

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

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

**DEFENDANT SHUGHART THOMSON & KILROY P.C.'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant Shughart Thomson & Kilroy P.C., for its opposition to Plaintiff's "Motion for Partial Summary Judgment," states as follows:

Response to Plaintiff's Statement of Facts

1. Controverted.

a. Objection. Plaintiff's alleged factual allegation contained in Item No. 1 is not properly supported by "pleadings, depositions, answers to interrogatories, and admissions on file" or by affidavits, as is required by Rule 56(c), F.R.Civ.P. and Rule 56.1, D.Kan.R. ("...shall refer with particularity to those portions of the record on which movant relies.").

b. Objection. Item No. 1 is merely supported by the attachment of a newspaper article and as such constitutes 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).

c. Moreover even if properly supported and admissible, the alleged “facts” contained in Item No. 1 are irrelevant to Shughart Thomson, to the claims raised in this litigation, and to plaintiff’s motion for summary judgment.

2. Controverted.

a. Objection. Plaintiff’s alleged factual allegation contained in Item No. 2 is not properly supported by “pleadings, depositions, answers to interrogatories, and admissions on file” or by affidavits, as is required by Rule 56(c), F.R.Civ.P. and Rule 56.1, D.Kan.R. (“...shall refer with particularity to those portions of the record on which movant relies.”).

b. Objection. Item No. 2 is merely supported by the attachment of a newspaper article which references comments allegedly made by an individual. As such, the support for Item No. 2 constitutes hearsay within 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).

c. Moreover even if properly supported and admissible, the alleged “facts” contained in Item No. 2 are irrelevant to Shughart Thomson, to the claims raised in this litigation, and to plaintiff’s motion for summary judgment.

3. Controverted.

a. Objection. Plaintiff’s alleged factual allegation contained in Item No. 3 is not properly supported by “pleadings, depositions, answers to interrogatories, and admissions on file” or

by affidavits, as is required by Rule 56(c), F.R.Civ.P. and Rule 56.1, D.Kan.R. (“...shall refer with particularity to those portions of the record on which movant relies.”).

b. Objection. Item No. 3 is supported in part by the attachment of a newspaper article and in part by hearsay in a pleading in an unrelated matter. As such, the support for Item No. 3 constitutes 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).

c. Moreover even if properly supported and admissible, the alleged “fact” relating to an unrelated case involving unrelated claims and naming unrelated parties, is irrelevant to Shughart Thomson, to the claims raised in this litigation, and to plaintiff’s motion for summary judgment.

4. **Controverted.**

a. Objection. Plaintiff’s alleged factual allegation contained in Item No. 4 is not properly supported by “pleadings, depositions, answers to interrogatories, and admissions on file” or by affidavits, as is required by Rule 56(c), F.R.Civ.P. and Rule 56.1, D.Kan.R. (“...shall refer with particularity to those portions of the record on which movant relies.”).

b. Objection. Item No. 4 is solely supported by hearsay contained in a pleading filed in an unrelated matter. The support for Item No. 4 constitutes 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).

c. Moreover even if properly supported and admissible, the alleged “fact” relating to an unrelated case involving unrelated claims and naming unrelated parties, is irrelevant to Shughart Thomson, to the claims raised in this litigation, and to plaintiff’s motion for summary judgment.

5. Controverted.

a. Objection. Plaintiff filed an amended complaint in 2002 against certain individuals and companies in a separate action. Shughart Thomson affirmatively states that those claims were dismissed by the district court and such dismissal was 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 a complaint that has been dismissed by the Court.

b. Objection. Plaintiff has failed to attach a complaint which is either certified, sworn, or even signed by counsel. Pursuant to Rule 56(e), F.R.Civ.P., Item No. 5 constitutes a factual allegation not properly supported by the record.

c. Moreover even if properly supported and admissible, the alleged “facts” contained in Item No. 5 are irrelevant to Shughart Thomson and to plaintiff’s motion for summary judgment.

6. Controverted.

a. Objection. Plaintiff filed an amended complaint in 2002 against certain individuals and companies in a separate action. Shughart Thomson affirmatively states that those claims were dismissed by the district court and such dismissal was 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 a complaint that has been dismissed by the Court.

b. Objection. Plaintiff has failed to attach a complaint which is either certified, sworn, or even signed by counsel. Pursuant to Rule 56(e), F.R.Civ.P., Item No. 6 constitutes a factual allegation not properly supported by the record.

c. Moreover even if properly supported and admissible, the alleged “facts” contained in Item No. 6 are irrelevant to Shughart Thomson and to plaintiff’s motion for summary judgment.

