



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: CARBON MONOXIDE EXPOSURE LITIGATION Civil Action No. 14-C-8000

THIS DOCUMENT APPLIES TO THE FOLLOWING CASES:

Stephen R. Agnatovech, et al,
v. Civil Action No. 13-C-234 KAN
Manisha Patel, et al.

Lori Burnside, et al.
v. Civil Action No. 14-C-120 KAN
Manisha Patel, et al.

Christian Ferris, et al.
v. Civil Action No. 14-C-223 KAN
Manisha Patel, et al.

Matthew Fontaine,
v. Civil Action No. 14-C-215 KAN
Manisha Patel, et al.

Jeffrey Hunter, et al.
v. Civil Action No. 14-C-214 KAN
Manisha Patel, et al.

Danielle Mallow, et al.
v. Civil Action No. 14-C-119 KAN
Manisha Patel, et al.

Danielle Sharot,
v. Civil Action No. 14-C-224 KAN
Manisha Patel, et al.

ORDER

On December 18, 2014, came the parties, by their respective counsel, for a hearing on the Motions to Dismiss of Defendant, Intercontinental Hotels Group, PLC ("IHG, PLC") in which IHG, PLC argues that this Court lacks personal jurisdiction over it in these proceedings. Also pending before the Court is Plaintiffs' Motion to Compel IHG, PLC to produce designated agents for depositions pursuant to West Virginia Rule of Civil Procedure 30(b)(7) and to produce

documents pursuant to West Virginia Rules of Civil Procedure Rule 34 on the ground that IHG, PLC has prevented Plaintiffs from discovering facts pertinent to the essential issues giving rise to personal jurisdiction over IHG, PLC.

Having reviewed and maturely considered the submissions of the parties, including extensive oral argument of counsel for IHG, PLC and Plaintiffs, and having conferred with one another to ensure uniformity of their decision as contemplated by West Virginia Trial Court Rule 26.07(a), the Presiding Judges hereby memorialize their findings of fact, conclusions of law, and rulings from the December 18, 2014, hearing on the aforementioned motions:

1. These civil actions arise out of one death and multiple injuries which occurred in January, 2012, at the Holiday Inn Express Hotel & Suites, located at 95 RHL Boulevard, South Charleston, West Virginia (“the Hotel”) when a pool heater caused carbon monoxide to be disbursed inside the Hotel.

2. Multiple complaints were filed against Pike’s Inc., the owner of the Hotel, Manisha Patel, the Hotel manager, and Defendants IHG, PLC, Six Continents Hotels, Inc. (“Six Continents”), Holiday Hospitality Franchising, LLC (“Franchising”), and InterContinental Hotels Group Resources, Inc. (“Resources”). Other Defendants in these lawsuits include the other owners and/or managers of Pikes, Inc. and the HVAC contractors involved in the installation of the pool heater which caused carbon monoxide to be disbursed inside the Hotel.

3. Plaintiffs’ Complaints were filed at different times and allege essentially the same causes of action against Defendants IHG, PLC, Six Continents, Franchising and Resources, including negligence, breach of contract, nuisance, strict liability and failure to warn. Plaintiffs’ Complaints further allege that IHG, PLC is the alter ego of Six Continents, Franchising, and Resources; that IHG, PLC has engaged in a joint venture with Six Continents, Franchising,

Resources, and Pikes, Inc., the franchisee that owns and operates the Hotel; and that Six Continents, Franchising, Resources and Pikes, Inc. acted as the agent of IHG, PLC in managing the Hotel.¹

4. Plaintiffs contend that, during the relevant time period: IHG, PLC directly or indirectly owned all or substantially all of the stock of Six Continents, Franchising and Resources; Franchising held the franchises for hotels under the IHG brand including the Hotel that is the subject of this litigation; that Six Continents operates and manages hotels through its agreements with IHG, PLC, Franchising and the franchisees, including Pikes, Inc.; and Franchising maintains, inspects and controls certain of the activities of its franchisees, including Pikes, Inc. and the Hotel.

5. IHG, PLC, a foreign corporation incorporated in Great Britain, registered in Wales, and having a principal place of business in Buckinghamshire in the United Kingdom, contends that it is merely a holding company and has not engaged in any activity that would subject it to personal jurisdiction under the West Virginia long-arm statute (West Virginia Code §56-3-33). IHG, PLC further contends that, even if it did engage in one of the enumerated activities under the West Virginia long-arm statute, its contacts with West Virginia do not rise to the level necessary to satisfy the requirements of federal due process.

6. In support of its position, IHG, PLC filed the affidavit of its General Counsel and Company Secretary, stating that he is familiar with IHG, PLC's business operations and corporate responsibilities, as well as those of its subsidiaries Six Continents, Franchising, and Resources. Affidavit of George Turner, Exhibit B to Motion to Dismiss. The Turner Affidavit denies IHG, PLC exerts any control, financial, operational, or otherwise, over Six Continents,

¹ Plaintiff's Response to Defendant's IHG, PLC's Motion to Dismiss Pursuant to W.V.R.C.P. 12(b)(2), (Transaction ID 56368492), pp. 19-21.

