

**IN THE CHANCERY COURT FOR TWENTIETH JUDICIAL DISTRICT
OF TENNESSEE**

*****)
JACK PELHAM, and)
KAY PELHAM,)
)
Plaintiffs,)
)
vs.) Case No. 05-2259-III
)
THE NASHVILLE CHURCH, INC.,)
INTERNATIONAL CHURCHES OF)
CHRIST, INC., HOPE WORLDWIDE, LTD.,)
and CENTRAL AND SOUTH AMERICA)
WORLD SECTOR, INC.,)
)
Defendants.)
*****)

**PLAINTIFFS' RESPONSE TO MOTION TO DISMISS BY DEFENDANT
INTERNATIONAL CHURCHES OF CHRIST, INC.**

Come now the Plaintiffs, JACK PELHAM and KAY PELHAM, by and through their undersigned counsel, and for response to the Motion to Dismiss filed herein by the Defendant, INTERNATIONAL CHURCHES OF CHRIST, INC., would state as follows:

INTRODUCTION

The Plaintiffs, Jack Pelham and wife, Kay Pelham, bring this action seeking equitable relief in the form of restitution and a constructive trust, as well as for compensatory damages arising out of the Defendants' widespread pattern of fraud, misrepresentation and deceit in the solicitation of funds through coercion and false advertising. Specifically, the Plaintiffs allege that during the time the Plaintiffs were members of these church organizations, the Defendants, The Nashville Church, Inc., International Churches of Christ, Inc., Central and South America World

Sector, Inc. and Hope Worldwide, Ltd., engaged in the use of cult-like tactics in order to gain compliance with, and blind obedience to, coercive techniques such as: manipulation, peer pressure, placing guilt on parishioners who failed to strictly adhere to their policies and practices; group criticism of the slightest wavering or questioning, or resistance, or objection; restricting and controlling communication between its members; and manipulating them into “tithing” and making contributions under the guises of charitable benevolence and of “special missions contributions.” Plaintiffs further allege that the Defendants falsely represented that funds which they solicited from the Pelhams would be allocated exclusively either to international humanitarian endeavors, or to the funding of missionary church “plantings” worldwide. These contributions were instead treated by the Defendants as “unrestricted funds” and diverted by them for the personal inurement and benefit of several high-ranking employees and officers of the Defendant corporations.

The Defendant, International Churches of Christ, Inc. (“ICOC”) has moved to dismiss the Complaint on the purported jurisdictional grounds claiming that it has no contacts with the State of Tennessee. the Defendant seeks to bolster its jurisdictional argument with two affidavits of individuals who are now, or have been in the past, beneficiaries of the fraudulent scheme described in the complaint. As shown from the Plaintiffs’ Verified Amended Complaint, however, a genuine issue of fact exists with regard to each of the jurisdictional points addressed in the Defendant’s motion and memorandum. Given the present procedural posture of this case, the Defendant’s motion to dismiss is not considered a responsive pleading, and the Plaintiffs should be allowed to file their amended complaint under Rule 15 Tenn.R.Civ.P. :

A motion to dismiss for the failure to state a claim is the equivalent of a demurrer under our former practice. *Cornpropst v. Sloan*, 528 S.W.2d 188 (Tenn.1975).

When the court granted the demurrer, the original action was at an end. 61 Am.Jur.2d *Pleading*, § 283, p. 693. Yet, the plaintiff was almost universally allowed to amend after the demurrer had been sustained. *Id.*; *see also* Caruthers, *History of a Lawsuit*, § 198, pp. 243-244 (8th ed., 1963). Our modern rules also recognize that leave to amend should be freely given. Rule 15.01, Tenn.R.Civ.P. Thus, when the court grants a motion to dismiss for failure to state a claim, only extraordinary circumstances would prohibit the plaintiff from exercising the right to amend its complaint. Since a Tenn. R. Civ. P. rule 12.02(6) motion is not deemed to be a responsive pleading within the meaning of Tenn. R. Civ. P. rule 15, Appellant should have been allowed to amend his complaint, and the trial court erred in denying the Motion to Amend.

Richmond Country Club v. CRC Equities, Inc., 832 S.W.2d 554 (Tenn.Ct.App.1991).¹

In fact, ICOC during the period of the Plaintiffs' membership in TNC and ICOC, this Defendant did maintain continuous, systematic contacts with the State of Tennessee. As shown in the Amended Complaint, also exerted considerable control over the management and operation of TNC and its "Affiliates" or "Integrated Auxiliaries" as it often refers to them in its ICOC Policies cited in the Amended Complaint.

In their 26 page Amended Complaint, the Plaintiffs set forth in specific detail the factual circumstances surrounding the Defendants' pattern of fraudulent conduct spanning over a period of three years, and how a veritable alphabet soup of overlapping corporate acronyms were used by ICOC to conceal and obfuscate its misappropriation of charitable donations. Specifically, the

¹ The Court's ruling in *Richmond Country Club* has been routinely applied in cases in which a motion to dismiss is met with a motion to amend the complaint. *See, accord, Demers v. Whittenberg*, 2004 WL 1196109 (Tenn.Crt.App., May 27, 2004)(Since a Tenn. R. Civ. P. rule 12.02(6) motion is not deemed to be a responsive pleading within the meaning of Tenn. R. Civ. P. rule 15, Appellant should have been allowed to amend his complaint, and the trial court erred in denying the Motion to Amend.)

