

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

John V. Work, Esquire
Law Office of John V. Work, P.A.
800 North King Street
Suite 303
Wilmington, Delaware 19801
Attorney for Plaintiff Universal Capital Management, Inc.

Samuel T. Hirzel, Esquire
Jill K. Agro, Esquire
Proctor Heyman, LLP
300 Delaware Avenue
Suite 200
Wilmington, Delaware 19801
Attorneys for Defendants MICCO World, Inc., Phil Lundquist, Steven Brisker, and Tom Ridenour

Re: Universal Capital Management, Inc. v. Micco World, Inc., et al.
C.A. No. 10C-07-039 RRC

Submitted: March 9, 2011¹

Decided: June 2, 2011

On Defendants' Motion to Dismiss Plaintiff's Complaint.

DENIED.

Dear Counsel:

INTRODUCTION

Defendants' motion to dismiss Plaintiff's complaint is predicated upon Superior Court Civil Rules 12(b)(2) and 12(b)(5), for lack of personal jurisdiction

¹ Date of reassignment of this case to the undersigned judge.

and insufficient service of process, respectively. For the reasons that follow, the Defendants' Motion to Dismiss is **DENIED**.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Universal Capital Management, Inc., ("Plaintiff") brought this cause of action against Micco World, Inc. ("Micco"), Phil Lundquist ("Lundquist"), Steven Brisker ("Brisker"), and Tom Ridenour ("Ridenour") (collectively "Defendants") alleging breach of contract, quantum meruit and unjust enrichment, fraud, tortious interference with business relations, defamation, and civil conspiracy. Plaintiff is seeking compensatory and punitive damages.

Plaintiff is a Delaware corporation with its principal place of business in Delaware.² Defendant Micco is a Georgia corporation with its principle place of business in Georgia.³ Defendant Micco is the surviving corporation from an alleged merger between Constellation Group, Inc. ("Constellation Group"), a Delaware corporation, and Micco; the merger was executed in Georgia.⁴ Defendant Lundquist is the Director of Micco and a resident of Georgia.⁵ Defendant Brisker is the Chief Marketing and Sales Strategist for Micco and a resident of Georgia.⁶ Defendant Ridenour is the Chief Financial Officer and Secretary of Micco and a resident of Georgia.⁷

According to Plaintiff's complaint, Defendant Lundquist approached Plaintiff on behalf of Defendant Micco's predecessor entity, seeking assistance to obtain financing for a start-up business venture.⁸ On July 16, 2008, Defendants Lundquist and Brisker came to Delaware and met with Plaintiff, to discuss entering into a contractual relationship with Plaintiff.⁹

On or about July 18, 2008, Plaintiff entered into two contracts with Constellation Group, initiated by Constellation Group.¹⁰ Under the terms of the contract, Plaintiff was to provide Constellation Group with business assistance and

² Compl. ¶ 1.

³ *Id.* ¶ 2.

⁴ *Id.* Ex. A.

⁵ *Id.* ¶ 4.

⁶ *Id.* ¶ 5.

⁷ *Id.* ¶ 6.

⁸ *Id.* ¶ 4.

⁹ *Id.*

¹⁰ *Id.* Ex. B.

introduce potential investors who would provide capital for use in bringing the company public via an initial public offering (“IPO”).¹¹

Pursuant to the first contract, Plaintiff would receive a warrant for the purchase of five hundred thousand shares of common stock of Constellation Group in exchange for management services.¹² As stated, “[t]his Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.”¹³ This contract also contains a Delaware choice of law provision.¹⁴ The agreement was signed on July 18, 2008 by Defendant Brisker, as President and Chief Executive Officer of Constellation, and Michael D. Queen, as President and Chief Executive Officer of Plaintiff.¹⁵

