

No. A12-0495

State of Minnesota
In Court of Appeals

Aon Corporation and Aon Risk Services Central, Inc.,

Respondents,

vs.

Lockton, Inc.; Lockton Insurance Agency, Inc.; and Lockton Management, LLC,

Appellants

APPELLANTS' REPLY BRIEF

Joseph M. Sokolowski (#0178366)
Lindsay J. Sokolowski (#0314705)
Krista A.P. Hatcher (#387825)
Pamela Abbate-Dattilo (#389889)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Telephone: (612) 492-7000
Facsimile: (612) 492-7077

ATTORNEYS FOR APPELLANTS

J Jackson (#0049219)
Bradley T. Smith (#0387223)
Andrew Brantingham (#0389952)
DORSEY & WHITNEY LLP
Suite 1500, 50 South Sixth Street
Minneapolis, MN 55402-1498
Telephone: (6 12) 340-2600
Facsimile: (6 12) 340-2868

ATTORNEYS FOR RESPONDENTS

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DORSEY & WHITNEY LLP
Suite 1500, 50 South Sixth Street
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ATTORNEYS FOR RESPONDENTS

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INTRODUCTION

Aon fails to meet its burden of proving that the district court's exercise of personal jurisdiction over the Foreign Corporate Defendants¹ comports with due process. Apparently realizing that it cannot meet its burden of proof, Aon's brief focuses almost exclusively on waiver. To establish a waiver, Aon bears the burden of proving that the Foreign Corporate Defendants acted to intentionally relinquish any objection to the Court's exercise of personal jurisdiction. Aon fails to show any such intentional waiver. Its argument that the Foreign Corporate Defendants waived their objection to personal jurisdiction by not raising it as a defense in their answer fails because the Foreign Corporate Defendants did not answer the Complaint. Aon admitted as much when it moved for a default judgment in the district court based on the fact that the Foreign Corporate Defendants had failed to answer. Although Aon now argues on appeal that the Foreign Corporate Defendants *did* answer, a waiver of due process rights has to be clear and unmistakable. Aon's dramatic flip-flop on the issue of whether the Foreign Corporate Defendants ever answered the Complaint merely serves to highlight the fact that Aon has not established the existence of such a clear and unmistakable waiver.

On the merits, Aon is completely unable to meet its burden of presenting evidence that would justify, under the due process clause, the district court's exercise of personal jurisdiction over the Foreign Corporate Defendants. Aon's response is long on allegations, but short on actual evidence. Allegations alone are insufficient to meet a

¹ For purposes of this appeal, the "Foreign Corporate Defendants" are Lockton, Inc.; Lockton Insurance Agency, Inc.; and Lockton Management, LLC.

party's burden, but that is all that Aon offers. The four documents it relies upon to prove that the Foreign Corporate Defendants were engaged in a "tortious scheme" merely show that the Foreign Corporate Defendants knew about the Kansas City Series' plans to open a Minneapolis office, passively approved the plan, and passively received information on two occasions from the Kansas City Series. There is no evidence of any "tortious" conduct contained in the four documents, and they are insufficient as a matter of law to establish that district court can, consistent with the due process clause, exercise personal jurisdiction over the Foreign Corporate Defendants.

ARGUMENT

I. THE FOREIGN CORPORATE DEFENDANTS DID NOT WAIVE THEIR OBJECTIONS TO THE COURT'S EXERCISE OF PERSONAL JURISDICTION.

As part of its burden to prove that the district court's exercise of jurisdiction comports with the due process clause, Aon also has the burden of proving that any waiver of objections to the district court's exercise of personal jurisdiction occurred. It has failed to carry its burden.

A. Waiver Is the Intentional Relinquishment of a Known Right.

A waiver is the intentional or voluntary relinquishment of a known right. Black's Law Dictionary, 1611 (8th ed. 2004); Ill. Farmers Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792, 798 (Minn. 2004). The waiver of due process rights under the U.S. and Minnesota Constitutions, such as the right of a defendant to not be haled into court in a foreign jurisdiction absent the constitutionally required minimum contacts with that jurisdiction, cannot be lightly inferred. Rather, a waiver has been found under Minnesota

law only in cases where a defendant has itself *affirmatively* invoked the court's power or has taken some other affirmative step that is inconsistent with its claim that the court lacks jurisdiction over it. See e.g., Shamrock Dev., Inc. v. Smith, 754 N.W.2d 377, 381 (Minn. 2008) (explaining that "A party may waive a jurisdictional defense, including insufficient service of process, by submitting itself to the court's jurisdiction and affirmatively invoking the court's power" but that "simple participation in the litigation does not, standing alone, amount to waiver of a jurisdictional defense. Rather, it is the failure to provide the court an opportunity to rule on the defense before affirmatively invoking the court's jurisdiction on the merits of the claim that is determinative.") (citations omitted).

