UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI

MEDICAL SUPPLY CHAIN, INC.,	)	Case No. 05-0210-CV-W-ODS
	)	
Plaintiff,	)	
	)	
NOVATION, LLC	)	
NEOFORMA, INC.	)	
ROBERT J. ZOLLARS	)	
VOLUNTEER HOSPITAL ASSOCIATION	)	
CURT NONOMAQUE	)	
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)	
ROBERT J. BAKER	)	
US BANCORP, NA	)	
US BANK	)	
JERRY A. GRUNDHOFFER	)	
ANDREW CESERE	)	
THE PIPER JAFFRAY COMPANIES	)	
ANDREW S. DUFF	)	
SHUGHART THOMSON & KILROY	)	
WATKINS BOULWARE, P.C.	)	
	)	
Defendants.	)	
	)	

SUGGESTIONS IN REPLY TO PLAINTIFF'S SUGGESTION IN OPPOSITION TO DEFENDANT ROBERT J. ZOLLARS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

I. INTRODUCTORY STATEMENT

Neither due process nor Missouri's long-arm statute allows for jurisdiction over an individual who has no business or contracts with, and has not committed any tortious acts upon, any resident of the State of Missouri. Plaintiff ignores these basic principles of law,

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however, and argues that this Court should exercise jurisdiction over Mr. Zollars for two primary reasons: (1) that Mr. Zollars was, at one time, an alleged "officer in Cardinal, a subsidiary of [co-defendant] Novation, LLC," and (2) Mr. Zollars is a member of an alleged conspiracy to (a) "overcharg[e] government and private insurance providers," and (b) to commit antitrust and RICO violations by operating a "price maintenance information exchange" between Neoforma and other defendants. (Opposition, at 3, 4.)

These arguments are meritless for several reasons. First, Plaintiff has failed to allege any facts establishing jurisdiction under Missouri's long-arm statute, or under any other theory of jurisdiction. Second, plaintiff has failed to allege facts establishing that Mr. Zollars committed any RICO or antitrust violations in his individual capacity. Third, this Circuit has not adopted the "conspiracy theory" of jurisdiction advanced by plaintiff, but even if it had, plaintiff has not alleged that Mr. Zollars was a member of any conspiracy in his personal capacity. Fourth and finally, plaintiff has failed to carry its burden of proving that the RICO or antitrust statutes compel jurisdiction over Mr. Zollars. Accordingly, the Court cannot exercise personal jurisdiction over Mr. Zollars and he should be dismissed from this case.

II. PLAINTIFF'S UNSUPPORTED ALLEGATIONS NOT ONLY FAIL TO ESTABLISH JURISDICTION UNDER MISSOURI'S LONG ARM STATUTE, BUT EXERCISING JURISDICTION OVER MR. ZOLLARS DOES NOT COMPORT WITH DUE PROCESS

Missouri's long-arm statute allows this Court to exercise jurisdiction over out-of-state defendants in six specific instances. Mo. Rev. Stat. § 506.500 (Lexis 2004). According to plaintiff, the Complaint establishes a "prima facie showing of sufficient contacts based on" three of these instances: "transactions for hospital supplies, tortious conduct including antitrust violations and contracts for escrow accounts and real estate" in Missouri. (Opposition, p. 3.) But there are several problems with this position. First, as set forth in Mr. Zollars' original moving papers and in his declaration, he has not engaged in any real estate or business transactions in Missouri. Second, all of plaintiff's allegations concerning these matters are directed at Mr. Zollars in his capacity as CEO of co-defendant Neoforma, and as such do not

support jurisdiction over Mr. Zollars individually. Third, none of the allegations are supported by any evidence, and therefore are insufficient as a matter of law. Finally, this Court cannot, as a matter of law, invoke jurisdiction over Mr. Zollars under the antitrust laws. For these reasons, the complaint against Mr. Zollars should be dismissed.