Plaintiffs have set forth with particularity facts which, if taken as true, would support a finding of *in personam* jurisdiction over this Defendant.

The following disputed facts as pleaded by the Pelhams in the Amended Complaint clearly show that ICOC maintained continuous and systematic contacts in State of Tennessee during the relevant time period:

1. During the time the Pelhams were members of TNC, from October of 1998 to August of 2001, it functioned as a local congregation of ICOC and was governed by an Affiliation Agreement with ICOC. As such, it was required to adhere to ICOC policies. (Amended Complaint at ¶ 8).

2. In October of 1998, Plaintiffs Jack and Kay Pelham (then Kay Davis) became members of The Nashville Church, Inc., having transferred their memberships from other ICOC congregations—that is from, The South Florida Church of Christ and The New York City Church of Christ, respectively. Upon becoming members of TNC, the Pelhams retained their existing membership in the International Churches of Christ, Inc. (“ICOC”). (Amended Complaint at ¶ 13).

3. In addition, during the time that Plaintiffs were members of TNC, they were misled by the leadership of TNC and ICOC, including Woody Rowe and Doug Lambert, into believing that no part of the collection designated as “contributions for the poor” or “special missions contributions” would inure to the personal benefit of those in leadership positions within TNC, ICOC, HOPE or other entities affiliated with these corporations.

In reliance on these representations, the Plaintiffs regularly made cash donations to these benevolent funds. (Amended Complaint at ¶ 16).

4. TNC leaders, including Doug Lambert (who was appointed by ICOC to a leadership position at TNC) and TNC's Elder/Administrator, Woody Rowe were aware that the representations made to the Plaintiffs during their membership in TNC regarding the "Contribution for the Poor" were false. (Amended Complaint at ¶ 20).

5. Throughout the course of the Plaintiffs' membership in TNC, the Defendants conducted regular, ongoing business within the State of Tennessee through their local affiliate, organization, TNC, using an elaborate enterprise consisting of various corporations having overlapping boards of directors, employees, and interlocking policies all of which were woven together through what ICOC referred to as "Affiliation Agreements." The following ICOC Administrative Policy, 02.01.01 sets forth the hierarchical structure of this enterprise:

ICOC Policy 02.01.01. ICOC

ICOC is a "Church" as defined by the tax code and is responsible for promulgating administrative policy and procedure to assist each of the other entities in accomplishing the goal of world evangelism. ICOC is composed of individual churches of the fellowship of the International Churches of Christ that are members of ICOC by **affiliation agreements**. These churches are represented by the delegate vote of the current World Sector Leaders (WSL) and World Sector Administrators (WSA). This body meets formally and informally throughout the year to promulgate policy, discuss theology, and implement ministry decisions to accomplish our goal of world evangelism.

(Amended Complaint at ¶ 21).

6. To illustrate the intricate interconnection between the various Defendant corporations, the Plaintiffs have attached as Exhibit A to their Amended Complaint a diagram which identifies various church leaders and their respective

positions held within these various corporate enterprises during the time the Plaintiffs were members of TNC. (Amended Complaint at ¶ 22, Exhibit A).

7. During the time that Plaintiffs were members of TNC this local church was a part of ICOC's corporate enterprise and any ICOC policy took precedence over local church actions.

01.02 Relationship to Local Standing Board Policies and Procedures

The Model Administrative Policies and Procedures of ICOC shall take precedence over any existing local standing Board Policies or Procedures at the date of adoption of this manual. After adoption of this manual, the local church Board may see a need for a new local standing policy which could possibly be in conflict with one or more of the Adopted Model Policies. Even though the local Board has the authority to establish local standing policies which could be in conflict with the Model Policies, it is preferable that any proposed changes are communicated to the Ecclesiastical Council so that it can consider revising the Model Policies to meet the local church's need and maintain unity among our churches by keeping the number of policy conflicts to a minimum.

When the local church Board is considering a local standing policy that may conflict with a Model Policy, **the local church administrator, prior to any action on the part of the local Board, should advise the World Sector Administrator of the proposed local Standing Policy, including the reasons for the conflict. The World Sector Administrator will forward the information to the ICOC World Sector Administrator who, if necessary, will confer with the ICOC General Counsel and the Ecclesiastical Council (See 01.03) to determine if the conflicting Model Policy should be revised to avoid a conflict.** If a revision to the Model Policy is not possible, the World Sector Administrator may advise the local church how the local Board might proceed with the establishment of a local Standing Policy.

(Amended Complaint at ¶ 23).

