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DISTRICT COURT, WELD COUNTY, STATE OF COLORADO 901 9th Avenue, Greeley, CO 80631	
Plaintiff: MARGARET R. COLUCCI, v. **Defendants:** NATIONAL BOARD OF CHIROPRACTIC EXAMINERS; SALVATORE D. LARUSSO; STEVEN R. CONWAY; JOHN C. NAB; PAUL N. MORIN; DANIEL M. COTE; LEROY F. OTTO; JOHN R. McGINNIS; FARREL GROSSMAN; and KIRK SHILTS	▲COURT USE ONLY▲
Attorneys for Defendants: Tamara Seelman, #29391 Kaitlin Marsh-Blake, #50592 GORDON REES SCULLY MANSUKHANI, LLP 555 Seventeenth Street, Suite 3400 Denver, CO 80202 Telephone: 303.534.5160 Facsimile: 303.534.5161 Email: tseelman@grsm.com kmarsh-blake@grsm.com	Case No.: 2018CV30203 Division: 5

DEFENDANTS' MOTION TO DISMISS

Defendants National Board of Chiropractic Examiners ("NBCE"), Salvatore D. LaRusso, Steven R. Conway, John C. Nab, Paul N. Morin, Daniel M. Cote, LeRoy F. Otto, John R. McGinnis, Farrel Grossman, and Kirk Shilts, (the "Individual Defendants") by and through their attorneys, Gordon Rees Scully Mansukhani, LLP, hereby move to dismiss Plaintiff's claims pursuant to C.R.C.P. 12(b)(2) and 12(b)(5) as follows:

Conferral Statement

Pursuant to C.R.C.P. 121, §1-15, undersigned counsel certifies she discussed this motion with Plaintiff's Counsel who stated Plaintiff opposes the relief sought herein.

Introduction

Plaintiff's complaint asserts no valid claims. The NBCE is a Texas non-profit corporation and the Individual Defendants are volunteer members of the NBCE's board of directors ("Board") who reside in states other than Colorado. Plaintiff is a former board member of the NBCE who resides in Nevada. Plaintiff's Complaint alleges Defendants engaged in misconduct by removing her from the NBCE's Board during a Board meeting held in Arizona. Plaintiff's Complaint fails to provide a feasible cause of action against any Defendant. The Court lacks personal jurisdiction over the Individual Defendants. Plaintiff lacks standing to bring her claims because the Individual Defendants do not owe her a fiduciary duty. The Individual Defendants are immune from liability pursuant to Colorado statute which protects volunteers of non-profit organizations. Finally, because Plaintiff lacks standing, lacks personal jurisdiction, and the Individual Defendants are immune from suit, she cannot maintain an action for declaratory judgment. The Court should therefore dismiss Plaintiff's complaint.

Argument

Plaintiff asserts three claims, (1) breach of fiduciary duty against the Individual Defendants, (2) Aiding and Abetting Breach of Fiduciary Duty against the NBCE, and (3) declaratory judgment against all Defendants. All three claims are deficient as discussed below.

1. Standard of Review

a. Lack of Jurisdiction – C.R.C.P. 12(b)(2).

Plaintiff must establish a prima facie case of personal jurisdiction to overcome a Motion to Dismiss under C.R.C.P. 12(b)(2). *See Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1190 (Colo. 2005). A prima facie showing is established when plaintiff raises a reasonable inference that the court has jurisdiction over the defendants. *Id.* In the absence of an evidentiary hearing, a personal jurisdiction challenge may be decided on documentary evidence. *Id.* at 1192.

b. Failure to State a Claim – C.R.C.P. 12(b)(5).