Invoking the court's jurisdiction on the merits of a claim includes actions such as filing a motion for partial summary judgment, bringing counterclaims, answering the complaint without asserting lack of personal jurisdiction as a defense, or moving to compel arbitration. See, e.g., Patterson v. Wu Family Corp., 608 N.W.2d 863, 867 (Minn. 2000); Mississippi Valley Dev. Corp. v. Colonial Enters., Inc., 217 N.W.2d 760, 763 (Minn. 1974); Zhang v. Equity Office Props. Trust, 2006 Minn. App. Unpub. LEXIS 352, *11-12 (Minn. Ct. App. 2006).

Whether a party has waived its objection to the district court's exercise of personal jurisdiction is reviewed de novo. See Patterson, 608 N.W.2d at 869 (reversing trial court's determination that a defendant had not waived its defense of insufficient service of process).

B. The Federal Action Is Irrelevant to Waiver.

Aon devotes pages of its Brief to discussing the federal district court action that preceded the current state court action. The federal action is irrelevant to the waiver analysis. Events that transpired—or did not transpire—in the dismissed federal action have no bearing on whether the district court *in this action* has personal jurisdiction over the Foreign Corporate Defendants. Aon cites no case law supporting its position that what a party does in one case is relevant to resolving a personal jurisdiction dispute in another case. In any event, the Foreign Corporate Defendants never answered the federal complaint—a fact acknowledged by Aon. (App. 149) (stating that the Foreign Corporate Defendants “fail[ed] to respond to a materially identical complaint in federal court.”)²

C. The Foreign Corporate Defendants Did Not Waive Their Objections to Personal Jurisdiction by Answering the Complaint.

Aon’s primary argument is that the Foreign Corporate Defendants waived their objections to personal jurisdiction by answering the Complaint.

Defendants’ actions and the substance of the Answer reveal that only the Kansas City Series, not the Foreign Corporate Defendants, joined the Employee-Defendants in answering the Complaint:

- Leading up to the time the Answer was filed, counsel for Defendants repeatedly informed counsel for Aon that the Foreign Corporate Defendants were not proper parties to the action and requested voluntary dismissal. (App. 257.)

² Additionally, Aon’s selective recitation of facts fails to mention that throughout the almost two years this litigation was pending in federal court, Aon made no effort to force the Foreign Corporate Defendants’ hand on the personal jurisdiction issue. Aon took no depositions and declined to move to compel the Foreign Corporate Defendants’ participation in discovery.

- A footnote at the outset of the Answer states: “Defendants deny that Lockton Inc., Lockton Companies, LLC, and Lockton Management, LLC [i.e., the Foreign Corporate Defendants] are proper parties to this action. Absent consent by Plaintiffs to dismiss them from this action, Defendants will bring an appropriate motion. ‘Lockton,’ as used throughout this Answer and Defenses, refers to the Kansas City Series of Lockton Companies, LLC.” (App. 47, note 1.)³
- In the text of the Answer, the answering Defendants responded to each allegation in the Complaint directed at the three Employee-Defendants and the Kansas City Series, but refused to respond to any allegations directed at the Foreign Corporate Defendants. In response to each allegation directed at one of the Foreign Corporate Defendants, the Answer states that the Foreign Corporate Defendant “is not an appropriate party to this action and therefore Defendants make no response to the allegations.” (App. 49, ¶¶ 8-11.)
- Following the filing of the Answer, the Foreign Corporate Defendants refused to respond to discovery directed at them by Aon. (See App. 261); Alger v. Hayes, 452 F.2d 841 (8th Cir. 1972) (“[W]e do not rely on the ambiguity [in the answer] alone. We look to the subsequent proceedings for clarification of defendant’s intent [to waive personal jurisdiction].”)
- Aon expressly acknowledged that the Foreign Corporate Defendants had *not* answered the Complaint when it moved for a default judgment against them for failing to answer the Complaint. (App. 155, 314.)

