IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
KANSAS CITY, KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-2299-KHV**
	)	
NOVATION, LLC, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF DEFENDANTS US BANCORP, U.S. BANK, JERRY S. GRUNDHOFER, ANDREW CECERE, THE PIPER JAFFRAY COMPANIES AND ANDREW S. DUFF IN OPPOSITION TO PLAINTIFF'S FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT

The "First Plaintiff's Motion for Partial Summary Judgment" should be denied. Not only does the motion fail on the merits of its legal arguments, the "statement of facts" also cannot support the plaintiff's request for partial summary judgment. The supposed "facts" are largely inadmissible statements of legal conclusion, mere allegation, contain irrelevant and immaterial information, and otherwise constitute inadmissible hearsay. Plaintiff's motion is in reality a disguised and belated attempt to respond further to the defendants' various motions to dismiss. Moreover, plaintiff seeks improper advisory opinions from the Court through its motion. Because of the numerous procedural and substantive deficiencies in plaintiff's motion, it must be denied.

RESPONSE TO PLAINTIFF'S "STATEMENT OF FACTS FOR PARTIAL SUMMARY JUDGMENT ON LEGAL ISSUES"

Defendants hereby respond to plaintiff's "statement of facts" as follows:

1. Controverted. Objection. Plaintiff's "statement" is based solely upon a "news story," is hearsay and, thus, is inadmissible evidence for purposes of summary judgment. *See Kephart v. Data Sys. Intern., Inc.*, 243 F. Supp.2d 1205, 1209 (D. Kan. 2003); *Wells Dairy, Inc. v. Travelers Indem. Co.*, 241 F. Supp.2d 945, 956 (N.D. Iowa 2003); *Countryside Oil Co. v. Travelers Ins. Co.*,

928 F. Supp. 474, 482 (D.N.J. 1995); *see also Villodas v. HealthSouth Corp.*, 338 F. Supp.2d 1096, 1104 (D. Ariz. 2004) ("news stories" not admissible evidence). Moreover, the supposed "facts" are irrelevant to these defendants.

2. Controverted. Objection. Plaintiff's "statement" is based solely upon unsworn comments in a "news story," is hearsay and, thus, is inadmissible evidence for purposes of summary judgment. *See Kephart v. Data Sys. Intern., Inc.*, 243 F. Supp.2d 1205, 1209 (D. Kan. 2003); *Wells Dairy, Inc. v. Travelers Indem. Co.*, 241 F. Supp.2d 945, 956 (N.D. Iowa 2003); *Countryside Oil Co. v. Travelers Ins. Co.*, 928 F. Supp. 474, 482 (D.N.J. 1995); *see also Villodas v. HealthSouth Corp.*, 338 F. Supp.2d 1096, 1104 (D. Ariz. 2004) ("news stories" not admissible evidence). Moreover, the supposed "facts" are irrelevant to these defendants.

3. Controverted. Objection. Plaintiff's "statement" is based solely upon hearsay and, thus, is inadmissible evidence for purposes of summary judgment. *See Kephart v. Data Sys. Intern., Inc.*, 243 F. Supp.2d 1205, 1209 (D. Kan. 2003); *Wells Dairy, Inc. v. Travelers Indem. Co.*, 241 F. Supp.2d 945, 956 (N.D. Iowa 2003); *Countryside Oil Co. v. Travelers Ins. Co.*, 928 F. Supp. 474, 482 (D.N.J. 1995); *Villodas v. HealthSouth Corp.*, 338 F. Supp.2d 1096, 1104 (D. Ariz. 2004). Moreover, the supposed "facts" are irrelevant to these defendants.

4. Controverted. Objection. Plaintiff's "statement" is based solely upon hearsay and legal argument and, thus, is inadmissible evidence for purposes of summary judgment. *See Kephart v. Data Sys. Intern., Inc.*, 243 F. Supp.2d 1205, 1209 (D. Kan. 2003); *Wells Dairy, Inc. v. Travelers Indem. Co.*, 241 F. Supp.2d 945, 956 (N.D. Iowa 2003); *Countryside Oil Co. v. Travelers Ins. Co.*, 928 F. Supp. 474, 482 (D.N.J. 1995); *Villodas v. HealthSouth Corp.*, 338 F. Supp.2d 1096, 1104 (D. Ariz. 2004). Moreover, the supposed "facts" are irrelevant to these defendants.