A motion to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) tests the sufficiency of the complaint. *See Hewitt v. Rice*, 119 P.3d 541 (Colo. App. 2004). The purpose is to determine whether plaintiff asserted claims upon which relief can be granted. *See Hemmann Mgmt. Servs. v. Mediacell, Inc.*, 176 P.3d 856 (Colo. App. 2007). In reviewing a motion to dismiss for failure to state a claim, the Court must accept all well-pleaded facts as true. *Rector v. City and County of Denver*, 122 P.3d 1010 (Colo. App. 2005). Only a complaint that states a plausible claim for relief survives a motion to dismiss. *See Warne v. Hall*, 373 P.3d 588, 2016 CO 50, ¶ 9 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937 (2009)).

2. This Court lacks personal jurisdiction over the Individual Defendants because the Individual Defendants lack sufficient contacts with Colorado to establish general or specific jurisdiction.

Plaintiff asserts two claims against the Individual Defendants, breach of fiduciary duty and declaratory judgment. The Individual Defendants however have insufficient contacts with Colorado to warrant the Court exercising personal jurisdiction over them. The Individual Defendants have negligible contacts with the State of Colorado and even those contacts are not enough to satisfy Colorado's long-arm statute and constitutional due process. Therefore, the Court should dismiss the claims against the Individual Defendants for lack of personal jurisdiction pursuant to C.R.C.P. 12(b)(2).

In order to establish personal jurisdiction over an out of state defendant a plaintiff must comply with the requirements of Colorado's long-arm statute and constitutional due process. *See First Horizon Merch. Servs. v. Wellspring Capital Mgmt., LLC*, 116 P.3d 166, 173 (Colo. App. 2007). Colorado's legislature intended the long-arm statute to confer the maximum jurisdiction allowed by the due process clauses of the United States and Colorado. *See Archangel Diamond Corp v. Lukoil,* 123 P.3d 1187, 1193 (Colo. 2005). The court addresses the requirements of the long-arm statute when it engages in a constitutional due process analysis. *See id.*

Due process requires a defendant have certain minimum contacts with the forum state so that he "may foresee being answerable in court there." *See First Horizon*, 116 P.3d at 173. "The quantity and nature of the minimum contacts required depends on whether the plaintiff alleges specific or general jurisdiction." *See Archangel Diamond Corp*, 123 P.3d at 1194. It is unclear whether Plaintiff alleges specific or general jurisdiction within her Complaint, therefore Defendants address both issues below.

In analyzing the contacts with Colorado, it is important to note Plaintiff is a resident of Nevada, the NBCE is a Texas non-profit corporation, the NBCE Board voted to remove Plaintiff as a board member during a Board meeting in Arizona, and the Individual Defendants are all residents of states *other than* Colorado. *See* Complaint, ¶¶ 1-11, 68.

a. General jurisdiction over the Individual Defendants does not exist because Plaintiff fails to establish contacts with Colorado that are "continuous and systematic, of a general business nature."

General jurisdiction exists when the activities of the out of state defendant are "continuous and systematic, of a general business nature." *See Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1271 (Colo. 2002). "Continuous and systematic" has been defined as the defendant is "essentially at home in the forum state." *See Magill v. Ford Motor Co.*, 2016 CO 57, ¶ 17, 379 P.3d 1033, 1037 (Colo. 2016). A non-resident's contacts with the state will rarely justify general jurisdiction. Plaintiff's Complaint does not allege jurisdictional facts that suggest the Individual Defendants are "essentially at home" in Colorado. *See id.*

The Individual Defendants do not work or own businesses in Colorado.[1] They are not legal residents of Colorado nor are they registered to vote in Colorado.[2] They own no property in Colorado and conduct no banking in Colorado.[3] None of the Individual Defendants have had a Colorado driver's license or filed taxes in Colorado.[4] They do not practice chiropractic in Colorado or have personal offices in the state.[5]

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[1] LaRusso Aff., Ex. A, ¶ 13-14; Conway Affidavit, Ex. B, ¶ 13-14; Nab Affidavit, Ex. C, ¶ 13-14; Morin Affidavit, Ex. D, ¶ 13-14; Cote Affidavit, Ex. E, ¶ 14-15; Otto Affidavit, Ex. F, ¶ 13-14; McGinnis Affidavit, Ex. G., ¶ 13-14; Grossman Affidavit, Ex. H, ¶ 13-14; Shilts Affidavit, Ex. I, ¶ 13-14.

