DISTRICT COURT, WELD COUNTY, STATE OF COLORADO 901 9th Avenue, Greeley, CO 80631	~~DATE FILED: May 29, 2018 4:54~~ PM
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' ~~REPLY IN~~ SUPPORT OF 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 submit the following Reply in Support of their Motion to Dismiss and state as follows:

Introduction

Plaintiff fails to show the Individual Defendants have contacts with Colorado sufficient for this Court to exercise jurisdiction over them. Plaintiff is a Nevada resident and her Complaint alleges injuries that arose out of a NBCE board meeting held in Arizona. The NBCE is a Texas non-profit and none of the Individual Defendant board members reside in Colorado. The limited contacts with Colorado are random and attenuated and are insufficient for general or specific jurisdiction.

Further, Plaintiff does not owe, and admits she does not owe, a fiduciary duty to the Individual Defendants. She therefore cannot state a claim for breach of fiduciary duty against the Individual Defendants or for aiding and abetting breach of fiduciary duty against the NBCE. Plaintiff's claim for declaratory relief likewise fails because it is premised on her fatal claim for breach of fiduciary duty.

Plaintiff cannot seek relief in this forum and the Court should dismiss her claims.

1. The Court lacks specific jurisdiction over the Individual Defendants because the alleged tort occurred in Arizona, against a Nevada resident.

Sufficient contacts do not exist to haul the Individual Defendants into court in Colorado. Plaintiff agrees specific jurisdiction exists when the injuries triggering litigation arise out of and are related to a defendant's activities that were purposefully directed at residents of the forum state. Specific jurisdiction requires satisfaction of two prongs: (1) whether the defendant purposefully availed himself of the privilege of conducting business in the forum state, and (2) whether the litigation arises out of defendant's forum-related contacts. *See First Horizon Merch. Servs. v. Wellspring Capital Mgmt., LLC*, 116 P.3d 166, 173 (Colo. App. 2007). Plaintiff fails to establish either prong. Notably, Plaintiff's response fails to address the significant facts that

Plaintiff is a *Nevada* resident, that the NBCE is a *Texas* non-profit corporation, and that the injury triggering Plaintiff's Complaint – Plaintiff's removal from the NBCE board of directors – occurred during a board meeting in *Arizona*.

a. The Individual Defendants did not purposefully avail themselves of the privilege of conducting business in Colorado.

"The 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random or fortuitous contacts or the unilateral activity of a third party." *Keefe v. Kirschenbaum P.C.*, 40 P.3d 1267, 1271 (Colo. 2002) (*citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). Mere foreseeability of causing injury in another state is insufficient to establish purposeful direction. *Burger King* at 474.

Plaintiff does not dispute the Individual Defendants' only contacts with Colorado are their limited volunteer work for the NBCE which is a Texas non-profit corporation with an office in Greeley, Colorado. The Individual Defendants do not reside, work, own businesses, bank, vote, file taxes, or own property in Colorado. S*ee* Affidavits attached to Motion Ex. A-I. The limited contacts of the Individual Defendants to Colorado are that they made phone calls or sent emails to employees of the NBCE in Colorado and some of the Individual Defendants attended a few meetings for the NBCE in Colorado. *Id*. Plaintiff contends these contacts are sufficient for personal jurisdiction and focuses on the number of days some of the Individual Defendants were allegedly physically in Colorado. However, it is not the *quantity* of contacts but rather the *quality* of contacts that is determinative of jurisdiction. *Continental American Corp. v. Camera Controls Corp.*, 692 F.2d 1309, 1314 (10th Cir. 1982) (*citing International Shoe International Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 159, 90 L.Ed. 95 (1945)).

The Individual Defendants' limited contacts with Colorado are random, fortuitous, and attenuated and do not raise an inference that the Individual Defendants purposefully availed themselves of the privilege of conducting business in Colorado. *See Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1195-97 (Colo. 2005); *Keefe* at 1271; *see also First Horizon*, 116 P.3d at 176 (Colo. App. 2007).