5. Controverted. Although plaintiff did file an amended complaint in 2002 against certain individuals and companies, those claims were dismissed by the district court and affirmed on appeal by the Tenth Circuit Court of Appeals. *Medical Supply Chain, Inc. v. US Bancorp*, 2003 WL 21479192 (D. Kan. 2003), *aff'd* 112 Fed. Appx. 730 (10th Cir. 2004). Plaintiffs may not properly rely upon allegations in their complaint, Fed. R. Civ. P. 56(e), particularly one that has been dismissed by the court.

6. Controverted. Although plaintiff did file an amended complaint in 2002 against certain individuals and companies, those claims were dismissed by the district court and affirmed on appeal by the Tenth Circuit Court of Appeals. *Medical Supply Chain, Inc. v. US Bancorp*, 2003 WL 21479192 (D. Kan. 2003), *aff'd* 112 Fed. Appx. 730 (10th Cir. 2004). Plaintiffs may not properly rely upon allegations in their complaint, Fed. R. Civ. P. 56(e), particularly one that has been dismissed by the court.

7. Controverted. Although plaintiff did file an amended complaint in 2002 against certain individuals and companies, those claims were dismissed by the district court and affirmed on appeal by the Tenth Circuit Court of Appeals. *Medical Supply Chain, Inc. v. US Bancorp*, 2003 WL 21479192 (D. Kan. 2003), *aff'd* 112 Fed. Appx. 730 (10th Cir. 2004). Plaintiffs may not properly rely upon allegations in their complaint, Fed. R. Civ. P. 56(e), particularly one that has been dismissed by the court. Moreover, the supposed "affidavit" does not make clear what "facts" are based upon personal knowledge or, as the "affidavit" states, are based upon "information" or "belief," which is improper. *See Hughes v. Amerada Hess Corp.*, 187 F.R.D. 682, 685 (M.D. Fla., 1999) ("Where there is a strict statutory requirement that an affidavit be based upon personal knowledge, as in Rule 56(e), then an affidavit based on information and belief is insufficient.") (citation omitted).

8. Defendants admit that plaintiffs' attempts to obtain injunctive relief failed but deny any and all claims of "monopolization." Plaintiffs' claims were dismissed by the district court and affirmed on appeal by the Tenth Circuit Court of Appeals. *Medical Supply Chain, Inc. v. US Bancorp*, 2003 WL 21479192 (D. Kan. 2003), *aff'd* 112 Fed. Appx. 730 (10th Cir. 2004).

9. Controverted. Objection. The evidence supporting plaintiff's supposed statement of "fact" is the current complaint and its allegations which are wholly insufficient to support summary judgment. *See* Fed. R. Civ. P. 56(e); *Earwood v. Norfolk So. Ry. Co.*, 845 F. Supp. 880, 884 (N.D. Ga. 1993).

10. Controverted. Objection. The evidence supporting plaintiff's supposed statement of fact is the current complaint which is wholly insufficient to support summary judgment. *See* Fed. R. Civ. P. 56; *Earwood v. Norfolk So. Ry. Co.*, 845 F. Supp. 880, 884 (N.D. Ga. 1993). Moreover, the supposed "facts" are irrelevant to these defendants.

11. Controverted. Objection. Defendants dispute that any submission to the Kansas Disciplinary Council was "fraudulent." Not only is plaintiff's "statement" a legal conclusion, but the material supporting plaintiff's supposed statement of fact clearly demonstrates the validity of the submission. Finally, the supposed statement of "fact" is irrelevant to these defendants.

12. Controverted. Objection. The evidence supporting plaintiff's supposed statement of fact is the current complaint and its allegations which are wholly insufficient to support summary judgment. *See* Fed. R. Civ. P. 56(e); *Earwood v. Norfolk So. Ry. Co.*, 845 F. Supp. 880, 884 (N.D. Ga. 1993). In addition, defendants dispute that any submission to the Kansas Disciplinary Council was "fraudulent." The material supporting plaintiff's supposed statement of fact clearly demonstrates the validity of the submission. Moreover, the statement of "fact" is irrelevant to these defendants.

13. Controverted. Objection. Plaintiff's "statement" is based solely upon hearsay and, thus, is inadmissible evidence for purposes of summary judgment. *See Kephart v. Data Sys. Intern., Inc.*, 243 F. Supp.2d 1205, 1209 (D. Kan. 2003); *Wells Dairy, Inc. v. Travelers Indem. Co.*, 241 F. Supp.2d 945, 956 (N.D. Iowa 2003); *Countryside Oil Co. v. Travelers Ins. Co.*, 928 F. Supp. 474, 482 (D.N.J. 1995); *Villodas v. HealthSouth Corp.*, 338 F. Supp.2d 1096, 1104 (D. Ariz. 2004). Moreover, the supposed "facts" are irrelevant to these defendants.