[2] LaRusso Aff., Ex. A, ¶ 5-7; Conway Aff., Ex. B, ¶ 5-7; Nab Aff., Ex. C, ¶ 5-7; Morin Aff., Ex. D, ¶ 5-7; Cote Aff., Ex. E, ¶ 6-8; Otto Aff., Ex. F, ¶ 5-7; McGinnis Aff., Ex. G., ¶ 5-7; Grossman Aff., Ex. H, ¶ 5-7; Shilts Aff., Ex. I, ¶ 5-7.

[3] LaRusso Aff., Ex. A, ¶ 8-10; Conway Aff., Ex. B, ¶ 8-10; Nab Aff., Ex. C, ¶ 8-10; Morin Aff., Ex. D, ¶ 8-10; Cote Aff., Ex. E, ¶ 9-11; Otto Aff., Ex. F, ¶ 8-10; McGinnis Aff., Ex. G., ¶ 8-10; Grossman Aff., Ex. H, ¶ 8-10; Shilts Aff., Ex. I, ¶ 8-10.

[4] LaRusso Aff., Ex. A, ¶ 11-12; Conway Aff., Ex. B, ¶ 11-12; Nab Aff., Ex. C, ¶ 11-12; Morin Aff., Ex. D, ¶ 11-12; Cote Aff., Ex. E, ¶12-13; Otto Aff., Ex. F, ¶ 11-12; McGinnis Aff., Ex. G., ¶ 11-12; Grossman Aff., Ex. H, ¶ 11-12; Shilts Aff., Ex. I, ¶ 11-12.

[5] LaRusso Aff., Ex. A, ¶ 13-14; Conway Affidavit, Ex. B, ¶ 13-14; Nab Affidavit, Ex. C, ¶ 13-14; Morin Affidavit, Ex. D, ¶ 13-14; Cote Affidavit, Ex. E, ¶ 14-15; Otto Affidavit, Ex. F, ¶ 13-14; McGinnis Affidavit, Ex. G., ¶ 13-14; Grossman Affidavit, Ex. H, ¶ 13-14; Shilts Affidavit, Ex. I, ¶ 13-14.

Some of the Individual Defendants attended a limited number of meetings in Colorado for the NBCE or another non-Colorado non-profit organization. Two of the Individual Defendants have never attended a NBCE meeting in Colorado.[6] Four of the Individual Defendants have attended only one meeting in Colorado.[7] Dr. LaRusso has been a Board member since 2008 and only attended meetings in Colorado on four occasions in the past ten years.[8] Dr. Conway has attended meetings in Colorado on six occasions since becoming a Board member in 2012.[9] Dr. Morin attended seven meetings in Colorado for the NBCE since becoming a Board member in 2009.[10] On occasion, the Individual Defendants have also exchange emails or telephone calls with employees of NBCE who work in Greeley, Colorado regarding business matters of NBCE.[11] These limited interactions however are insufficient to establish contacts that are "continuous and systematic, of a general business nature," and that make each Individual Defendant "at home" in Colorado. *See Keefe*, 40 P.3d at 1271; *Magill*, 2016 CO 57 at ¶ 17.

b. Plaintiff fails to establish specific jurisdiction over the Individual Defendants because the litigation does not arise out of the limited Colorado-related contacts of each Individual Defendant.

