established to collect payments from its clients.³

The Individual Defendants are all orthopaedic surgeons and former colleagues of Dr. Born at the Hospital. Each is a resident of New Jersey, except Dr. Iannacone, who resides in the Eastern District of Pennsylvania. Each is also an adjunct professor of medicine at Penn and Jefferson, both located in Philadelphia.

Cooper is a New Jersey non-profit corporation. It operates the Hospital, which is located in Camden, New Jersey, within two miles of the Pennsylvania border. Cooper contracts with health care providers like the UOS partnership for the supply of medical services in physical facilities that it owns. Until the contested events took place, Cooper contracted with the UOS doctors, permitting them to use Cooper's operating rooms and other facilities in exchange for a 20% cut of the partnership's receipts.

This suit follows a transaction in which a group of three UOS partners dissolved the partnership and allowed Cooper to acquire its assets and take over as their direct employer. Dr. Born was not included. According to the Complaint, Dr. Born made himself unpopular with the Hospital in the mid-1990's when he opposed several questionable Hospital practices. (Compl. at ¶ 30.) One was the Hospital's alleged practice of requiring surgeons to refer

³ One of the issues in this case is whether UOS and SJMMC continue to exist, or were validly liquidated and acquired by Cooper. For purposes of this motion, the Court will discuss them in the past tense and treat Dr. Born as the sole plaintiff, recognizing that Dr. Born may later prove their continued legal existence.

their patients to a Cooper physiatrist. (Id.) Another was its alleged encouragement of doctors to sign patient charts even if only a resident had seen the patient. (Id.) Dr. Born refused to participate in either practice, and retained a lawyer to investigate and stop the practice of mandatory physiatrist consults. (Id.) Thereafter, Dr. Born claims:

Defendant Cooper solicited and conspired with Defendants Iannacone, Dalsey, Deutsch, and Catalano, in their joint development and execution of a plan to assume control of Plaintiff's practice, UOS's accounts receivable, a billing and collections company partly owned by Dr. Born (SMMJC), and to curtail Dr. Born's orthopaedic and orthopaedic traumatology practice in the relevant market area and thereby achieve monopoly power over those services.

(Id. ¶ 33).

The mechanics of the alleged conspiracy are less relevant to the present motion than to the pending motion to dismiss. Briefly, in the summer of 1996, Cooper began demanding that the UOS partners join the Cooper Physician Association (CPA), an entity that would own all receipts from the orthopaedic practice and pay the doctors a salary from them. This would replace the existing system in which UOS owned its own receipts and paid Cooper a 20% share. The UOS partners resisted Cooper's demands, and appointed Dr. DeLong to negotiate a more favorable arrangement with Cooper's representative Dr. Anthony DelRossi, Chief of the Department of Surgery. In a June 4, 1996 meeting, however, DelRossi and Dr. Albert R. Tama, President of the CPA, told the UOS partners that they had no choice

but to join the CPA. In a July 31, 1996 letter, the UOS partners rejected Cooper's demands. Instead, DeLong continued to work for an alternate arrangement and the Individual Defendants appeared to support his efforts.

On September 26, 1996, however, without warning DelRossi terminated DeLong from his position as the Hospital's Chief of Orthopaedic Surgery. At the same time Doctors Iannacone, Dalsey, Deutsch, and Catalano informed Dr. Born that they had worked out a secret deal with Cooper, from which he was excluded. According to the deal, UOS would dissolve and Cooper would acquire all of the partnership's assets without compensating Dr. Born. In turn, they would join Cooper as its direct employees. In the fall and winter of 1996, the Individual Defendants performed the legal acts necessary to effectuate their plan.

Since the acquisition, Dr. Born complains that the Defendants have harmed him in numerous ways not relevant to the present motion. Highly relevant, however, is his claim that he has been a victim of antitrust violations. In Counts I through III, Dr. Born claims that the Defendants have colluded to destroy his medical practice in the relevant geographic market. First, he states, they have excluded him from his former position at the Hospital. Next, he states that they have cut off his supply of patients by instructing Hospital personnel and other physicians who maintain privileges at the Hospital not to refer patients to him, contacting Dr. Born's outside referring physicians, and contacting former patients. He also claims that they have harassed and intimidated

him, and vandalized his property, to prevented him from conducting his practice at any Cooper medical facilities. Finally, he claims, the Defendants have instituted an arrangement whereby the Individual Defendants receive all of the Hospital's referrals for trauma and unassigned emergency room patients.