14. Controverted. Objection. The evidence supporting plaintiff's supposed statement of "fact" include the current complaint and its allegations which are wholly insufficient to support summary judgment. *See* Fed. R. Civ. P. 56(e); *Earwood v. Norfolk So. Ry. Co.*, 845 F. Supp. 880, 884 (N.D. Ga. 1993). Moreover, the supposed "affidavit" does not make clear what "facts" are based upon personal knowledge or, as the "affidavit" states, are based upon "information" or "belief" which is improper. *Hughes v. Amerada Hess Corp.*, 187 F.R.D. 682, 685 (M.D. Fla., 1999) ("Where there is a strict statutory requirement that an affidavit be based upon personal knowledge, as in Rule 56(e), then an affidavit based on information and belief is insufficient.") (citation omitted). The "affidavit" is filled with speculation and innuendo inappropriate for consideration as "personal knowledge." Fed. R. Civ. P. 56(e).

SUMMARY JUDGMENT STANDARD

Although Fed. R. Civ. P. 56 permits the filing of motions for partial summary judgment, some courts have held that partial summary judgment motions are disfavored. *See Tilcon Minerals, Inc. v. Orange and Rockland Util., Inc.*, 851 F. Supp. 529, 531 (S.D.N.Y. 1994). That certainly is the case here where plaintiff's motion adds nothing to the ultimate disposition of the entire matter and, like many of its other filings, plaintiff's piecemeal effort is wasting valuable resources of the Court and parties. No efficiencies are created by these improvident and spurious filings, yet defendants remain compelled to continue responding. Enough is enough.

Moreover, plaintiff's motion is procedurally and substantively deficient in that plaintiff relies upon inadmissible and irrelevant evidence of its supposed "facts" and inapposite law to support the underlying the motion. That is wholly insufficient. *Earwood v. Norfolk So. Ry. Co.*, 845 F. Supp. 880, 884 (N.D. Ga. 1993). In these circumstances, defendants are not obligated to put forth additional evidence. *Id*.

ARGUMENT

Plaintiff's motion and memorandum are nothing more than a belated effort to save its meritless RICO claim from dismissal.[1] Plaintiff seeks only an advisory ruling from this Court concerning what it might prove or be permitted to prove should this case ever reach trial. But that is not the purpose of a dispositive summary judgment motion. Because the motion is insufficient as a matter of law, it must be denied.

Plaintiff's motion is a virtual cut-out of an opinion from the district court in *United States v. Philip Morris USA*, 327 F. Supp.2d 13 (D.D.C. 2004). While plaintiff argues that the present case is somehow parallel to the United States' action against the tobacco industry, notwithstanding the spurious and caustic nature of those of those characterizations, any factual basis for the comparison is utterly lacking. The United States' motion sought to address certain affirmative defenses pleaded in that case; however, here most of the defendants have filed dispositive motions to dismiss and have not yet filed answers and affirmative defenses. Thus, unlike in *Philip Morris*, any court ruling on this motion would be premature and advisory. The motion should be denied.

PLAINTIFF HAS NOT PLEADED THAT THE INDIVIDUAL DEFENDANTS ARE DISTINCT FROM THE RICO ENTERPRISE.

Although plaintiff seeks by its motion to have the Court rule as a matter of law that the defendants in this case are separate and distinct from the supposed RICO enterprise, nowhere in

[1] Defendants' motion to dismiss the plaintiffs' complaint remains pending.

Count XV of plaintiff's complaint does it even plead that allegation. Nor has any affirmative defense been raised as to this issue at this time. Moreover, there are no "facts" in plaintiff's "statement of facts" to support its proposition and, therefore, nothing has been proven to demonstrate that each defendant is distinct from the supposed RICO enterprise. Whether the point is ultimately disputed, plaintiff's motion should be denied at this time on the sole basis that plaintiff has not demonstrated uncontroverted facts–nor has it even pleaded an allegation in its complaint–that each defendant is distinct from the alleged RICO enterprise.

Finally, because an affirmative defense has not been raised as to this issue as yet, plaintiff is seeking through this motion an improper advisory opinion as to its viability. *Gusdonovich v. Business Information Co*., 705 F. Supp. 262, 266 (W.D. Pa., 1985) ("The defendants have not raised this defense in their pleadings, and therefore the plaintiff is seeking, through his motion for summary judgment, an advisory opinion which this court is not empowered to make.") (citation omitted).