8. In furtherance of this elaborate, interlocking enterprise, and as a means of exerting domination and control over its local church congregations, ICOC divided the world into geographic sectors and set up church associations which were called "world sector corporations" to serve as a diocese-like enterprise for each sector of the world. Local congregations which were located in a particular geographic world sector became members of this world sector church association. Under this scheme, the geographic

region which encompassed Tennessee, and thus included TNC, was governed under a world sector known as Central and South America World Sector, Inc. (“CSA”). (Amended Complaint at ¶ 24).

9. CSA was at all times an affiliate or “integrated auxiliary” of ICOC, and, during the time that Plaintiffs were members, TNC was itself a member of this world sector corporation. CSA was a subsidiary of ICOC, and was also classified by ICOC as an association of churches. In the following excerpt from ICOC Policy, the word “Member” refers to member church and, during the relevant timeframe, included TNC:

Member shall continue to issue ministerial or ordination credentials to its own ministers. However, (*World Sector*) retains authority to designate the Lead Evangelist of Member and to discipline and/or withdraw the ministerial credentials of any clergy of Member for ecclesiastical reasons. Moreover, (*World Sector*) **and Member agree that ICC retains ultimate authority through the ICC Ecclesiastical Council, to discipline and/or withdraw the ministerial credentials of any clergy of Member.** In the event that an ordained minister moves from one Local Church to another, or from one World Sector Association of Churches to another for ministry purposes, the minister shall remain ordained and no new ordination will be necessary, so long as the minister remains in the CHURCH.

(Amended Complaint at ¶ 25).

10. Throughout the period that the Plaintiffs were members of TNC, this Tennessee church was also required to submit to the leadership of its respective world sector corporation, in this case the Central and South American World Sector (CSA). The CSA, like all other world sector corporations, were subsidiaries of ICOC and required under ICOC Policy 02.01.04 to “operate pursuant to applicable ICOC Administrative Policies and Procedures.” (Amended Complaint at ¶ 26).

11. Acting pursuant to its authority under the aforementioned and other ICOC policies, in 1998 ICOC appointed and designated Doug Lambert to a position of leadership over TNC as its “Lead Evangelist”. Mr. Lambert resided in Tennessee and,

during the Plaintiffs' membership, served as an official representative of both ICOC and its World Sector Corporation, CSA, and exercised supervisory authority capacity in the day-to-day operation of TNC. (Amended Complaint at ¶ 27).

12. The following ICOC policy 02.04.02.01 sets forth the specific chain of authority which ICOC, acting through Mr. Lambert, exercised over TNC by virtue of Mr. Labert's authority as Lead Evangelist during the period of the Plaintiffs' membership in TNC:

ICOC policy 02.04.02.01 Office Manager (OM)

The OM is responsible for the day to day management of the church offices and its personnel. The OM shall be appointed by the CEO or CFO, subject to approval by the Lead Evangelist. The OM shall submit to the Lead Evangelist on all spiritual and ecclesiastical matters. The OM must have sufficient management skills and experience to manage the office and personnel needs of the church.

(From ICOC Administrative Policies, 2001).

(Amended Complaint at ¶ 28).

13. In addition, as Lead Evangelist for ICOC and CSA, Doug Lambert exercised broad overarching authority over the management of TNC, as demonstrated by the following ICOC policies which were in effect during the period of the Plaintiffs' church membership:

02.04.02.02 Accounting Manager (AM)

The AM is responsible for the administration of all aspects of cash management for the church. The AM shall be appointed by the CEO or CFO, **subject to approval by the Lead Evangelist**. The AM shall report directly to the CEO or CFO on all administrative matters. The AM shall submit to the Lead Evangelist on all spiritual and ecclesiastical matters. The AM must be a Certified Public Accountant (or have adequate experience to demonstrate similar competence) with adequate business experience to manage the financial and managerial accounting needs of the church. (From ICOC Administrative Policies, 2001)

02.04.02.03 Human Resources Manager (HRM)

The HRM is responsible for all aspects of the management of Human Resources systems and procedures for the church, including policy implementation, employment, wage and

salary administration, and employee safety. The HRM shall be appointed by the CEO or CFO, **subject to approval by the Lead Evangelist**. The HRM shall report directly to the CEO or CFO on all administrative matters. The HRM shall submit to the Lead Evangelist on all spiritual and ecclesiastical matters. The HRM must have adequate experience and training to manage the Human Resources needs of the church. (From ICOC Administrative Policies, 2001)

02.04.02.04 Information Systems Manager (ISM)

The ISM is responsible for the management of all information systems of the church. The ISM shall be appointed by the CEO or CFO, subject to approval by the Lead Evangelist. The ISM shall report directly to the CEO or CFO on all administrative matters. The ISM shall submit to the Lead Evangelist on all spiritual and ecclesiastical matters. The ISM must have sufficient experience in information systems to manage the information systems needs of the church. (From ICOC Administrative Policies, 2001)

(Amended Complaint at ¶ 29).

