

## In re Texas Prison Litig.

United States District Court for the Western District of Missouri, Central Division

February 9, 1999, Decided ; February 9, 1999, Filed

Master File No. 98-7110-TX-C-5, Case No. 98-4201-CV-C-5, Case No. 98-4204-CV-C-5

**Reporter:** 1999 U.S. Dist. LEXIS 11123

In re Texas Prison Litigation

**Subsequent History:** [\*1] Adopting Order of February 16, 1999, Reported at: [1999 U.S. Dist. LEXIS 11120](#).

**Disposition:** Recommended that this defendant Brazoria County's alternative motion to sever be denied [237-3]. Defendant Brazoria County's November 16, 1998, motion to dismiss or, in the alternative, to transfer for improper venue be denied [237-2]. Defendant Brazoria County's motion of November 16, 1998, to dismiss for lack of personal jurisdiction be denied [237-1].

**Counsel:** For TEXAS PRISONER LITIGATION (98-TX-7110): Randall D. Thompson, Ensz & Jester, Kansas City, MO.

For TEXAS PRISONER LITIGATION (98-TX-7110): Henry W. Prejean, Amanda K. Miller, Angleton, TX.

**Judges:** WILLIAM A. KNOX, United States Magistrate Judge.

**Opinion by:** WILLIAM A. KNOX

### Opinion

### REPORT AND RECOMMENDATION

Before the court is the November 16, 1998, motion filed by defendant Brazoria County, Texas, to dismiss for lack of personal jurisdiction and for improper venue. In accord with the Magistrate Act, [28 U.S.C. § 636](#), L.R. 72.1 and the order of July 8, 1998, this motion was referred to the undersigned for the issuance of a report and recommendation. Plaintiffs responded in opposition to the motion, and defendant Brazoria County replied.

### Plaintiffs' Claims

Plaintiffs are Missouri inmates who [\*2] were temporarily confined in a penal facility in Brazoria County, Texas, for various periods in 1996 and 1997. They allege violations of state and federal law based upon the conditions of their confinement in Brazoria County and while being transported from Missouri to Texas. In Count I, they seek a declaratory judgment of their rights under the contract entered into

between Brazoria County, Texas, and the State of Missouri. Count II alleges a breach of that contract.

Counts III and IV are brought under [42 U.S.C. § 1983](#), alleging violations of the [Eighth Amendment](#) based upon excessive use of force and other acts of cruel and unusual punishment. Counts V through IX are brought against defendants other than Brazoria County.

### Motion to Dismiss

Defendant Brazoria County seeks dismissal under [Fed. R. Civ. P. 12\(b\)\(2\)](#) for lack of personal jurisdiction and 12(b)(3) for improper venue. In the alternative, defendant requests a transfer for improper venue, pursuant to [28 U.S.C. § 1406\(a\)](#).

### Personal Jurisdiction

Brazoria County first claims the Missouri long-arm statute does not provide a basis for personal jurisdiction over it. It further [\*3] asserts that even if the court finds jurisdiction, the exercise of personal jurisdiction would violate due process.

"When personal jurisdiction is challenged, the plaintiff has the burden of showing that jurisdiction exists." [Guinness Import Co. v. Mark VII Distributors, Inc.](#), 153 F.3d 607, 611 (8th Cir. 1998). The plaintiff's burden is met, however, if he makes a prima facie showing of personal jurisdiction. [Digi-Tel Holdings v. Proteq Telecommunications, Ltd.](#), 89 F.3d 519, 522 (8th Cir. 1996). At this stage, the evidence is viewed in the light most favorable to the plaintiff and all factual conflicts are resolved in his favor. *Id.*

The issue is analyzed in two parts. First, the facts presented must meet the criteria of the forum's long-arm statute. If they do, then the second inquiry is whether the exercise of jurisdiction would violate due process principles. *Id.*

### Jurisdiction under the Missouri Long-Arm Statute

Missouri's long-arm statute is found at [Mo. Ann. Stat. § 506.500](#) (West Supp. 1998). Three subsections of the statute authorize jurisdiction over nonresidents who transact business within the state, make a contract within the [\*4] state or commit a tortious act within the state. Plaintiffs cite these three subsections as their basis for asserting personal jurisdiction over defendant Brazoria County, Texas.

The long-arm statute allows for "the exercise of jurisdiction over non-residents to the extent permissible under the due process clause." Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1330 (E.D. Mo. 1996). Plaintiffs state their claims arise out of or relate to a contract entered into between Brazoria County, Texas, and the State of Missouri through the Missouri Department of Corrections. If that contract was made within the State of Missouri, the long-arm statute would permit the court to exercise personal jurisdiction over the nonresident defendant, Brazoria County.