7. Controverted.

a. Objection. Plaintiff filed an amended complaint in 2002 against certain individuals and companies in a separate action. Shughart Thomson affirmatively states that those claims were dismissed by the district court and such dismissal was 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 a complaint that has been dismissed by the Court.

b. Objection. Plaintiff has failed to attach a complaint which is either certified, sworn, or even signed by counsel. Pursuant to Rule 56(e), F.R.Civ.P., Item No. 7 constitutes a factual allegation not factually supported by the record.

c. Objection. The referenced 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).

d. Moreover even if properly supported and admissible, the alleged “facts” contained in Item No. 7 are irrelevant to Shughart Thomson and to plaintiff’s motion for summary judgment.

8. **Admit.** Defendant admits that plaintiff’s attempts to obtain injunctive relief were unsuccessful. Plaintiff’s 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.**

a. Objection. The evidence supporting plaintiff’s supposed statement of fact in Item No. 9 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).

b. Moreover even if properly supported and admissible, the alleged “facts” contained in Item No. 9 are irrelevant to Shughart Thomson and to plaintiff’s motion for summary judgment.

10. **Controverted.**

a. Objection. The evidence supporting plaintiff’s supposed statement of fact in Item No. 10 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).

b. Shughart Thomson & Kilroy has taken no efforts to “obstruct justice” or “prevent [M]edical Supply from having representation and legal resources. *See Affidavit, attached hereto.*

11. Controverted.

a. Objection. Plaintiff’s alleged factual allegation contained in Item No. 11 is not properly supported by “pleadings, depositions, answers to interrogatories, and admissions on file” or by affidavits, as is required by Rule 56(c), F.R.Civ.P. and Rule 56.1, D.Kan.R. (“...shall refer with particularity to those portions of the record on which movant relies.”).

b. Objection. 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.

c. Neither Shughart Thomson & Kilroy nor Andrew DeMarea filed any Kansas Disciplinary complaint against Medical Supply’s counsel which was allegedly “fraudulent” or improper in any way. *See Affidavit, attached hereto.*

12. Controverted.

a. Objection. Plaintiff’s alleged factual allegation contained in Item No. 12 is not properly supported by “pleadings, depositions, answers to interrogatories, and admissions on file” or by affidavits, as is required by Rule 56(c), F.R.Civ.P. and Rule 56.1, D.Kan.R. (“...shall refer with particularity to those portions of the record on which movant relies.”).

b. Objection. The evidence supporting plaintiff’s supposed statement of fact in Item No. 12 is in part 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).

c. Moreover even if properly supported and admissible, the alleged “facts” contained in Item No. 12 are irrelevant to Shughart Thomson and to plaintiff’s motion for summary judgment.

13. **Controverted.**

a. Objection. Plaintiff’s alleged factual allegation contained in Item No. 13 is not properly supported by “pleadings, depositions, answers to interrogatories, and admissions on file” or by affidavits, as is required by Rule 56(c), F.R.Civ.P. and Rule 56.1, D.Kan.R. (“...shall refer with particularity to those portions of the record on which movant relies.”).

b. 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).

c. Moreover even if properly supported and admissible, the alleged “facts” contained in Item No. 13 are irrelevant to Shughart Thomson and to plaintiff’s motion for summary judgment.

14. **Controverted.**

a. Objection. Contrary to Rule 56(e), F.R.Civ.P., the affidavit supporting Item No. 14 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). Furthermore, the “affidavit” is filled with speculation and innuendo inappropriate for consideration as “personal knowledge.” Fed. R. Civ. P. 56(e).

b. Shughart Thomson & Kilroy has no knowledge of and has not participated in the outrageous claims of plaintiff as set forth in paragraph 14. *See Affidavit, attached hereto.*

LEGAL ARGUMENT

A. Plaintiffs Motion Is Procedurally Improper

Plaintiff’s motion should be denied because it is procedurally inadequate and improper. As described in detail above, the statement of material facts is not properly supported by “pleadings, depositions, answers to interrogatories, and admissions on file” or by affidavits, as is required by Rule 56(c), F.R.Civ.P. and Rule 56.1, D.Kan.R. (“...shall refer with particularity to those portions of the record on which movant relies.”). Additionally, even if plaintiff’s factual allegations were accepted as true, those facts do not warrant the granting of summary judgment under the standards of Rule 56(c), F.R.Civ.P.

