

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 SUPPORT OF DEFENDANT ROBERT J. ZOLLARS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Pursuant to Federal Rule of Civil Procedure 12b(2), Defendant Robert J. Zollars submits the instant Suggestions in support of his Motion to Dismiss For Lack of Personal Jurisdiction.

I. INTRODUCTORY STATEMENT

Mr. Robert J. Zollars, the Chairman and CEO of Defendant Neoforma, Inc. (“Neoforma”), has been sued by plaintiff Medical Supply Chain, Inc. (“plaintiff”) in his personal

capacity. (Declaration of Robert J. Zollars (“Zollars Dec.”) ¶ 1.)¹ However, Mr. Zollars has no relationship whatsoever with the State of Missouri. Rather, Mr. Zollars lives and works in the State of California. (*Id.* ¶ 2.) He does not own, rent, lease, or utilize any property of any kind in the State of Missouri. (*Id.* ¶ 3.) He is not a party to any contract governed by Missouri law, executed in Missouri, or with any company or individual located in Missouri. (*Id.* ¶ 4.) Although Mr. Zollars occasionally stops over in Missouri’s airports, he does not conduct any business in the State. (*Id.* ¶ 5.) In fact, he has only been to Missouri twice in the last four or five years: Once while driving through the State to take his daughter to college, and another time he had dinner with a potential client of Neoforma’s. (*Id.* ¶ 6.)

Despite his extremely limited contact with the State of Missouri, Mr. Zollars has been sued there for various torts and other statutory violations. However, as set forth below, Mr. Zollars' contact with the State of Missouri is not sufficient for this Court to exercise personal jurisdiction over him. Accordingly, the action against Mr. Zollars must be dismissed.

II. THE COURT CANNOT SUBJECT MR. ZOLLARS IN HIS PERSONAL CAPACITY TO ITS JURISDICTION BECAUSE MR. ZOLLARS DOES NOT HAVE SUFFICIENT CONTACTS WITH THE STATE OF MISSOURI, AND JURISDICTION WOULD CONFLICT WITH DUE PROCESS OF LAW

A. Legal Standards And Burden Of Proof

Personal jurisdiction refers to the power of a court to “summon a defendant before it to adjudicate a claim against him,” and it is a prerequisite to any lawsuit. (Wright & Miller, *Federal Practice and Procedure*, 4 Civil § 1064 at 334 (West Group 2002). There are two types of personal jurisdiction: specific jurisdiction and general jurisdiction. *Lakin v. Prudential Securities, Inc.*, 348 F.3d 704, 707 (8th Cir. 2003). “Specific jurisdiction refers to jurisdiction over causes of action that ‘arise out of’ or ‘relate to’ a defendant’s activities within a state.” *Id.*, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). By contrast, general

¹ When considering whether personal jurisdiction exists under Missouri’s Long Arm Statute, it is permissible to consider matters outside the pleadings, such as affidavits or declarations from the movant. *Enterprise Rent-A-Car Co. v. U-Haul Int’l, Inc.*, 327 F.Supp.2d 1032, 1036 (E. D. Mo. 2004).

jurisdiction “refers to the power of a state to adjudicate any cause of action involving a particular defendant, regardless of where the cause of action arose.” *Lakin*, at 707.

“A party seeking to invoke the jurisdiction of a federal court bears the burden to establish that jurisdiction exists.” *Enterprise Rent-A-Car Co. v. U-Haul Int’l., Inc.*, 327 F.Supp.2d 1032, 1036 (E. D. Mo. 2004). To survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must “make a prima facie showing of jurisdiction.” (*Id.*) “For the purpose of a prima facie showing, the court must view the **evidence** in the light most favorable to the plaintiff.” (*Id.*, emphasis added.) Stated another way, “[o]nce a defendant has challenged the court’s personal jurisdiction over him, the plaintiff assumes the burden of establishing sufficient jurisdictional facts.” *Hanline v. Sinclair Global Brokerage Corp.*, 652 F.Supp. 1457, 1458 (W.D. Mo. 1987). This means the plaintiff must do more than provide “mere allegations that all elements of the tort” or other cause of action “are present.” *Id.*, at 1459.

As set forth below, plaintiff cannot meet his burden of proof, because (i) neither general nor specific jurisdiction exists in this case, and (ii) because he has no evidence at all in support of jurisdiction. Accordingly, the case against Mr. Zollars in his personal capacity must be dismissed.