Under Missouri law, "[a] contract is made where the last act necessary to form a binding contract occurs." Career Aviation Sales, Inc. v. Cohen, 952 S.W.2d 324, 326 (Mo. App. E.D. 1997). The essential elements of a valid, binding contract are offer, acceptance and bargained-for consideration. Of the three essential elements, acceptance is the last act to occur. Thus, the contract is made where acceptance [\*5] occurs. *Id.*

The contract in this case was signed on behalf of Brazoria County on August 26, 1996, in Texas, and on behalf of the Missouri Department of Corrections on August 27, 1996, in Missouri. Viewing the evidence in the light most favorable to plaintiffs, the signature of Dora Schriro on behalf of Missouri constituted acceptance of the contract in Missouri by the State of Missouri. Thus, acceptance of the contract occurred in Missouri. Accordingly, the court finds, for personal jurisdiction purposes, that Brazoria County made a contract within the state.

Defendant argues that plaintiffs are not third-party beneficiaries of the contract and cannot use the contract as a basis for their claims or assertions of personal jurisdiction over defendant. Whether plaintiffs are third-party beneficiaries of the contract is an issue to be addressed on the merits of Count I. It is premature to address that issue at this stage.

What is currently relevant, however, is whether plaintiffs' claims arise out of or relate to the contract. For the reasons set forth below in the discussion related to due process issues, the court finds that they do.

Accordingly, plaintiffs have made a sufficient [\*6] showing that jurisdiction exists under the "making a contract within the state" subsection of the Missouri long-arm statute and the court does not need to address whether defendant transacted business within the state or committed a tortious act within the state.

#### *Due Process Considerations*

The second inquiry is whether the exercise of personal jurisdiction will violate due process. Implicit in due

process are "traditional notions of fair play and substantial justice." Milliken v. Meyer, 311 U.S. 457, 463, 85 L. Ed. 278, 61 S. Ct. 339 (1940). Thus, due process mandates that a lawsuit should not be maintained unless the nonresident defendant has sufficient minimum contacts with the forum state. International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945).

There are sufficient contacts to satisfy due process when "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980). Those contacts provide the defendant with [\*7] "fair warning that a particular activity may subject [him] to the jurisdiction" of the courts in that state. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985) (quoting Shaffer v. Heitner, 433 U.S. 186, 218, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977)). The fair warning requirement is met if the defendant has "purposefully directed" its activities to the state's residents" and the litigation "results from alleged injuries that 'arise out of or relate to' those activities." Burger King Corp. v. Rudzewicz, 471 U.S. at 472.

There is no question that defendant Brazoria County purposefully directed its activities to Missouri residents when it contracted with the State of Missouri to house and supervise Missouri inmates in Texas. In exchange for money, Brazoria County agreed to provide housing, meals, transportation, medical care and other services for eligible Missouri inmates. The contract indicates Missouri was experiencing a shortage of accommodations for certain classes of inmates and that defendant Brazoria County had unused prison accommodations. Missouri inmates who were sent to Brazoria County [\*8] did not become Texas inmates, but remained Missouri inmates who were housed in Texas temporarily.

All of the claims asserted in this case arise out of injuries allegedly incurred during the transportation of Missouri inmates to Texas or the housing of Missouri inmates in Brazoria County. The inmates would not have been in the facility or under the control of Brazoria County employees or agents but for the contract.

Nevertheless, a contract, standing alone, does not automatically establish sufficient minimum contacts. Burger King Corp. v. Rudzewicz, 471 U.S. at 478. Negotiations, contemplated future consequences, the terms of the contract, and other matters must be evaluated to determine whether the defendant purposely established minimum contacts with the forum. Burger King Corp. v. Rudzewicz, 471 U.S. at 479. "Jurisdiction is proper where the contacts proximately result from actions by the

defendant itself that create a 'substantial connection' with the forum State." Digi-Tel Holdings v. Proteq Telecommunications, Ltd., 89 F.3d at 522.

In conjunction with the basic principles of due process, courts in the Eighth Circuit use a five-part [\*9] test to consider the constitutional requirements of personal jurisdiction. Relevant factors are "(1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the forum; (3) the relation of the cause of action to these contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties." Digi-Tel Holdings v. Proteq Telecommunications, Ltd., 89 F.3d at 522-23. The first three factors are of primary importance and the last two are of secondary importance. *Id.*

Brazoria County entered into a contract with the State of Missouri which provided for the ongoing housing and supervision of up to 512 Missouri inmates. The contract commenced on September 3, 1996, and was to expire after one year. It provided for up to three annual renewals, and unilateral termination upon sixty days written notice.

