IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

JOHN F. PETTRY, JR.,	)	
	)	
Plaintiff	)	
	)	
vs.	)	
	)	Civil Action No.:13-C-162H
RAILSERVE, INC., et al.,	)	
	)	
Defendants.	)	

ORDER

The plaintiff, John F. Pettry, Jr., brings this action against the defendants to recover for his development of hemophagocytic syndrome, also known as hemophagocytic lymphohistiocytosis (HLH), which allegedly resulted from his employment with defendant Railserve, Inc. at the chemical manufacturing facility of defendant E.I. duPont de Nemours and Company located in Belle, Kanawha County, West Virginia. The plaintiff has brought a claim against Railserve for liability as a common carrier under the Federal Employers' Liability Act, and alternatively a deliberate intent claim against defendant Railserve under W. Va. Code § 23-4-2. The plaintiff has brought claims against defendant DuPont for premises liability and respondeat superior liability. The plaintiff has brought claims against defendants Timothy M. Harrison and Debra Hartman for negligence performance of safety responsibilities at the DuPont facility where the plaintiff worked.

Defendant Railserve has moved to dismiss the plaintiff's amended complaint for lack of jurisdiction and improper venue pursuant to W. Va. R. Civ. P. 12(b)(2) and 12(b)(3), or in the alternative, to remove the case to the Circuit Court of Kanawha County under W. Va. Code § 56-9-1. Defendants DuPont and Harrison have moved to dismiss the plaintiff's amended complaint

for improper venue pursuant to W. Va. R. Civ. P. 12(b)(3). Defendant Hartman has filed a motion to join the motion to dismiss filed by defendants DuPont and Harrison.

As an initial matter, the Court **GRANTS** defendant Hartman's motion to join defendants DuPont and Harrison's motion to dismiss without objection from any other party. The Court will now proceed to discuss the merits of the pending motions to dismiss.

W. Va. R. Civ. P. 12(b)(2) and 12(b)(3) authorize motions to dismiss for lack of personal jurisdiction and improper venue, respectively. On a motion to dismiss, "the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978). Against this backdrop, the Court will examine the defendants' specific arguments.

I. JURISDICTION

Railserve has moved to dismiss the plaintiff's claims for lack of personal jurisdiction, asserting that the allegations in the plaintiff's amended complaint do "not establish that Railserve has sufficient minimum contacts with Marshall County to be sued there without violating due process." Defendant Railserve, Inc.'s Motion to Dismiss Plaintiff's Amended Complaint, or to Transfer, p. 4.

West Virginia's Longarm Statute confers personal jurisdiction in this state over any nonresident who performs one of a number of acts, including "[t]ransacting business in this state", "[c]ontracting to supply services and things in this state", and "[c]ausing tortious injury by an act or omission in this state". W. Va. Code § 56-3-33(a). Additionally, in order for a West Virginia court to exercise jurisdiction over a nonresident, federal due process requires that the nonresident have minimum contacts with this state "so that it will be fair and just to require a

defense to be mounted in [West Virginia]." Syl. Pt. 2, Pries v. Watt, 186 W. Va. 49, 410 S.E.2d 285 (1991).

"To what extent a nonresident defendant has minimum contacts with the forum state depends upon the facts of the individual case." Syl. Pt. 2, Easterling v. American Optical Corp., 207 W. Va. 123, 529 S.E.2d 588 (2000). An "essential inquiry" that indicates in determining if a defendant has the necessary contacts is whether or not it "has purposefully acted to obtain benefits or privileges in the forum state." Id., quoting Syl. Pt. 3, Pries, 186 W. Va. 49, 410 S.E.2d 285.

"[T]he critical element for determining minimum contacts is not the volume of activity but rather 'the quality and nature of the activity in relation to the fair and orderly administration of the laws.'" Easterling, 207 W. Va. at 130, 410 S.E.2d at 595 (citations omitted). Foreseeability is the touchstone of the due process inquiry. As the West Virginia Supreme Court has observed, a "defendant's conduct and connection with the forum state [must be] such that he should reasonably anticipate being haled into court there." Id. at 130, 529 S.E.2d at 595 (citations omitted).

