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Christopher J. Falcon
CLERK, CIRCUIT COURT
FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT OR FAIRFAX COUNTY

JOSHUA EVERETT BUSHMAN ADMINSTRATOR FOR THE ESTATE OF CALVIN VAN PELT, et al.,	:	
Plaintiffs,	:	**Case No: CL2023-06260**
v.	:	
SALVO TECHNOLOGIES, INC. d/b/a 80 P BUILDER, et al.	:	
Defendants.	:	

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION BY SPECIAL APPEARANCE TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Defendant Salvo Technologies, Inc. hereby files this Reply in support of its motion by special appearance under Supreme Court Rules 3:8 and 4:15, to dismiss all claims against it for lack of personal jurisdiction, for the reasons stated in the accompanying brief.

January 26, 2024

Respectfully submitted,

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ARGUMENT

Salvo did not own or operate the 80P Builder website when the Complaint alleges Burkard purchased gun parts from that website. It follows that Plaintiffs' claims do not arise from any contacts Salvo has with Virginia, and Salvo must be dismissed from this lawsuit.

I. Plaintiffs' Claims Do Not Arise From Any Contacts Salvo Has With Virginia.

Plaintiffs ignore the "arising from" language in Virginia's long arm statute, *see* Br. at 2–3, arguing instead that Salvo's general sales in Virginia give rise to personal jurisdiction. That is not the rule. While the long-arm statute requires "only one transaction in Virginia to confer jurisdiction," *Peninsula Cruise, Inc. v. New River Yacht Sales, Inc.*, 512 S.E.2d 560, 562 (Va. 1999), that "single act" can confer personal jurisdiction *only* as to those claims that "*aris*[*e*] *from*" Salvo's in-state actions, VA. CODE ANN. § 8.01-328.1(A) (emphasis added). The only relevant in-state action here is the alleged sale of gun parts to Burkard. But according to Plaintiffs, Burkard purchased those parts on or before February 1, 2021. Am. Compl. ("Compl.") ¶ 89 (Sept. 29, 2023). A photo of a shipping label that Plaintiffs filed with the Court confirms as much. *See* Ex. W to Pls.' Mot. for Leave to Amend Compl. (Sept. 12, 2023) (FedEx label dated Feb. 1, 2021). Salvo has submitted uncontroverted evidence that it did not acquire the 80P Builder website, or any of Okori's assets, until March 1, 2021. *See* Asset Purchase Agreement ¶ 1(a), attached to Bass Decl. as Ex. 1 ("APA"); *see also* Decl. of Patrick Bass ¶ 3 (July 27, 2023).[1] Indeed, Plaintiffs concede the point by pleading that Salvo "has been responsible for the operation of the 80P Builder website since March 1, 2021." Compl. ¶ 22. Because the sale to Burkard indisputably occurred before Salvo acquired any interest in the 80P Builder website, this Court lacks personal jurisdiction over Salvo. *See Mireskandari v. Daily Mail & Gen. Trust PLC*, 2020 WL 8837630, at *3 (Va. Cir. Ct.

[1] Plaintiffs argue that it is unclear when Salvo began operating the 80P Builder website. But paragraph 22 of Plaintiffs' Complaint concedes that the relevant date is March 1, 2021.

July 27, 2020); *Hepp v. Facebook*, 14 F.4th 204, 208 n.1 (3d Cir. 2021) (no personal jurisdiction over company that did not operate a website at the relevant time).

II. There is No Conspiracy Personal Jurisdiction Over Salvo.

There is a division of authority over whether the actions of an alleged co-conspirator can give rise to personal jurisdiction over an out-of-state defendant, and the Virginia Supreme Court has not decided this issue.[2] Plaintiffs' conspiracy argument fails at the threshold because the courts that have rejected this theory have been correct to do so under U.S. Supreme Court precedent. *See, e.g.*, *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (jurisdiction cannot be based on conduct of "third parties" over whom the defendant lacks control, but "must arise out of contacts that the defendant *himself* creates with the forum" or else due process is violated (cleaned up)).