The contract required the County to notify Missouri, in writing, and to obtain advance authorization for nonemergency medical, dental or psychiatric care not covered under enumerated routine services. The costs of routine medical, dental and psychiatric services were considered part of [\*10] the "costs reimbursed by the fixed rate per inmate day as provided by this Contract." Master File Doc. 237, Exh. B-2 at 4. Inmate deaths or escapes were to be reported to the State of Missouri immediately. The County was to bill the State of Missouri monthly, based upon the number of inmates housed in Brazoria County and the number of days they were housed there.

Thus, the terms of the contract clearly provided for an ongoing relationship between Brazoria County, the State of Missouri and Missouri inmates. It anticipated contacts beyond those required to negotiate and enter into the contract and called for periodic payments from Missouri revenues. While housed in a Brazoria County facility, Missouri inmates were dependent upon the defendant for the basic necessities of life and for constitutional conditions of confinement. That dependency relationship was created, at least in part, by the contract with the State of Missouri. Without the contract, plaintiffs would have looked solely to the State of Missouri for their basic necessities and for constitutional conditions of confinement.

Furthermore, the contract recognized under section 3.4 that other parties might bring actions relating [\*11] to the

performance of the contract and that the County might be sued by inmates for alleged actions by the County. At section 3.8, the contract stated it was to be "governed in all respects by the laws of the State (Missouri) and any litigation with respect thereto shall be brought in the courts of the State." Master File Doc. 237, Exh. B-2 at 8. The language of the contract is broadly worded, refers to "any litigation" and does not limit the forum selection to suits brought by the signatories to the contract. Therefore, defendant agreed to suit in Missouri and to be governed by Missouri law with respect to actions brought as a result of the contract. "It is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court . . . ." National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16, 11 L. Ed. 2d 354, 84 S. Ct. 411 (1964). In this case, defendant did so. After including such language in the contract, it is difficult for defendant to argue convincingly that it could not "reasonably anticipate being haled into court" in Missouri on issues that would not have arisen but for the contract.

### Improper Venue

Defendant [\*12] also seeks transfer or dismissal under 28 U.S.C. § 1406(a). As an alternative to a section 1406(a) dismissal or transfer, defendant requests the court to sever plaintiffs' claims against Brazoria County and transfer those claims to the Southern District of Texas. Plaintiffs Barnes and Davis have filed a response opposing the motion. In their response, plaintiffs adopt the response filed by defendants Goeke, Groose, Lombardi and Schriro on August 5, 1998, in such cases as Giles v. Brazoria County, No. 98-4090 (W.D. Mo. filed April 17, 1998). They also adopt the consolidated response filed by the plaintiffs in Giles. See Document 33, Master File No. 98-7110.

Brazoria County argues that venue is not proper under 28 U.S.C. § 1391(b)(2) because the vast majority of wrongful actions alleged against Brazoria County all occurred within the State of Texas, in Brazoria County. The County argues that venue must be proper as to each defendant and each claim and, therefore, plaintiffs cannot rely on their claims against Missouri defendants to determine that a Missouri venue is appropriate for the claims against Brazoria County.

Plaintiffs [\*13] oppose Brazoria County's motion on the grounds that as a threshold matter, Brazoria County consented to venue in Missouri through an express forum selection clause in the contract between the State of Missouri and Brazoria County. Plaintiffs argue that venue, moreover, is proper in the Western District of Missouri under section 1391(b)(2), because a substantial portion of plaintiffs' claims is grounded upon alleged events or omissions that took place in Missouri: negotiations

relating to the contract took place in Missouri; the decision to send inmates to Texas was made in Missouri; and Missouri officials were required to supervise and oversee performance of the contract. Missouri defendants also note that the complaint alleges inmates' complaints were not investigated in Missouri and inmates were mistreated in Missouri while they were transported from Missouri to Texas. Plaintiffs further argue that defendant has waived its venue objection because it failed to include this objection in its motion to dismiss for lack of personal jurisdiction, but instead, filed the objection separately, a few days later.

Defendant Brazoria County argues that in accordance with [section 1406\(a\)](#), the [\*14] court should dismiss or transfer this case for improper venue.

Title 28 U.S.C. § 1406(a) provides:

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Accordingly, the court must first decide whether venue is proper in the Western District of Missouri.