As a wholly separate procedural flaw, plaintiff has filed what it refers to as a “pure legal question summary judgment”. (*Memorandum in Support, p.1*). Plaintiff’s motion seeks not a judgment against any particular defendant, or even a judgment on any particular claim. Instead, plaintiff asks this Court to issue certain statements of law in the abstract, “pure legal questions,” (*Memorandum in Support, p.1*), without any necessary application to this case or these parties.

Plaintiff’s motion “requests rulings” (*Memorandum in Support, p.1*), as follows:

- a. that each defendant is distinct from the RICO enterprise,
- b. that a defendant’s liability for RICO conspiracy does not require that defendant to participate in the operation or management of the enterprise,
- c. that RICO liability extends to aiders and abettors, and

d. that the law firm of Shughart Thomson & Kilroy is somehow a RICO defendant.

Summary judgment is permissible only as authorized pursuant to the provisions of Rule 56. Subsection (a) authorizes summary judgment for plaintiffs. Subsection (b) authorizes summary judgment for defendants. Subsection (c) defines the standard whereby motions should be granted only if "there is no genuine issue as to any material fact."

Plaintiff's motion is not authorized within any of the first three provisions of Rule 56. Essentially, plaintiff is attempting to proceed under Rule 56(d), captioned "Case Not Fully Adjudicated on Motion," for his motion for partial summary judgment. But a party may not make an independent Rule 56(d) motion. *SFM Corp. v. Sundstrand Corp.*, 102 F.R.D. 555, 558 (N.D.Ill.1984); *see also Arado v. Geberal Fire Extinguisher Corp.*, 626 F.Supp. 506, 508-09 (N.D.Ill.1985); *Capitol Records, Inc. v. Progress Record Distrib.*, 106 F.R.D. 25, 29-30 (N.D.Ill.1985); *Oberweis Dairy v. Associated Milk Producers, Inc.*, 553 F.Supp. 962, 970-71 (N.D.Ill.1982); *Mendenhall v. Barber-Greene Co.*, 531 F.Supp. 947, 948 (N.D.Ill.1981). Nor may Rule 56(d) be used to single out limited issues on which the court's advice may be obtained. *Wetherill v. University of Chicago*, 548 F.Supp. 66, 67 n. 3 (1982); *Mendenhall*, 531 F.Supp. at 948. Rather, Rule 56 is ancillary to a motion for summary judgment and designed to " 'salvage some results from the judicial effort involved in the denial of a motion for summary judgment.' " 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2737 (quoting *Yale Transp. Corp. v. Yellow Truck & Coach Mfg. Co.*, 3 F.R.D. 440, 441 (D.C.N.Y.1944)); *SFM Corp.*, 102 F.R.D. at 558; *Arado*, 626 F.Supp. at 509; *Capitol Records, Inc.*, 106 F.R.D. at 29.

"[S]ummary judgment must be brought pursuant to Rule 56(a) or 56(b) and must be reasonably justified under 56(c)." *SFM Corp.*, 102 F.R.D. at 558. Rule 56(d) does not authorize the

initiation of motions for summary judgment, the sole object of which is to adjudicate issues which are not dispositive of any claim or part thereof. *Id.*

Plaintiff's motion attempts to mimic an opinion from the Washington, DC district court in *United States v. Philip Morris USA*, 327 F. Supp.2d 13 (D.D.C. 2004). The distinction between these cases are significant. The United States' motion sought to obtain summary judgment pertaining to certain affirmative defenses, or whole "claims," pleaded in that case. Here most of the defendants, including Shughart Thomson, have filed dispositive motions to dismiss and have not yet filed answers or any affirmative defenses. Thus, unlike in *Philip Morris*, any court ruling on this motion would be premature and advisory. The motion should be denied as being procedurally improper.

B. Plaintiffs Motion Should Substantively Be Denied

1. Plaintiff Has Not Plead or Proven That the Individual Defendants are Distinct From the Alleged RICO Enterprise

Plaintiff's motion asks that the Court rule as a matter of law that each defendant in this case is separate and distinct from the alleged RICO enterprise. Unfortunately, that issue is not plead in either plaintiff's complaint or any answer or affirmative defense from any defendant. Plaintiff's statement of material undisputed facts does not include any factual contention which would purport to substantiate that each defendant is distinct from the supposed RICO enterprise.

Because the legal issue has not been plead and no facts have been proven to substantiate the "pure legal question summary judgment" which plaintiff seeks, plaintiff is essentially seeking an improper advisory opinion from this Court. *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).