Franchising or Resources; and further denies that IHG, PLC had any contact with West Virginia or the Hotel. *Id.*

7. IHG, PLC also filed the affidavit of Alinda Baggett, Assistant Treasurer for Six Continents, in support of its motion. Ms. Baggett states that “Six Continents is a Delaware corporation, the owner of the Holiday Inn Express® brand, and the sole parent of Holiday Hospitality Franchising, Inc., and InterContinental Hotels Group Resources, Inc.” Affidavit of Alinda Baggett, Exhibit C to Motion to Dismiss.

8. In support of their position, Plaintiffs filed depositions of West Virginia Rule of Civil Procedure 30(b)(7) agents of Six Continents, Franchising and Resources, which they contend contradict statements made in the Turner and Baggett Affidavits.

9. Plaintiffs also filed public documents of IHG, PLC, including IHG, PLC’s Form 20-F filed with the United States Securities Exchange Commission (“SEC”) and its Annual Report in which Plaintiffs contend that IHG, PLC made public statements, which show IHG, PLC is more than a mere holding company, and that it manages and controls its subsidiaries and franchisees.

10. IHG, PLC’s Form 20-F makes numerous public statements concerning its business operations, its subsidiaries and its relationship with its subsidiaries and franchisees. In particular, the SEC. Form 20-F states that “the Group refers to IHG and its subsidiaries or where appropriate, Intercontinental Hotels Limited or Six Continents Limited and their subsidiaries as the context requires”. **(Exhibit 1)**²

11. The “IHG Annual Report and Financial Statement 2010” **(Exhibit 1A)** states: “We’re a global hotel company-the world’s largest by number of rooms - operating seven well-

² The numbered Exhibits referenced in this Order are Exhibits to Plaintiff’s Response to Defendant’s IHG, PLC’s Motion to Dismiss Pursuant to W.V.R.C.P. 12(b)(2) (Transaction ID 56368492).

known brands internationally.” *Id.* 2. “We want people to feel good about what we do and how we do it...delight our guests...inspire our people...act responsibly... generate financial returns....” *Id.*

12. One of the most important and relevant statements by IHG, PLC is included in the section titled “Ensuring health and safety. Providing and supporting a safe and secure environment for our guests...is paramount and IHG applies high standards of health and safety across the Group.” *Id.* 27.

13. IHG, PLC summarizes its business by stating that, “The Group’s (IHG, PLC’s) business model has a clear focus on franchising and managing hotels, rather than owning them outright, enabling the Group to grow at an accelerated pace, with limited capital investment.” (**Exhibit 1**, Form 20-F, p. 18.) IHG emphasizes its franchised and managed business because it “generates more cash than is required for investment in the business, with a high return of capital and that 87% of its operating profit was derived from franchised and managed hotels.” “The Group’s business model creates opportunities to build relationships with independent hotel owners and generate revenues by offering access to our global demand delivery system where guests can book their hotels through the Group’s booking channels, including branded websites and call centers.” *Id.*

14. A two-part analysis must be applied to determine whether the Court has personal jurisdiction over a nonresident or foreign defendant. The first step is to determine whether the defendant’s actions satisfy West Virginia’s personal jurisdiction statutes and the second is to determine whether the defendant’s contacts with West Virginia satisfy federal due process. *Id.*, 497 S.E.2d 755, 766 (W.Va. 1997).

15. West Virginia Code §56-3-33 provides generally that a nonresident is subject to personal jurisdiction under West Virginia’s long-arm statute if it engages in any one of the following:

- (1) Transacting any business in this State;
- (2) Contracting to supply services or things in this State;
- (3) Causing tortious injury by an act or omission in this State;
- (4) Causing tortious injury in this State by an act or omission outside this State if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
- (5) Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he or she might reasonably have expected such person to use, consume or be affected by the goods in this State: Provided, that he or she also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
- (6) Having an interest in, using or possessing real property in this State; or
- (7) Contracting to insure any person, property or risk located within this State at the time of contracting.

W. Va. Code §56-3-33 (2011).

16. If the Court reaches the second step in the required two-step analysis, the Court must then determine whether assertion of personal jurisdiction over the nonresident defendant would violate federal due process. “[Due process] does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

17. When a defendant files a motion to dismiss for lack of personal jurisdiction under West Virginia Rule of Civil Procedure 12(b)(2), the circuit court may rule on the pleadings, affidavits, and other documentary evidence or the court may permit discovery to aid in its decision. Syl. pt. 4, *State ex rel. Bell Atl. - W. Va., Inc. v. Ranson*, 201 W.Va. 402, 497 S.E.2d 755 (1997).

