IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LONE STAR NATIONAL BANK, N.A., et al., Plaintiffs, v. KEYBANK, N.A., et al., Defendants.	)	Case No. 4:10-cv-00171 JUDGE LEE H. ROSENTHAL

DEFENDANT HEARTLAND BANK'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS UNDER FED. R. CIV. P. 12(B)(2) AND FED. R. CIV. P. 12(B)(6)

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

OTHER AUTHORITIES

RULES

I. NATURE AND STAGE OF PROCEEDINGS AND SUMMARY OF ARGUMENT

This Court should hold that it lacks personal jurisdiction over Heartland Bank. The Bank has not waived that argument, and Plaintiffs have not come close to showing specific or general jurisdiction. This Court also should grant the Bank's motion to dismiss. The flaws in Plaintiffs' claims are clear from the face of the Complaint, the Merchant Processing Agreement, and the applicable law, and those deficiencies are properly addressed through a Rule 12(b)(6) motion.

II. STATEMENT OF ISSUES, STANDARDS OF REVIEW, AND ARGUMENT

A. Plaintiffs' Claims Should Be Dismissed Under Fed. R. Civ. P. 12(b)(2) Because This Court Lacks Personal Jurisdiction Over Heartland Bank.

Plaintiffs contend that Heartland Bank waived its right to contest personal jurisdiction by joining in a request to assign this case to this Court. *See* Pls' Opp. Br. at 9-10. That argument fails. A waiver occurs only if a party does not raise personal jurisdiction issues in its Rule 12 motion or seeks affirmative relief from a court. *See PaineWebber Inc. v. Chase Manhattan Private Bank (Switzerland)*, 260 F.3d 453, 460-61 (5th Cir. 2001). Heartland Bank has done neither. Heartland Bank's consent to an initial joint motion to move the case from Judge Harmon to this Court due to the pending MDL proceedings is not inconsistent with its personal jurisdiction arguments, *id.* at 460 n.7, and Heartland Bank expressly raised those arguments in its Rule 12 motion. Plaintiffs' waiver argument therefore should be rejected by this Court.

Heartland Bank does not have branches, employees, or business operations in Texas or own property in Texas. *See* Aff. of David Minton ¶¶ 2-4 (attached to Heartland Bank motion to dismiss). Plaintiffs do not dispute those facts, nor do they make any meaningful argument that specific jurisdiction exists. *See* Pls' Opp. Br., at 10-14. Instead, Plaintiffs argue only that this Court has general jurisdiction over Heartland Bank because it participates in the card payment

system and has a contract with Heartland Payment Systems ("HPS"), which in turn has certain contacts with Texas. *See id.* at 12-13. Neither argument has merit.

General jurisdiction exists where the defendant has "continuous and systematic" contacts with the forum state. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-15 (1984). The "continuous and systematic contacts test is a difficult one to meet, requiring extensive contacts between a defendant and a forum," and "vague and overgeneralized assertions that give no indication as to the extent, duration, or frequency of contacts are insufficient to support general jurisdiction." *Johnston v. Multidata Sys. Intern. Corp.*, 523 F.3d 602, 609-10, 615 (5th Cir. 2008). Here, Plaintiffs offer only such "vague and overgeneralized" allegations.

Plaintiffs' argument that participation in the Visa and MasterCard networks establishes general jurisdiction in Texas because those networks are "national," Pls' Opp. Br., at 12, is similar to an argument that was rejected in *Stroman Realty, Inc. v. Antt*, 528 F.3d 382 (5th Cir. 2008). There, the district court concluded that it had personal jurisdiction over non-Texas state agencies "because the officers are parts of larger administrative apparatuses, segments of which had a permanent presence in Texas." *Id.* at 385. The Fifth Circuit reversed, and noted:

> [T]he practical consequence of this approach would be that *any* state action by a Florida or California official could be challenged in Texas. This is not the general jurisdiction contemplated in *Helicopteros*, which arises out of continuous and systematic contacts with a forum. . . . Rather, it is an attempt at universal jurisdiction, by a federal district court, for which there are no limiting principles.

Id. There similarly is no support for Plaintiffs' argument that any banks that participate in card-payment networks are thereby subjected to general jurisdiction in any state.

Plaintiffs' argument that general jurisdiction is created through the actions of HPS, Pls' Opp. Br., at 12-13, also is unavailing. Although Plaintiffs refer to HPS as Heartland Bank's "agent," the Merchant Processing Agreement between those entities refutes that characterization.