Dr. Born filed this action on September 9, 1997. Thereafter, Cooper filed the present motion to dismiss the action for improper venue, or alternatively, to transfer venue to the District of New Jersey.

II. DISCUSSION

In its motion, Cooper argues that the case against it should be dismissed, or venue transferred, because all of the operative events alleged took place in New Jersey.

A. Rule 12(h) Waivers

As an initial matter, the Court notes that the Defendants have waived several procedural defenses. Rules 12(g) and (h)(1) of the Federal Rules of Civil Procedure provide that a party who fails to object to personal jurisdiction or venue in its first Rule 12(b) motion forever waives the unraised objection. See Fed. R. Civ. P. 12(g); id. 12 (h)(1); Insurance Corp. of Ireland v. Compaigne des Bauxites de Guinee, 456 U.S. 694, 704 (1982); Coleman v. Kaye, 87 F.3d 1491, 1498 (3d Cir. 1996). Cooper has omitted a Rule 12(b)(2) defense in its motion, and therefore waives any objection to personal jurisdiction in the Eastern District of Pennsylvania. The Individual Defendants--Iannacone, Dalsey, Deutsch, and Catalano--

have likewise omitted an objection to personal jurisdiction in their Rule 12(b) motion to dismiss. Accordingly, they too have waived their potential jurisdictional objection.

Furthermore, in their separate motion to dismiss, the Individual Defendants effectively waive their potential venue objection as well. They state:

The interests of justice clearly require that the instant dispute be adjudicated as a totality. The claims presented by Plaintiff against Cooper are intertwined with the claims presented against the Individual Defendants.

(Ind. Def.s' Mem. of Law at 8). Although they present this as an argument for transferring them in the event that the Court transfers the case against Cooper to New Jersey, the argument cuts both ways. Following their reasoning, if the Court instead finds that Cooper should remain in the Eastern District of Pennsylvania, the Individual Defendants presumably assent to venue in this district as well, to obtain the benefits of consolidated proceedings.

This is no objection to venue at all. Rather, it is a plea that the Court not sever the case in the name of procedural niceties. Venue is a personal privilege of the Defendant, and may be raised or waived only by him. See Cottman Transmission Sys. v. Martino, 36 F.3d 291, 296 (3d Cir. 1994). Cooper has standing only to raise its own objection to venue. However, while the Court

finds that the Individual Defendants have waived their objection to venue, it will accommodate their wishes by tethering them to Cooper for venue purposes.

B. Motion to Dismiss for Improper Venue

Cooper first moves to dismiss under 28 U.S.C. § 1406(a) on the ground that Plaintiffs laid venue improperly in the Eastern District of Pennsylvania. The Court disagrees with the Defendants, and finds that venue is proper.

A plaintiff is not required to plead allegations showing proper venue. See Myers v. American Dental Association, 695 F.2d 716, 724 (3d Cir. 1982); Fed. R. Civ. P. Form 2, Advisory Committee Note 3. Rather, a defendant moving to dismiss under § 1406(a) bears the burden of establishing affirmatively that venue is improper. See Myers, 695 F.2d at 724; Continental Airlines, Inc. v. American Airlines, Inc., 805 F. Supp. 1392, 1395 (S.D.Tex. 1992) (placing burden on defendant in § 1404(a) motion to transfer venue).

In most federal cases venue is governed by the general venue statute, 28 U.S.C. § 1391 (1994). In the antitrust context, however, Congress provided a special venue provision, 15 U.S.C. § 22 (1994), to supplement § 1391 and liberalize the venue requirement as against corporate defendants. See Myers, 695 F.2d at 725; Medical Accessories Center, Inc. v. Sharplan Lasers, Inc., 1991 WL 171433 (E.D.Pa. 1991); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 291 F. Supp. 252, 255

(E.D.Pa. 1968).