Specific jurisdiction exists when "the injuries triggering litigation arise out of and are related to 'activities that are significant and purposefully directed by the defendant at residents of the forum.'" *See Archangel Diamond Corp.*, 123 P.3d at 1194. The minimum contacts analysis to satisfy specific jurisdiction is a two part test determining: "(1) whether the defendant

[6] *See* McGinnis Aff., Ex. G, ¶ 19; Shilts Aff., Ex. I, ¶ 19.
[7] Nab Aff., Ex. C, ¶ 19; Cote Aff., Ex. E, ¶ 19; Otto Aff., Ex. F, ¶ 18; Grossman Aff., Ex. H, ¶ 20.
[8] LaRusso Aff., Ex. A, ¶ 3, 18-19.
[9] Conway Aff., Ex. B, ¶ 18-19.
[10] Morin Aff., Ex. D, ¶ 18-19.
[11] LaRusso Aff., Ex. A, ¶ 16; Conway Affidavit, Ex. B, ¶ 16; Nab Affidavit, Ex. C, ¶ 16; Morin Affidavit, Ex. D, ¶ 16; Cote Affidavit, Ex. E, ¶ 17; Otto Affidavit, Ex. F, ¶ 16; McGinnis Affidavit, Ex. G., ¶ 16; Grossman Affidavit, Ex. H, ¶ 17; Shilts Affidavit, Ex. I, ¶ 16.

purposefully availed himself or herself of the privilege of conducting business in the forum state, and (2) whether the litigation arises out of the defendant's forum-related contacts." *See First Horizon*, 166 P.3d at 173. To satisfy the "arising out of" prong of this test, defendant's actions giving rise to the litigation must have created a "substantial connection" with the forum state. *Id.* Essentially, the court will examine whether the defendant's actions taken outside the forum are directed at causing a harmful effect within the forum state such that a sufficient nexus exists between the defendant and state to satisfy due process. *Id.* at 174.

Here, Dr. Colucci's allegations do not allege a sufficient nexus between the Individual Defendants and Colorado to satisfy specific jurisdiction. Her claims against the Individual Defendants relate to her removal from the Board. Plaintiff is a resident of Nevada, and the Board voted to remove her during a meeting in Arizona. In contrast, each of her allegations relating to jurisdiction over the Individual Defendants relates to general conduct of the Individual Defendants with Colorado unrelated to her removal from the Board. For example, Dr. Colucci alleges "each of the individual Defendants conducts the business of NBCE in accordance with Colorado law," and "each individual Defendant has flown to Colorado and attended NBCE Board Meetings," and "each individual Defendant has made telephone calls and sent various mailings and emails to the NBCE Executive Director…who reside in Colorado." *See* Complaint, pg. 3, ¶¶ 17, 19. None of these allegations relate to specific conduct at issue - Plaintiff's removal from the Board of a Texas non-profit - which occurred in Arizona and affected a Nevada resident (Plaintiff).

Plaintiff's removal had no effect in Colorado. Plaintiff does not allege the Individual Defendants committed any acts in Colorado that constitute a breach of fiduciary duty. Plaintiff must connect the actions of the Individual Defendants to a breach of fiduciary duty (or other injury) that had a harmful effect in the State of Colorado. *See First Horizon*, 166 P.3d at 173-74. Her Complaint fails to do so.

3. Plaintiff lacks standing.

a. The Individual Defendants do not owe Plaintiff a fiduciary duty, therefore Plaintiff cannot state a claim for breach of fiduciary duty against the Individual Defendants or aiding and abetting breach of fiduciary duty against the NBCE.

Standing relates to a plaintiff's ability to bring an action in court. To establish standing, a plaintiff must show she suffered (1) an injury in fact, (2) to a legally protected interest. Injury in fact exists if "the action complained of has caused or has threatened to cause injury." *Kreft v. Adolph Coors Co.*, 170 P.3d 854, 857 (Colo. Ct. App. 2007). A legally protected interest must arise "from a constitutional, statutory, or judicially created rule of law that entitles the plaintiff to some form of judicial relief." *Bd. of County Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1053 (Colo. 1992). Breach of a fiduciary duty is cognizable at common law as a protected interest. The Individual Defendants, however, do not owe Plaintiff a fiduciary duty. For that reason, Plaintiff lacks standing.