Plaintiff further contends the Individual Defendants purposefully availed themselves of the privilege of conducting business in Colorado because, by becoming board members, they agreed to manage the NBCE's affairs in accordance with the laws of Colorado and thus had "continuous obligations" with Colorado. A contractual relationship, alone, however is insufficient to establish personal jurisdiction. *In re The Foundation For Knowledge in Development v. Interactive Design Consultants*, 234 P.3d 673, 680 (Colo. 2010) *citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). In any event, there is no contract between Plaintiff and any of the Individual Defendants. The purported contract to which Plaintiff refers is between the NBCE and the Individual Defendants.

Plaintiff further contends the NBCE Board Policy Manual advised the Individual Defendants they have individual accountability "under Colorado law." Plaintiff misstates the manual. The manual does not state what law applies in the event a board member breaches a duty to the NBCE. Besides, the NBCE manual refers to duties owed *to the NBCE*, not other board members. Moreover, the NBCE regularly holds meetings in states *all over the United States*. See Affidavits attached to Motion Ex. A-I. The NBCE develops, administers and scores standardized exams for candidates graduating from chiropractic colleges; the NBCE's exams are either accepted or required in all fifty states of the United States. *See* https://www.nbce.org/about-nbce/ (last accessed 05/29/2018).

Plaintiff next contends the Individual Defendants purposefully availed themselves of conducting business in Colorado because they received compensation from the NBCE. This argument makes no sense because the NBCE is a Texas non-profit. As discussed further below, the Individual Defendants receive reimbursements from the NBCE when traveling for NBCE business. These reimbursements do not show contacts with Colorado because they have no relation to Plaintiff (a Nevada resident) or her complaint about being removed from the Board during the NBCE meeting in Arizona. Further, the Individual Defendants receive reimbursement for traveling on NBCE business *all over the United States*. Their reimbursements are not directly related to work performed in Colorado and come from a Texas non-profit. The case Plaintiff cites, *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008), does not stand for her contention that receiving compensation, or some other type of reimbursement, establishes consent to jurisdiction.

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In *Dudnikov*, the non-resident defendants sent a notice of copyright infringement to plaintiffs in Colorado relating to fabric prints the Colorado plaintiffs were selling. The notice demanded the Colorado plaintiffs stop selling the prints and threatened a lawsuit. The Colorado plaintiffs then filed a declaratory judgment action in Colorado, and the defendants sought dismissal for lack of jurisdiction. The district court dismissed the action and the Colorado plaintiffs appealed. The Tenth Circuit reversed and found jurisdiction over the non-residents because the non-residents purposefully aimed their conduct (the letter) at Colorado residents and intended their conduct to affect the business operations of the Colorado residents – in particular stopping the plaintiffs from selling the prints. *Id.* at 1076. The court stated specific jurisdiction is "premised on something of a quid pro quo: in exchange for 'benefitting' from some purposive conduct directed at the forum state, a party is deemed to consent to the exercise of jurisdiction for claims related to those contacts. *Id.* at 1078. Thus, the court found the defendants' conduct was directly aimed at Colorado residents and their Colorado business, therefore, the plaintiffs "benefitted" by being able to proceed with their action in Colorado.

To the contrary, here, the Individual Defendants did nothing intentional or purposeful directed to or at Plaintiff *in Colorado*. The reimbursements from the NBCE (a Texas non-profit) to the Individual Defendants (non Colorado residents) had no connection to Plaintiff's dispute or Colorado. Plaintiff suggests the tort at issue took place in Colorado, but this is incorrect. Plaintiff's Complaint arises out of the Individual Defendants' vote to remove her from the NBCE's board of directors. *See* Complaint, *generally*. Plaintiff's own Complaint admits this vote took place *in Arizona*. *See* Complaint at ¶¶68, 82.

Plaintiff also contends jurisdiction is proper over the Individual Defendants because they were the "primary participants" in the breaches of fiduciary duty that give rise to jurisdiction. Plaintiff cites two cases in support of this theory, neither of which are applicable here. First, Plaintiff cites *SEC v. Knowles*, 87 F.3d 413, 418-19 (10th Cir. 1996) which involves whether a Bahamian citizen is required to respond to a subpoena served on him by the Denver office of the United States Securities and Exchange Commission ("SEC") while he was visiting New York and again when he was visiting Miami. *Id.* The case at issue does not involve an investigation by the SEC, a subpoena or a non-United States citizen. Second, Plaintiff relies on *Wise v. Lindamood*, 89 F. Supp.2d 1187, 1194-95 (D. Colo. 1999). This case involves a Colorado plaintiff suing a California defendant over the defendant's alleged violation of copyright protections. The parties had signed an agreement that provided Colorado law would govern their activities. The court used this choice of law provision as one factor in determining it had jurisdiction over the California defendant. Here, however, there is <u>no contract</u> between Plaintiff and the Individual Defendants.