Only one conclusion can be drawn: the Foreign Corporate Defendants did not answer the Complaint. While Aon points to some alleged ambiguities in the Answer⁴,

³ The text of the Answer reveals that “Defendants” refers only to the answering Defendants—*i.e.*, the three Employee-Defendants and the Kansas City Series—while “Lockton” refers only to the Kansas City Series.

⁴ The introduction to the Answer—which defines “Defendants” as Paul B. Haskins, Jeffrey J. Herman, Fredrick O. Flemig, Lockton, Inc., Lockton Companies, LLC, Lockton Management, LLC, and Kansas City Series of Lockton Companies, LLC—was simply an oversight by counsel. A waiver is an “*intentional* relinquishment” of a right. Counsel’s

Aon has failed to meet its burden of showing the Foreign Corporate Defendants chose to intentionally relinquish their right to object to personal jurisdiction.

Aon's argument that the Foreign Corporate Defendants intentionally waived their objections to the court's exercise of personal jurisdiction is rebutted not only by the fact that Aon brought a motion for default judgment against the Foreign Corporate Defendants, but also by its admission in its briefing to the district court in opposition to Defendants' motion to dismiss that "The Foreign Corporate Defendants... did not join in the answer Defendants served and filed." (App. 155); (See also App. 157) (noting that the answer was filed "by the other Defendants.")⁵ That *Aon* understood the Answer to be only on behalf of the Employee-Defendants and the Kansas City Series confirms that this was Defendants' intent.

oversight in defining "Defendants" as all parties cannot be construed as an intentional waiver by the Foreign Corporate Defendants of their right to object to the court's exercise of personal jurisdiction, especially where the text of the Answer reveals that the Foreign Corporate Defendants did not join in answering the Complaint. Moreover, although Aon *now* relies on that introductory statement as evidence that the Foreign Corporate Defendants answered the Complaint, Aon did not make that argument in its briefing to the district court on Defendants' motion to dismiss. The signature block, to which Aon also refers, indicates that counsel represents all Defendants in this action—not that all Defendants joined in the Answer.

⁵ Aon now claims that it advanced this argument only as an "alternative analysis"—and that it believed all along that the Foreign Corporate Defendants joined the Answer. This is unavailing and inconsistent with the record below. Aon brought its motion for default *before* the Foreign Corporate Defendants brought their motion to dismiss for lack of personal jurisdiction. Moreover, Aon's response to Defendants' motion to dismiss argues that the Foreign Corporate Defendants waived their objections to personal jurisdiction by waiting four months to bring their motion to dismiss, but it does not argue that the Foreign Corporate Defendants waived their objections to personal jurisdiction by *joining in the Answer*. The reality is that Aon altered its "understanding" of Defendants' Answer only during oral arguments on the motion. (App. 312-13.)

Finally, Aon argues that the Answer submitted by the other Defendants in the action (the Employee-Defendants and the Kansas City Series) failed to assert a personal jurisdiction defense and therefore constitutes a waiver. The Foreign Corporate Defendants did not join in the Answer and the answering Defendants—the Employee-Defendants and Kansas City Series—have never objected to personal jurisdiction. Therefore, the answering Defendants had no reason to plead lack of personal jurisdiction as an affirmative defense, and their failure to do so does not constitute a waiver with respect to a different set of defendants.

D. The Foreign Corporate Defendants Did Not Waive their Objections to Personal Jurisdiction through Other Conduct.

Aon next argues that even if the Foreign Corporate Defendants did not answer the Complaint, they waived their objections to personal jurisdiction by implication by: (1) waiting four months after the Complaint was filed to bring their motion to dismiss; (2) participating in a telephone conference with the court; and (3) entering into a discovery order and protective order. This conduct does not amount to waiver.

1. The Passage of Four Months Does Not Amount to a Waiver.

The passage of four months between the time of the Complaint and the time the Foreign Corporate Defendants moved to dismiss does not amount to waiver—*i.e.*, an affirmative act to intentionally relinquish a known right. Throughout this litigation, both in federal court and state court, Defendants repeatedly requested voluntary dismissal of the Foreign Corporate Defendants, even proposing a meeting with Aon and Lockton’s general counsel to explain why the Kansas City Series is the only proper corporate party.

(App. 253-57.) Defendants' attempts to informally resolve the personal jurisdiction dispute without involving the district court should not be construed as an affirmative waiver. Defendants' consistent efforts to obtain voluntary dismissal of improperly joined parties due to lack of personal jurisdiction, and avoid unnecessary and expensive motion practice, does not amount to waiver—an intentional act to relinquish a known right.