2. Plaintiff Has Not Plead or Proven Participation in the Operation and Management of the Enterprise

Plaintiff claims that it is entitled to a legal ruling from this Court that a defendant's liability for RICO conspiracy does not require proof that defendant participated in the operation or management of the RICO enterprise. Contrary to the position it now takes, plaintiff plead in its Complaint that the defendants *did* participate in the operation and management of a RICO enterprise. *See* Complaint ¶ 577. And as with its first argument, plaintiff's bizarre statement of material undisputed facts does not include any factual contention which would purport to substantiate that any particular defendant did or did not participate in the operation or management of any alleged RICO enterprise.

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.").

As in plaintiff's previous argument, plaintiff relies upon the court's order in *United States v. Philip Morris*, 327 F. Supp.2d 13 (D.D.C. 2004) to support its position that a defendant's liability for RICO conspiracy does not require proof that defendant participated in the operation or management of the RICO enterprise. Significantly, however, the *Phillip Morris* court distinguished the government's criminal case against the tobacco industry from a private civil RICO claim like Medical Supply Chain asserts here. *Id.* at 20 n.10. Therefore, besides being unsupported by plaintiff's factual allegations and pleadings, plaintiff's legal position is unsupported by the law.

3. Plaintiffs Aiding and Abetting Claim is Inadequate

Plaintiff requests in its third argument that the Court hold that “a Defendant’s liability for RICO aiding and abetting liability does not have to be determined at trial.” (*Memorandum In Support*, p. 11). Once again, plaintiff’s statement of material undisputed facts does not include any factual contention which would purport to substantiate “aiding and abetting,” nor has it plead “aiding and abetting.”

Moreover, plaintiff’s request for summary judgment is incorrect as a matter of law. Although the Tenth Circuit Court of Appeals has not yet addressed 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).

4. Plaintiff Has Not Plead or Proven that Shughart Thomson & Kilroy is Properly a RICO Defendant

Plaintiff’s final request for summary judgment asks that the Court issue a legal ruling that a law firm, such as Shughart Thomson, is not immune from RICO liability. Plaintiff is again seeking an improper advisory opinion from the Court. Shughart Thomson & Kilroy has filed a motion to dismiss, and has not yet filed an answer or any affirmative defense asserting that it is immune from RICO liability. Plaintiff’s motion seeks an advisory opinion on a legal issue which has not yet even

been plead by a party. *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); *see also*, *U.S. v. Seymour Recycling Corp.*, 686 F. Supp. 696, 700 (S.D. Ind., 1988). As filed by plaintiff, this motion for summary judgment should be denied.

Liability under §1962(c) extends only to those persons associated with or employed by an enterprise who “conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering.” 18 U.S.C. §1962(c). The Supreme Court has held that this “conduct” requirement authorizes recovery only against defendants who participate in the operation or management of the enterprise itself. *Reves v. Ernst & Young*, 507 U.S. 170, 185, 113 S.Ct. 1163, 1173, 122 L.Ed.2d 525 (1993). The Eighth Circuit opinion upon which plaintiff relies, *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997), itself holds that “it is difficult to fathom any scenario in which an attorney might expose himself to RICO liability” because the provision of legal services do not entail the operation or management of an enterprise. *Id.* at 1349.

Paragraphs 10 through 12 and 14 of plaintiff’s “material facts” are the only items which purport to substantiate any allegations pertaining to Shughart Thomson. As detailed above, these allegations are not properly supported as required for entry of summary judgment pursuant to Rule 56. Such material facts have also been contradicted by defendant Shughart Thomson, and thus are not undisputed as is necessary for purposes of entry of summary judgment. Plaintiff’s motion is therefore inadequate and must be denied.

CONCLUSION

WHEREFORE, defendant Shughart Thomson & Kilroy respectfully requests that plaintiff's Motion for Partial Summary Judgment be denied in its entirety, that this defendant be awarded its costs and expenses incurred herein, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Kathleen A. Hardee

ROBERT A. HENDERSON

KATHLEEN A. HARDEE

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ATTORNEYS FOR DEFENDANT SHUGHART
THOMSON & KILROY P.C.

VERIFICATION

State of Missouri)
) ss
County of Jackson)

The above and foregoing Opposition to Plaintiff's Motion for Partial Summary Judgment, and the factual statements relating to Shughart Thomson & Kilroy P.C., contained therein, are true and accurate to the best of my knowledge and belief.

Further affiant sayeth not.

Kathleen A. Hardee
Shughart Thomson & Kilroy P.C.

The foregoing was subscribed and sworn to before me this 29th day of September, 2005.

Notary Public

My commission expires:

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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