A. Mr. Zollars Has Not Engaged In Any Business or Real Estate Transactions In the State of Missouri

Plaintiff accuses Mr. Zollars of engaging in transactions for hospital supplies and in having (or committing tortious acts by having) contracts for escrow accounts and real estate in Missouri. (Opposition, p. 3.) By doing so, plaintiff appears to be invoking either § 506.500(1) or § 506.500(2), which allow jurisdiction over causes of action arising from the transaction of any business or the making of any contract within Missouri. Mo. Rev. Stat. § 506.500(1)-(2). However, plaintiff offers no evidence to support its position; and the only allegations it makes in this regard appear in paragraph 176 of the Complaint. (Opposition ¶ 6.) This is insufficient, especially in light of Mr. Zollars' declaration to the contrary.

"[F]acts adduced in opposition to jurisdictional allegations are considered more reliable than mere contentions offered in support of jurisdiction." *Leasco Data Processing Equip. Corp.,* 319 F.Supp. 1256, 1260 (S.D.N.Y. 1970), *rev'd. on other grounds,* 468 F.2d 1326. Here, the only evidence of jurisdiction is in Mr. Zollars' declaration. Mr. Zollars does not own, rent, lease, or utilize any property of any kind in the State of Missouri. (Declaration of Robert J. Zollars ("Zollars Dec.") ¶ 3.) He is not personally a party to any contract governed by Missouri law, executed in Missouri, or with any company or individual located in Missouri. (*Id.* ¶ 4.) And, he does not conduct any personal business in the State. (*Id.* ¶ 5.) Facts such as these refute plaintiff's contrary allegations and arguments. *Leaseco,* at 1260. Accordingly, there is no jurisdiction over Mr. Zollars under § 506.500(1)-(2).

B. Unsupported Allegations In The Complaint Cannot Be A Basis For Jurisdiction Over Mr. Zollars Because The Allegations Describe Things Mr. Zollars' Supposedly Did Only In His Capacity As CEO Of Neoforma

Mr. Zollars has been sued individually and has moved to dismiss all allegations levied against him in his personal capacity alone. Although it has the burden of proving that jurisdiction over Mr. Zollars is proper, *Enterprise Rent-A-Car Co. v. U-Haul Int'l., Inc.*, 327 F.Supp.2d 1032, 1036 (E. D. Mo. 2004), plaintiff's Opposition focuses almost exclusively on actions and statements that were made by Mr. Zollars, not individually, but solely in his capacity as CEO of Neoforma. For example, Mr. Zollars' allegedly made wrongful "statements as the CEO of the publicly traded Neoforma, Inc.," which were printed in The Wall Street Journal on December 20, 2001. (Opposition, p. 1 ¶ 3 [emphasis added]; *see also* Complaint ¶ 376.) Similarly, the complaint "describes the notice given to Mr. Zollars and his company Neoforma Inc. about the failure to obtain injunctive relief from the cartel's actions," and "the impending threat of the monopolization of hospital supplies from the sale of Neoforma, Inc. to GHX, LLC. As CEO [of Neoforma], Zollars will determine and control whether this event occurs." (Opposition, p. 2 ¶¶ 4, 5 [emphasis added], citing Complaint ¶¶ 399-422.) These allegations, which focus exclusively on Mr. Zollars' actions as a representative of a corporation, do not support the exercise of jurisdiction over Mr. Zollars as a matter of law. *Cantrell v. Extradition Corp. of America*, 789 F.Supp. 306, 309 (W.D. Mo. 1992) (recognizing the "fiduciary shield" doctrine); *see also Cawley v. Bloch,* 544 F.Supp. 133, 135 (D. Md. 1982) (holding that an individual defendant who acted in Maryland as a representative of his corporation" and not in his "individual capacity" could not be subject to personal jurisdiction under that State's long-arm statute).