According to the second contract, also executed on July 18, 2008, Plaintiff would receive a warrant for the purchase of one million shares of common stock of Constellation Group in exchange for strategic planning and investment services.¹⁶ Plaintiff allegedly satisfied its obligations under both contracts by providing managerial, strategic, and planning and investment services to Constellation Group. This agreement contains the same binding language as the first contract; it is binding on each party’s respective successors and assigns.¹⁷

According to the certificate of merger, on August 1, 2008, Defendant Brisker attested to the fact that “[t]he shareholders of Constellation unanimously approved the merger contemplated herein, the consent of the shareholders of Micco not being required pursuant to Section 14-2-1103(h) of the Georgia Business Corporation Code.”¹⁸ However, in September of 2008, Defendant Brisker indicated that Constellation Group changed its name to Micco simply because there was already a publicly traded company called Constellation.¹⁹

¹¹ *Id.*

¹² *Id.* ¶ 4.

¹³ *Id.* Ex. B ¶ 12(d).

¹⁴ *Id.*

¹⁵ *Id.* at 8.

¹⁶ *Id.* Ex. C ¶ 4.

¹⁷ *Id.* Ex. C ¶ 12(d).

¹⁸ *Id.* Ex. A.

¹⁹ In an e-mail dated September 23, 2008, Defendant Brisker stated “Constellation Group is renamed Micco World, Inc. to account for anoth[e]r public company name[d] Constellation. Since we are going public through our association with Universal Capital, we needed to change the name of the company.” Response to Mot. to Dismiss Ex. 2.

In December 2008, Defendant Micco provided Plaintiff with a private offering memorandum (“POM”) to use in the solicitation of investors.²⁰ With the aid of the POM, Plaintiff introduced investors to Micco who invested approximately six hundred thousand dollars. Plaintiff later learned that the POM provided by Micco allegedly contained numerous material misrepresentations and omissions.²¹ Over the course of approximately three months, Micco allegedly exhausted all or nearly all of the funds provided by Defendant’s investors without an explanation as to how the money was expended. Despite its failure to provide Plaintiff with an accounting of its expenditures, Micco nonetheless requested aid from Plaintiff in obtaining additional investment funds.

Between March and June 2009, Plaintiff repeatedly requested an accounting of investor funds prior to introducing new investors to Micco.²² The responses to those requests were delayed and the information provided by Defendant Ridenour was incomplete. Defendant Ridenour, as Chief Financial Officer of Defendant Micco and a certified public accountant, advised Plaintiff that Micco’s accounting was never intended to meet generally accepted account principles (“GAAP”) or Securities and Exchange Commission (“SEC”) requirements. Meeting both of those standards is necessary for a company to be publicly traded, which was the purpose behind the investment funds and the two contracts executed in July 2008.

Upon reviewing the incomplete accounting information provided by Defendant Ridenour, Plaintiff discovered that Micco was allegedly misappropriating the funds.²³ Plaintiff asserts that Defendants Brisker and Lundquist were using the investor money for personal expenses and not for its intended purpose.²⁴

In July 2009, after Plaintiff challenged Defendant Micco’s use of the funds provided, Micco terminated its relationship with Plaintiff.²⁵ Thereafter, on December 9, 2009, Micco held a shareholders’ meeting and allegedly made false and disparaging claims; the investors Plaintiff found for Micco were included among the shareholders in attendance at that meeting.²⁶

²⁰ Compl. ¶ 15.

²¹ *Id.* ¶ 16.

²² *Id.* ¶ 18.

²³ *Id.* ¶ 20.

²⁴ *Id.*

²⁵ *Id.* ¶ 21.

²⁶ *Id.* ¶ 22.