B. There Is No General Jurisdiction Over Mr. Zollars, Who Neither Conducts Substantial Business, Nor Is Present, In The State of Missouri

“By definition, general jurisdiction only exists where a defendant’s contact with the forum state is so pervasive and continuing that the defendant is effectively deemed to be a resident for purposes of personal jurisdiction.” *In re: Texas Prisoner Litigation*, 41 F.Supp.2d 960, 962 (W.D. Mo. 1999). Here, Mr. Zollars lacks continuing or “pervasive” contacts with Missouri. He lives in California, and he has been to the State only once on business in the last four or five years – and that was at best a tangential business meeting since it merely involved having dinner with the employee of a potential client. (Zollars Dec. ¶¶ 2, 5, 6.) Other than that, he has stopped at airports and driven through the State once with his daughter in the last four or five years. (*Id.* ¶¶ 5, 6.) These brief contacts with Missouri are not “pervasive” or “continuing”

or systematic – they are casual and occasional at best. Finally, Mr. Zollars is a resident of California, where he lives and works. (*Id.* ¶ 2.) Accordingly, this Court does not have general jurisdiction over Mr. Zollars.

C. There Is No Specific Jurisdiction Over Mr. Zollars

Although plaintiff attempts to invoke diversity jurisdiction (Complaint ¶ 1), the court has no diversity jurisdiction since both plaintiff and at least one of the defendants is alleged to reside or can be found in Missouri (Complaint ¶¶ 10, 24; 28 U.S.C. § 1332.) Accordingly, the Court’s subject matter jurisdiction rests on federal question grounds. (*See*, Complaint ¶¶ 1-9; 28 U.S.C. § 1331; 28 U.S.C. § 1337.) “Where a federal court’s subject matter jurisdiction over a case stems from the existence of a federal question, personal jurisdiction over a defendant exists if the defendant is amenable to service of process under the forum state’s long-arm statute and if the exercise of personal jurisdiction would not deny the defendant due process.” *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir., 2002) (internal citations omitted); *Enterprise*, at 1036 (applied the *Bird* analysis to a case with both federal question and diversity claims). Since neither of these requirements can be satisfied, this case must be dismissed.

1. Missouri’s Long Arm Statute Does Not Apply To Mr. Zollars’ Alleged Conduct

Missouri’s Long Arm Statute provides in pertinent part:

1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

- (1) The transaction of any business within this state;
- (2) The making of any contract within this state;
- (3) The commission of a tortious act within this state;
- (4) The ownership, use, or possession of any real estate situated in this state;
- (5) The contracting to insure any person, property or risk located within this state

at the time of contracting;

(6) Engaging in an act of sexual intercourse within this state with the mother of a child on or near the probable period of conception of that child. . . .

Mo. Rev. Stat. § 506.500 (Lexis 2004).

If a case fits within one of the six specific categories in § 506.500 (1), then jurisdiction is appropriate under the long-arm statute. “Missouri case law is clear that the purpose of the long-arm statute is to extend the jurisdiction of the courts of this state over nonresident defendants to that extent permissible under the Due Process Clause of the Fourteenth Amendment of the United States.” *Texas Prisoner Litigation*, at 962; *State ex rel. Newport v. Wiesman*, 627 S.W.2d 874, 876 (1982). This means that “the language of the long-arm statute should be interpreted to reach as far as the Due Process Clause will permit, but in all cases involving specific jurisdiction, a court must first determine whether the long-arm statute applies. When making that determination, . . . a court must give the broadest interpretation to the language of the long-arm statute that is consistent with the Constitution.” *Texas Prisoner Litigation*, at 962 n. 1. But if the conduct at issue does not fall within the scope of § 506.500, there is no jurisdiction. See, e.g., *Stavrides v. Zerjav*, 848 S.W.2d 523, 529 (1993) (holding that there was no jurisdiction in part because the escrow of a Missouri promissory note in Illinois did not constitute the transaction of business in Missouri for the purposes of long arm jurisdiction).

Three of the six particularized activities in § 506.500 – the ownership and/or use of real estate, contracting for insurance, and sexual intercourse – are not at issue here. Accordingly, the discussion that follows focuses only on the other three activities: Transaction of business within the State, commission of a tortious activity within the State, and the making of any contracts within the State.

First, Mr. Zollars is not a party to any contract within the State. (Zollars Dec. ¶¶ 3, 4.) Thus jurisdiction cannot be based on § 506.500(1)(2). Second, with the exception of one dinner in the last four to five years, a remote connection at best, he has not conducted any

business within Missouri – and thus jurisdiction cannot be based on § 506.500(1)(1). (*Id.* ¶ 6.)