C. Plaintiff Has Failed To Carry Its Burden Of Proof Because It Has Not Presented Any Evidence That Mr. Zollars Engaged In Any Wrongdoing

While allegations in a complaint "are viewed in the light most favorable to the plaintiffs, there must nonetheless be some evidence upon which a prima facie showing of jurisdiction may be found to exist." *Tax Lease Underwriters, Inc. v. Blackwall Green, Ltd.,* 613

F.Supp. 1082, 1084 (E.D. Mo. 1985) (emphasis added); *see also, Hanline v. Sinclair Global Brokerage Corp.,* 652 F.Supp. 1457, 1458 (W.D. Mo. 1987). Here, there is none. As plaintiff tacitly admits, the only allegations against Mr. Zollars in his individual capacity are those set forth in paragraph 176 of the Complaint. (Opposition, ¶ 6.) Contrary to plaintiff's suggestion, these allegations do not "describe[] Zollars as an antitrust person with a significant personal interest separate from Neoforma, Inc. by virtue of having been an officer in Cardinal." (*Id.*) Rather, these allegations simply state that Mr. Zollars was an untitled, un-ranked "Cardinal employee" who "left Cardinal and later joined Neoforma." (Complaint ¶ 176 (emphasis added); *see also* Mr. Zollars' Suggestions, p. 6.) There is no evidence (nor even an allegation) that Mr. Zollars engaged in any tortious conduct as a Cardinal employee. Accordingly, plaintiff's argument that Mr. Zollars has an "interest" in the alleged antitrust violations by virtue of the position he held at Cardinal cannot be the basis of jurisdiction as a matter of law. (Opposition, p. 2 ¶ 6; *Tax Lease,* at 1084; *Hanline,* at 1458.)

III. THERE IS NO JURISDICTION OVER MR. ZOLLARS UNDER THE ANTITRUST LAWS

As set forth in Mr. Zollars' opening papers, there is no basis for jurisdiction over Mr. Zollars under the antitrust laws. In opposition, however, plaintiff argues that jurisdiction is proper under the antitrust laws because (1) there is a nationwide service of process provision in 15 U.S.C. § 5; and (2) Mr. Zollars is subject to jurisdiction based on his alleged "responsib[ility] for having in place internal controls" at Neoforma designed to "prevent losses to Neoforma" and its "shareholders." (Opposition, p.6-7.) These arguments lack merit.

With respect to the nationwide service of process argument, 15 U.S.C. § 22 cannot be a basis for jurisdiction because that "nationwide" service of process statute applies to corporations only. (Defendant Zollars' Suggestions, pp. 8-9; *see also* 15 U.S.C. § 22; *Kingsepp vs. Wesleyan University*, 763 F. Supp. 22, 25 (S.D.N.Y. 1991).) Recognizing this, plaintiff now argues in opposition that this Court should invoke jurisdiction under 15 U.S.C. § 5 because it would "facilitate the adjudication of this matter." (Opposition, p. 7.) But as this Court

recognized in its April 20, 2005 Order Denying Plaintiff's Motion for U.S. Marshall Service of Process, plaintiff cannot invoke 15 U.S.C. § 5 because it is not the U.S. Attorney. Stated another way, 15 U.S.C. § 5 does not apply to private actions by corporations. (*See* 15 U.S.C. § 5; *Greer v. Stoller*, 77 F.1, 3 (W.D. Mo. 1896); *see also Albert H. Cayne Equipment Corp. v. Union Asbestos & Rubber Co.,* 220 F.Supp. 784 (S.D.N.Y. 1963).)

Plaintiff's next argument, that Mr. Zollars "subjected himself to federal antitrust law" because he allegedly violated his responsibility to Neoforma and its shareholders to maintain adequate "internal controls under The Sarbanes-Oxley Act," by "execut[ing] long term exclusive agreements between Neoforma" and Novation, LLC and GHX, LLC, is patently ludicrous. First, there are no allegations in the complaint – let alone evidence – of Mr. Zollars being responsible for "internal controls" under Sarbanes-Oxley. But even if such allegations existed, Mr. Zollars would have undertaken such responsibilities on behalf of Neoforma, and not in his personal capacity. Second, any contracts that Mr. Zollars might have executed on behalf of Neoforma are just that – contracts executed in his capacity as CEO of Neoforma, on behalf of Neoforma. They have nothing to do with Mr. Zollars' personal liability, and are irrelevant to a consideration of whether this Court can exercise personal jurisdiction over Mr. Zollars as an individual in this case. Finally, there are no allegations in the Complaint demonstrating that plaintiff has any standing to sue as a shareholder, or on behalf of Neoforma, for Mr. Zollars' alleged antitrust violations. This argument is frivolous, and should be given no weight.