The business contacts that bear on this Court's exercise of jurisdiction are not limited to Railserve's dealings in Marshall County, but include all of Railserve's contacts with West Virginia. As the Easterling Court noted, a "defendant's conduct and connection with the forum state [must be] such that he should reasonably anticipate being haled into court there." 207 at 130, 529 S.E.2d at 595 (citations omitted) (emphasis added). The Court notes that Railserve does not dispute that it performs and has performed services at a facility in Natrium, in Marshall

County. Affidavit of John Roberts, ¶ 9.[1] Moreover, Railserve acknowledges that it performs and has performed services at the Belle Works, where the plaintiff worked. Id., ¶ 10.[2]

The plaintiff argues that the relevant inquiry on this motion to dismiss is the sufficiency of the allegations in his amended complaint, but also asserts that documents available in the public domain demonstrate that Railserve has been doing business at the same Natrium facility since 2008. The plaintiff has submitted copies of a Railserve newsletter that discuss Railserve's work at at least two different facilities in Natrium and Moundsville from 2008 through 2013.[3] While not essential to the Court's decision, these documents tend to suggest that in addition to the substantial work Railserve does not deny it performs at the Belle Works, it has at least five years of continuous business presence in Marshall County. That presence is well-defined and long-term in nature, and is in no way comparable to the transitory contacts that failed to support the exercise of jurisdiction in the cases Railserve cites.

Railserve's general manager acknowledges by affidavit that the company performs operations at two separate West Virginia facilities, including one in Marshall County. Affidavit of John Roberts, ¶¶ 9-10. As such, Railserve "has purposefully acted to obtain benefits or privileges in" West Virginia. Syl. Pt. 2, Easterling, 207 W. Va. 123, 529 S.E.2d 588, quoting Syl. Pt. 3, Pries, 186 W. Va. 49, 410 S.E.2d 285. Furthermore, Railserve's continuous conduct of business in West Virginia for a number of years makes it foreseeable that it might have to

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[1] Attached to Railserve's Motion as Exhibit 1.

[2] In particular, Railserve discussed a recent United States Supreme Court case that found a parent company not susceptible to jurisdiction based on the actions of its subsidiary. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). *Bauman* does not control here. The actions at issue are Railserve's, not those of a subsidiary. Moreover, the *Daimler* Court discussed "the absence of any ***California*** connection to the" subject of the complaint. 134 S. Ct. at 630 (emphasis added). The events described in the plaintiff's amended complaint took place in West Virginia, which is the relevant consideration for purposes of jurisdiction.

[3] The materials in question are attached to Plaintiff's Response to Railserve's Motion as Exhibits B, C, D, E, and F.

defend a lawsuit in this state. The plaintiff has pled that Railserve "transacted substantial business throughout the State of West Virginia,"Amended Complaint, ¶ 2, and while evidentiary proof is not necessary on this motion to dismiss, the facts available bear out the plaintiff's allegation. As such, the Court **FINDS** that jurisdiction is proper in West Virginia.

II. VENUE

All of the defendants have moved to dismiss the plaintiff's claims for improper venue. Railserve asserts that "[v]enue is improper because the Amended Complaint fails to allege that all or any of the acts or omissions giving rise to Plaintiffs' [sic] claims occurred in Marshall County." Railserve's Motion to Dismiss, p. 10. Similarly, DuPont and Mr. Harrison assert that DuPont's connection to Marshall County is insufficient to support venue, and that "Plaintiff has offered no argument or evidence in support of his conclusory allegation that DuPont 'does or has done business in Marshall County.'" Defendant E.I. du Pont de Nemours and Company and Timothy M. Harrison's Motion to Dismiss for Improper Venue, ¶¶ 8-15.[4]