14. Acting through its Lead Evangelist, in this case Doug Lambert, as well as various affiliated enterprises including one known as the Kingdom News Network, (which ICOC referred to as one of its “integrated auxiliaries”), ICOC routinely solicited contributions in the State of Tennessee from its local ICOC churches, including TNC. These contributions included gifts and donations made by the Pelhams during the period of their membership in TNC and ICOC. (Amended Complaint at ¶ 30).

15. As further evidence of the Defendants’ interlocking corporate enterprise, the following excerpt from its own policy demonstrates the control ICOC exercised over what it referred to as its “integrated auxiliary” Kingdom News Network (KNN):

ICOC Policy 02.01.07 KNN

KNN is an **"integrated auxiliary"** of ICOC yet shall operate as a separate corporation whose primary purpose is the production and provision of news media to the individual members and entities within the fellowship of International Churches of Christ. Even though KNN has its own Officers and Directors, it may be subject to ecclesiastical direction or control of the Media/Law World Sector of the International Churches of Christ. (From ICOC Administrative Policies, 2001)

(Amended Complaint at ¶ 31).

16. In addition, during the period that the Pelhams were members of TNC and ICOC, the Defendants ICOC, CSA and HOPE all regularly solicited and received donations from their local churches within the State of Tennessee through the collection of what were referred to as “management fees”. These fees were based on the average weekly offerings received by the local member church. The Defendants’ practice of soliciting these funds from the local church congregations is well documented in the following ICOC policies:

ICOC Policy 02.01.02 ICCMS (International Churches of Christ Mission Society)

ICCMS is an "integrated auxiliary" of ICOC. The sole purpose of ICCMS is the receipt and distribution of mission funding pursuant to the World Financial Plan (WFP). The WFP is a detailed financial plan for the funding and support of world evangelism. Specifically, it is the intent of ICOC to establish a church in every nation that has a city with a population exceeding 100,000 inhabitants by the year 2000. The WFP accommodates this goal by allocating the receipt and distribution of funding from the various churches and other entities associated with or affiliated with the International Churches of Christ. **ICCMS and its board will be responsible for the receipt and distribution of these funds.** The board of ICCMS shall be approved by ICOC. (From ICOC Administrative Policies, 2001)

ICOC Policy 12.03.03.01 HOPE Worldwide Support

For a church entity, HOPE Worldwide support is determined through the World Sector Administration in accordance with the ICOC World Financial Strategic Plan. This amount is usually a percentage of the church’s average weekly contribution from a month in the prior year. This same percentage should then be allocate to sub-entities. (From ICOC Administrative Policies, 2001)

ICOC Policy 12.03.03.02 ICOC Management Fee

The ICOC management fee is determined in the same manner as the HOPE Worldwide Support and should therefore be allocated using the same procedure described above. (From ICOC Administrative Policies, 2001)

ICOC Policy 12.03.04 World Missions Support

The fixed amount of World Missions support is determined annually in the World Financial Plan. This fixed amount is sent to the respective World Sector Corporation as the local church’s funding commitment per the Strategic Plan. (From ICOC Administrative Policies, 2001)

(Amended Complaint at ¶ 32).

17. Throughout their involvement as members of TNC and other ICOC churches, the Plaintiffs have participated in fund raising activities such as walk-a-thons and door-to-door solicitation campaigns, organized by the various churches and ICOC to “raise funds for HOPE.” It was the Plaintiffs’ shared and sincere belief, based on the representations of TNC and ICOC leaders, that these funds too were designated exclusively to benevolent endeavors, and would not be used to underwrite the administrative and salary expenses of HOPE Worldwide. (Amended Complaint at ¶ 41).

18. The funds which were solicited by TNC and ICOC within the State of Tennessee were also funneled to the Defendant, Central and South America World Sector, Inc., (“CSA”), an affiliate of ICOC. During a CSA conference in April of 2003, CSA leadership made the following admission of the miscommunications within ICOC and its member churches with regard to the use of funds:

The CSA Leadership has failed to communicate adequately with the churches in our group especially about the finances and administration of special contributions. Peter Garcia and Jaime De Anda sincerely apologize for this lack of sensitivity to the continual sacrifices of the individual churches and members. Their failure to provide an effective communication channel caused many disciples to feel excluded and disconnected from the administration and finances of the CSA World Sector. In particular, they express their sorrow that some members have been under the impression that all the money collected through their churches’ special contributions was distributed directly to Latin America. Although the majority of the CSA contributions were sent directly to the mission field, a percentage was also used to support the administrative and ministry oversight of the world sector.

(Amended Complaint at ¶ 42).

19. During the course of his investigation, Mr. Pelham has since discovered that during the period of their church membership, the Defendant ICOC also funneled funds which it received from them as members of TNC to corporate employees in other

world sectors, including the Middle East World Sector. Neither TNC nor CSA ever informed the Plaintiffs that theirs and other TNC members' Special Mission Fund donations were being used for that purpose. (Amended Complaint at ¶ 54).

