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

Medical Supply CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W-ODS
NOVATION, LLC	) Attorney Lien
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.	)

Suggestion in Opposition to Dismissal Of Robert J. Zollars
On Personal Jurisdiction Grounds

Comes now, Medical Supply and makes the following suggestion in response to Robert J. Zollars motion (doc.s 13, 13-1 and 14) to dismiss him as a defendant. Plaintiff's complaint describes the conduct of Robert J. Zollars as the chief executive of Neoforma, Inc., a business that has substantial and continuing business transactions in the State of Missouri.

1. At over 83 places in the complaint, the plaintiff names Robert J. Zollars and describes Zollars' knowledge of the conspiracies and combinations to restrain trade in hospital supplies and his actions to further the conspiracies and combinations in restraint of trade with the other defendants and identified non-defendant coconspirators that do business and have operations in the State of Missouri.

2. The descriptions of Zollar's conduct include "who what where and when" details about his specific actions with varying combinations of defendants and other coconspirators.

3. Paragraph 376 on page 74 of the plaintiff's complaint quotes Zollar's own statements as the CEO of the publicly traded Neoforma, Inc. describing the competitive landscape of the market for hospital supplies and the relationships, agreements and long term exclusive contracts restraining trade that he has secured for his company, concurring with the allegations made by Medical Supply Chain:

"TWST: Could you give us a sense of the competitive landscape?

Mr. Zollars: About a year or so ago, there were probably 100 companies competing for this opportunity, and today you have less than a handful. As you look at the metrics that we're enjoying right now, as of October 18, Neoforma has over 700 trading partners; that includes 563 hospitals under contract, 333 live using the technology, and 130 suppliers. To give you an idea of scale, that means in our third quarter, we processed over 500,000 order documents that included 1.5 million line items. So, clearly, by any measure, we're out in front of the rest of the pack, which is exciting for us.
TWST: What were the steps you took to achieve this dominant position?
Mr. Zollars: I think the most important thing is we have great partners. First of all, we're partnered with Novation. Novation is the number one group purchasing organization in the country, or GPO. It covers roughly one-third of the market. It's members buy approximately $36 billion a year in medical supplies and equipment, and just over a year ago we signed an agreement with Novation to be it's exclusive e-commerce partner for 10 years. We're now one year into that agreement and have generated some great results together, as I just mentioned. The other great partner we have is GHX, the Global Health Exchange, an industry supplier consortium. It was founded by General Electric, Johnson & Johnson, Baxter, Abbott and Medtronic, and up until August, had been competing with us in the market. We struck a strategic alliance agreement with GHX in August that is really exciting for us. It's the first time healthcare buyers and suppliers have really gotten on the same side of the table to work at taking healthcare costs out. The alliance gives us access to the great supplier relationships that GHX has and they, of course, get the great buyer relationships that we have with our hospitals."

The Wall Street Transcript Interview 12/20/2001

4. 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 to prevent Medical Supply from entering the market and the intent of Medical Supply to bring claims for damages. The complaint alleges Zollars responded to this knowledge by participating in the defendants' conspiracy to interfere in the administration of justice, including depriving Medical Supply of counsel. ¶¶ 399-418.

5. The complaint describes the impending threat of the monopolization of hospital supplies from the sale of Neoforma, Inc. to GHX, LLC in ¶¶ 419-422. As CEO, Zollars will determine and control whether this event occurs.

6. The complaint describes Zollars as an antitrust person with a significan personal interest seperate from Neoforma, Inc. by virtue of having been an officer in Cardinal, a subsidiary of Novation, LLC and then an officer in the defendant Neoforma, Inc. See ¶ 176.

7. The complaint describes Zollars actions in furtherance of the common enterprise's combinations and conspiracies to restrain trade by injuring Medical Supply, a Missouri company that included conscious actions with US Bancorp, US Bank, Piper Jaffray and General Electric that have offices in Missouri and regularly conduct business in the state.

8. The complaint describes the effect on the State of Missouri from the tortious actions of the defendants contributing to higher Medicaid expenditures and the likely cuts of healthcare insurance to citizens of Missouri in ¶85 as a foreseeable result of the defendant's conduct to target Medicare, Medicaid and private health insurers with artificially inflated hospital supply costs.

ARGUMENTS AND AUTHORITIES

The long arm statute of Missouri utilized to serve process on Mr. Zollars, RSMo section 506.510 extends jurisdiction over Mr. Zollars where the plaintiff's compliant establishes a prima facie showing of sufficient contacts based on transactions for hospital supplies, tortious conduct including antitrust violations and contracts for escrow accounts and real estate RSMo section 506.500.1, .1, .2 and .3.

The complaint avers facts of a conspiracy meeting the requirement of federal jurisdiction over co-conspirators. The original leading case on "conspiracy theory" of jurisdiction was *Leasco Data Processing Equipment Corp. v. Maxwell*, 319 F.Supp. 1256 (S.D.N.Y.1970), a securities fraud action under the Securities Exchange Act of 1934. The *Leasco* approach has been adopted in several jurisdictions where the question has arisen. See, e. g., *McLaughlin v. Copeland*, 435 F.Supp. 513 (D.Md.1977); *Chromium Industries v. Mirror Polishing and Plating Co.,* 448 F.Supp. 544 (N.D.Ill.1978).