Accordingly, plaintiff's first argument for partial summary judgment should be denied.

PLAINTIFF'S ARGUMENT THAT IT MAY ESTABLISH LIABILITY UNDER 28 U.S.C. § 1962(d) WITHOUT PROOF OF PARTICIPATION IN THE OPERATION OR MANAGEMENT OF AN ENTERPRISE FAILS

As with its first argument, plaintiff has not adduced any facts nor has it pleaded that it need not prove participation in the operation or management of a RICO enterprise for purposes of a claim under 28 U.S.C. § 1962(d). In fact, the burden plaintiff has taken upon itself by its pleading is to show that the defendants did participate in the operation and management of a RICO enterprise. *See* Complaint ¶ 577. Based upon the statements and allegations in its complaint, plaintiff cannot now seek summary judgment contrary to its stated legal theory.

As above, plaintiff recites much of the court's order in *United States v. Philip Morris*, 327 F. Supp.2d 13 (D.D.C. 2004) to support its views. Significantly, however, that court distinguished the government's case against the tobacco industry from a private civil RICO claim like Medical

Supply Chain asserts here. *Id*. at 20 n.10. Nothing in *Philip Morris* can or should be read to expand its reach outside of a criminal case or the government's claim for equitable relief.

Regardless of the *Phillip Morris* decision's application to the present case, plaintiff is again seeking an improper advisory opinion from the Court. Plaintiff requests "partial summary judgment that a Defendant's liability for RICO conspiracy does not require that Defendant to [*sic*] participate in the operation or management of the enterprise should be granted." (Pl. Mo. p. 9.) Plaintiff's motion seeks an advisory opinion concerning what it may at some future time try to prove. *Gusdonovich* , 705 F. Supp. at 266; *U.S. v. Seymour Recycling Corp*., 686 F. Supp. 696, 700 (S.D. Ind., 1988) ("[A] ruling by the Court in favor of the Generator Defendants would be an advisory opinion without a sound basis in fact or law.").

Accordingly, plaintiff's second request for a preliminary ruling by this Court must be denied.

PLAINTIFF'S "CLAIM" OF AIDING AND ABETTING IS INSUFFICIENT AS A MATTER OF LAW

Plaintiff asserts in its third argument that it need do nothing more than claim aiding and abetting liability in order for it to stand at trial. Plaintiff's request is that the Court hold that "a Defendant's liability for RICO aiding and abetting liability does not have to be determined at trial." (Pl. Mem. p. 11.) Once again, not only has plaintiff failed to plead "aiding and abetting" in its RICO claim (Count XV), it also has not provided any factual basis for this argument to support summary judgment.

Moreover, plaintiff is incorrect as a matter of law. Although the Tenth Circuit Court of Appeals has apparently not yet decided whether aiding and abetting liability under the RICO statute remains cognizable in a private RICO cause of action (following the United States Supreme Court decision in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994)) the weight of authority holds that aiding and abetting under a private civil RICO claim is not available.

See Pennsylvania Assoc. of Edwards Heirs v. Rightenour, 235 F.3d 839, 844 (3rd Cir. 2000); *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 657 (3rd Cir. 1998); *King v. Deutsche Bank Ag.*, 2005 WL 611954 *28 (D. Ore., Mar. 8, 2005); *Jubelirer v. Mastercard Intern., Inc.*, 68 F. Supp.2d 1049, 1054 (W.D. Wisc. 1999); *Wuliger v. Liberty Bank, N.A.*, 2004 WL 3377416 (N.D. Ohio 2004); *Heffernan v. HSBC Bank USA*, 2001 WL 803719 *7 (E.D.N.Y., Mar. 29, 2001). Plaintiff relies exclusively upon criminal cases which are decidedly inapposite.

Accordingly, based upon the weight of legal authority, plaintiff's argument for partial summary judgment must be denied.

CONCLUSION

For all of the above reasons, plaintiff's motion for partial summary judgment should be denied.[2]

Respectfully submitted,

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[2] Plaintiff's final argument seeking partial summary judgment is asserted solely against the law firm defendant in this case. Accordingly, because plaintiff seeks no relief on its summary judgment motion against these defendants for that argument, defendants do not respond. However, to the extent any response is necessary, defendants hereby incorporate the response of the law firm defendant.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 29th day of September, 2005, to:

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