

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: April 3, 2006 **DEPT.** 71 **REPORTER:**

CSR#:

**HON. RONALD S. PRAGER,
JUDGE PRESIDING**

REPORTER'S ADDRESS:
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BAILIFF:

Judicial Council
Coordination Proceedings
No. JCCP 4041

Coordination Proceeding
Title [Rule 1550(b)]
TOBACCO CASE

TENTATIVE RULING

The Motion to Quash filed by Cross-Defendant National Association of Attorneys General (hereinafter "NAAG") is hereby DENIED.

C.C.P. §410.10 provides that California courts may exercise jurisdiction on any basis not inconsistent with the California or United States Constitutions. "When a nonresident defendant challenges personal jurisdiction, the plaintiff must prove, by a preponderance of the evidence, the factual basis that would justify the exercise of jurisdiction. If the plaintiff meets this burden, it is then up to the defendant to show that the exercise of jurisdiction would be unreasonable. In this analysis, the merits of the complaint are not implicated." [*F. Hoffman--La Roche, Ltd. v. Superior Court* (2005) 130 Cal. App. 4th 782, 794 citing *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 424, 449.] The Court finds that although U.S. Smokeless Tobacco Company (hereinafter "US Smokeless") has not met its burden to show that general jurisdiction exists, it has met its burden to show that this Court's assertion of specific jurisdiction over NAAG is warranted, and NAAG has not shown that the exercise of jurisdiction would be unreasonable under these facts and circumstances.

General Jurisdiction:

The Court has reviewed and considered the evidence submitted and finds that NAAG's contacts in California are not substantial or continuous and systematic. NAAG does not maintain a CA office, does not own property in CA, and has not appointed an agent for service of process in CA. [See Greenwold Decl. and Ross Decl.] Although NAAG maintains a partially interactive website that is accessible to users nationwide, it does not solicit on-line sales or otherwise "engage[] in

active solicitation toward and participation in the [CA's] markets." [See *Gator.com Corp. v. L.L. Bean, Inc.* (9th Cir. 2003) 341 F.3d 1072 at 1077, applying CA law.] Unlike the virtual on-line store which formed the basis for the assertion of general jurisdiction in *Gator.com*, the interactive portion of NAAG's website is limited to permitting public comments and questions to which NAAG responds by mail. [See Ross Decl., ¶5.]

US Smokeless has also failed to present evidence to establish general jurisdiction on the basis of the theories of alter ego and agency.

"To invoke alter ego, two conditions must be met: 1) there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist; and 2) there must be an inequitable result if the acts in question are treated as those of the corporation alone. [*F. Hoffman—La Roche, supra*, 796-797, internal citations omitted.] NAAG and the California Attorney General's Office (hereinafter "CA AG") do not maintain a unity of ownership, and US Smokeless has not shown that any inequity would result if NAAG and the CA AG were treated as separate entities.

"In the case of agency the corporate identity is preserved but the principal is held for the acts of [the] agent....[T]he hallmark of agency is the exercise of control over the agent by the principal." [*Id.* at 798.] Here, US Smokeless has not presented evidence to establish that an agency relationship exists between NAAG and the CA AG as the CA AG does not essentially exist only to further the business of NAAG. To the contrary, NAAG's purpose is "to provide a forum for the exchange of views and experiences on subjects of importance to the chief legal officers and the states and other jurisdictions that are members of the Association..." [See NAAG's Constitution, Article I, attached to Allen Decl. as Exhibit N.] Moreover, US Smokeless did not present evidence that NAAG "exercise[s] a degree of control over [the CA AG] that is more pervasive than [common features such as interlocking directors and officers, consolidated reporting, and shared professional services] signal...[or that it]... exercise[d] of control over the internal affairs of the [CA AG] and the determination of how the [CA AG] will be operated on a day-to-day basis." [*Id.* 797-798.] "In the absence of a showing of fraud or injustice, courts will generally respect the presumption of corporate separateness in a jurisdictional analysis." [*Id.*]

Special Jurisdiction:

"If the nonresident defendant does not have substantial and systematic contacts in the forum sufficient to establish general jurisdiction, he or she still may be subject to the *specific* jurisdiction of the forum, if the defendant has purposefully availed himself or herself of forum benefits [citation], and the controversy is related to or 'arises out of' a defendant's contacts with the forum....[S]pecific jurisdiction is determined under a three-part test: (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction

must be reasonable.” [*Jewish Defense Organization, Inc. v. Superior Court* (1999) 72 Cal.App.4th 1045, 1054.]

“The purposeful availment inquiry ... focuses on the defendant’s intentionality. This prong is only satisfied when the defendant purposefully and voluntarily directs [its] activities toward the forum so that [it] should expect, by virtue of the benefit [it] receives, to be subject to the court’s jurisdiction based on [its] contacts with the forum. ... By limiting the scope of a forum’s jurisdiction in this manner, the ‘purposeful availment’ requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts... Instead, the defendant will only be subject to personal jurisdiction if it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the state.” [*Snowey v. Harrah’s Entertainment* (2005) 35 Cal.4th 1054, 1062-1063, internal citations omitted.]

