

VIRGINIA: IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOSHUA EVERETT BUSHMAN, ADMINISTRATOR FOR
THE ESTATE OF CALVIN VAN PELT, et al.,

Plaintiffs,

v.

Case No. 2023-06260

SALVO TECHNOLOGIES INC.
d/b/a 80P BUILDER, et al.,

Defendants.

**POLYMER80'S REPLY BRIEF IN SUPPORT OF ITS
MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

On brief, Plaintiffs argue that jurisdiction is supported by: (1) Polymer80's indirect sales into Virginia and (2) the existence of an alleged conspiracy. Both arguments fall short.

I. Polymer80's indirect sales into Virginia do not support personal jurisdiction

Placing an article into the stream of commerce, even with knowledge that it will be swept into the forum, does not satisfy the minimum contacts / purposeful availment test. E.g., AESP, Inc. v. Signamax, LLC 29 F. Supp. 3d 683 (E.D. Va. 2014) (citing Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939 (4th Cir. 1994)). Far more purposeful conduct is required – and the claim must arise out of that purposeful conduct. Id. at 690 (“Such additional, intentional conduct may consist of designing the product for the market in the forum, advertising in the forum, establishing channels for providing regular advice to customers in the forum, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum.”) (internal citations omitted). Such purposeful conduct is completely absent here. Decl. ¶¶ 4-15.

The Plaintiffs argue that this case is analogous to Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017. It is not. In Ford, the Supreme Court held that Ford was subject to personal jurisdiction in Montana and Minnesota notwithstanding that the vehicles at issue were neither

designed, built, nor sold in those states. Id. at 1032. In so holding, the court noted that, unlike here, Ford “conceded purposeful availment.” Id. at 1028. Key to its holding were the facts that Ford advertises in the two states “by every means imaginable,” sells its cars in those states through its dealerships, and “distributes replacement parts both to its own dealers and to independent auto shops.” Id. The court placed this high level of purposeful availment at one end of a spectrum and contrasted it with a hypothetical retiree in Maine selling duck decoys through a website – a fact pattern with no purposeful availment in any state other than Maine. Id. n. 4.

Polymer80’s contacts with Virginia are nearly as attenuated as the hypothetical decoy seller’s. Far from being analogous to Ford, this case is more akin to two recent cases applying Ford. In Miller v. Bearman Inds., LLC, 2023 WL 2603383 (S.D. W. Va. Mar. 22, 2023), the plaintiff argued, as the Plaintiffs here do, that the defendant firearm manufacturer was subject to jurisdiction because it had placed guns in the stream of commerce knowing they would end up in the forum and because it “exploited” the forum’s market by advertising and repairing guns owned by citizens of the forum. Id. The court rejected both arguments, holding that: (a) mere knowledge the stream of commerce would sweep the product into the forum is insufficient; (b) the alleged advertising contacts were de minimis; and (c) customer-initiated repair requests do not constitute purposeful availment. Id. at *7-8. Similarly, the Ninth Circuit rejected jurisdiction over a manufacturer whose battery found its way into a vaping device sold by a third-party and exploded in the plaintiff’s mouth. Yamashita v. LG Chem., Ltd., 62 F.4th 496 (9th Cir. 2023).

II. The conspiracy allegations do not support personal jurisdiction over Polymer80

A. Conspiracy jurisdiction only applies to the conspiracy count (if at all)

Personal jurisdiction is a claim specific inquiry, and a plaintiff must establish personal jurisdiction as to each claim. E.g., Gatekeeper Inc. v. Stratech Sys., Ltd., 718 F. Supp. 2d 664, 667–68 (E.D. Va. 2010). Accord Wright & Miller, 4A Fed. Prac. & Proc. Civ. § 1069.7 (4th ed.)

("[A] plaintiff also must secure personal jurisdiction over a defendant with respect to each claim she asserts."). Thus, even if conspiracy personal jurisdiction were applicable here, it would only provide jurisdiction with respect to the Plaintiffs' conspiracy count.

B. Conspiracy jurisdiction fails even with respect to the conspiracy count

1. Automatic conspiracy jurisdiction is inconsistent with *Walden*

Conspiracy jurisdiction fails even with respect to the conspiracy count. First and foremost, conspiracy jurisdiction, at least the *automatic* variety¹ advanced by the Plaintiffs, does not comport with the U.S. Supreme Court's 2014 decision in Walden v. Fiore, 571 U.S. 277, or with the Virginia Long-Arm Statute. In Walden, the Supreme Court held that "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." Id. at 286. "Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." Id.