Under West Virginia's venue statute, if a corporation is a defendant in a civil action, the plaintiff may bring the action in the circuit court of any county "wherein [the corporate defendant's] principal office is or wherein its mayor, president or other chief officer resides; or if its principal office be not in this state, and its mayor, president or other chief officer do not reside therein, wherein it does business." W. Va. Code § 56-1-1(a)(2). A corporation's business activities need not be related to the subject of the lawsuit in order to confer venue. Kidwell v. Westinghouse Elec. Co., 178 W. Va. 161, 163, 358 S.E.2d 420, 422 (1986). Moreover, West Virginia courts apply "the venue-giving defendant principle, whereby, once venue is proper for

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[4] At oral argument on this motion, DuPont also argued that the plaintiff had not alleged that any defendant had done business in Marshall County. However, as noted below, the plaintiff's amended complaint alleges that both Railserve and DuPont do or have done business in Marshall County.

one defendant, it is proper for all other defendants subject to process." Morris v. Crown Equip. Corp., 219 W. Va. 347, 633 S.E.2d 292, 301 (2006) (citations omitted).

In his amended complaint, the plaintiff alleges that Railserve "transacted substantial business throughout the State of West Virginia," that Railserve is a Delaware corporation,[5] that "Railserve's chief officers do not reside in West Virginia," and that "Railserve does or has done business in Marshall County," Amended Complaint, ¶¶ 2, 4. Moreover, as is the case with the question of jurisdiction, while the inquiry on Railserve's motion is into the sufficiency of the plaintiff's allegations, the plaintiff has submitted publicly available documents suggesting that Railserve has been doing substantial business in Marshall County continuously for years. In fact, Railserve's general manager, John Roberts, acknowledges in his affidavit that the company does business in Marshall County. Affidavit of John Roberts, ¶ 9.

The plaintiff argues that the case of State ex rel. Huffman v. Stephens, 206 W. Va. 501, 526 S.E.2d 23 (1999) is persuasive here. The Court notes that the facts in Huffman do bear some similarity to those in this case. In Huffman, the West Virginia Supreme Court of Appeals found venue proper in McDowell County where an out-of-state defendant performed services for entities there, even though the claims in the case arose from services performed in Mercer County.

Railserve suggests that the amount of business it does in Marshall County is insufficient to make venue proper, in light of the fact that the plaintiff lives and worked in Kanawha County. Railserve's Motion, p. 9-10. Specifically, Railserve relies on an affidavit from its general manager to the effect that its Marshall County business accounts for seven-tenths of one percent of its annual revenue. Id. Even considering this material from outside the plaintiff's amended

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[5] Railserve's principal place of business is in Atlanta, Georgia. Affidavit of John Roberts, ¶ 3.

complaint, and even assuming Mr. Roberts' statement is accurate, that statement does not make venue improper here.

No bright-line threshold exists for the amount of business a defendant must conduct in a county in order for venue to be proper there, so long as that defendant's contacts satisfy due process for purposes of jurisdiction. Railserve's connection to Marshall County meets that standard. Railserve did business in Marshall County during the entire time period relevant to this case, and continued to do business there as recently as last year.

Furthermore, the plaintiff has alleged that DuPont "does or has done business in Marshall County, West Virginia," and that "DuPont's chief officers do not reside in West Virginia, so that venue is proper in Marshall County" under W. Va. Code § 56-1-1(a)(2). Amended Complaint, ¶ 5. Additionally, under the venue-giving defendant principle applied by West Virginia courts, if venue against one defendant is proper, venue is proper against all defendants. Morris, 219 W. Va. 347, 633 S.E.2d at 301. Therefore, the Court **FINDS** that venue is proper against all defendants in Marshall County.

III. REMOVAL UNDER W. VA. CODE § 56-9-1

Railserve also contends that even if venue is proper in Marshall County, this Court should remove this case to Kanawha County because the plaintiff lives in Kanawha County, his injuries occurred in Kanawha County, and individuals with relevant knowledge live in Kanawha County. Railserve's Motion, p. 10-11.