20. In addition, Mr. Pelham has since learned from a reliable source that approximately 18% of the Special Mission Funds collected by CSA, were forwarded to the Defendant ICOC, where a large portion was used to support *local* ministry work in the Los Angeles Church of Christ during the time Plaintiffs were members. Neither TNC nor CSA ever informed the Plaintiffs that their Special Missions Contribution donations were being used for local ministry work in Los Angeles or in any other established church in the United States. (Amended Complaint at ¶ 55).

21. The Plaintiffs have also been informed that during the time they were members of TNC a portion of the funds which were paid to ICOC were funneled into a "discretionary fund" for Kip McKean, one of the founders of ICOC. (Amended Complaint at ¶ 56).

22. In addition, the Plaintiffs have learned through a reliable source that contrary to the representations made to them by the Doug Lambert and Woody Rowe of ICOC and TNC, a significant portion of the yearly special missions contribution was often used to cover deficits accrued in the monthly budgets of the large American churches where the world sector leaders were based. (Amended Complaint at ¶ 57).

23. As members of an ICOC church, the Plaintiffs were subjected to subtle and even direct tactics involving coercion and manipulation to obtain their submission to the forced tithing and fund raising efforts by the Defendants. By illustration, and not by

limitation, the Plaintiffs were: (1) told that their failure to participate in these programs would subject them to public exposure; (2) subjected to guilt-producing tactics; (3) subjected to threats of possible church discipline, including disfellowship or excommunication; and (4) warned about the loss of their eternal salvation. TNC, acting on its behalf and that of ICOC and HOPE, would even send representatives to the homes of its members to “collect” these contributions in the event that the members were absent from church meetings. Members who did not make their mandated contributions were subjected to phone calls and other forms of intimidation or harassment, including the public ridicule by having their names called at church meetings. (Amended Complaint at ¶ 58).

Far from being mere conclusory allegations, the foregoing excerpts from the verified amended complaint are fact specific and rely, to a large extent, on information generated by the Defendants themselves for their authenticity.

LAW AND ARGUMENT

I. THE ALLEGATIONS OF THE AMENDED COMPLAINT ESTABLISH A PRIMA FACIE BASIS FOR A FINDING OF PERSONAL JURISDICTION OVER THIS DEFENDANT.

In response to the Defendants' motion challenging jurisdiction, the Plaintiffs have come forward with a verified pleading in the form of an amended complaint which sets forth a close nexus between ICOC and the State of Tennessee. Pursuant to Tenn. R. Civ. P 12.02(6), a motion to dismiss for failure to state a claim on which relief may be granted challenges the legal sufficiency of the complaint, not the strength of the plaintiff's proof. *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.2d 691 (Tenn.2002). When considering a motion to dismiss, the court should construe the allegations set forth in a complaint liberally with all facts presumed to be true and the plaintiff given the benefit of all reasonable inferences. *Id.*, at 696-7, 71 S.W.2d 691. A motion to dismiss for failure to state a claim should not be granted unless it is clearly shown that the plaintiff can prove no set of facts supporting his claim that would warrant relief. *Id.*

The Defendants has not moved for summary judgment (and at this phase of the litigation such a motion would be premature absent an opportunity for discovery). ICOC has instead launched a facial attack on the complaint. Motions to dismiss merely on jurisdictional grounds are not converted to summary judgment motions when material factual disputes arise. *Chenault v. Walker*, 36 S.W.3d 45, 55 (Tenn.2001)². Hence, the only issue before the Court at this juncture

² *Chenault v. Walker* involved a "factual," as opposed to a "facial," challenge to jurisdiction. These two types of challenges are different. 2A James W. Moore, et al., *Moore's Federal Practice and Procedure* ¶ 12.07[2.-1], at 12-50 through 12-55 (2d ed.1995). A "facial" challenge makes war on the complaint itself. It asserts that the complaint, considered from top to bottom, fails to allege facts that show that the court has power to hear the case. *See, e.g., Crawford v. United States Dep't of Justice*, 123 F.Supp.2d 1012, 1013 (S.D.Miss.2000) (making a facial challenge to jurisdiction). In deciding a facial challenge, the court considers the impugned pleading and nothing else. *Laird v. Ramirez*, 884 F.Supp. 1265, 1272 (N.D.Iowa 1995); *Ensign-Bickford Co. v. ICI Explosives USA, Inc.*, 817 F.Supp. 1018, 1023 (D.Conn.1993). If a complaint merely attacked on its face competently alleges any facts, which if true, would establish grounds for subject matter jurisdiction, the court must uncritically accept those facts, end its inquiry, and deny the dismissal motion. *Great Lakes Educ. Consultants v. Federal Emergency Mgmt. Agency*, 582 F.Supp. 193, 194 (W.D.Mich.1984).

is whether the allegations of the verified amended complaint state a factual basis for the exercise of personal jurisdiction over this Defendant. The court is not obliged, as intimated by the Defendant, to weigh the credibility of the evidence, or to make rulings regarding the merits of the Plaintiffs' claims.