But even if he were a party to any such contracts, or even if he had conducted business within the State, he would still not be subject to the long-arm statute, since plaintiff has not alleged that any of those hypothetical contracts or business transactions were the **source** of any cause of action in this case. Mo. Rev. Stat. § 506.500(1). Moreover, plaintiff has not offered any **evidence** that Mr. Zollars has made any contracts, or conducted any business within the State. (*See, Enterprise*, at 1036.) Indeed, the only evidence before the Court is to the contrary. (*See, generally, Zollars Dec.*)

Third, there are no allegations that Mr. Zollars, in his personal capacity, has committed any tortious acts within the State of Missouri. The Complaint in this matter is long and confusing, and it is difficult to understand what – if anything – Mr. Zollars, in his personal capacity, supposedly did to plaintiff. At best, the Complaint alleges that Mr. Zollars simply worked at Cardinal Health, Inc. (“Cardinal”), a subsidiary of Owen Healthcare, Inc. (“Owen”), during the same time that Owen acquired a copy of plaintiff’s business plan and other proprietary information. (Complaint ¶ 176.) According to the Complaint, Cardinal then used the business plan somehow – but there is no allegation of who at Cardinal used the business plan, or how it was used. (*Id.*) Rather, there is simply a statement that Mr. Zollars was a “Cardinal employee” who “left Cardinal and later joined Neoforma.” (*Id.*) There is no allegation that Mr. Zollars took the business plan, or anything in it, with him to Neoforma; nor is there any allegation that Mr. Zollars was familiar with the information in the business plan at all! These allegations do not fall within the scope of Missouri’s long-arm statute, because they are not tortious acts.

Finally, there is no **evidence** supporting any of the tort allegations in the Complaint. This is true for both the common law tort actions and the alleged Antitrust and RICO violations. Rather, the Complaint contains only rambling, unspecified allegations that Mr. Zollars engaged in wrongful or illegal activity – and fails to present any evidence to back up the allegations at issue. Thus, plaintiff cannot satisfy his burden of proof, and his claims must fail.

See, e.g., Hanline, at 1458-1459 (holding that the “establishment of a prima facie case” of jurisdiction “requires more than mere allegations that all elements of the tort are present.”).

To summarize, plaintiff has failed to satisfy the requirements of the Missouri long-arm statute. *See, e.g., Stavrides*, at 529. Moreover, plaintiff cannot satisfy his burden of proof. *See, Enterprise*, at 1036. Accordingly, the claims against Mr. Zollars must be dismissed.

2. The Exercise Of Jurisdiction Over Mr. Zollars In His Personal Capacity Would Not Comport With Due Process

Even if the Court were to find that Mr. Zollars’ alleged acts fell within the scope of Missouri’s long-arm statute, jurisdiction should be denied because the exercise of jurisdiction would deny Mr. Zollars due process under the law.

Due process limits the power of a court to assert personal jurisdiction over a nonresident defendant.” *Enterprise*, at 1036. “The constitutional touchstone of the determination whether an exercise of personal jurisdiction comports with due process remains whether the defendant established minimum contacts in the forum state.” *Burger King*, at 474. “Those ‘minimum contacts must have a basis in some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the protections of its laws.’” *In re: Texas Prisoner Litigation*, at 963, quoting *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 109 (1987). Additionally,

[t]he exercise of jurisdiction must . . . be reasonable, taking into account such factors as (a) the burden on the defendant; (b) the interest of the forum state; (c) the plaintiff’s interest in obtaining relief; (d) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; [and] (e) the shared interest of the several states in furthering fundamental substantive social policies.

Texas Prisoner Litigation, at 963.

There are simply no allegations that Mr. Zollars, in his personal capacity, committed any acts **at all** in the State of Missouri, or that he availed himself at all of the privilege of conducting activities within the state. *See*, section II(B)(2), *supra*, and Complaint,

generally and at ¶ 176. Again, while the Complaint alleges generically that Mr. Zollars committed a tort against a Missouri resident, there is no allegation of any specific **evidence** to back up the generic allegations – and thus they fail as a matter of law. *See, e.g., Hanline* at 1459. What’s more, the evidence here refutes any allegations that Mr. Zollars ever conducted any business activities, made any contracts, or committed any torts in Missouri. *See, generally, Zollars Dec.*

Finally, the exercise of jurisdiction over Mr. Zollars in his personal capacity would be unreasonable. Since he lives and works in California, it would be a tremendous burden on Mr. Zollars to have to oppose a lawsuit in Missouri. (Zollars Dec. ¶ 2.) Since he committed no act – tortious or otherwise – in Missouri, the State has no interest in allowing plaintiff a forum in which to prosecute a claim against Mr. Mr. Zollars. For the same reasons the interstate judicial system has no interest in seeking relief against Mr. Zollars. In short, Mr. Zollars has very, very few contacts with the State of Missouri and exercising jurisdiction against him in this case would violate due process.