W. Va. Code § 56-9-1 provides that:

> A circuit court...wherein an action, suit, motion or other civil proceeding is pending...may on the motion of any party, after ten days' notice to the adverse party or his attorney, and for good cause shown, order such action, suit, motion or other civil proceeding to be removed, if pending in a circuit court, to any other circuit court.

W. Va. Code § 56-9-1 is not "an independent statutory source for a transfer to another circuit based upon the convenience of the parties and the witnesses." State ex rel. Riffle v. Ranson, 195 W. Va. 121, 125, 464 S.E.2d 763, 767 n. 4 (1995). "Historically, good cause in the context of this statute means the moving party must demonstrate prejudice." Id. n. 4, citing Pittsburgh, Wheeling & Ky. R. Co. v. Applegate & Son, 21 W. Va. 172 (1882) (emphasis in original). The West Virginia Supreme Court has identified circumstances that constitute "good cause" under W. Va. Code § 56-9-1, including: "situations where the judge is disqualified"; "where an uninterested and unbiased jury cannot be found in the circuit where the suit was originally filed"; "or where the clerk of the court is a party litigant." Riffle, 195 W. Va. at 125, 464 S.E.2d at 767 n. 4 (citations omitted). Inconvenience alone—even of a high degree—simply does not constitute good cause supporting removal under the statute.

Railserve cites federal authority to support its argument for removal. For instance, Railserve argues that the federal transfer statute, 28 U.S.C. § 1404(a), bolsters its position. The statute authorizes a federal district court to transfer a civil action to another district "[f]or the convenience of parties and witnesses, in the interest of justice." However, the statute merely provides a federal court "with the power to transfer a transitory cause of action to a more convenient federal court." Pope v. Atlantic Coast Line R.R. Co., 345 U.S. 379, 384 (1953). "It does not speak to state courts." Id. Moreover, the statute speaks in terms of "the convenience of parties and witnesses," which the West Virginia Supreme Court has specifically rejected as a basis for removal under W. Va. Code § 56-9-1. Riffle, 195 W. Va. at 125, 464 S.E.2d at 767 n. 4.

Similarly, Railserve cites a federal appellate decision for the proposition that the plaintiff "must make a 'strong showing of convenience'" to receive deference for his choice of forum. Windt v. Qwest Communications, Int'l, Inc., 529 F.3d 183 (3rd Cir. 2008). However, this case comes from a federal court applying the federal law of forum non conveniens, and therefore does not inform this Court's inquiry under West Virginia law. Indeed, in Riffle Justice Cleckley referred to previous decisions' characterization of W. Va. Code § 56-9-1 as a forum non conveniens statute as "inartful," and suggested that more recent statutory enactments called into question those cases (including Norfolk & Western Ry. Co. v. Tsapis, 184 W. Va. 231, 400 S.E.2d 239 (1990), on which Railserve relies). Riffle, 195 W. Va. at 125, 464 S.E.2d at 767 n. 4. W. Va. Code § 56-9-1 is not merely a forum non conveniens statute. It requires a different, more extensive showing of cause to justify removal of a case. As such, the Court **FINDS** that Railserve has not made the showing of good cause required for removal under W. Va. Code § 56-9-1.

For the foregoing reasons, the Court hereby **ORDERS** as follows:

1. Defendant Railserve, Inc.'s Motion to Dismiss Plaintiff's Amended Complaint, or to Transfer is **DENIED**.

2. Defendant E.I. du Pont de Nemours and Company and Timothy M. Harrison's Motion to Dismiss for Improper Venue is **DENIED**.

3. Defendant Debra Hartman's request for dismissal by adoption of Defendant E.I. du Pont de Nemours and Company and Timothy M. Harrison's Motion to Dismiss for Improper Venue is **DENIED**.

4. All defendants shall file an answer to the plaintiff's amended complaint within 20 days of the entry of this Order.

The Court notes the defendants' objections and exceptions.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered: September 4, 2014.

HON. DAVID W. HUMMEL, JR., JUDGE
CIRCUIT COURT OF MARSHALL COUNTY,
WEST VIRGINIA

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