Other courts have rejected the coconspirator theory as an impermissible means of enlarging the "transacting business" test of § 12 of the Clayton Act. See *West Virginia v. Morton International, Inc.*, 264 F.Supp. 689 (D.Minn.1967); *I. S. Joseph Co., Inc. v. Mannesmann Pipe and Steel Corp.*, 408 F.Supp. 1023 (D.Minn.1976). However, Medical Supply also makes claims against Robert J. Zollars under RICO.

The complaint alleges a common enterprise and a conspiracy that committed RICO predicate acts and Mr. Zollars role in causing those acts to be committed as part of a continuing purpose of overcharging government and private insurance providers. To be liable under § 1962(d),

> "[A] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor."

Salinas v. United States, 522 U.S. 52, ___, 118 S.Ct. 469, 477, 139 L.Ed.2d 352 (1997). Mr. Zollars suggestion in support of dismissing this court's jurisdiction over him mistakenly faults the complaint for not averring that Mr. Zollars committed RICO predicate acts with his own hands. A conspirator need not agree to commit or facilitate each and every part of the substantive offense; if the partners agree to pursue

the same criminal objective and divide up the work, each is responsible for the acts of the other. See *id*. Indeed, "[a] person, moreover, may be liable for conspiracy even though he was incapable of committing the substantive offense." *Id*.

A conspirator remains party to the conspiracy unless and until he admits his participation to the authorities or communicates his abandonment in a manner reasonably calculated to reach co-conspirators. See *United States v. Thomas*, 114 F.3d 228, 267 (D.C.Cir.), cert. denied, ___ U.S. ___, 118 S.Ct. 635, 139 L.Ed.2d 614 (1997). The plaintiff's complaint alleges that Mr. Zollars did not renounce the conspiracy upon receiving notice of Medical Supply's claims in December but instead relied on the common enterprise's commission of more predicate acts against Medical Supply in the hope this action could be obstructed. Once proof of a conspiracy is established, the defendant has the burden of proving that he affirmatively withdrew from the conspiracy. *Id*. at 269.

For the reasons set forth above, Zollars agreement with US Bancorp and Piper Jaffray to subordinate the interest of Neoforma's shareholders in favor of securing favorable contracts for healthcare technology companies with Novation's hospitals and his operation of Neoforma as a price maintenance information exchange between competitors to secure profit for Novation, UHC and VHA at the loss of Neoforma's shareholders were both essential for the existence of the common enterprise to overcharge government and private insurers. Zollars' willingness to participate in the common enterprise, even though it was committing RICO predicate acts in the theft of intellectual property and obstruction of justice makes him liable under § 1962(d).

In addition, the direct actions in Missouri to deny Medical Supply its contracted for escrow accounts and Medical Supply's sale of a lease to GE Transportation, both known to be required to capitalize Medical Supply's entry into Mr. Zollars market, were proximately caused by this conspiracy. It is hornbook law that

> "[O]nce the conspiracy has been formed, all its members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy. A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable. He need not even have planned or known about the injurious action ... so long as the purpose of the tortious action was to advance the overall object of the conspiracy."

Halberstam v. Welch, 705 F.2d 472, 481 (D.C.Cir.1983). Zollars' agreement to act in the interests of the common enterprise instead of Neoforma's shareholders was essential to the cartel's maintenance of artificially inflated hospital supply prices by excluding web based discounted hospital supply transactions

from the cartel's member hospitals. Mr. Zollars operation of Neoforma as the technology platform the cartel required to police its anticompetitive exclusionary contracts was an essential link in the causal chain leading to Medical Supply's injuries.

The plaintiff's complaint alleges the elements required by the Conspiracy Theory of Jurisdiction as simplified by the District of Maryland:

> "[A] simplified articulation of the conspiracy theory of jurisdiction. Under that doctrine, when
> (1)two or more individuals conspire to do something
> (2)that they could reasonably expect to lead to consequences in a particular forum, if
> (3)one co-conspirator commits overt acts in furtherance of the conspiracy, and
> (4)those acts are of a type which, if committed by a non-resident, would subject the non-resident to personal jurisdiction under the long-arm statute of the forum state, then those overt acts are attributable to the other co-conspirators, who thus become subject to personal jurisdiction in the forum, even if they have no direct contacts with the forum.
> *Cawley v. Bloch*, 544 F. Supp. 133, 134-35 (D. Md. 1982) (citations and footnotes omitted), quoted in *Chenault v. Walker*, No. 02A01_9812_CV_00340, slip op. at 14-15 (Tenn. Ct. App. Feb. 9, 2000)."