#### *Forum Selection Clause*

As a threshold matter, the court notes that the contract between Brazoria County and Missouri Department of Corrections contains a forum selection clause that requires any litigation with respect to the contract to be brought in the courts of the State of Missouri. (Doc. 315, Exh. A, § 3.8.) This case is not based on diversity jurisdiction alone and therefore, federal law governs the validity of the forum selection clause. [Farmland Industries, Inc. v. Frazier-Parrott Commodities](#), 806 F.2d 848, 852 (8th Cir. 1986), *abrogated on other grounds by* [Lauro Lines S.R.L. v. Chasser](#), 490 U.S. 495, 104 L. Ed. 2d 548, 109 S. Ct. 1976 (1989). Forum selection [\*15] clauses are deemed to be prima facie valid and are to be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances. See [The Bremen v. Zapata Off-Shore Co.](#), 407 U.S. 1, 10, 15, 92 S. Ct. 1907, 1913, 1916, 32 L. Ed. 2d 513 (1972).

In the instant case, Brazoria County argues that the forum selection clause in the Missouri-Brazoria contract is not controlling because the contract explicitly states that the parties do not intend to create third-party beneficiary rights for any entity, including inmates. Defendant argues

that the suit in the present case is brought by third parties who are not beneficiaries of the contract and, therefore, cannot seek to enforce its terms and conditions.

In its reply suggestions, Brazoria County also appears to argue that plaintiffs' [section 1983](#) claims are not governed by the forum selection clause because the clause only deals with contractual claims.

The court will not decide here whether plaintiffs are third-party beneficiaries of the Missouri-Brazoria contract because such a determination goes to the merits of Count 1 of the complaint. That does not end the inquiry, however. Brazoria County [\*16] assumes that only nonsignatories who are third-party beneficiaries of a contract can invoke or be bound by a forum selection clause. In [Stephens v. Entre Computer Centers](#), 696 F. Supp. 636, 638, 639 n.2 (N.D. Ga. 1988), the district court rejected the argument that a clause is enforceable against a nonsignatory only when the nonsignatory party is a third-party beneficiary of the contract. The court rejected a rigid third-party beneficiary rule and, relying on the opinion in [Coastal Steel Corp. v. Tilghman Wheelabrator](#), 709 F.2d 190 (3d Cir.), *cert. denied*, 464 U.S. 938, 104 S. Ct. 349, 78 L. Ed. 2d 315 (1983)<sup>1</sup>, held that factors such as "foreseeability" were important when determining whether a party should be bound by a forum selection clause. In [Hugel v. Corporation of Lloyd's](#), 999 F.2d 206 (7th Cir. 1993), the Seventh Circuit held: "While it may be true that third-party beneficiaries would be definition, satisfy the 'closely related' and 'foreseeability' requirements, *see, e.g., Coastal Steel*, 709 F.2d at 203, . . . a third-party beneficiary status is not required." 999 F.2d at 209-10 n.7. [\*17]

In determining whether nonsignatories can enforce or be bound by a contract, several courts have considered whether the nonsignatories are "transaction participants." These courts have held that a range of transaction participants, parties and nonparties, should benefit from, and be subject to, a forum selection clause. See, e.g., [Stephens v. Entre Computer Centers](#), 696 F. Supp. 636, 639 (N.D. Ga. 1988); [Detroit Coke v. NKK Chemical](#), 794 F. Supp. 214, 217 n.2 (E.D. Mich. 1992); [Manetti-Farrow, Inc. v. Gucci America](#), 858 F.2d 509, 514 (9th Cir. 1988); and [Brock v. Entre Computer Centers](#), 740 F. Supp. 428, 430 (E.D. Tex., 1990).

Transaction participants need not be third-party beneficiaries. In [Brock](#), [Detroit Coke](#), [Stephens](#), and [Manetti-Farrow](#), the forum selection clause was applied to nonsignatories [\*18] without the courts considering, as a threshold matter, whether the nonsignatories were

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<sup>1</sup> *abrogated on other grounds by* [Lauro Lines S.R.L. v. Chasser](#), 490 U.S. 495, 104 L. Ed. 2d 548, 109 S. Ct. 1976 (1989)



third-party beneficiaries. In *Manetti-Farrow*, the Ninth Circuit found that the alleged conduct of the nonparties was so closely related to the contractual relationship that the forum selection clause applied to all the litigants in the case. *Manetti-Farrow*, 858 F.2d at 514 n.5. The district court in *Detroit Coke* determined that where a nonsignatory's material involvement was expressly referenced throughout the agreement, the nonsignatory could benefit from the forum selection clause. *Detroit Coke*, 794 F. Supp. at 217 n.2.

A review of these cases indicates courts are guided by the specific facts of the case when determining whether nonsignatories are transaction participants who can benefit from, and be bound by, a forum selection clause. Courts consider factors such as the following: whether the nonsignatories are so closely related to the contractual relationship and the dispute that it would become foreseeable that they would be bound, *see, e.g., Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993); and whether they are materially [\*19] involved with the transactions and that involvement is referenced throughout the agreement between the signatories. *See, e.g., Detroit Coke*, 794 F. Supp. at 217 n.2. When evaluating these kinds of factors, courts are also guided by equitable considerations such as notice and foreseeability. *See, e.g., Hugel v. Corporation of Lloyds*, 999 F.2d at 209.