To achieve this end, § 22 authorizes venue over a corporation in "any district wherein it may be found or transacts business." 15 U.S.C. § 22.⁴ Congress enacted the "transacts business" language as part of the Clayton Act in 1914 to surmount "hairsplitting legal technicalities" that had developed in the Sherman Act analysis of whether a corporation was "found" within a particular venue district. See United States v. Scophony Corp., 333 U.S. 795, 807-08 (1948); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 372-73 (1927). This language was meant to institute a "practical everyday business or commercial concept" of what it means to do business in a district, and to "relieve[] persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or residence." Scophony, 333 U.S. at 808. Thus, for nearly a century the courts have held that, whether or not it has an agent or office in the district, a corporation is subject to venue in a district if "in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character." Eastman Kodak, 273 U.S. at

⁴ 15 U.S.C. § 22 states in full:

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it might be found.

373; see Myers, 695 F.2d at 726; Expoconsul Int'l Inc. v. A/E Systems Inc., 711 F. Supp. 730, 733 (S.D.N.Y. 1989).

In determining whether business transacted is substantial, courts have recognized a number of subsidiary rules:

First, it has been held that purchasing activity as well as sales activity constitutes the transaction of business. Furthermore, the substantiality of the business transacted is to be judged from the point of view of the average businessman and not in proportion to the sales or revenues of the defendant. Finally, the purchases and/or sales which constitute the transaction of business need not be connected to the subject matter of [the] suit.

Black v. Acme Markets, Inc., 564 F.2d 681, 687 (5th Cir. 1977) (citations omitted). The Court must "look to the actual unity and continuity of the whole course of the defendant's conduct at the time the complaint was served on the defendant." Daniel v. American Bd. of Emergency Medicine, 988 F. Supp. 127, 257 (W.D.N.Y. 1998) (quoting Scophony, 333 U.S. at 807). If the defendant has conducted any substantial business in the district, then venue there is proper.

In its Motion to Dismiss, Defendant Cooper seeks to prove that a large, state of the art medical center, located barely two miles from the City of Philadelphia, maintains insubstantial business connections with the Eastern District of Pennsylvania. Cooper makes two critical errors, however. First, Cooper assumes that the predicate business transactions must be related to the claim raised in the complaint. (See Def.s' Reply Brief to Pl.s' Opp. to Def.s' Mot. to Dismiss at 12). As noted above, however, the § 22 analysis

considers any business transactions within the venue district, whether or not they relate to the instant dispute. See Black, 564 F.2d at 687; Expoconsul, 711 F. Supp. at 733. Therefore, Cooper's reliance upon National Cathode Corp. v. Mexus Co., 855 F. Supp. 644, (S.D.N.Y. 1994) and Key Indus., Inc. v. O'Doski, Sellers & Clark, Inc., 872 F. Supp. 858 (D.Kan. 1994) for this proposition is misplaced.

Second, Cooper overstates the degree of business connection necessary to sustain venue under § 22. As the Supreme Court articulated in Eastman Kodak, 273 U.S. at 372-73, and Scophony, 333 U.S. at 807-08, the very purpose of § 22 was to relax the standard for venue in the antitrust context. In using the term "substantial," the Court did not mean to raise new barriers against establishing antitrust venue. Rather, the Court found that § 22 authorized venue in any district in which the defendant had transacted more than a de minimis quantity of business, from the point of view of the "average businessman." See Black, 564 F.2d at 687; Expoconsul, 711 F. Supp. at 733.