States with long arm statutes similar to Missouri's have recognized that co-conspirators are correctly before their courts when the object of a conspiracy was to injure a citizen of their state or injuries to citizens in their state were the reasonably foreseeable outcome of the conspirators conduct:

> "[w]hen the purpose of a conspiracy is to commit an intentional tort against a Georgian, all of the coconspirators are purposefully directing their activities toward Georgia and should reasonably anticipate being haled into court here. . . . In this case, . . . the alleged conspiracy targeted a Georgia resident specifically. Thus, the nonresident conspirators purposefully directed their activities toward Georgia, and could reasonably expect to be haled into court here. Accordingly, the imputation to them of the instate acts of their coconspirator to satisfy the requirements of the Georgia Long Arm Statute is not precluded by due process concerns."

Rudo v. Stubbs, 472 S.E.2d 515, 517 (Ga. Ct. App. 1996) (citation and footnote omitted). The 8th Circuit recognizes that Missouri's long arm statute would similarly apply to Zollars' common enterprise or combination and conspiracy's averred targeting of Medical Supply in Missouri:

> "[A] prima facie case of specific personal jurisdiction can only be established if Prudential Savings "has purposefully directed [its] activities at [Missouri] residents," and the claim of this suit either "arises out of" or "relates to" these activities. Burger King, 471 U.S. at 472 (citation omitted); State ex rel. Newport v. Wiesman, 627 S.W.2d 874, 876 (Mo. 1982) (en banc) (extending the Missouri long-arm statute to the extent permissible under the Due Process Clause)."

Lakin v. Prudential Securities, Inc., No. 02-2477 at pg.5 (8th Cir. 11/4/2003) (8th Cir., 2003).

Missouri has simplified these principles even further for contract and transaction based long arm jurisdiction. In *Schilling*, the Illinois defendant Human Support Services had had the bus with a malfunctioning wheelchair lift repaired several times by a co-defendant in St. Louis, Missouri. The court

found that these repairs were sufficient to constitute transaction of business under the long-arm statute, even though it was unclear whether the Missouri repairs were connected to the injury. See *Schilling v. Human Support Services*, 978 S.W.2d 368, 370 at 371 (Mo. App. 1998).

The court in *Roberts v. Morse Chevrolet, Inc.* did not lose sight of general jurisdiction over defendants operating in Missouri recogninzing that the "…Appellant alleged that Morse has numerous contractual arrangements with a Missouri entity" and stating:

> "General jurisdiction can arise where a foreign corporation is present and conducts substantial business in Missouri. *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165 (Mo. banc 1999)(corporation adjudged to be conducting substantial and continuous business in Missouri was allowed to be sued here for a slip-and-fall case that arose in Colorado)."

Roberts v. Morse Chevrolet, Inc., 44 S.W.3d 402 (Mo.banc, 2001).

Robert J. Zollars is responsible for having in place internal controls under The Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745, § 302 (a)(4) and (5) to prevent losses to Neoforma Inc. shareholders from the violation of antitrust laws by the company and its officers. When Zollars executed long term exclusive agreements between Neoforma, Inc. and competing hospital supply distributors like the defendant Novation, LLC and the nondefendant GHX, LLC, knowing their controlling market share, he subjected himself to federal antitrust law. When Zollars participated in repeated efforts to injure a Missouri company, he put himself under the general jurisdiction of Missouri courts.

Mr. Zollars may be inconvenienced defending here but his inconvenience does not outweigh the interest of the State of Missouri in enforcing its legislated policy and the 8th Circuit has stated the interest in vindication of federal statutes will nearly always outweigh the inconvenience of the forum:

> "A few appellate courts have adopted the view that the constitutionality of the application of statutes granting nationwide jurisdiction to federal courts depends on whether the proposed forum puts a defendant at a "severe disadvantage," Republic of Panama v. BCCI Holdings, S.A., 119 F.3d 935, 948 (11th Cir.1997), in defending the action and, if so, whether something called the "federal interest," id., in litigating the matter in that forum outweighs attendant inconveniences to a defendant. With respect, we detect nothing in the case law already discussed that suggests that due process, or any other constitutional concern, requires such an approach to deciding the jurisdictional question that this case presents. We note, too, that the vindication of federal law principles in a federal court would seemingly always be sufficient to carry the day in favor of the exercise of federal jurisdiction, even if we felt obliged to engage in a balancing enterprise, which, in fact, we do not."

Federal Fountain, Inc., In re, 165 F.3d 600 at 602 (C.A.8 (Mo.), 1999).

Alternatively, the court may employ the second Sherman Act long arm statute § 5 Sherman Act, (15 U.S.C. § 5) which expressly states individuals may be brought before this forum even though they reside in other districts:

> § 5 Sherman Act, 15 U.S.C. § 5, Bringing in additional parties
>
> Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

This court could consequently assert jurisdiction over Mr. Zollars if his presence would facilitate the adjudication of this matter.

CONCLUSION

Whereas for the above stated reasons, the plaintiff respectfully requests the court deny Robert J. Zollars motion to dismiss on the basis of a lack of jurisdiction, recognizing that this court does indeed have general jurisdiction of Mr. Zollars. Or, in the alternative, the plaintiff respectfully requests that the court bring in Mr. Zollars as an additional party under 15 U.S.C. § 5.

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611
1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on April 8th, 2005 I have served 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:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

Attorneys for Defendants

S/Bret D. Landrith
Bret D. Landrith