The court finds that, given the specific facts of the case, plaintiffs are involuntary transaction participants who should be entitled to rely on the forum selection clause. Plaintiffs are current or former inmates who are referenced throughout the contract and are intimately connected to the contract. The contract involves arrangements relating to their care, custody, medical needs, discipline, right of redress, and legal and religious access. A nonsignatory party whose material involvement is referenced throughout a commercial contractual agreement can benefit from a forum selection clause. *Detroit Coke*, 794 F. Supp. at 217 n.2. It is even more compelling that nonsignatory parties, such as plaintiffs, whose basic care, confinement and human needs form the basis of the contractual relationship [\*20] between the signatory parties, should be able to benefit from the forum selection clause. In the unusual circumstances of this case, where the involuntary participants are referenced throughout the contract and the contract involves not an ordinary commercial contract, but a contract that relates to the basic human needs of the nonsignatory parties, the court determines that plaintiffs should be able to benefit from the forum selection clause. Although this court would not force plaintiffs to use the forum selection clause if they did not wish to do so, no violation of due process or fundamental sense of fairness occurs in allowing them the benefit of the clause. Mutuality should not be necessary in these circumstances.

The court notes, moreover, that in another case, involving similar claims by Missouri inmates against Gregg County, Texas, the Eastern District of Missouri determined that "based on the forum selection clause, venue is appropriate in the present forum." *See Bailey v. Gregg County, Texas*, No. 4:98CV7, Memorandum and Order at p.9 (E.D. Mo. Sept. 28, 1998). (Gregg County has since filed a motion for reconsideration and that motion is pending.)

Defendant Brazoria [\*21] County also argues that insofar as plaintiffs' claims include *section 1983* claims, such claims cannot be covered by the forum selection clause. In *Terra International v. Mississippi Chemical Corp.*, 119 F.3d 688 (8th Cir. 1997), the Eighth Circuit, after reviewing decisions from other circuit courts, held that it is appropriate to consider the following factors when determining whether forum selection clauses apply to tort claims: whether the contract-related tort claims involve the same operative facts as a parallel claim for breach of contract; whether resolution of the tort claims relates to interpretation of the contract; and whether the tort claims ultimately depend on the existence of a contractual relationship between the parties. *Id.* at 694-95. At least one of these factors is present here. The *section 1983* claims are essentially claims alleging constitutional torts. A review of the complaint indicates that the breach-of-contract claims and *section 1983* claims depend on the same operative facts. Plaintiffs generally allege that the cruel and unusual conditions of confinement they suffered constitute violations under *section 1983*. They also allege [\*22] that those conditions constitute a breach of contract because Brazoria County was obligated under the contract to provide constitutional care. Accordingly, the *section 1983* claims as well as the breach-of-contract claims depend on the same operative facts and are covered by the forum selection clause.

The presence of a forum selection clause is a significant factor to figure centrally in the district court's calculus. *Detroit Coke*, 794 F. Supp. at 218-19. However, the mere existence of a forum selection clause is not to be deemed in and of itself dispositive on the question whether an action should be transferred. *Id.* at 218. A number of case-specific factors have to be considered such as the convenience of the parties and witnesses, and public interest concerns such as systemic integrity and fairness. The court will consider these additional factors later when considering whether a transfer is warranted under *28 U.S.C. § 1404(a)*. First, however, the court will consider whether, even if the forum selection clause in this case were not applicable, venue is proper under the general venue statute.

#### Section 1391(b)(2)

[\*23] In this civil action, jurisdiction is not founded solely on diversity of citizenship and, accordingly, the

provisions of 28 U.S.C. § 1391(b) apply. The parties agree that section 1391(b)(2) governs the issues in this case. Section 1391(b)(2) provides that a civil action "wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought . . . in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . ."

Brazoria County argues that under section 1391(b)(2), venue is not proper in Missouri because a substantial or significant part of the events or omissions giving rise to claims against Brazoria County occurred in Texas and the majority of claims that occurred in Missouri are against Missouri defendants. The County argues that venue must be proper as to each defendant and each claim and plaintiffs cannot meet their burden of showing that venue is proper as to Brazoria County.