Moreover, Aon has not been prejudiced by the four-month lapse in time. Notwithstanding Defendants' repeated efforts to explain to Aon why the Foreign Corporate Defendants are not proper parties, Aon refused to hear the explanation. Additionally, Aon has had two years to conduct discovery on Defendants' objection to personal jurisdiction and has never, until the motions that preceded this appeal, brought any motion to seek additional discovery or default judgment.

2. Participating in a Telephone Conference and Discovery Orders Does Not Amount to a Waiver.

Aon alleges that even if the Foreign Corporate Defendants did not answer the Complaint, they waived their objections to personal jurisdiction by entering into a Protective Order and a discovery order, and participating in a telephone conference with the district court. Aon fails to cite anything in the record to support its allegation that the Foreign Corporate Defendants were parties to the discovery orders and participated in the telephone conference. (Resp. Br. p. 22.) Nevertheless, even assuming Aon's unsupported allegations to be true, these actions do not amount to waiver.

Participation in a telephone conference with the district court regarding scheduling and stipulating to a protective order do not invoke the court's jurisdiction "on the merits

of the claims.” Patterson, 608 N.W.2d at 868. Courts routinely reject plaintiffs’ arguments that simple participation in litigation—including moving to strike a judge, moving for a protective order, or appearing at hearings—constitutes waiver of a personal jurisdiction defense. See Matanich v. Health Span Health Sys. Corp., 1995 Minn. App. LEXIS 1492, *6-7 (Minn. Ct. App. Dec. 5, 1995); Thomas & Betts Corp. v. Leger, 2004 Minn. App. LEXIS 1322 (Minn. Ct. App. Nov. 24, 2004). Therefore, Aon has not met its burden of establishing a waiver.

II. AON’S “EVIDENCE” IS INSUFFICIENT TO ESTABLISH PERSONAL JURISDICTION OVER THE FOREIGN CORPORATE DEFENDANTS.

Notwithstanding the fact that Aon has had over two years of litigation, multiple depositions, and voluminous document productions from which to locate evidence, Aon fails to meet its burden of coming forward with competent evidence supporting personal jurisdiction over the Foreign Corporate Defendants.

A. Aon Has Had Over Two Years of Litigation and Voluminous Document Productions to Locate Evidence Supporting Personal Jurisdiction.

Aon’s assertion that it “mustered” its personal jurisdiction evidence “without receiving a single discovery response from Appellants,” mischaracterizes the volume of discovery Aon has at its disposal. After two and a half years of litigation, depositions of all three Employee-Defendants and voluminous document productions from the Kansas City Series and the Employee-Defendants in the federal case, Aon cobbled together only four documents supporting its personal jurisdiction claims over the Foreign Corporate Defendants:

- (1) A PowerPoint slide from a presentation given to Lockton, Inc.’s Board of Directors about the Kansas City Series’ plans to open a Minneapolis office (App. 204-05);
- (2) A meeting planner reflecting a thirty-minute meeting between John Lumelleau, Ron Lockton and Tim Meacham about the Minneapolis office (App. 207);
- (3) An email update from Meacham to Lumelleau and Ron Lockton about the Minneapolis office (App. 209); and
- (4) Lockton, Inc.’s Board Minutes approving the opening of a Minneapolis Office by the Kansas City Series (App. 214-19).

These four documents do not establish a tortious scheme justifying personal jurisdiction over the Foreign Corporate Defendants, nor do they satisfy the traditional due process minimum contacts test.

B. Aon Fails to Establish Personal Jurisdiction Over the Foreign Corporate Defendants Under a “Tortious Scheme” Theory.

Aon’s attempts to establish personal jurisdiction over the Foreign Corporate Defendants based upon their alleged participation in a “tortious scheme” fall short. In order to meet its burden, Aon must present actual evidence of a tortious scheme—not just allegations. Aon fails to do so, relying on bare allegations alone.

1. Minnesota Law Recognizes a “Tortious Scheme” Theory of Personal Jurisdiction, but the Plaintiff Must Present More than Mere Allegations.