In the recent case of *Law Offices of Hugo Harmatz v. Dorrough*, 2005 WL 1690609 (Tenn.Ct.App., Jul 20, 2005) at * 2.³ the Court of Appeals, relying for instruction on the case of *Chenault v. Walker*, 36 S.W.3d 45 (Tenn.2001), addressed the question of "[w]ith what certainty must the facts be established in the record for a judge to determine that personal jurisdiction exists over the defendants?" *Id.* at 55. Quoting from *Chenault*, the Court stated as follows:

Under the Tennessee Rules of Civil Procedure a motion to dismiss may be based on one or more of eight grounds, including lack of personal jurisdiction and failure to state a claim on which relief can be granted. *See* Tenn. R. Civ. P. 12.02. A court either decides this motion based on the allegations contained in the pleadings or, if matters outside the pleadings--such as affidavits--are presented, the court will treat the motion as one for summary judgment as provided in Tenn. R. Civ. P. 56. *See* Tenn. R. Civ. P. 12.03.

As we have stated in the past, however, Rule 12.03 does not apply to a motion to dismiss for lack of personal jurisdiction, **unless the evidence brought to the court is so conclusive that the motion may be fully and finally resolved on the merits.** *See Nicholstone Book Bindery, Inc. v. Chelsea House Publishers*, 621 S.W.2d 560, 561 n. 1 (Tenn.1981) ("**[S]ummary judgment procedure does not properly apply to jurisdictional issues.**") (quoting 6 Moore, Federal Practice (Part 2) § 56.17(36) at 913 (1980)).

Again in *Chase Cavett Servs., Inc. v. Brandon Apparel Group, Inc.*, No. 02A01-9803-CH-00055, 1998 WL 846708, at *1 (Tenn.Ct.App. Dec.7, 1998) (*no perm. app. filed*) the Court of Appeals instructs that a motion to dismiss for jurisdictional

³ A copy of this recent slip opinion is attached hereto for the Court's convenience.

grounds should not be treated as a motion for summary judgment even when matters outside the pleadings are filed by the defendant:

This general rule under ¶12.03, is inapplicable, however, when the motion is one involving jurisdictional issues. *See Nicholstone Book Bindery, Inc. v. Chelsea House Publishers*, 621 S.W.2d 560, 561 n. 1 (Tenn.1981) (finding that the trial court committed harmless error in treating the defendant's motion to dismiss for lack of personal jurisdiction as one for summary judgment). Thus, although we recognize that the trial court in the instant case had before it matters that were outside the pleadings, we nevertheless conclude that the trial judge acted properly in treating Brandon's motion as a motion to dismiss rather than a motion for summary judgment.

In ruling on the defendant's motion to dismiss for lack of personal jurisdiction, this court is required to construe the factual allegations contained in the verified amended complaint in the light most favorable to the plaintiff. *Progeny Marketing v. Farmers & Merchants Bank*, 2005 WL 819732 (Tenn.Ct.App.,2005.)⁴; *Chase Cavett Servs., Inc. v. Brandon Apparel Group, Inc.*, No. 02A01-9803-CH-00055, 1998 WL 846708, at *1 (Tenn.Ct.App. Dec.7, 1998) (*no perm. app. filed*); *accord CompuServe v. Patterson*, 89 F.3d 1257 1262; *6th Cir. 1996Market/Media Research v. Union Tribune Publishing Company*, 951 F.2d 102 at 104 (6th Cir. 1991); *Theunissen v. Matthews*, 935 F.2d 1454 at 1459 (6th Cir. 1991); *Serras v First Tennessee Bank National Ass'n.*, 874 F.2d 1212 at 1214 (6th Cir. 1989). Under *Chenault*, a court must still take as true the allegations of the nonmoving party and resolve all factual disputes in its favor. *Chenault v. Walker*, 36 S.W.3d at 55-56 (Tenn.2001)[footnote omitted].

⁴ A copy of this recent slip opinion is also attached hereto.

When faced with a motion to dismiss for lack of personal jurisdiction, the court has several alternatives. It "may determine the motion on the basis of affidavits alone; **or it may permit discovery in aid of the motion**; or it may conduct an evidentiary hearing on the merits of the motion." *Serras v First Tennessee Bank National Ass'n*, 874 F.2d 1212 at 1214 (6th Cir. 1989) citing *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2nd Cir.1981)(emphasis added). Given the sharp dispute between ICOC's rendition of the facts and those set forth in the amended complaint, the Plaintiffs urge the court to consider allowing the parties to conduct limited discovery going to the issue of personal jurisdiction.⁵

Under Tennessee's long-arm statute, Tenn.Code Ann. § 20-2-214, Tennessee courts are allowed to exercise jurisdiction over non-resident defendants to the extent the Fourteenth Amendment to the United States Constitution permits. *Id.* at 52-53.3d 544, 550 (Tenn.Ct.App.2004). The long-arm statute provides:

(a) Persons who are nonresidents of Tennessee and residents of Tennessee who are outside the state and cannot be personally served with process within the state are subject to the jurisdiction of the courts of this state as to any action or claim for relief arising from:

- (1) The transaction of any business within the state;
- (2) Any tortious act or omission within this state;
- (3) The ownership or possession of any interest in property located within this state;
- (4) Entering into any contract of insurance, indemnity, or guaranty covering any person, property, or risk located within this state at the time of contracting;
- (5) Entering into a contract for services to be rendered or for materials to be furnished in this state;
- (6) Any basis not inconsistent with the constitution of this state or of the United States;

⁵ Since three of the four defendants in this case have raised this same issue, limiting initial discovery as to these parties going to the issue of whether they indeed satisfied minimum contacts with Tennessee would allow the court to make an informed ruling on this pivotal issue before summarily ruling on the Defendants' motions.