When venue is challenged, it is the burden of the plaintiff to prove that venue is proper in the forum state. Where there are multiple claims against multiple defendants, [\*24] the plaintiffs have the burden of establishing that venue is proper as to each defendant and each claim. *Sheppard v. Jacksonville Marine Supply, Inc.*, 877 F. Supp. 260, 269 (D.S.C. 1995); *Jarrett v. State of North Carolina*, 868 F. Supp. 155, 158[6] (D.S.C. 1994).

Brazoria County argues that plaintiffs have not met the burden of showing that venue is proper. To analyze this argument, the court must first consider the contours of section 1391(b)(2). Section 1391 was amended in 1990 in order to expand the number of venues available to a plaintiff. Under section 1391(b)(2), as amended, "we no longer ask which district among two or more political forums is the 'best' venue . . . . Rather, we ask whether the district the plaintiff chose had a substantial connection to the claim whether or not other forums had greater contacts." *Setco Enterprises v. Robbins*, 19 F.3d 1278, 1281 (8th Cir. 1994). Venue is proper if the events in the district were not insubstantial and the forum is a convenient one, balancing the equities and fairness to each party. *Id.*

Section 1391(b)(2) focuses on events and omissions and, therefore, requires a nexus [\*25] between what occurred or what duties failed to be performed in a judicial district and the requisite elements of the claims asserted. By referring to events or omissions giving rise to the claim, "Congress meant to require courts to focus on relevant activities of the defendant, not of the plaintiff." *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995). By requiring events and omissions in the judicial district to be substantial, section 1391(b)(2) preserves the element of fairness so that a defendant is not haled into a remote district having no real relationship to the dispute. *Cottman*

*Transmission Systems Inc v. Martino*, 36 F.3d 291, 295 (3d Cir. 1994). See also *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995). Events or omissions that might only have some tangential connection with the dispute in litigation are not enough. *Cottman*, 36 F.3d at 295.

In analyzing whether substantial events or omissions occurred in Missouri, the court considers not merely the number of events or omissions, but how significant they were to the genesis of the dispute. See, e.g., *Magic Toyota v. Southeast Toyota Distributors*, 784 F. Supp. 306, 319 (D.S.C. 1992) [\*26] (court looked to see whether activities in a particular forum were significant for venue purposes).

A key event giving rise to the claims in the complaint was the decision in Missouri to send Missouri inmates to Texas. This decision was made in Missouri, and is the central event from which the breach-of-contract and section 1983 claims flow. As a result of the decision, inmates were involuntarily transferred from Missouri to Texas and inmates were removed from the care, confinement and supervision of the State of Missouri and assigned to the care, confinement and supervision of a municipality in Texas. But for that decision, the current dispute would not have arisen. Brazoria County is intimately connected with this decision, for the decision was made in critical part because Brazoria County undertook, by way of a contract executed with the State of Missouri, to confine and supervise Missouri inmates assigned to its care and custody. Brazoria County agreed to undertake an important governmental function on behalf of the State of Missouri by agreeing in the contract to provide housing, care, meals, medical services, rehabilitative services, and religious and legal access for Missouri [\*27] inmates. Based on Brazoria County's commitment, as set out in the contract, a decision was made in Missouri to make Missouri inmates dependent on Brazoria County for the basic necessities of life and for constitutional conditions of confinement. There is a sufficient nexus between this substantial event and the series of events giving rise to the breach-of-contract and constitutional claims. It cannot seriously be argued that Brazoria County is being haled into a remote district that has no real relationship to the dispute.

The court finds that Missouri's decision to send inmates to Texas, on the basis of Brazoria County's representations, of itself, constitutes a "substantial event" on which venue in the Western District of Missouri is justified. Stated differently, Brazoria County's agreement to provide Missouri inmates with constitutionally adequate housing and care set in motion a substantial sequence of events in Missouri resulting in the transfer of the inmates to Texas.

Other acts and omissions in Missouri constitute substantial events or omissions. Plaintiffs allege that Brazoria County

was obligated by contract to send accurate, detailed reports of disciplinary actions to [\*28] Missouri, but that it sent misleading information. (Case No. 98-4204, Doc. 1, P 55(a); Case No. 98-4201, Doc. 1, P 47(a).) Plaintiffs allege Brazoria County deliberately disseminated false and/or misleading information about use of force and abusive acts and tactics to the Missouri defendants and the State of Missouri. (Case No. 98-4204, Doc. 1, P 106; Case No. 98-4201, Doc. 1, P 98.) In a related claim, plaintiffs allege that Brazoria County deliberately withheld information about their abusive acts and tactics from the State of Missouri, despite their legal and contractual obligations to provide such information. (Case No. 98-4204, Doc. 1, P 105; Case No. 98-4201, Doc. 1, P 97.)