"Before there can be a breach of a fiduciary duty, a fiduciary relationship or a confidential relationship must exist." *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1312 (Colo. Ct. App. 1998) (citing *Vikell Investors Pacific, Inc. v. Kip Hampden, Ltd.*, 946 P.2d 589 (Colo. App. 1997)). To state a claim for breach of fiduciary duty, a plaintiff must show "(1) that the defendant is acting as a fiduciary of the plaintiff; (2) that he breaches a fiduciary duty to the plaintiff; (3) that the plaintiff incurs damages; and (4) that the defendant's breach of fiduciary duty is a cause of the plaintiff's damages." *Graphic Directions v. Bush*, 862 P.3d 1020 1022 (Colo. App. 1993).

Plaintiff admits the Individual Defendants do not owe her a fiduciary duty as her Complaint states the Individual Defendants owe duties of care, loyalty, and good faith "to NBCE," and the "NBCE knew the board members owed it fiduciary duties." *See* Complaint, ¶¶ 103, 108. Nowhere in Plaintiff's Complaint does she allege the Individual Defendants owed ***her*** a fiduciary duty.[12] For that reason alone her claim for breach of fiduciary duty fails to state a claim upon which relief can be granted.

Because the Individual Defendants do not owe Plaintiff a fiduciary duty, Plaintiff also cannot state a claim for aiding and abetting breach of fiduciary duty against NBCE. The elements of aiding and abetting a breach of fiduciary duty include: (1) breach by a fiduciary of a duty owed to a plaintiff, (2) a defendant's knowing participation in the breach, and (3) damages. *Nelson v. Elway*, 971 P.2d 24598, 249-250 (Colo. App. 1999). Plaintiff cannot meet the first element, therefore, she cannot proceed with this claim.

b. To the extent Plaintiff intends her Complaint to be akin to a derivative action, she cannot bring a derivative action because she is not a member of the NBCE.

In Colorado, a member or director of a nonprofit corporation can bring a derivative suit against the nonprofit or its members. *See* C.R.S. § 7-126-401. This means a member or director of a nonprofit can bring a lawsuit on behalf of the organization to enforce or defend a legal right or claim. A Colorado statue provides, "a proceeding may be brought in the right of a nonprofit

[12] As a result of the conferral process for this motion, Defendants understand Plaintiff intends to argue that a third-party has standing to allege breach of fiduciary duty under *Spacek v. Taylor (In re Taylor Trust)*, 2016 COA 100, 381 P.3d 428 (Colo. App. 2016). This case is distinguishable, however, because it deals with the inheritance of beneficiaries of a revocable trust and probate issues and does not state any rule that would apply to a former board member suing for breach of fiduciary duty as a third-party beneficiary.

corporation to procure a judgment in its favor by: (a) [a]ny voting member or voting members having five percent or more of the voting power; or (b) any director." C.R.S. § 7-126-401(1). It further states that, "[i]n any such proceeding, each complainant shall be a voting member or director at the time of bringing the proceeding." *Id.*(emphasis added).

Here, Plaintiff's lawsuit claims the actions of the Individual Defendants and NBCE caused her personal damage. But, she only alleges the Individual Defendants owe a fiduciary duty to the NBCE organization – not to her. Plaintiff's Complaint appears to be a quasi-derivative suit. But, it does not meet the requirements of derivative suits under C.R.S. § 7-126-401 because (1) Plaintiff did not bring the lawsuit in the name of or on behalf of the NBCE and (2) Plaintiff is not a director or voting member of the NBCE organization.

4. Plaintiff's claims against the Individual Defendants are barred by Colorado statute C.R.S. § 13-21-115.7(2) because the Individual Defendants are volunteers of a nonprofit corporation.

The Individual Defendants are immune from liability for Plaintiff's allegations under Colorado statute because they are volunteers of a non-profit organization and acted within the scope of their official functions and duties. The statute provides:

> …any person who serves as a director, officer, or trustee of a nonprofit corporation or nonprofit organization and who is not compensated for serving as a director, officer, or trustee on a salary or prorated equivalent basis shall be immune from civil liability for any act or omission which results in damage or injury if such person was acting within the scope of such person's official functions and duties as a director, officer, or trustee unless such damage or injury was caused by the willful and wanton act or omission of such director, officer, or trustee.

