

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

GOVERNMENT OF BERMUDA,

Plaintiff,

v.

LAHEY CLINIC, INC. (a.k.a. LAHEY
HOSPITAL & MEDICAL CENTER,
BURLINGTON), and LAHEY CLINIC
HOSPITAL, INC.,

Defendants.

**Leave to File Granted On
1/08/2018**

C.A. No. 17-10242-IT

ORAL ARGUMENT SCHEDULED
FOR 1/31/18

**DEFENDANTS' NOTICE OF ADDITIONAL AUTHORITY IN SUPPORT OF THEIR
MOTION TO DISMISS THE COMPLAINT**

Defendants Lahey Clinic, Inc. and Lahey Clinic Hospital, Inc. ("Lahey") submit this notice of additional authority issued after briefing on Lahey's Motion to Dismiss. A copy of the new authority is attached as Exhibit 1.

On October 30, 2017, the United States Court of Appeals for the Second Circuit decided what it described as a question "of first impression" in any Court of Appeals regarding what satisfies the "domestic injury" requirement in a civil RICO case. *Bascunan v. Elsaca*, 874 F.3d 806 (2d Cir. 2017), involved a civil RICO action brought by a citizen and resident of Chile against another citizen and resident of Chile, and several co-defendants. In reviewing the trial court's grant of a motion to dismiss the complaint, the Court of Appeals clarified the standard that a foreign plaintiff must meet in order to demonstrate a domestic injury that is cognizable under civil RICO. Bascunan alleged that Elsaca, his financial manager, stole approximately \$64 million from him through four separate schemes. The schemes involved transfers of funds in New York trust accounts, laundering assets through bank accounts in New York, using a power

of attorney to seize bearer shares stored in a safety deposit box in New York, and diverting dividend payments from an account in Chile to an account in New York. *Id.* at 811-813.

Bascunan presented the question of whether the plaintiff had alleged a “domestic injury” to support his RICO claim. As the Supreme Court held in *RJR Nabisco, Inc. v. European Community*, ___ U.S. ___, 136 S. Ct. 2090 (2016), RICO’s private right of action does not apply extraterritorially and therefore “Section 1964 (c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries.” 136 S. Ct. at 2110. In *RJR Nabisco*, however, the plaintiffs had waived any claim for domestic injury and so the Supreme Court left open the question of how courts should determine whether an alleged injury was foreign or domestic. *Bascunan*, 874 F.3d at 806. The Second Circuit answered that question in *Bascunan*, holding that “[w]here the injury is to tangible property, we conclude that, absent some extraordinary circumstances, the injury is domestic *if plaintiff’s property was located in the United States when it was stolen or harmed*, even if the plaintiff himself resides abroad.” *Id.* at 820-21 (emphasis added). In applying this rule, the court rejected the argument that money or other “financial property” should be distinguished from other forms of property such as real property or chattels. *Id.* at 822-23. The court also explained that “a defendant’s use of the U.S. financial system to conceal or effectuate his tort does not, on its own, turn an otherwise foreign injury into a domestic one.” *Id.* at 819. Similarly, given “the primacy of American banking and financial institutions,” the court explained, “the use of bank accounts located within the United States to facilitate or conceal the theft of the property located outside the United States does not, on its own, establish a domestic injury.” *Id.*

Applying these rules to the four alleged schemes in *Bascunan*, the Second Circuit held that only two of them alleged a domestic injury (the misappropriation of funds from the New

York account and the theft from the New York safety deposit box). The other two alleged schemes--laundering money through New York bank accounts and diverting funds from Chile to New York—failed to allege a domestic injury because the only domestic conduct alleged were the transfers or the laundering using the U.S. accounts. *Id.* at 817-820. Thus *Bascunan* clarifies *RJR Nabisco*'s requirement that a civil RICO complaint allege a domestic injury, holding that if the alleged injury is the loss of tangible property, including money, then the property must be located in the United States in order to support a RICO violation. Furthermore, if the injury is intangible, *Bascunan* suggests that the court looks to the plaintiff's residence to decide where the injury occurred.¹

Applying these principles to this case, plaintiff's alleged injury consists of two components: (1) a financial injury in the form of plaintiff's payments to Bermuda insurers for the increased costs of allegedly unnecessary medical scans and alleged payments of "millions of dollars on contracts tainted by bribes" (Opp. at 13), although plaintiff fails to identify such contracts (Reply Br. at 3-4); and (2) an alleged intangible injury caused by the deprivation of the honest services of Dr. Brown. Opp. at 14, n.5. Under the framework articulated in *Bascunan*, neither of these injuries is domestic. First, the alleged financial injury occurred in Bermuda where plaintiff claims that as an "end-payor" (Opp. at 15-16) it paid more to Bermuda insurance companies than it should have due to the increased cost of allegedly unnecessary scans. And even if some of plaintiff's payments to Bermuda insurers eventually found their way to Lahey via a U.S. bank transfer (a basis for the alleged predicate act of money laundering), that fact alone does not establish a domestic U.S. injury. *See Bascunan*, 874 F.3d at 818 (rejecting the money laundering scheme using U.S. banks as establishing a domestic injury). The property –

¹ For example, the Second Circuit noted that had the allegation been the "diminished value of ownership in a company...the clear locational nexus was the shareholder's place of residence." 874 F.3d at 823.

the money that was allegedly overpaid – was located in Bermuda at the time the injury was allegedly sustained and therefore its loss does not constitute a “domestic injury” under *Bascunan*. Second, the intangible injury in the form of the alleged deprivation of honest services or Dr. Brown’s alleged breach of fiduciary duty (Opp. at 3) also occurred, if at all, in Bermuda – where plaintiff is located. In short, plaintiff has failed to allege a domestic injury, as required under civil RICO. For this reason, as well as the others previously briefed, this complaint should be dismissed.

Dated: January 8, 2018

Respectfully submitted,

LAHEY CLINIC, INC. (a.k.a. LAHEY HOSPITAL & MEDICAL CENTER, BURLINGTON), and LAHEY CLINIC HOSPITAL, INC.,

By its attorneys,

/s/ Yvonne W. Chan

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CERTIFICATE OF SERVICE

I, Yvonne W. Chan, hereby certify that I caused this document to be filed through the ECF system, which will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants, if any, on January 8, 2018.

/s/ Yvonne W. Chan