IV. THE "CONSPIRACY THEORY" OF JURISDICTION IS INAPPLICABLE BECAUSE THE EIGHTH CIRCUIT HAS NOT ADOPTED IT, AND THERE IS NO NEXUS BETWEEN MR. ZOLLARS' ALLEGED CONDUCT AND THE ALLEGED CONSPIRACY

Plaintiff also argues that jurisdiction exists under Missouri's long-arm statute because Mr. Zollars engaged in tortious conduct in the State by being a member of a conspiracy to commit antitrust and RICO violations. (Opposition, pp. 3-5.) This is sometimes known as the "conspiracy theory" of jurisdiction. The conspiracy theory of jurisdiction "is based on two principles: (1) that the acts of one co-conspirator are attributable to all co-conspirators; and (2)

that the constitutional requirement of minimum contacts between non-resident defendants and the forum can be met if there is a substantial connection between the forum and a conspiracy entered into by such defendants." *Cawley,* 544 F.Supp. at 134; *West Virginia v. Morton International, Inc.*, 264 F.Supp. 689, 691-692 (D. Minn. 1967); *I.S. Joseph Co., Inc. v. Mannesmann Pipe & Steel Corp. et. al.,* 408 F.Supp. 1023, 1024 (D. Minn. 1976). Thus, "when several individuals (1) conspire to do something (2) that they could reasonably expect to have consequences in a particular forum, if one co-conspirator (3) who is subject to personal jurisdiction in the forum (4) commits overt acts in furtherance of the conspiracy, those acts are attributable to the other co-conspirators, who thus become subject to personal jurisdiction even if they have no other contacts with the forum." *Cawley,* at 134.

An exhaustive search of the case law reveals that the Eighth Circuit has not adopted or even ruled on this "co-conspirator theory" of jurisdiction. Importantly, however, several district courts within the Eighth Circuit have rejected this expansive theory. *See, e.g., I.S. Joseph Co.*, at 1024; *see also Morton,* at 691-692 (rejecting the co-conspirator theory to expand venue to out of state defendant). Even if the Court were to accept this theory of jurisdiction, it would still not be enough to draw Mr. Zollars into this lawsuit because there is no factual evidence in the Complaint to support allegations of Mr. Zollars' involvement in a conspiracy.[1] Indeed, the only allegations concerning Mr. Zollars in his personal capacity are found in paragraph 176 of the Complaint. These allegations concern Mr. Zollars former employment at Cardinal, a fact that has no "nexus" or relationship to the alleged conspiracy. *In re Bulk Popcorn Antitrust Litig.,* 1990 U.S. Dist. LEXIS 16333 at * 9-*10 (D. Minn. 1990) (holding that the

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[1] Contrary to plaintiff's belief, the argument that plaintiff must allege evidence of Mr. Zollars' involvement in alleged wrongdoing does not mean that plaintiff must "aver[] that Mr. Zollars committed RICO predicate acts" or other conspiratorial acts "with his own hands." (Opposition, p. 3.) Rather, it means that, in order for the Court to have jurisdiction over Mr. Zollars, plaintiff must provide evidence in the Complaint demonstrating that Mr. Zollars in his personal capacity was a member of a conspiracy, or conspired to do something with another defendant who is subject to the Court's jurisdiction. *See, e.g., Hanline v. Sinclair Global Brokerage Corp.,* 652 F.Supp. 1457, 1458-1459 (W.D. Mo. 1987); *Cawley,* at 134. There is no such evidence here.

conspiracy theory cannot be a basis for jurisdiction over a non-resident defendant that lacks minimum contacts with the forum state unless there is a relationship or nexus between the alleged conspiracy and the specific factual assertion).[2] Without factual evidence connecting Mr. Zollars to the conspiracy, plaintiff cannot use the "conspiracy theory" of jurisdiction to salvage its inadequate jurisdictional allegations against Mr. Zollars. *Hanline v. Sinclair Global Brokerage Corp.,* 652 F.Supp. 1457, 1458-1459 (W.D. Mo. 1987).