The “tortious scheme” or “conspiracy” theory of personal jurisdiction is that a nonresident individual who commits a tort in Minnesota causing injury or property damage may be subject to personal jurisdiction in Minnesota, even if he never physically entered the state. Kopperud v. Agers, 312 NW 2d 443, 445 (Minn. 1981). While Aon

relies on Hunt v. Nevada State Bank, 172 N.W.2d 292, 311 (Minn. 1969), for the proposition that personal jurisdiction may be established under this theory, cases following Hunt have narrowed its application. Specifically, this Court noted that Hunt “does not stand for the proposition that minimum contacts are unnecessary whenever a conspiracy with in-state effects are alleged, or that such an allegation is itself a sufficient showing of minimum contacts.” Stangel v. Rucker, 398 N.W.2d 602, 606 (Minn. Ct. App. 1986); see Kopperud v. Agers, 312 N.W.2d 443, 445 (Minn. 1981) (interpreting Hunt and stating: “[o]ur long-arm statute, however, does not confer jurisdiction whenever a tort is committed by a nonresident”).

Thus, although Minnesota recognizes a theory of personal jurisdiction based upon the defendant’s participation in a “tortious scheme” or “conspiracy,” the plaintiff must provide more than mere allegations to prove jurisdiction is appropriate. The plaintiff must “sufficiently establish” the defendant’s participation in the tortious scheme. See Hunt, 172 N.W.2d at 311 (Minn. 1969) (requiring plaintiff to “sufficiently establish” defendant’s participation in a tortious scheme to validly assert jurisdiction); Peterson v. Wallace, 622 F. Supp. 2d 791, 800-801 (D. Minn. 2008) (requiring plaintiff to show the existence of a conspiracy, the nonresident’s participation in or agreement to join the conspiracy, and an overt act taken in furtherance of the conspiracy within the forum) (citing Remmes v. Int’l Flavors and Fragrances, Inc., 389 F. Supp. 2d 1080, 1095-96 (N.D. Iowa 2005)).

2. Aon Fails to Prove the Foreign Corporate Defendants' Participation in a Tortious Scheme.

Aon's four "supporting" documents do not establish the Foreign Corporate Defendants' participation in a tortious scheme.

As an initial matter, Aon's attempt to cast "Project Mayo" as a tortious scheme designed specifically to "poach Aon's top Minneapolis employees" and steal Aon's "confidential information" is unsupported by evidence in the record. (Resp. Br. pp. 7, 32-33.) To the contrary, Project Mayo was simply the name for the Kansas City Series' plan to open a Minneapolis office. Project Mayo included plans to hire individuals not just from Aon, but other companies as well. (App. 204, 209.)

None of Aon's four "supporting" documents reflect any effort or scheme by Defendants to acquire, procure, use, or steal Aon's confidential information and trade secrets. (See App. 209, 204, 205, 207, 214-219.) None of Aon's "supporting" documents reflect any attempt by Defendants to induce the Employee-Defendants to breach their fiduciary duties to Aon. (Id.) Nor do the documents reflect any scheme to tortiously interfere with Aon's alleged noncompete agreement with Paul Haskins—the only one of the Employee-Defendants who signed a purported noncompete agreement with Aon. (Id.)

Rather, Aon's "supporting" documents simply reflect Defendants' plans to open a Minneapolis office and interview three Aon employees. There is nothing illegal, illicit or

tortious about Defendants' competitive plans.⁶ Moreover, even assuming Aon's characterization of Project Mayo to be true⁷—that it was named after a client of Fred Flemig's sought by Defendants—this also is insufficient to establish a tortious scheme. (See Resp. Br. p. 4.) Defendants have every right to compete with Aon in the marketplace, including by targeting Aon's customers. Defendants were also free to solicit Flemig and his customers, specifically, because Flemig never signed a noncompete agreement with Aon. These actions become unlawful or tortious only if they involve misappropriating Aon's confidential information or inducing the Employee-Defendants to breach their duties to Aon. Otherwise, they simply constitute free competition.

Aon presents no evidence that Project Mayo included plans to misappropriate Aon's confidential information and trade secrets or induce the Employee-Defendants to breach any duties they may have owed to Aon. No such evidence exists because the assertion is not true. Aon presents no email, memo, letter or document showing that the Foreign Corporate Defendants plotted to violate Aon's rights in any way. In other words, Aon failed to make the threshold showing for "tortious scheme" jurisdiction—*i.e.*, that the Foreign Corporate Defendants participated in a conspiracy to commit an intentional tort, the effects of which were felt in Minnesota. While Aon is not required to prove the merits of its claims at this stage, it must put forth some evidence of intent to commit a

⁶ This is true even with respect to Defendant Haskins. The law places no restrictions on a potential employer's ability to *interview* an employee with a purported noncompete agreement.