III. THE ADDITION OF ANTITRUST, RICO AND USA PATRIOT ACT CLAIMS DOES NOT CONFER JURISDICTION AGAINST MR. ZOLLARS

A. There Is No Personal Jurisdiction Under Antitrust Law

The bulk of plaintiff’s Complaint seems to be devoted to various antitrust theories. In paragraph 1, the purported bases of jurisdiction are set forth. With respect to antitrust, he generally cites 15 U.S.C. §§ 15 and 16. (Complaint ¶ 1.) Plaintiff does not cite 15 U.S.C. § 22, which refers to nationwide service of process as to corporations, and therefore might be a basis to argue that personal jurisdiction might be available without the analysis of the long-arm statute and due process. However, § 22 by its terms applies only to corporations, and has been construed narrowly. *Kingsepp vs. Wesleyan University*, 763 F. Supp. 22, 25 (S.D.N.Y. 1991). Mr. Zollars is an individual, not a corporation. For non-corporations, the rule is that one applies the same long-arm statute and due process analysis to antitrust claims as one does to other types of claims. *Id.* at 26-27.

B. Plaintiff's RICO Claims Are Not Directed At This Defendant, But, Even If They Were, Plaintiff's Allegations Are Not Sufficient Under 18 U.S.C. § 1965(b)

In his Racketeer Influenced And Corrupt Organizations Act ("RICO") claim, plaintiff generically refers to "Defendants." An examination of the specific allegations, however, shows that there is nothing asserted against Mr. Zollars. (Complaint ¶¶ 572-592.) Although this particular claim is difficult to understand, it appears to be leveled primarily at another defendant, the Shughart, Thompson and Kilroy law firm. Apparently angry at that firm's successful defense of a prior lawsuit, the Complaint claims at paragraph 582 that the firm engaged in racketeering activity in doing so. As silly and scurrilous as such claim is, it is not one aimed at Mr. Zollars. This section of the Complaint also talks about some copyrighted works that someone is alleged to have stolen from plaintiff. However, the Complaint fails to allege that Mr. Zollars engaged in any such activity, nor is there any evidence cited in the Complaint that Mr. Zollars ever stole anything from plaintiff. Finally, there is a claim that a threat to take action under the U.S.A. Patriot Act is a RICO violation, but that is not alleged against Mr. Zollars. In sum, there can be no claim that the Complaint imposes jurisdiction over Mr. Zollars for a RICO violation, since there are no facts alleged suggesting that he is part of such a claim, despite plaintiff's careless tossing about of the word "Defendants" in the plural. Accordingly, the Complaint fails as a matter of law to allege jurisdiction over Mr. Zollars on RICO grounds. *Hanline*, at 1459; *Enterprise*, at 1036.

Were the Court to assume that plaintiff is alleging a RICO claim against Mr. Zollars, plaintiff has still failed to allege jurisdiction over Mr. Zollars. This is because plaintiff has failed to allege evidence demonstrating that nationwide jurisdiction is appropriate under 18 U.S.C. § 1965(b). *Enterprise*, at 1036. In particular, plaintiff has not alleged facts showing that he has met the "ends of justice" requirement in that statute. 18 U.S.C. § 1965(b). In fact, he does not even allege that § 1965(b) is a basis for jurisdiction in the jurisdictional section of his

Complaint as required by pleading rules. *See* Complaint ¶ 1. Accordingly, there is no RICO jurisdiction.

C. Plaintiff Fails To Allege A Violation Of The U.S.A. Patriot Act Against Mr. Zollars, And So That Statute Cannot Be The Basis Of Personal Jurisdiction

Finally, there is a claim that someone threatened plaintiff with the U.S.A. Patriot Act. But this is alleged against someone other than Mr. Zollars. *See*, Complaint ¶¶ 593-612. Accordingly, this cause of action cannot be a ground under which this court could assert personal jurisdiction over Mr. Zollars.

IV. CONCLUSION

Mr. Zollars, a resident of California, has had almost no contact with the State of Missouri in the last four to five years. In his personal capacity, he has not conducted any contract or business transactions in the State, nor has he engaged in any tortious action that would lend itself to jurisdiction under § 506.500 or the due process clause. Finally, plaintiff has failed to allege jurisdiction under the antitrust laws, RICO, or the U.S.A. Patriot Act. Accordingly, the allegations against him must be dismissed for lack of personal jurisdiction.

HUSCH & EPPENBERGER, LLC

By: /s/ John K. Power
John K. Power, # 35312
Joel K. Goldman, #40453
1200 Main Street, Suite 1700
Kansas City, MO 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596

ATTORNEYS FOR DEFENDANTS NOVATION,
LLC, NEOFORMA, INC., ROBERT J. ZOLLARS,
VOLUNTEER HOSPITAL ASSOCIATION,
CURT NONOMAQUE, UNIVERSITY
HEALTHSYSTEM CONSORTIUM, ROBERT J.
BAKER

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 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::

Bret D. Landrith landrithlaw@cox.net
Attorney for Plaintiff

/s/ John K. Power

John K. Power