C.R.S. § 13-21-115.7(2) (emphasis added).

Removal of a member from the board is within the functions and duties of the NBCE and its board members as set forth in the NBCE's Board Policy Manual:

Removal of officers 7.6

The board of directors will follow NBCE Bylaws Article V OFFICERS, Section 3 for removal of its officers:

- Removal. Any officer elected or appointed by the Board may be removed whenever, in the judgment of the Board, the best interests of the National Board would be served thereby. Such a removal requires a two-thirds vote of the entire Board.

See NBCE Board Policy Manual, Ex. J, Chapter 7, Section 7.6; NBCE Bylaws, Ex. K, Article V, Section 3.[13] As alleged in Plaintiff's Complaint, the Board voted 9 – 2 to remove Plaintiff, therefore, the required two-third vote was met. *See* Complaint, ¶ 82. Further, Plaintiff does not allege that her removal was done pursuant to any "wanton" or "willful" conduct. To the contrary, Plaintiff alleges the Individual Defendants engaged in "improper and wrongful acts". *See* Complaint, ¶ 82. The Individual Defendants are therefore immune from liability and all claims against them must be dismissed.

5. **There is no actual controversy to merit a declaratory judgment because Plaintiff lacks standing, lacks jurisdiction, and the Individual Defendants are immune from liability.**

Declaratory judgment actions must be based on an actual controversy. *See Community Tele-Communications, Inc. v. Heather Corp.*, 677 P.2d 330, 334 (Colo. 1984). As discussed

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[13] Plaintiff references the NBCE's policies and by-laws within her Complaint. Therefore, Defendants are able to cite to its contents without converting their Motion to Dismiss under C.R.C.P. 12(b) to a Motion for Summary Judgment under C.R.C.P. 56. "A document that is referred to in the complaint, even though not formally incorporated by reference or attached to the complaint, is not considered a "matter outside the pleading." Thus, if a document is referred to in the complaint and is central to the plaintiff's claim, the defendant may submit an authentic copy to the court to be considered on a motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment." *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. Ct. App. 2005).

above, Plaintiff fails to state a claim upon which relief can be granted for multiple reasons, and the Court lacks jurisdiction. Those failures alone illustrate lack of an actual controversy that would merit declaratory judgment. *See id.* In addition, to have standing a plaintiff seeking declaratory judgment must establish that her rights are adversely affected. *Id.*at 334-35. The analysis of standing is the same for declaratory judgment as discussed above – plaintiff must show an injury in fact to a legally protected interest. *Id.* As discussed above, neither the Individual Defendants nor the NBCE owe a duty to Plaintiff and, therefore, Plaintiff cannot show an injury to a legally protected right. For these reasons and those discussed above, the Court should dismiss Plaintiff's third claim for declaratory judgment.

Conclusion

WHEREFORE, Defendants National Board of Chiropractic Examiners, Salvatore D. LaRusso, Steven R. Conway, John C. Nab, Paul N. Morin, Daniel M. Cote, LeRoy F. Otto, John R. McGinnis, Farrel Grossman, and Kirk Shilts respectfully request the Court grant their Motion to Dismiss and enter an order dismissing all of Plaintiff's claims with prejudice, and for any such other and further relief the Court deems just and necessary.

Respectfully submitted this 1st day of May, 2018.

GORDON REES SCULLY
MANSUKHANI, LLP

Original on file pursuant to C.R.C.P. 121 § 1-26(7).

/s/ Kaitlin M. Marsh-Blake
Tamara Seelman
Kaitlin Marsh-Blake

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of May, 2018, a true and correct copy of the foregoing was filed and served via Colorado Courts E-Filing to all attorneys of record:.

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