The Individual Defendants also did not avail themselves of benefits of doing business in Colorado, or consent to jurisdiction in Colorado, by raising an immunity defense in their Motion to Dismiss. Plaintiff alleges that by arguing immunity under the C.R.S. § 13-21-115.7(2), the Individual Defendants have somehow agreed to jurisdiction in Colorado. Plaintiff's theory does not meet the above described criteria for specific jurisdiction. Moreover, Defendants are entitled to allege alternative theories for dismissal without admitting to or accepting jurisdiction in this state. *See* C.R.C.P. 8. Thus, if the court determines that it does have jurisdiction over the Individual Defendants, *in the alternative*, Plaintiff's claims should be dismissed pursuant to the immunity statute.

b. Individual Defendants' alleged conduct does not create harm in Colorado to satisfy the "arising out of" prong for specific jurisdiction.

The second prong Plaintiff must satisfy for the court to exercise specific jurisdiction is whether the alleged injury arises out of and is related to activities that are directed at the forum. *See Archangel*, 123 P.3d at 1194 (Colo. 2005); *First Horizon*, 116 P.3d at 173. The question is whether the defendant's allegedly tortious actions have a *substantial connection* with the forum state and caused a harmful effect in the forum state. *Id.* at 174.

The Individual Defendants' actions of removing Plaintiff from the board did not have a substantial connection with Colorado and did not cause a harmful effect in Colorado. The

Individual Defendants (non Colorado residents) voted to remove Plaintiff (a Nevada resident) from the board of directors of the NBCE (a Texas non-profit corporation) during a board member held in Arizona. Plaintiff's removal from the Board does not have a substantial connection to Colorado and caused no harmful effect in Colorado.

Plaintiff contends this prong is met because the Individual Defendants owed and breached fiduciary duties to the NBCE which has an office in Colorado. The facts as alleged by Plaintiff do not support this theory. Plaintiff's alleged injuries triggering her lawsuit clearly arose out of the Individual Defendants' vote to remove her from the board of directors and Plaintiff's Complaint clearly (and correctly) alleges that vote occurred in Arizona. *See* Complaint at ¶¶68, 82. Plaintiff's Complaint does not allege a harmful effect in Colorado.

Finally, it would be unreasonable to require the Individual Defendants to litigate this matter in Colorado, as none of Individual Defendants reside in Colorado or have sufficient contacts with Colorado to merit personal jurisdiction. Plaintiff also does not live in Colorado. Plaintiff contends the only alternative would be for her to litigate in nine different jurisdictions. This is untrue. Plaintiff ignores the potential jurisdiction of Arizona, where the alleged tort occurred. Moreover, as discussed below, Plaintiff cannot state a claim for breach of fiduciary duty against the Individual Defendants because the Individual Defendants do not owe her a fiduciary duty. Plaintiff, therefore, may not be able to assert such a claim in *any* jurisdiction. Just because Plaintiff is upset the Individual Defendants voted to remove her from the NBCE board of directors does not mean she has a legal claim. It is not this court's obligation to find a jurisdiction in which Plaintiff can sue. It is only this court's obligation to determine whether Plaintiff can sue these Defendants in *this* jurisdiction.

2. Plaintiff fails to establish the Individual Defendants are "essentially at home" in Colorado to warrant general jurisdiction.

Plaintiff does not dispute that in order to establish general jurisdiction over the Individual Defendants, Plaintiff must show the Individual Defendants have continuous and systematic contacts with Colorado. This standard is further defined as "essentially at home in the forum state," and Colorado courts have concluded that "[a] nonresident defendant's contacts with the state will rarely justify exercising general jurisdiction." *See Magill v. Ford Motor Co.*, 2016 CO 57, ¶ 17, 379 P.3d 1033, 1037 (Colo. 2016). Moreover, only a limited set of affiliations with a forum will render a defendant subject to general jurisdiction. *Id.* Plaintiff's Complaint does not establish that the Individual Defendants are "essentially at home" in Colorado. Therefore, general jurisdiction does not exist.