Notably, the courts that have (wrongly) accepted Plaintiffs' conspiracy theory of personal jurisdiction take special care to scrutinize the facts alleged in the complaint before exercising personal jurisdiction on this basis. Plaintiffs must specifically and plausibly allege facts that (1) a conspiracy to harm Plaintiffs existed, (2) Salvo participated in that conspiracy, and (3) a co-conspirator took overt acts in Virginia in furtherance of the conspiracy. *Unspam Tech., Inc. v. Chernuk*, 716 F.3d 322, 329 (4th Cir. 2013); *Noble Sec., Inc. v. MIZ Eng'g, Ltd.*, 611 F. Supp. 2d 513, 540–41 (E.D. Va. 2009). Due process also requires Plaintiffs to plead that Salvo "knew, or should have known, that those acts [furthering the conspiracy] would be committed in" Virginia. *Noble*, 611 F. Supp. 2d at 539. The Complaint fails to satisfy these requirements.

[2] *See Davis v. A&J Elec.*, 792 F.2d 74, 75–76 (7th Cir. 1986) (rejecting co-conspirator theory of personal jurisdiction); *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995) (same); *Ashby v. State*, 779 N.W.2d 343, 361 (Neb. 2010) (same); *Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 625 (5th Cir. 1999) (similar). *See also Chirila v. Conforte*, 47 F. App'x 838, 842–43 (9th Cir. 2002) (noting "great deal of doubt surrounding the legitimacy of" this theory).

The Complaint does not allege facts showing that Salvo participated in, or knew of, any conspiracy. "A civil conspiracy is a combination of two or more persons, by some concerted action" to accomplish an unlawful purpose or a lawful purpose by unlawful means. *Hechler Chevrolet, Inc. v. Gen. Motors Corp.*, 337 S.E.2d 744, 748 (Va. 1985). But here there are no facts alleged in the Complaint—much less "concrete evidence in the record"—indicating "that there was a common plan" between Salvo and others, or that Salvo engaged in any concerted action with its supposed co-conspirators. *Lolavar v. de Santibanes*, 430 F.3d 221, 230 (4th Cir. 2005). The only relevant facts alleged in the Amended Complaint are that Polymer80 sold pistol frame kits to 80P Builder's operators, Compl. ¶ 185, who in turn resold some of those kits over the internet to customers in Virginia, *id.* ¶ 81. But those facts "could equally describe arms-length transactions . . . in the ordinary course of business" and so are insufficient to establish the existence of personal jurisdiction based upon a conspiracy. *Unspam Techs.*, 716 F.3d at 329–30.

Plaintiffs' conspiracy claim also fails to establish personal jurisdiction over Salvo for the independent reason that the Complaint does not allege that Salvo knew an overt act in furtherance of the conspiracy would be taken in Virginia. Indeed, how could Salvo know of such an act (assuming one existed) involving a sale through 80P Builder *before* Salvo acquired any interest in the website? Plaintiffs cite no authority that Salvo could be grandfathered into an alleged conspiracy that, if it occurred at all, occurred *before* Salvo acquired any interest in 80P Builder. Plaintiffs similarly fail to allege that they were the target of any alleged conspiracy, which is also fatal to their jurisdictional arguments. *See Noble*, 611 F. Supp. 2d at 541 (finding no personal jurisdiction based on conspiracy where plaintiff failed to show it was target of alleged conspiracy).

III. There is No Successor Liability Personal Jurisdiction Over Salvo.

Plaintiffs do not once mention in their Complaint the exceptions to successor liability on which they now rely—implied assumption of liability and the de facto merger doctrine. This

ignores the rule that Plaintiffs must specifically plead the exceptions to the general rule of successor liability on which they rely. *See* Salvo MTD at 6 (collecting authorities) (July 28, 2023). Nor do Plaintiffs allege facts satisfying the elements of either exception.

As an initial matter, implied assumption of liability is irrelevant here because the express terms of the contract allocate liability between Salvo and Okori. Implied assumption of liability is not appropriate when the contract expressly addresses the issue. *See* Salvo MTD at 7 (collecting authorities). The contract here is clear: "All Purchased Assets and inventory shall be sold and transferred to Buyer free and clear of all mortgages, pledges, security interests, liens, and encumbrances, and debt." APA ¶ 3.