(7) Any action of divorce, annulment or separate maintenance where the parties lived in the marital relationship within this state, notwithstanding one party's subsequent departure from this state, as to all obligations arising for alimony, custody, child support, or marital dissolution agreement, if the other party to the marital relationship continues to reside in this state.

(b) "Person," as used herein, includes corporations and all other entities which would be subject to service of process if present in this state.

(c) Any such person shall be deemed to have submitted to the jurisdiction of this state who acts in the manner above described through an agent or personal representative.

Tenn.Code Ann. § 20-2-214. (emphasis added).

The exercise of jurisdiction over ICOC comports with due process because, as shown in the verified amended complaint, during the relevant time period this defendant had such minimum contacts with Tennessee that the maintenance of this action does not offend traditional notions of fair play and substantial justice. *Chenault*, 36 S.W.3d at 53; *J.I. Case Corp. v. Williams*, 832 S.W.2d 530, 531-33 (Tenn.1992)(citing *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-78, 105 S.Ct. 2174, 2181-84, 85 L.Ed.2d 528 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-94, 100 S.Ct. 559, 564-66, 62 L.Ed.2d 490 (1980).

Moreover, the extent of ICOC's contacts within the State of Tennessee during the relevant timeframe are sufficient to allow an exercise of general jurisdiction over this Defendant. Courts recognize two types of personal jurisdiction: general jurisdiction and specific jurisdiction. *United Agricultural Services, Inc. v. Scherer*, 17 S.W.3d 252, 256 (Tenn.Ct.App.1999). When a state exercises personal jurisdiction over a defendant in a lawsuit not arising out of or related to the defendant's contacts with the forum, the state is exercising general jurisdiction over the defendant.

Id.; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 9, 104 S.Ct. 1868, 1872 n. 9, 80 L.Ed.2d 404 (1984). When a state exercises personal jurisdiction over a defendant in a lawsuit arising out of or related to the defendant's contacts with the forum, the state is exercising specific jurisdiction over the defendant. *Id.*; *Helicopteros*, 466 U.S. at 414 n. 8; 104 S.Ct. at 1872 n. 8.

II. THE DEFENDANT ICOC IS PROPERLY SUBJECT TO THE JURISDICTION OF THIS COURT BY VIRTUE OF ITS CENTRAL ROLE IN THE CIVIL CONSPIRACY USED TO PERPETUATE THE DEFENDANTS' FRAUDULENT ACTIVITIES IN TENNESSEE.

In this case, the Plaintiffs have alleged that the defendants are liable under a claim of civil conspiracy. Under Tennessee law, a civil conspiracy is a "combination between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means." *Beaudreau v. Larry Hill Pontiac/Oldsmobile/GMC*, 160 S.W.3d 874 (Tenn.Crt.App. 2004)(quoting *Dale v. Thomas H. Temple Co.*, 186 Tenn. 69, 208 S.W.2d 344, 353 (1948)); *Chenault v. Walker*, 36 S.W.3d 45, 52 (Tenn.2001).

The conspiracy theory of personal jurisdiction is based on the "time honored notion that the acts of [a] conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy." *General Motors Corp. v. Ignacio Lopez de Arriortua*, 948 F.Supp. 656, 664-66 (E.D.Mich.1996); *Dooley v. United Technologies Corp.*, 786 F.Supp. 65, 78-80 (D.D.C.1992); *Cawley*, 544 F.Supp. at 134-35.

Taking the allegations of the amended complaint as true, the Plaintiffs have alleged facts which support a finding that each of the defendants had the intent to accomplish their common

purpose of soliciting funds under false pretenses, and that each knew of the other's intent. *Dale*, 186 Tenn. at 90, 208 S.W.2d at 353-54. The agreement "need not be formal, the understanding may be a tacit one, and it is not essential that each conspirator have knowledge of the details of the conspiracy." *Id.* Finally, "it is [a] basic principle that each conspirator is responsible for everything done by his confederate which the execution of the common design makes probable as a consequence"; in other words, each conspirator is liable for the damage caused by the other. *Id.* 186 Tenn. at 90-91, 208 S.W.2d at 354;. . . *Brown v. Birman Managed Care, Inc.*, 42 S.W.3d 62, 67 (Tenn.2001).