See Minton Aff. Ex. A, Art. 1.1 (j). HPS and Heartland Bank are simply parties to a contract, and the fact that Heartland Bank has a contract with an entity that has operations in Texas does not give rise to personal jurisdiction over Heartland Bank in Texas. Moreover, Plaintiffs cite no authority for the proposition that HPS' contacts with Texas – even if they could be attributed to Heartland Bank – are sufficient to establish general jurisdiction. For all of these reasons, Plaintiffs' general jurisdiction argument fails. *See Johnston v. Multidata Sys. Intern. Corp.*, 523 F.3d at 609-10; *Cent. Freight Lines v. APA Transp. Corp.*, 322 F.3d 376, 381 (5th Cir. 2003); *Dalton v. R&W Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990).[1]

B. Plaintiffs' Claims Against Heartland Bank Should Be Dismissed Under Fed. R. Civ. P. 12(b)(6) For Failure To State A Claim.

1. Plaintiffs' Breach of Contract Claim Must Be Dismissed.

The parties agree that the choice of law provision in the Merchant Processing Agreement is enforceable under Texas law and therefore Missouri law governs plaintiffs' breach of contract claim. *See* Pls' Opp. Br., at 15 n.7, 17 n.8. Plaintiffs also concede that, under Missouri law, only an intended third-party beneficiary may sue to enforce a contract to which it is not a party, *id.* at

---

[1] Plaintiffs state that Heartland Bank has pursued its personal jurisdiction arguments as a "delay tactic." Pls' Opp. Br., at 10. That assertion is without merit. Heartland Bank has raised personal jurisdiction arguments because it is not subject to personal jurisdiction in Texas.

Plaintiffs did propose that Heartland Bank agree to "abandon" its personal jurisdiction arguments. Heartland Bank was unwilling to waive those arguments and rejected that proposal. As an alternative, Heartland Bank proposed that Plaintiffs stipulate that there is no personal jurisdiction over Heartland Bank in the direct action in this Court and the parties would then stipulate, and this Court would order, that the claims against Heartland Bank be treated as having been transferred to the United States District Court for the Eastern District of Missouri, which would have personal jurisdiction over Heartland Bank, and then returned to this Court as a "tag along" action pursuant to MDL procedures, with this Court's clerk notifying the clerk in the Eastern District of Missouri and the clerk of the MDL Panel. Heartland Bank believes that such an approach would preserve its due process rights while at the same time minimizing any delay that would be caused by a circuitous transfer of the claims against Heartland Bank.

17 n.8, and that the necessary intent must be "gleaned from the contract itself." *Id.* at 19. Plaintiffs, however, can find no support for their claim to third-party beneficiary status in the Merchant Processing Agreement.

Plaintiffs admit that there is no reference to card-issuing banks in the Agreement, and they cite only a few general terms that do not reflect an intent to benefit card-issuing banks. *Id.* at 18, 20. The first simply imposes an obligation on the Bank to hold as confidential "all data relating to the Program submitted to Bank pursuant to this Agreement" and an obligation on HPS to hold as confidential "all data relating to Bank business received by HPS pursuant to this Agreement." Minton Aff. Ex. A, Art. 4.3 (emphasis added). Because the provision broadly addresses "all data" it cannot establish the necessary clear intent to benefit card-issuing banks – which is what Missouri law requires before third-party beneficiary status may be conferred. *See Chmieleski v. City Prods. Corp.*, 660 S.W.2d 275, 289 (Mo. Ct. App. 1983).

Even more outlandish is the argument that Plaintiffs are "affiliates" of Heartland Bank within the meaning of certain provisions of the Merchant Processing Agreement. *See* Pls' Opp. Br., at 18. Those provisions, which concern HPS' indemnification obligations, clearly refer only to corporate entities that are directly affiliated with Heartland Bank. *See* Minton Aff. Ex. A, Art. 1.2(e) ("HPS shall be responsible for any loss or damages to Bank, its subsidiaries, affiliates, employees, officers, directors, successors or assigns . . . ."), Art. 4.5(a) ("HPS will at all times indemnify, protect and hold harmless Bank, and its subsidiaries, affiliates, directors, officers, employees, subcontractors, successors and assigns . . . ."), Art. 1.5(f) (referring to reimbursement of "Bank or any of its affiliates for any loss or damages as provided for in Section 4.5(a)"). Plaintiffs do not allege that they are corporate affiliates of Heartland Bank – nor could they.