The complaint, therefore, alleges that Texas defendants (i) disseminated false information in Missouri, and (ii) withheld important information which they were contractually obligated to provide to the State of Missouri. The first allegation, dissemination of false information in Missouri, is an event in Missouri and is linked to plaintiffs' claims because plaintiffs allege such dissemination of false information was a breach of Brazoria County's contractual obligations. It can also reasonably be inferred [\*29] from the complaint that plaintiffs allege that the dissemination of false information in Missouri prolonged and aggravated violations of constitutional rights in Texas. Although the complaint is not entirely clear on this point, it suggests, for example, that a report provided about inmate unrest in Missouri in September 1996, seriously understates acts of inmate abuse on that date. (See Case No. 98-4204, Doc. 1, PP 50-54; Case No. 98-4201, Doc. 1, PP 42-46.) There is a substantial connection between providing false information in Missouri and the breach-of-contract and section 1983 claims.

The second allegation, withholding of important information in Missouri, constitutes an omission in Missouri. The reference to omissions in section 1391(b)(2) establishes that "in instances in which an act or acts were required by the engagement of the parties, and were required to take place in a given district, a failure to perform them in that district can qualify the district as a proper venue." Siegel, Westlaw 540 PLI/Lit 7, p.64 (1996). Plaintiffs allege that defendant Brazoria County was obligated by contract to provide Missouri with "accurate, detailed reports of the disciplinary [\*30] actions against the State inmates." (Case No. 98-4204, Doc. 1, P 55(a); Case No. 98-4201, Doc. 1, P 47(a).) They further allege that such accurate, detailed reports were not provided to Missouri in important cases. Plaintiffs argue, in effect, that by failing to perform an act required to take place in Missouri, the County breached its contractual obligations. This is a substantial omission which has a nexus to the claims in the complaint against Brazoria County.

Plaintiffs also allege in the complaint that Brazoria County denied, hindered and interfered with their access to the courts. (Case No. 98-4204, Doc. 1, P 62(m); Case No. 98-4201, Doc. 1, P 54(0).) Defendant Brazoria County contractually undertook to provide inmates with access to the courts, including access to Missouri statutes, access to legal materials as required by Missouri law (as well as Texas and federal law), and access to courts "comparable to that of a state inmate in Missouri institutions." (Doc. 315, Exh. A, P 2.6.) It is reasonable to infer from the complaint that plaintiffs allege Brazoria County interfered with plaintiffs' efforts to communicate with Missouri courts and not just Texas courts.

For all the [\*31] reasons discussed above, the court finds that venue is proper in Missouri because there is a substantial connection between the events and omissions in Missouri and the claims against Brazoria County.

In Setco Enterprises v. Robbins, 19 F.3d 1278, 1281 (8th Cir. 1994), the Eighth Circuit stated that principles of equity and fairness to each party play some role in determining whether venue is proper in a judicial district. In the instant case, Brazoria County would argue that it is fair to require plaintiffs to litigate in Texas because the complaint alleges Texas defendants tortured, abused and subjected inmates to cruel and unusual punishment in Texas. The court notes that in the usual venue case, a plaintiff performs some voluntary act that will link him to a forum where events and omissions occurred. Here, the court is faced with a unique situation where plaintiffs did not choose to have contacts with Texas. They were involuntarily transferred to Texas and did not voluntarily avail themselves of the jurisdiction of Texas courts. The events in Texas were triggered without plaintiffs seeking any contacts with Texas. Aside from the fact that the court finds a substantial [\*32] connection between events and omissions in Missouri and plaintiffs' claims, the court also believes that principles of fairness and equity favor Missouri as a proper forum.

#### Section 1404(a) and Forum Non Convenience

Although not specifically raised by Brazoria County, the court will consider whether this case should be transferred to the United States District Court for the Southern District of Texas based on the doctrine of forum non convenience under 28 U.S.C. § 1404.

Section 1404(a) provides that a court should consider three factors when deciding whether to transfer: (1) the convenience of the parties; (2) the convenience of the witnesses, and (3) the interests of justice. Jumara v. State

*Farm Ins. Co.*, 55 F.3d 873, 877-878 (3d Cir. 1995). A district court must engage in a case-specific balancing analysis using these factors to determine whether transfer is proper.

In *Jumara*, 55 F.3d at 879-880, the Third Circuit noted that, in ruling on *section 1404(a)* motions, courts, in addition to the three factors enumerated above, consider such factors as the plaintiff's forum preference, the convenience of the parties as indicated [\*33] by their relative physical and financial condition, the convenience of the witnesses and the locations of books and witnesses. Courts also consider public interest factors such as enforceability of the judgment; practical considerations that could make the trial easy, expeditious, or inexpensive; the local interest in deciding local controversies at home; the public policies of the fora and the familiarity of the trial judge with the applicable state law in diversity cases.