In the instant case the Plaintiffs have alleged with specificity in their Amended Complaint that the Defendants have accomplished this scheme through an enterprise consisting of various interlocking corporations under the umbrella of ICOC and its various "affiliates" and "integrated auxiliaries." (Amended Complaint, ¶ 10). They further allege that throughout the course of the Plaintiffs' membership in TNC, the Defendants used an elaborate enterprise consisting of various corporations having overlapping boards of directors, employees, and interlocking policies all of which were woven together through what ICOC referred to as "Affiliation Agreements." *Id.* at ¶ 21. See also Exhibit A to Amended Complaint showing the inter-relationships of the Defendants through common board members and personnel.

The Tennessee Supreme Court in *Chenault*, found that when there are allegations of civil conspiracy this serves as a basis for the exercise of personal jurisdiction over each of the co-conspirators, whether or not they are residents of the forum state. The Supreme Court adopted *in toto* the reasoning of *Cawley v. Bloch*, 544 F.Supp. 133 (D.Md.1982), which articulated the conspiracy theory of personal jurisdiction as follows:

Under [this] doctrine, when

- (1) two or more individuals conspire to do something,
 - (2) that they could reasonably expect to lead to consequences in a particular forum, if
 - (3) one co-conspirator commits overt acts in furtherance of the conspiracy, and
 - (4) those acts are of a type which, if committed by a non-resident, would subject the non-resident to personal jurisdiction under the long-arm statute of the forum state,
- then those overt acts are attributable to the other co-conspirators, who thus become subject to personal jurisdiction in the forum, even if they have no direct contacts with the forum.

Cawley, 544 F.Supp. at 135.

The Supreme Court found the application of personal jurisdiction under such circumstances to comport with the due process clause requirement of sufficient minimum contacts:

This well-established constitutional framework for evaluating personal jurisdiction can be difficult to apply depending on the strength of the defendant's contacts with the forum state. But, in the abstract, we find nothing explicit or implicit in these constitutional principles that would prohibit the exercise of jurisdiction based on the imputation of a co-conspirator's minimum contacts. To the contrary, we think that the conspiracy theory follows plainly from the very definition of conspiracy and the meaning of co-conspirator liability: the acts of a conspirator in furtherance of an illegal agreement with his co-conspirator are attributed to that co-conspirator. *See Dale*, 186 Tenn. at 90-91, 208 S.W.2d at 353-54. If due process does not prevent that co-conspirator from being held civilly or criminally responsible based on the principle of imputed conduct, it is difficult to see why it should prevent the exercise of jurisdiction based on that same principle. Rather, given the notion of conspiracy liability, the conspiracy theory of jurisdiction is premised on principles of common sense and basic fairness. As one court has put it, "[i]f through one of its members a conspiracy inflicts an actionable wrong in one jurisdiction, the other members should not be allowed to escape being sued there by hiding in another jurisdiction." *Stauffer v. Bennett*, 969 F.2d 455, 459 (7th Cir.1992) (Posner, J.).

Chenault, 36 S.W.3d at 54.

Turning finally to the Defendant's Rule 9.02 Tenn.R.Civ.P. argument that the complaint is deficient for lack of specificity as to the fraud allegations, the Plaintiffs adopt by reference herein the points and authorities set forth in the Memorandum In Opposition To Motion To Dismiss by the Defendant The Nashville Church.

CONCLUSION

Taking the sworn allegations of the Amended Complaint as true and resolving all inferences in a light most favorable to the Plaintiffs, as required under Rule 12, the Defendant's motion must be denied. The Plaintiffs have come forward with specific and detailed allegations which go far beyond mere conclusory allegations, and which form a basis for personal jurisdiction over this Defendant. If, however, the Court is of the opinion that the record in its present state is insufficient to make an informed determination as to the nature and extent of this Defendant's contacts with the state, then Plaintiffs urge the Court to permit limited discovery going solely to this issue and reserve ruling pending the further development of the record on these facts.

Respectfully submitted,

LARRY L. CRAIN, ESQ.
Tn.Sup.Crt. No. 9040
Law Offices of Brentwood
5214 Maryland Way, Suite 402
Brentwood, TN. 37027

(615) 376-2600
Lcrain@brentwoodlaw.com

Attorney for the Plaintiffs

CERTIFICATE OF SERVICE

I, Larry L. Crain, do hereby certify that a true and correct copy of the foregoing pleading was delivered to the following individuals on this the _____ day of _____, 2005, in the manner indicated below:

E. Todd Presnell
Miller and Martin, PLLC
1200 One Nashville Place
150 Fourth Avenue, North
Nashville, TN 37219-2433

Charles K. Grant
Baker, Donelson, Bearman et al.
P.O. Box 190613
Nashville, TN 37219

Kathryn Ann Stephenson
Trauger, Ney & Tuke
The Southern Turf Building
222 Fourth Avenue North
Nashville, TN 37219-2117

Nancy King Crawford
Attorney at Law
1929 21st Avenue South
Nashville, TN 37212

- " U.S. Mail, Postage Prepaid
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- " Email
- " Hand Delivered

LARRY L. CRAIN