Plaintiffs' final argument is that this Court should look outside the four corners of the Merchant Processing Agreement to determine whether the parties to the contract intended to benefit card-issuing banks. *See* Pls' Opp. Br., at 19-21. This Court should decline to do so. The recent decision in *Executive Bd. Of the Missouri Baptist Convention v. Windermere Baptist Conference Center*, 280 S.W.3d 678 (Mo. Ct. App. 2009), is pertinent on this point. There, the Court rejected the argument that it needed to look beyond the contract itself to determine whether there was an intent to make a party a third-party beneficiary, and explained:

> Circumstances surrounding the contract's execution may only be examined when the court finds an ambiguity in the original articles. . . . No ambiguity exists in the original articles as they contain no express declaration that the intent was to primarily benefit the Convention. Absent an ambiguity, we may not consider the circumstances surrounding the execution of the original articles. The circuit court, therefore, did not err as a matter of law in concluding that the Convention was not entitled to pursue its third-party beneficiary claims.

Id. at 696 (emphasis added); *see also Nitro Distrib., Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. 2006) (en banc) (determining third-party beneficiary status solely on basis of contract terms).

In short, Plaintiffs' breach of contract claim based on a third-party beneficiary theory must be dismissed. Under Missouri law, the contract itself must "clearly express an intent to benefit" the purported third-party beneficiary, *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 135 (Mo. 2007), and the contract in this case does not do so.

2. Plaintiffs' Breach of Fiduciary Duty Claim Must Be Dismissed.

The issue raised by Plaintiffs' breach of fiduciary duty claim is whether, by virtue of their membership in the MasterCard and Visa card networks, Plaintiffs and defendants are "joint venturers" that owe fiduciary duties to one another. *See* Cmplt. ¶ 124.

Plaintiffs grudgingly accept that New York law governs whether MasterCard is a joint venture and that they must establish five elements to allege a joint venture under New York law.

See Pls' Opp. Br., at 25. Plaintiffs have failed to do so, however. They do not cite any provisions of the MasterCard regulations indicating that they and Heartland Bank "intended to be associated as joint venturers" – rather than simply as members of MasterCard. Their only argument on the requirement of division of profit and loss is that, under the MasterCard system, acquiring banks and issuers will split the fee paid by the merchant when a payment card is used, *id.* at 26, which plainly is not the same as what New York law requires – namely, sharing the risk of profit and loss and agreeing to make good any losses that the joint venture may sustain. *See Cosy Goose Hellas v. Cosy Goose USA, Ltd.*, 581 F. Supp. 2d 606, 621-23 (S.D.N.Y. 2008).

Similarly, the fact that Plaintiffs may have some control over their own activities in the processing of payment card transactions, Pls' Opp. Br., at 28-29, does not satisfy the requirement that parties to a joint venture must have "some degree of control over the venture." *Cosy Goose Hellas*, 581 F. Supp. 2d at 620. Plaintiffs' ability to decide whether they issue cards to a particular cardholder does not give them "some degree of control" over the MasterCard system; under MasterCard's regulations, only MasterCard has such control. *See* Minton Aff. Ex. B, MasterCard Operating Regulations § 3.1; *see also Int'l Equity Invs., Inc. v. Opportunity Equity Partners Ltd.*, 472 F. Supp. 2d 544, 553 (S.D.N.Y. 2007) ("The limited provisions for IEII's advisory and oversight role do not alter the fact that the management of the CVC Fund's involvement in the side-by-side investments was exclusively in Opportunity Equity's control.").

Plaintiffs' effort to find a joint venture in the Visa system also is flawed. For unspecified reasons, Plaintiffs contend that New Jersey law would govern that question. *See* Pls' Opp. Br., at 25. The only connection to New Jersey noted in Plaintiffs' brief is that HPS is a New Jersey corporation, *see id.* at 35-37, but the Complaint acknowledges that HPS is not even a member of Visa. *See* Cmplt. ¶¶ 52-53, 59-63. It obviously is nonsensical to argue that the determination of

whether a particular association constitutes a joint venture should be governed by law applicable only to a non-member in that association that also is not a party to the action.