V. PLAINTIFF HAS NOT MET ITS BURDEN OF PROVING JURISDICTION IS PROPER UNDER THE RICO STATUTES

As a last resort, plaintiff alleges that Mr. Zollars is subject to the court's jurisdiction as a "co-conspirator" in RICO actions. (Opposition, p. 3.) This allegation, too, is meritless. As set forth above, there are no facts in the Complaint to support the inference that Mr. Zollars conspired with any of the named defendants, and the Eighth Circuit has not adopted the "conspiracy theory" of jurisdiction. Similarly, plaintiff has failed to allege any evidence that Mr. Zollars, in his personal capacity, took part in any RICO-based conspiracy, and thus the claim fails as a matter of law. *Hanline,* at 1458-1459. However, in the event that the Court considers whether jurisdiction is proper under the RICO statutes, we address such argument here.

In 18 U.S.C. § 1965(b), "Congress provided for service of process upon RICO defendants residing outside the federal court's district when it is shown that 'the ends of justice' require it." *Butcher's Union Local No. 498 et al. v. SDC Investment, Inc. et al.,* 788 F.2d 535, 538 (9th Cir. 1986); *see also Rust v. City of Kansas City,* 1985 U.S. Dist. LEXIS 12328, *3 (W.D. Mo.) "Under the standard rules of statutory construction, the court should construe this provision in accordance with the ordinary meaning of the words used, and the "purpose or object" Congress sought to accomplish by the legislation." (*Butcher's,* at 538.). The purpose or object of the RICO statutes is to "eradicate organized crime in this country," and the "ends of justice" provision is intended to "bring all members of a nationwide RICO conspiracy before a

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[2] Although this case has not been officially published, it was cited in plaintiff's Opposition and, as such, is addressed here.

court in a single trial." *Id.* "Consequently, the 'ends of justice' requirement in § 1965(b) is fulfilled when *venue* is properly laid in the forum district at least as to *one* defendant and there exists *no* other district in which venue would be appropriate as to all defendants." (Roddy, K., *Rico in Business and Commercial Litigation,* p. 6-18, § 6:06 (McGraw-Hill 1991), *citing Butcher's Union,* at 539.)

In this case, plaintiff has failed to carry its burden of proving that Mr. Zollars is subject to jurisdiction under 18 U.S.C. § 1965(b). In particular, plaintiff has made no effort at all to demonstrate that the "ends of justice" have been satisfied, pursuant to § 1965(b).[3] And, although venue might be properly laid here with respect to at least one defendant, there is another, more appropriate district in which all defendants might be subject to venue and jurisdiction: The Kansas District Court. That is where plaintiff filed its first lawsuit against many of the other defendants in this case, and that is where several of those defendants have urged this Court to transfer this case.

VI. CONCLUSION

Because it has failed to allege any facts supporting its baseless allegations, plaintiff has not carried its burden of proof on the issue of jurisdiction. Contrary to what plaintiff suggests, Mr. Zollars does not transact business in this State, nor is he a party to any contracts in this State. He is not a party to any alleged conspiracy, or to any alleged RICO or antitrust violations. Accordingly, the exercise of personal jurisdiction over Mr. Zollars would violate Missouri's long-arm statute and due process of law and the complaint against Mr. Zollars should be dismissed.

[3] In fact, plaintiff does not even mention § 1965(b). Instead, plaintiff points to 18 U.S.C. § 1962 – the substantive, criminal RICO law – and incorrectly conflates § 1962's substantive requirements with § 1965's jurisdictional requirements.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2005, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following::

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/s/ John K. Power
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