⁷ Aon cites nothing in the record for many of its conclusory statements, including this one.

tort. Aon's unsubstantiated allegations of an underlying tort are insufficient to establish personal jurisdiction over the Foreign Corporate Defendants. See, e.g., Conwed Corp., et al. v. R.J. Reynolds Tobacco Comp., et al., 1999 U.S. Dist. LEXIS 9641, *17-18 (D. Minn. Apr. 1, 1999) (noting that the "conspiracy theory of personal jurisdiction is being rejected by a growing number of courts" and holding that plaintiffs failed to establish jurisdiction because "bare allegations of a conspiracy will not suffice to confer personal jurisdiction over one of the alleged conspirators.").

C. **Aon's "Supporting" Documents Do Not Satisfy the Due Process Minimum Contacts Test.**

A showing of minimum contacts is still necessary when a "conspiracy" or "tortious scheme" with Minnesota effects is alleged. Peterson v. Wallace, 622 F. Supp. 2d 791, 800-801 (D. Minn. 2008). Moreover, "[T]he *allegation* of such a conspiracy does not satisfy the minimum contacts test itself." Id. (emphasis added.) Aon fails to establish that the Foreign Corporate Defendants have sufficient minimum contacts with the state of Minnesota justifying specific or general personal jurisdiction.

Aon's "supporting" documents demonstrate, in their totality, that Lockton, Inc. approved the Kansas City Series' plans to open a Minneapolis office after viewing two PowerPoint slides, and that Lumelleau⁸ received an email update from Meacham and participated in a 30-minute meeting regarding the Minneapolis office. (App. 204-205, 207, 209, 214-219.) Therefore, Aon's allegations that the Foreign Corporate Defendants

⁸ Lumelleau is President/CEO of Lockton, Inc. and President of Lockton Management, LLC. Aon's allegations regarding Ron Lockton's involvement are irrelevant, as Ron Lockton is a Member of the Kansas City Series. Aon has put forth no evidence that Ron Lockton's involvement was in any role other than as Member of the Kansas City Series.

actively “supervised” and “participated” in the plans to open the Minneapolis office are an exaggeration of the actual evidence, and certainly do establish minimum contacts.

Lockton, Inc.’s ordinary supervision of its subsidiary does not subject it to personal jurisdiction in Minnesota.⁹ Curtis v. Altria Group, Inc., 792 N.W.2d 836, 847 (Minn. Ct. App. 2010). The Foreign Corporate Defendants’ passive receipt of information (through a PowerPoint presentation and email) and participation in a 30-minute meeting reflect nothing more than ordinary supervision of the Kansas City Series’ operations. The documents show no active participation by the Foreign Corporate Defendants and no tortious scheme. Nothing in the documents establishes that the Foreign Corporate Defendants directed the plans for opening a Minneapolis office or instructed the Kansas City Series to hire the Employee-Defendants. See Peterson, 622 F. Supp. 2d at 800 (“This is not a case in which a non-resident defendant directed the activities of an agent within the forum, thereby causing harm within the state, but seeks to shield himself because his own activities were extra-territorial.”). In fact, the documents clearly establish that the plans to open the Minneapolis office, interview and hire the Employee-Defendants were spearheaded and executed by the Kansas City Series.

⁹ Aon’s reliance on Doe 1-22 v. Roman Catholic Bishop, 509 N.W.2d 598 (Minn. Ct. App. 1993) is misplaced. In Doe, this Court found personal jurisdiction over a Massachusetts Diocese that had approved the transfer of a priest to Minnesota who was a known pedophile. In finding jurisdiction, the Court relied exclusively on other priest child abuse cases and expressly noted “the unique relationship between priest and diocese.” Id. at 601. Here, unlike Doe, the Foreign Corporate Defendants do not exert control over the local defendants that “encompasse[s] all phases” of the other Defendants’ existence. See id.

Even viewing this evidence collectively, Aon fails to show that the Foreign Corporate Defendants had sufficient minimum contacts with the State of Minnesota giving rise to personal jurisdiction.

CONCLUSION

Based on the foregoing, Appellants respectfully request this Court reverse the district court's order, and dismiss the Foreign Corporate Defendants for lack of personal jurisdiction.

Respectfully submitted,

Dated: July 5, 2012



Joseph M. Sokolowski (#0178366)
Lindsay J. Sokolowski (#0314705)
Krista A.P. Hatcher (#387825)
Pamela Abbate-Dattilo (#389889)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Tel: 612-492-7000
Fax: 612-492-7077

ATTORNEYS FOR DEFENDANTS/APPELLANTS