The members of the Visa system are Plaintiffs and Heartland Bank, and the law of the states where those entities have their principal places of business all establish that Plaintiffs' joint venture claim based on the Visa system fail for the same reason that Plaintiffs' claim based on the MasterCard system fails. *See* Minton Aff. Ex. C, Visa Operating Regulations § 1.7; *see also Jackson-Shaw Co. v. Jacksonville Aviation Auth.*, 8 So. 3d 1076, 1089 (Fla. 2008); *John Nagle Co. v. Gokey*, 799 A.2d 1225, 1227 (Me. 2002); *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 331-32 (Mo. 2009); *Snellbaker v. Herrmann*, 462 A.2d 713, 716 (Pa. Super. Ct. 1983); *Arthur v. Grimmett*, --- S.W.3d ---, 2009 WL 2461812, at *9 (Tex. Ct. App. Aug. 12, 2009); *Lopez v. Courville*, No. 24940-9-III, 2008 WL 2460280, at *2 (Wash. Ct. App. June 19, 2008).

3. Plaintiffs' Negligence Claim Must Be Dismissed.

Plaintiffs' response to Heartland Bank's motion to dismiss the negligence claim focuses entirely on choice of law issues. *See* Pls' Opp. Br., at 32-39. Heartland Bank has shown that under Missouri law, which explicitly governs the contract that created the duties that purportedly give rise to Plaintiff's negligence claim, Plaintiffs' claim is barred by the economic loss doctrine. *See Rockport Pharmacy, Inc. v. Digital Simplistics, Inc.*, 53 F.3d 195, 198 (8th Cir. 1995); *Auto-Owners Ins. Co. v. Mid-America Piping, Inc.*, No. 4:07-CV-00394, 2008 WL 2859193, *2 (E.D. Mo. March 17, 2008); *Self v. Equilon Enters., LLC*, No. 4:00CV1903TA, 2005 WL 3763533, *10-11 (E.D. Mo. March 30, 2005). Significantly, Plaintiffs make no argument to the contrary and thereby concede that, if Missouri law applies, their claims must be dismissed.

Plaintiffs' choice of law argument first contends that courts will not decide choice of law questions on motions to dismiss when doing so would require consideration of materials beyond

the pleadings. *See* Pls' Opp. Br., at 32. That argument is unavailing because the only document needed to resolve the choice of law issue is the Merchant Processing Agreement between HPS and Heartland Bank, and that contract was expressly addressed in the Complaint and therefore is properly considered by this Court in ruling on Heartland Bank's motion to dismiss.

Plaintiffs next argue that this Court should not consider the choice of law provision in the Merchant Processing Agreement in performing its choice of law analysis. *See id.* at 34-35. That argument also fails. The Agreement is closely related to the negligence claim because the duties Plaintiffs contend were breached exist only because of the contract between HPS and Heartland Bank, and therefore the existence and nature of the contract and its choice-of-law provision are properly considered in determining the state with the most significant relationship to the claims. *See Cates v. Creamer*, 431 F.3d 456, 464-66 (5th Cir. 2005); *Texas Taco Cabana, L.P. v. Taco Cabana of New Mexico, Inc.*, 304 F. Supp. 2d 903, 908-10 (W.D. Tex. 2003).

In addition, Plaintiffs offer no meaningful basis for contending that New Jersey law should apply to their negligence claim. The Complaint does not mention New Jersey, none of the Plaintiffs or defendants is a New Jersey corporation, there is no claim that any injury purportedly suffered by Plaintiffs occurred in New Jersey, and there is no apparent basis for claiming that any of the other factors set forth in Section 145 of the *Restatement (Second) of Conflicts of Laws* would point to New Jersey. This Court therefore should hold that Missouri law applies and dismiss Plaintiffs' claim pursuant to the economic loss doctrine.

4. Plaintiffs' Vicarious Liability Claim Must Be Dismissed.

Plaintiffs' opposition to the motion to dismiss their vicarious liability claim contends that a choice of law analysis is "premature" and that they have stated a claim under New Jersey law.

See Pls' Opp. Br., at 43-48. Once again, Plaintiffs make no effort to address Heartland Bank's argument that, under Missouri law, the vicarious liability claim fails. *Id.*

There is nothing premature about the choice of law inquiry in this case, and the case upon which Plaintiffs rely, *Cates v. Creamer*, 431 F.3d 456 (5th Cir. 2005), demonstrates as much. In *Cates*, which involved a Texas personal injury accident involving an automobile lease entered into in Florida, the Court held that Florida law governed because the "most relevant relationship is that which arises from the lease of the automobile." *Id.* at 464-65 (emphasis added).