Plaintiff contends the contacts she alleged to support specific jurisdiction also support general jurisdiction. As discussed, however, the Individual Defendants' only contacts with Colorado are limited to their volunteer work for the NBCE and include phone calls, emails and, for some, a few meetings. These limited contacts do not satisfy the first prong of specific jurisdiction and therefore cannot satisfy the test for general jurisdiction which is more stringent.

3. Plaintiff provides no legal authority to support her claim for breach of fiduciary duty against the Individual Defendants.

Plaintiff admits the Individual Defendants do not owe her a fiduciary duty. The Individual Defendants owe fiduciary duties only to the NBCE. Accordingly, Plaintiff has failed to state a claim for breach of fiduciary duty. Plaintiff argues she can bring a claim for breach of fiduciary duty because she contends, based on *Spacek v. Taylor*, 2016 COA 100, 381 P.3d 428 (Colo. App. 2016), she is a third party beneficiary of the fiduciary duties the Individual

Defendants owe to the NBCE. This case is irrelevant because it is based *on the probate code* and has not been extended to any other area of law.

In *Taylor*, the court examined whether the child beneficiary of her mother's trust could maintain an action for breach of fiduciary duty against the trustee. *Id.* at 430-31. The court acknowledged Colorado law provides that a plaintiff cannot recover damages based on a fiduciary duty not owed to them, but to someone else. *See id.* at 431. Whether a plaintiff could do so is an issue of standing. *Id.* at 432. The court in *Taylor*, found the plaintiff did suffer an injury in fact, based largely on its analysis of other probate cases from California. *Id.* Specifically, both the California and Colorado probate codes contain an "implication" that a beneficiary of a trust could challenge the trustee's breach of fiduciary duty to the extent the breach harmed the beneficiaries' interests. *Id.* The court noted Colorado's probate code authorized courts to supervise the administration of estates. *Id.* The probate code further provides that damages can be awarded to beneficiaries for breaches of fiduciary duties. *Id.*

No such implications exist in Colorado law related to non-profit (or for-profit) corporations and the court did not extend its ruling to any other area of law. There is no legal basis or authority to suggest the *Taylor* court's ruling extends to former board members of a non-profit corporation. *Taylor* is based on the probate code with a very narrow application to probate law and is therefore irrelevant and inapplicable here.

4. **Plaintiff's Complaint is devoid of any facts alleging the exceptions of the Colorado civil immunity statute.**

The Individual Defendants are immune from liability under Colorado statute because they are volunteers of a non-profit organization and acted within the scope of their official functions and duties. C.R.S. §13-21-115.7(2). Plaintiff contends the statute does not apply because of two exclusions provided in the statue. Plaintiff, however, failed to plead these exclusions in her Complaint. A motion to dismiss under 12(b) tests the sufficiency of a complaint. For that reason, the court must base its decision only on the contents of the complaint. *See Bristol Co., L.P. v. Osman*, 190 P.3d 753, 755 (2007). In her Response, Plaintiff improperly attempts to plead additional facts not contained in her Complaint in an effort to save her claims.

First, the Plaintiff relies on the exclusion that states the statute does not apply to volunteers who receive compensation on a "salary or a prorated equivalent basis." Plaintiff now alleges the Individual Defendants received "compensation" as shown in a previously uncited IRS form and therefore the statue does not apply. Not only does Plaintiff improperly allege facts not contained in her Complaint but she also failed to explain how the alleged "compensation" meets the statutory exclusion of "salary or a prorated equivalent basis." Significantly, although Plaintiff refers to the NBCE Board Policy Manual in her Complaint, she fails to cite anything in the manual that shows the Individual Defendants receive "salary or a prorated equivalent basis."