18. “At this stage, the party asserting jurisdiction need only make a *prima facie* showing of personal jurisdiction in order to survive the motion to dismiss. In determining whether a party has made a *prima facie* showing of personal jurisdiction, the court must view the allegations in the light most favorable to such party, drawing all inferences in favor of jurisdiction. If, however, the court conducts a pretrial evidentiary hearing on the motion, or if the personal jurisdiction issue is litigated at trial, the party asserting jurisdiction must prove jurisdiction by a preponderance of the evidence.” *Id.*

19. “A parent-subsidary relationship between corporations, one of which is ‘doing business’ in West Virginia, does not without the showing of additional factors subject the non-resident corporation to this state’s jurisdiction. However, if the parent and its subsidiary operate as one entity, their formal separate corporate structures will not prevent the assertion of jurisdiction over the non-resident corporation. The extent of control exercised by the non-resident corporation over the corporation doing business in this state determines whether the non-resident corporation is subject to this state’s jurisdiction.” *Id.* at Syl. pt. 5, citing Syl. pt. 2, *Norfolk Southern Ry. Co. v. Maynard*, 190 W. Va. 113, 437 S.E. 2d 277 (1993).

20. The Court **FINDS** that IHG, PLC’s Form 20-F filed with the SEC identifies the “Group” as including IHG, PLC and its subsidiaries. See IHG, PLC’s Form 20-F, attached as Exhibit 1 to Plaintiffs’ Response, at page 4, which provides: “Group” refers to InterContinental Hotels Group PLC and its subsidiaries or, where appropriate, InterContinental Hotels Limited or Six Continents Limited and their subsidiaries as the context requires.

21. Additionally, although IHG, PLC denies any contacts in West Virginia and denies any control over subsidiaries Six Continents, Franchising and Resources, the Court **FINDS** that statements in IHG, PLC’s Form 20-F, its Annual Reports, and other indicia establish that IHG,

PLC may exert control over its subsidiaries such that it may appropriately be subject to personal jurisdiction in this Court.

22. “It is within the trial court’s sound discretion whether to permit discovery to aid its decision of a motion to dismiss for lack of personal jurisdiction, made pursuant to Rule 12(b)(2) of the West Virginia Rules of Civil Procedure, or whether to decide such a motion based solely upon the pleadings, affidavits and other documentary evidence. The court’s decision will not be overturned absent an abuse of discretion.” Syl. pt. 1, *Bowers v. Wurzburg*, 202 W. Va. 43, 501 S.E.2d 479 (1998).

23. In the case *sub judice*, the Court **FINDS** that discovery would aid its decision of IHG, PLC’s motion to dismiss for lack of personal jurisdiction, made pursuant to Rule 12(b)(2) of the West Virginia Rules of Civil Procedure.

24. In light of these findings, and in order to aid in the Court’s determination of whether it may appropriately exercise personal jurisdiction over IHG, PLC in these proceedings, it is hereby **ORDERED** that IHG, PLC produce a designated witness or witnesses, in accordance with Rule 30(b)(7) of the West Virginia Rules of Civil Procedure, to testify about all issues relating to whether (1) the Court has personal jurisdiction over IHG, PLC; (2) whether IHG, PLC is the alter ego of Six Continents, Franchising, and Resources; (3) whether IHG, PLC has engaged in a joint venture with Six Continents, Franchising and Resources, along with Pikes, Inc., the franchisee that owns and operates the Hotel; and (4) whether Six Continents, Franchising, Resources, and Pikes, Inc. acted as the agent of IHG, PLC in managing the Hotel.

25. It is further **ORDERED** that counsel for Plaintiffs and IHG, PLC meet and confer to refine the topic areas of Plaintiffs’ “Amended Notice of Rule 30(b)(7) Video Deposition of Designated Agent of Defendant, InterContinental Hotels Group, PLC”, and Plaintiffs’ “Requests

for Production of Documents and Things” so as to allow Plaintiffs to obtain documents and depose a designee of IHG, PLC as it relates to the issues set forth in West Virginia Code § 56-3-33 (2011) and the degree to which IHG, PLC’s contact with West Virginia, if any, constitutes “minimum contacts” as discussed in applicable case law.

26. After counsel for the parties meet and confer in accordance with this Order, IHG, PLC is **ORDERED** to produce witnesses pursuant to West Virginia Rule of Civil Procedure 30(b)(7) and produce documents pursuant to West Virginia Rule of Civil Procedure 34 consistent with this Order. Plaintiffs’ Motion to Compel IHG, PLC to produce witnesses pursuant to West Virginia Rule of Civil Procedure 30(b)(7) and to produce documents pursuant to West Virginia Rule of Civil Procedure 34 is rendered moot by the Court’s decision.

27. IHG, PLC’s Motions to Dismiss are **HELD IN ABEYANCE** while such discovery is completed.

28. The Court notes and preserves all objections and exceptions to its ruling.

It is so **ORDERED**.

ENTER: February 4, 2015.

/s/ John A. Hutchison
Lead Presiding Judge
Carbon Monoxide Exposure Litigation