In any event, Plaintiffs fail to plead facts necessary to show that Salvo impliedly assumed Okori's liabilities. While Plaintiffs cite a list of relevant facts from *States Roofing*, the Complaint in this case does not plead similar facts. Nor can the alleged operation of an asset (here, 80P Builder) after the contract was executed and alleged maintenance of relationships with the predecessor's suppliers and customers be the basis for implied assumption of liability. *See Harris v. T.I.*, 413 S.E.2d 605, 609 (Va. 1992) (finding no express or implied assumption of liabilities even where purchasing company undertook same manufacturing operation at same physical location and maintained the same personnel and customers).[3] If Plaintiffs were right, *every* asset purchase would give rise to implied assumption of liability, and the default rule that a successor does not inherit the previous owner's liabilities would be eviscerated.

Plaintiffs also fail to show that Okori and Salvo executed a de facto merger because they do not allege continuity of enterprise, dissolution of the selling corporation, and assumption of

[3] Plaintiffs' citation to *Harris* to support its implied assumption of liability argument is misleading. *Harris* found *no* express or implied liability on the facts Plaintiffs recite and it upheld the trial court's grant of the defendant's motion to dismiss.

liabilities. Continuity of enterprise requires "the same management, personnel, assets and physical location" before and after the sale. *Serchay v. NTS Fort Lauderdale Off. Joint Venture*, 707 So.2d 958, 960 (Fla. Dist. Ct. App. 1998). While Plaintiffs allege that Salvo now employs Mr. Sousana, they do not allege (nor could they) that Mr. Sousana ever managed Salvo as a whole. As the APA specifies, Mr. Sousana was only employed in a particular division within the company during a hand-off period. APA ¶¶ 5–6. Similarly, Plaintiffs fail to allege that Salvo obtained any of Okori's assets beyond the 80P Builder website or occupied its physical location. Nor have Plaintiffs submitted any evidence that Okori has dissolved (because it has not). *See* Salvo MTD at 8. Because "there is no record evidence to establish that [Okori] was dissolved," there can be no *de facto* merger. *Amjad Munim, M.D., P.A. v. Azar*, 648 So.2d 145, 154 (Fla. Dist. Ct. App. 1994). Plaintiffs also fail to allege assumption of liability. That Salvo assumed rights under customer contracts for the 80P Builder website, *see* Br. at 9—just one of Okori's assets—is insufficient.

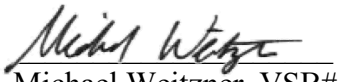
IV. Plaintiffs' Request for Jurisdictional Discovery Should Be Denied.

It is well settled that jurisdictional discovery is not appropriate if the facts pleaded in the complaint are insufficient. *See, e.g.*, *Trend Micro Inc. v. Open Text, Inc.*, 2023 WL 6446333, at *12 (E.D. Va. Sept. 29, 2023) (denying jurisdictional discovery where no sufficient contacts with Virginia alleged). The same result obtains here because Plaintiffs fail to allege that any cause of action "arise[s] from" Salvo's actions in Virginia. *See supra* Part I. And Plaintiffs "fail[] to make more than conclusory allegations that additional relevant" discoverable facts exist such that jurisdictional discovery would even be productive. *FireClean, LLC v. Tuohy*, 2016 WL 3952093, at *9 (E.D. Va. July 21, 2016). Burkard purchased the firearm parts on or before February 1, 2021, and Salvo did not have any interest in 80P Builder at that time. Those facts are dispositive.[4]

[4] The cases Plaintiffs cite in support of their argument that a bench trial is warranted are inapposite because neither concerned personal jurisdiction. Br. at 10.

January 26, 2024

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 26th day of January 2024, a true copy of the foregoing Reply in Support of Defendant's Motion by Special Appearance to Dismiss for Lack of Personal Jurisdiction was served by electronic mail and File & ServeXpress.

Michael Weitzner