The Board Policy Manual discusses compensation to board members in sections 2.23, 2.24 and 2.25. *See* NBCE Board Policy Manual, Ex. J to Motion, Part 1, sections 2.23-2.25. The only compensation identified in the NBCE Board Policy Manual provides for *reimbursement* for expenses related to NBCE business including travel. *See* NBCE Board Policy Manual, Ex. J to Motion, Part 1, Sections 2.24 and 2.25. In addition, at the end of section 2.24, the Board Policy Manual refers to Addendum 2D which provides further explanation about the "NBCE Travel/Expense Guidelines for NBCE Board of Directors". *See* NBCE Board Policy Manual, Ex. J to Motion, Part 1, Sections 2.24 and Ex. J to Motion, Part 5, Section 2.24 Addendum 2D. This Addendum says nothing about salary or a prorated equivalent of salary. *Id.*

Second, the Plaintiff relies on the exclusion that states the statute does not apply where the injury at issue was caused by "the willful and wanton act or omission" of the volunteer. The Complaint does not allege the Individual Defendants' acts were willful and wanton. Plaintiff now argues that although she did not use the words "willful" or "wanton", the language she used in the Complaint alleges the same type of conduct and relies on the case *Peterson v. Arapahoe County Sheriff*, 72 P.3d 440 (Colo. App. 2003). *Peterson* is inapplicable here because it is a criminal case and the language the plaintiff used in the *Peterson* complaint is not in Plaintiff's Complaint here. In *Peterson*, a bond jumper brought an action against the county and others, alleging deputies failed to protect him from bounty hunters who beat him. The defendants moved to dismiss and in pertinent part argued the plaintiff failed to set forth facts showing willful and wanton conduct by deputies. Although the plaintiff did not use the words "willful and wanton", the court found the language he did use properly alleged willful and wanton conduct. Specifically, the court stated:

> Plaintiff's amended complaint asserted that, despite his pleas to the deputies for help, they <u>purposefully ignored</u> his condition and obvious dilemma. His pro se pleading alleges that 'upon seeing [his] physical condition,' the deputies '<u>knowingly and intentionally</u> refused to accept ... custody ... while <u>knowing</u> ... that ... the beatings would continue.'

Peterson at 444 (emphasis added). The words "purposefully", "knowingly" or "intentionally" do not appear in Plaintiff's Complaint in her description of the conduct of the Individual Defendants.

Plaintiff further cites *Jarvis v. Deyoe* for the proposition that "willful and wanton" has been defined as "an element of conscious disregard for the safety of others." *Jarvis v. Deyoe*, 892 P.2d 398, 401 (Colo. App. 1994). Plaintiff's Complaint, however, contains no allegations about her "safety". Further, Plaintiff's factual allegations show the Individual Defendants followed their guidelines in voting in remove her. The NBCE Bylaws state that removal of a member of the NBCE Board of Directors is within the functions and duties of the board. Defendants' Motion to Dismiss inadvertently cited the provision pertaining to removal of "Officers", but the provision pertaining to members of the board who are not officers contains the same language:

> Any Director may be removed by the members of the Board 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 Bylaws, Ex. K to Motion Article IV, Section 8. Clearly, removal of a member from the Board is within the functions and duties of the NCBE and its board members as set forth in NBCE's Bylaws. Plaintiff's Complaint specifically alleges that the Board voted 9-2 for her removal, thus satisfying the two-thirds vote requirement for her removal. *See* Complaint, ¶ 82. There is nothing willful or wanton about the board performing its duties in conformance with its policy and bylaws. Plaintiff's Complaint fails to allege facts to the contrary supporting willful or wanton conduct.

5. **Plaintiff did not respond to Defendants' arguments pertaining to Plaintiff's second and third claims for aiding and abetting breach of fiduciary duty and declaratory judgment.**

Plaintiff's Complaint 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. Defendants' Motion to Dismiss requests the court to dismiss all three claims.

Plaintiff's response did not address the NBCE's contention that Plaintiff has failed to state a claim against it for aiding an abetting breach of fiduciary duty because the Plaintiff has failed to show the existence of a fiduciary duty. Plaintiff's response also did not address Defendants' contentions that Plaintiff has failed to state a claim for declaratory judgment because she lacks standing and has failed to allege an actual controversy.

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 29th day of May, 2018.

GORDON REES SCULLY
MANSUKHANI, LLP

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

/s/ Tamara Seelman
Tamara Seelman
Kaitlin Marsh-Blake

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th 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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