Here, the most significant relationship to Plaintiffs' claim that Heartland Bank is vicariously liable for the actions of HPS is found in the Merchant Processing Agreement that created the relationship between HPS and Heartland Bank. That Agreement explicitly states that Missouri law governs that contractual relationship. Furthermore, that Agreement addresses whether an agency relationship is created, and states that "[t]his Agreement is not intended to create, nor does it create and shall not be construed to create, a relationship or joint venture or agency or any association for profit between [Heartland] Bank and HPS." Minton Aff. Ex. A, Art. 1.1(j). The fact that the contract expressly addresses the agency issue, and specifies that Missouri law governs that contract provision as well as others, further confirms that Missouri law should apply to the agency issue. There is no basis in the relevant provisions of the *Restatement (Second) of Conflict of Laws* for contending that New Jersey law should trump the contractual choice-of-law provision under those circumstances. *See Cates*, 431 F.3d at 464-65.

In short, Missouri law should be held to apply to Plaintiffs' vicarious liability claim. Plaintiffs do not dispute that, under Missouri law, their vicarious liability claim against Heartland Bank should be dismissed because, as the Merchant Processing Agreement establishes, HPS clearly does not have the ability to alter Heartland Bank's legal relationships with third parties.

See Minton Aff. Ex. A, Art. 1.1(j); *see also State ex rel. McDonald's Corp. v. Midkiff*, 226 S.W.3d 119, 123-24 (Mo. 2007) (en banc); *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 642, 644 (Mo. 2002) (en banc).

III. CONCLUSION

This Court should hold that it does not have personal jurisdiction over Heartland Bank because the Bank does not have the requisite minimum contacts with Texas. This Court also should hold that all of Plaintiffs' claims against Heartland Bank fail. Plaintiffs are withdrawing their subrogation claim, *see* Pls' Opp. Br., at 48, and their remaining claims, for third-party beneficiary breach of contract, breach of fiduciary duty, negligence, and vicarious liability, should be dismissed for failure to state a claim.

Dated: June 7, 2010

Respectfully submitted,

s/ Latosha Lewis Payne
Latosha Lewis Payne
Attorney-in-charge
Texas Bar No. 24027452
Southern District No. 29161
VORYS, SATER, SEYMOUR AND PEASE LLP
700 Louisiana Street, Suite 4100
Houston, Texas 77002
(713) 588-7018
Fax: (713) 588-7068
Email: llpayne@vorys.com

Mary Ellen Fairfield
Robert N. Webner
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, Ohio 43215
(614) 464-6400
Fax: (614) 464-6350
Email: mefairfield@vorys.com
rnwebner@vorys.com

Attorneys for Defendant Heartland Bank

CERTIFICATE OF SERVICE

A copy of the foregoing ***Defendant Heartland Bank's Reply Brief in Support of Motion to Dismiss*** was served by the Court's CM/ECF system, this 7th day of June, 2010, on:

Michael A. Caddell
Cynthia B. Chapman
Cory S. Fein
Caddell & Chapman
1331 Lamar, #1070
Houston TX 77010

Richard L. Coffman
The Coffman Law Firm
First City Building
505 Orleans St., Ste. 505
Beaumont, TX 77701

Joseph G. Sauder
Matthew D. Schelkopf
Benjamin F. Johns
Chimicles & Tikellis LLP
One Haverford Centre
361 West Lancaster Avenue
Haverford, PA 19041

Natalie Finkelman
Shepherd Finkelman Miller & Shah, LLP
35 E State Street
Media , PA 19063

R Douglas Gentile
Douthit Frets Rouse Gentile & Rhodes LLC
903 East 104th St, Ste 610
Kansas City , MO 64131

Christopher G Hayes
Law Office of Christopher G. Hayes
225 South Church St
West Chester, PA 19382

Jeffrey L Kodroff
Spector Roseman Kodroff & Willis, P.C.
1818 Market St, Ste 2500
Philadelphia , PA 19103

Mitchell A Toups
Weller, Green, Toups & Terrell, LLP
PO Box 350
Beaumont , TX 77704

Gregory Weiss
Leopold~Kuvin, P.A.
2925 PGA Blvd
Palm Beach Gardens , FL 33410

John R. Wylie
Futterman Howard Watkins Wylie & Ashley, Chtd.
122 S. Michigan Ave., Suite 1850
Chicago, IL 60603

s/ Latosha Lewis Payne
Latosha Lewis Payne