Returning to the facts of this case, even after excluding unrelated business transactions--as Cooper would have the Court do--there is ample basis for § 22 venue. When the proper set of business transactions is figured in, there can be no doubt that Cooper transacts sufficient business in this district to support venue. Cooper's Reply Brief itself establishes sufficient connection to this district when it cites Dr. Albert R. Tama's figures for the percentage of Pennsylvania residents that received

treatment at Cooper in the years of 1996 and 1997. According to Dr. Tama, in 1996, 3.23% of all of Cooper's orthopaedic patients, 5.10% of all of Cooper's trauma patients, and 1.83% of all Cooper's patients across the board came from eastern Pennsylvania. (See Def.'s Reply at 3). In 1997, these figures fell slightly to 3.25%, 4.17%, and 1.79% respectively. (See id.). Although Cooper and Dr. Tama cite these figures as being de minimis relative to the whole of Cooper's business, the money or business involved need only be substantial from the point of view of a hypothetical "average businessman." See Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 291 F. Supp. at 256. Cooper makes no attempt to quantify these amounts in dollar terms. In his Affidavit in Opposition to Defendants' Motion to Dismiss, however, Dr. Born states that the 1996 Pennsylvania billings for the UOP group alone totaled \$4,071,544.03 from third-party payors in Pennsylvania, \$701,592.50 in billings in Pennsylvania for Medicare, and \$105,527.02 in billings in Pennsylvania to attorneys for work for their patient clients. (See Affidavit of Christopher T. Born ¶ 6 at 9). These business transactions alone, which represent a small portion of those related to the case, are sufficiently substantial to support venue under § 22. See, e.g., Black, 564 F.2d at 687 (purchases of \$1,125,000 substantial); Expoconsul, 711 F. Supp. at (\$1,000,000 earned in five year period substantial). See also cases cited in Plaintiff's Brief in Opposition 18 n.36. Plaintiffs, however have supplied the Court with a picture of the interrelationship between Cooper, the City of

Philadelphia, and this litigation so detailed as to remove any doubt that the Defendants transact substantial business in this district. (See Born Aff. ¶ 6). An extensive review of these factual allegations is not necessary, however, as it is not the Plaintiffs' burden to establish venue, but the Defendants' burden to rebut it. As the Defendants cannot do so in this case, the Court finds that venue is proper in the Eastern District of Pennsylvania.

C. Motion to Transfer Venue

Cooper next moves to transfer venue to the District of New Jersey under 28 U.S.C. § 1404(a). The Court declines in view of the minimal benefits that such a transfer would produce.

Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a)(1994). In a motion to transfer venue under § 1404(a), the moving party bears the burden of demonstrating that the following factors weigh in favor of transfer:

1. Relative ease of access to sources of proof;
2. Availability of compulsory process for attendance of unwilling witnesses;
3. Cost of attendance at trial by willing witnesses;
4. The possibility of view of the premises, if appropriate;
5. All other practical problems that make trial of a case easy, expeditious, and inexpensive;
6. "Public Interest" factors, including the relative congestion of court dockets, choice of law considerations, and the relation of the community in which the courts and jurors are required to serve to the

occurrences that give rise to the litigation.

Kohli v. Platt, No. CIV.A. 89-1911, 1989 WL 79863 at *1 (E.D. Pa. July 5, 1989)(Hutton, J.) (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947)).

The Court need not engage in a detailed analysis of the § 1404(a) factors in this case, because there is so plainly no benefit in transferring the case to the District of New Jersey. The federal courthouse in Camden stands within two miles from this Court, separated only by the Benjamin Franklin Bridge. See Roberts Bros., Inc. v. Kurts Bros., 231 F. Supp. 163, 167 (D.N.J. 1964) (observing the lack of benefit in transferring a case from the District of New Jersey to the Eastern District of Pennsylvania). Even if the Defendants could show that most of parties, witnesses and evidence in the case are located in New Jersey, they cannot carry their burden of proving that the balance of convenience favors transfer. Accordingly, the Defendant's Motion to Transfer Venue is denied as well.

An appropriate Order follows.

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O R D E R

AND NOW, this 3rd day of June, 1998, upon consideration of the Defendants' Motion to Dismiss for Improper Venue, or, in the Alternative, to Transfer Venue, Plaintiffs' Opposition and Supplemental Opposition thereto, and Defendant Cooper Health System's Reply Brief and Supplemental Affidavit of Albert R. Tama, M.D., IT IS HEREBY ORDERED that:

- (1) Defendants' Motion to Dismiss for Improper Venue is **DENIED**; and
- (2) Defendants' Motion to Transfer Venue is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.