It is therefore no surprise that "[m]any courts that have considered the viability of vicarious conspiracy jurisdiction post-*Walden* have rejected it, holding that participation in a conspiracy cannot 'provide a standalone basis for jurisdiction.'" Martin v. Eide Bailly LLP, No. 1:15-CV-1202-WTL-DKL, 2016 WL 4496570, at *3 (S.D. Ind. Aug. 26, 2016). This Court should likewise reject the automatic conspiracy jurisdiction theory advanced by the Plaintiffs. The Plaintiffs' theory also conflicts with the long-arm statute, which requires that the defendant itself, either directly or by agent, conduct certain activities. Va. Code § 8.01-328.1. While it is *possible* for

¹ The Plaintiffs argue "When a co-conspirator has sufficient contacts with the forum so that the court may assert personal jurisdiction, these contacts are imputed against a foreign co-conspirator." Pl. Br. 8. This *automatic* imputation cannot be squared with Walden. It does not require that the foreign co-conspirator direct or cause his confederate to engage in contacts with the forum. Indeed, it does not require that the foreign co-conspirator even know of such contacts. This plainly conflicts with Walden's injunction that "a defendant's relationship with . . . a third party, standing alone, is an insufficient basis for jurisdiction."

one co-conspirator to be the agent of another, this is not required. A co-conspirator can have *full* supervisory control over another, *some* control, or *no* control at all. A conspirator may not even know every other co-conspirator. Only where the foreign co-conspirator exerts such control as to create an agency relationship would imputing his confederate's jurisdictional contacts comport with the long-arm statute. Here, no such control or agency relationship is alleged. Thus, the conspiracy alleged cannot confer jurisdiction under the long-arm statute because none of the required acts was done by Polymer80 or by its agent. RZS Holdings AVV v. PDVSA Petroleos S.A., 293 F. Supp. 2d 645, 649 (E.D. Va. 2003) (holding "contacts could meet the requirements of due process, yet escape the literal grasp of the long-arm statute.").

2. **Jurisdiction is absent under this Court's pre-*Walden* jurisprudence**

a. **There cannot be conspiracy jurisdiction because Plaintiffs cannot make a prima facie showing of conspiracy**

To establish conspiracy jurisdiction, Plaintiffs must first make a prima facie showing / plausible claim of conspiracy. E.g., Massey Energy Co. v. United Mine Workers, 69 Va. Cir. 118, 2005 WL 3476771 at *5 (Fairfax County 2005); Pl. Br. 5 ("To succeed on this theory, plaintiffs must make a plausible claim: (1) that a conspiracy existed . . ."). They cannot. "The object of a civil conspiracy claim is to spread liability to persons other than the primary tortfeasor." Gelber v. Glock, 293 Va. 497, 534 (2017). "Thus, a civil conspiracy plaintiff must prove that *someone in the conspiracy* committed a tortious act that proximately caused his injury." Id. (emphasis added; internal citation omitted). Here, the Plaintiffs' injuries were proximately caused by Defendant Burkard. Compl. ¶ 170 ("As a direct and proximate result of being shot by Defendant Burkard, the decedents sustained severe and violent injuries that caused their death."). Defendant Burkard is not "someone in the conspiracy." Compl. Count V (pled "Against the Firearm Defendants" – not against Burkard). Accordingly, the Plaintiffs have failed to set forth a plausible claim of common

law conspiracy against the Firearm Defendants (including Polymer80).

To be sure, the Plaintiffs do allege the Firearm Defendants conspired to violate certain gun laws. But this too is insufficient to state a claim for civil conspiracy. “A claim of civil conspiracy is not actionable in its own right.” La Bella Dona Skin Care, Inc. v. Belle Femme Enterprises, LLC, 294 Va. 243, 256 (2017). “Consequently, an action for civil conspiracy will not lie unless the predicate unlawful act independently imposes liability upon the primary wrongdoer.” Where, as here, the “predicate unlawful act” cannot support a direct cause of action by the plaintiff, it will likewise not support an indirect action for conspiracy to commit the “predicate unlawful act.” Id. (rejecting a claim for conspiracy to commit a fraudulent conveyance because the remedy is a return of “the fraudulently conveyed assets to the transferor” not “an in personam judgment”). Plaintiffs cannot directly sue Polymer80 for violation of firearms statutes; they therefore cannot indirectly sue Polymer80 for conspiring to violate those statutes. With no plausible conspiracy claim, conspiracy jurisdiction cannot lie.

b. The alleged conspiracy was not directed at Virginia

Even prior to Walden, this Court has always required more than the mere allegation of a conspiracy to confer jurisdiction, typically requiring that the conspiracy be directed at a Virginia resident. E.g., Nathan v. Takeda Pharm. Am. Inc., 83 Va. Cir. 216, 2011 WL 8947650 at *13 (2011) (finding personal jurisdiction did not offend due process because “the alleged conspiracy was aimed at a Virginia resident” and because Virginia is “where their conspiratorial acts inflicted the greatest harm.”). Here, the Plaintiffs allege only a generalized conspiracy to violate gun laws – a conspiracy not aimed at any particular person or jurisdiction. This is plainly not enough. Id. Accord Gonzalez v. Stout, 81 Va. Cir. 376 (Fairfax County 2010).

Conclusion

For the foregoing reasons, this case should be dismissed for lack of personal jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2024, I electronically filed the foregoing with the Clerk of the Court using File & ServXpress, which will send notification of such filing to the following:

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