Initially, the court will consider the convenience of the parties. Two considerations persuade the court that this factor does not favor transfer. The first of these is the forum selection clause in the contract. The clause indicates that Brazoria County did not regard Missouri as an inconvenient forum and had a reasonable expectation that, based on the contract, disputes would be resolved in Missouri. Second, the court believes there would be great administrative difficulties and law enforcement burdens involved in moving a large number of plaintiffs, most of whom are in Missouri prisons, from Missouri to Texas. These burdens greatly outweigh the inconvenience involved in requiring Brazoria County to defend this [\*34] case in Missouri.

The same considerations apply when balancing the convenience of witnesses. The court acknowledges that it will be burdensome for witnesses who reside in Texas to travel to Missouri for this litigation. However, the transfer of numerous inmate witnesses, who must remain under guard while being transported and while housed during a trial, creates an even heavier burden and this factor does not favor transfer.

The interests of justice must also be considered when deciding whether to transfer venue. Were this case to be tried in Texas, some of the plaintiffs might be returned to Texas during the trial and might be housed in the very jails where they allege they were improperly treated.

Other factors militating against transfer are as follows. A plaintiff's choice of forum is normally given considerable deference. *Ramiccio v. N.J. Transit Rail Operations, Inc.*, 1997 U.S. Dist. LEXIS 6209, No. 96-6772, 1997 WL 230791 at 2 (E.D. Pa. Apr. 30, 1997). The contract provides that interpretation of the contract is governed by Missouri law and this factor favors Missouri because of the relative familiarity of the trial judge with applicable state law. Further, Missouri has a strong public [\*35] interest in

the resolution of the issues in this case because they implicate important governmental functions.

Therefore, the court finds that the case should not be transferred to the Southern District of Texas under *section 1404(a)*.

### Severance

Defendant Brazoria County also argues, alternatively, for severance. Specifically, Brazoria County argues that the court should retain jurisdiction over Missouri defendants and transfer the case as to Brazoria County to the Southern District of Texas. In a situation where venue is proper for one defendant but not for another and dismissal is inappropriate, the district court may sever the claims, retaining jurisdiction over one defendant and transferring the case as to the other defendant to an appropriate district. See *Cottman Transmission Systems, Inc., v. Martino*, 36 F.3d 291, 295-96 (3d Cir. 1994). In the instant case, the court has determined that venue is proper as to defendant Brazoria County. Accordingly, severance is inappropriate.

Brazoria County might argue that even if venue were properly laid in Missouri, the court should sever the claims against Brazoria County and transfer them to the Southern District [\*36] of Texas because venue is more convenient for Brazoria County in Texas. The court has already determined, after considering the convenience of the parties and witnesses, the interests of justice and other factors that it would not be appropriate to transfer this case. Many of these same considerations apply equally to severance as to transfer, and severance is inappropriate for many of the same reasons. Further, a court should not sever claims if the defendant over whom jurisdiction is retained is so involved in the controversy to be transferred that partial transfer would require the same issues to be litigated in two places. *Cottman Transmission Systems*, 36 F.3d at 296. Even if venue was more convenient for Brazoria County in Texas, the grant of a severance would not ordinarily be consistent with the sound exercise of discretion. Brazoria County is connected to the main issues in this complaint and, accordingly, severance by the district court would not be proper.

For these reasons and those set forth in the parties' briefs in opposition to defendant's motion, it is

RECOMMENDED that defendant Brazoria County's alternative motion to sever be denied [237-3]. It [\*37] is further

RECOMMENDED that defendant Brazoria County's November 16, 1998, motion to dismiss or, in the



alternative, to transfer for improper venue be denied [237-2].  
It is further

RECOMMENDED that defendant Brazoria County's motion of November 16, 1998, to dismiss for lack of personal jurisdiction be denied [237-1].

Under 28 U.S.C. § 636(b)(1), the parties may make specific written exceptions to this recommendation within twenty days. If additional time is needed, a motion for an extension of time must be filed within twenty days. The motion should state the reasons for the request. *See Nash v. Black*, 781 F.2d 665, 667 (8th Cir. 1986) (citing *Thomas*

*v. Arn*, 474 U.S. 140, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985)); *Messimer v. Lockhart*, 702 F.2d 729 (8th Cir. 1983). Exceptions must be filed, **in duplicate**, pursuant to L.R. 5.1(c). Failure to make specific written exceptions to this report and recommendation may result in a waiver of the right to appeal.

Dated this 9th day of February, 1999, at Jefferson City, Missouri.

WILLIAM A. KNOX

United States Magistrate Judge