Here, NAAG’s contacts with CA were not random, fortuitous, or attenuated; there is sufficient evidence that NAAG purposefully availed itself of the protections or privileges of CA; and the cross-complaint is, indeed related to NAAG’s contacts with CA as follows: (1) NAAG’s executive committee “approved the assumption by NAAG of the responsibilities outlined in subsection VIII(a) of the Smokeless Tobacco Master Settlement Agreement.” [See 3/30/99 letter, attached to Allen Decl. as Exhibit B.] (2) “NAAG ... provides attorney services to the Settling States [including CA] and is involved in substantive consideration of legal issues and drafting of documents....With respect specifically to the subject matter of the Cross-Complaint, prior to April 14, 2005, NAAG engaged in ...[such] coordinating and facilitating activities...” [NAAG’s Response to SR 6, attached as Exhibit C.] (3) “...[W]ith respect to the 30-day notice and the Complaint, the NAAG Tobacco Project assisted in the preparation of correspondence, the notice and the Complaint, and circulated them to Settling Parties for their review, comment, and, where appropriate, their decision to be included in correspondence or the notice.” [NAAG’s Response to SR 7, attached as Exhibit C.] (4) NAAG attended a meeting in Newport Beach, CA on 12/3/01 that “was held pursuant to and for the purposes stated in Section VIII(a)(2) of the MSA and STMSA,” and held its Summer Meeting in Santa Monica, CA on June 15-18, 2004 during which “the NAAG Tobacco Committee and NAAG Tobacco Project staff reported to members of NAAG and their staff on the status of certain tobacco-related issues, one of which concerned the subject of USSTC’s Skoal Racing Brand Name Sponsorship.” [NAAG’s Response to SR 12, attached as Exhibit C; see also, CA’s Response to SR 9, attached as Exhibit D.] (5) Mark Greenwold and William Lieblich, attorneys in the NAAG Tobacco Project, were admitted pro hac vice to assist in representing the People of California in *People of the State of California ex rel. Bill Lockyer v. R. J. Reynolds Tobacco Co.*, No. JCCP 4041, a case involving allegations that RJ Reynolds was promoting its cigarettes in violation of advertising restrictions in the MSA; and Peter Levin, an attorney in the NAAG Tobacco Project, was admitted pro hac vice to assist in representing the People of California in *People of the State of California ex rel. Bill Lockyer v. R. J. Reynolds Tobacco Co.*, No. JCCP 4041, a case involving allegations that House of Prince, a participating manufacturer under the MSA, was not complying with its MSA payment obligations. [NAAG’s

Response to SR 15, attached as Exhibit C.] (6) “Pursuant to Section VIII of the MSA and STMSA and Exhibit J to the MSA, NAAG administers the States’ Antitrust/Consumer Protection Tobacco Enforcement Fund (‘Fund’)....California has applied and received approval for several grants. These have related to ... experts in connection with the litigation between California and Cross-Claimant regarding the Skoal Racing Brand Name Sponsorship....From 1999-2001, NAAG retained a California law firm to advise NAAG on MSA payment calculation issues. To date, one payment has been made pursuant to the grant to California relating to this litigation...[in the amount of] approximately \$8700 and was made by NAAG to an expert who does not reside or work in California.” [NAAG’s Response to SR 23, attached as Exhibit C.] (7) “NAAG and the State of California have entered into an oral Common Interest Agreement relating to the matters at issue [in the] Complaint and in the Cross-complaint of this case.” [NAAG’s Response to SR 24, attached as Exhibit C.] (8) In the CA AG’s 4/14/05 “notice of intent, pursuant to section VII(c)(2) of the STMSA to initiate proceedings against U.S. Smokeless to enforce various sections of the STMSA, CA expressly referenced US Smokeless’ response to an inquiry from NAAG about US Smokeless’ 2005 brand name sponsorship plans and US Smokeless’ report to NAAG that in 2005 it would engage in brand name sponsorship of multiple NHRA cars in violation of the STMSA.. [See 4/14/05 letter, attached to Allen Decl. as Exhibit F.] (9) NAAG’s Spring 2004 newsletter states in the section entitled “Tobacco”: “The Tobacco Project coordinates the activities of the states in defending and enforcing the landmark tobacco Master Settlement Agreement...Led by Chief Counsel Mark Greenwold, the project works to help states enforce the provisions of the MSA...The project is very active in litigation efforts designed to ensure that payments called for in the MSA are made promptly and in full....The project has also has been successful in ensuring that youth are not the targets of magazine advertisements of smoking, as required under the MSA. Most recently, a California appellate court upheld a trial court’s decision in an action brought by California Attorney General Bill Lockyer that RJ Reynolds targeted youth in its magazine advertising in violation of the MSA...[T]he litigation ...was supported by the Tobacco Project.” (10) NAAG issued various checks payable to the California Department of Justice, including a check in the amount of \$400,000.00, the grant to California to fund its action under the MSA relating to RJ Reynolds Tobacco Company’s magazine advertising. [See Allen Decl., ¶14 and Exhibit L thereto.] (11) Article II, Section 2 of NAAG’s Constitution states in pertinent part: “The Association’s purpose...is carried out pursuant to the direction and approval of its membership. The functions of the Association are not independent of the functions of its membership. NAAG staff are in a confidential relationship with the Attorneys General and may act as their agent when so directed by the Attorneys General. In order to further the purpose of the Association and its membership, Association members may assert that certain Association communication...be deemed confidential and subject to the same privileges of discovery and litigation protection afforded to the Attorney General or his staff.” [See NAAG Constitution, Article II, Section 2, attached to Allen Decl. as Exhibit N.]

The exercise of jurisdiction over NAAG under these facts and circumstances does indeed “comport with fair play and substantial justice” [*Burger King Corp. v. Rudzewicz* (1985) 471 US 462, 477-478], and this Court’s exercise of jurisdiction over NAAG is reasonable.

IT IS SO ORDERED.