Plaintiff contends that the misrepresentations by Defendants Micco, Lundquist, Brisker, and Ridenour and the alleged misappropriation of funds have had “an adverse and injurious effect on Plaintiff’s ability to provide strategic management services and injure the relationship with current and future investors.”²⁷

Defendants have moved to dismiss Plaintiff’s complaint based on an alleged lack of personal jurisdiction.²⁸ Defendants note that Micco’s status as a Georgia corporation and the individual Defendants’ statuses as Georgia residents required Plaintiff to satisfy Delaware’s “long-arm” statute, 10 Del. C. § 3104.²⁹ Defendants contend that Plaintiff has not alleged facts that would support this Court’s exercise of personal jurisdiction over Defendants under any of the enumerated bases of personal jurisdiction found in § 3104(c).³⁰ Defendant further asserts that, given this alleged lack of personal jurisdiction, it necessarily follows that Plaintiff’s attempt to serve process via mail, pursuant to § 3104(d)(3), is insufficient and warrants dismissal of Plaintiff’s complaint pursuant to Superior Court Civil Rule 12(b)(5).³¹

STANDARD OF REVIEW

I. Service of Process

The Defendants were properly served Plaintiff’s complaint. Since the Defendants are nonresidents of Delaware, service of process must comply with Super. Ct. Civ. R. 4 and 10 Del. C. § 3104. Super. Ct. Civ. R. 4(h) states:

In an action in which the plaintiff serves process pursuant to 10 *Del. C.* § 3104 . . . the defendant’s return receipt and the affidavit of the plaintiff or the plaintiff’s attorney of the defendant’s nonresidence and the sending of a copy of the complaint with the notice required by the statute shall be filed as an amendment to the complaint within 10 days of the receiving by the plaintiff or the plaintiff’s attorney of the defendant’s return receipt; provided,

²⁷ *Id.*

²⁸ Def.’s Mot. to Dismiss at 2.

²⁹ *Id.*

³⁰ *Id.* (“[Plaintiff] does not allege that Defendant committed any of the “enumerated acts” set forth in 10 Del. C. § 3014(c) that are necessary to confer personal jurisdiction.”).

³¹ “Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (5) insufficiency of service of process.”

however, that the amendment shall not be served upon the parties in accordance with the provisions of Rule 5(a).

When a plaintiff has alleged a nonresident committed acts sufficient to permit this Court to have jurisdiction over the nonresident, service may be made “[b]y any form of mail addressed to the person to be served and requiring a signed receipt.”³² Additionally, proof of service may be made by an affidavit of the person effecting service or, if served by mail, “proof of service shall include a receipt signed by the addressee or other evidence of personal delivery to the addressee satisfactory to the court.”³³ If process is insufficient, then there is no personal jurisdiction over the Defendants.³⁴

II. Personal Jurisdiction

On a motion to dismiss for lack of personal jurisdiction, Plaintiff bears the burden of making a prima facie case to establish the basis for jurisdiction.³⁵ This burden is satisfied if Plaintiff shows that Delaware’s long-arm statute, 10 Del. C. § 3104(c), confers jurisdiction.³⁶ In relevant part, § 3104(c) provides as follows:

As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent:

- (1) Transacts any business or performs any character of work or service in the State;
- (2) Contracts to supply services or things in this State;
- (3) Causes tortious injury in the State by an act or omission in this State;
- (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State. . . .

The Court first determines if jurisdiction is appropriate under the long-arm statute and, if it is, the court then determines if asserting such jurisdiction would

³² 10 Del. C. § 3104(d)(3).

³³ *Id.* §3104(e).

³⁴ *Cannon v. Target Stores*, 2009 WL 2382946, *1 (D. Del. 2009).

³⁵ *Greenly v. Davis*, 486 A.2d 669, 670 (Del. 1984).

³⁶ *Boone v. Oy partek Ab*, 724 A.2d 1150, 1154 (Del. Super. 1997).

offend the Due Process Clause of the Fourteenth Amendment.³⁷ In making its determination, the court must accept all factual allegations in the Complaint as true and must view all factual inferences in a light most favorable to the plaintiff.³⁸

DISCUSSION

I. Service of Process

A. Service of Defendant Micco World, Inc. was Proper.

Plaintiff properly sued Defendant Micco. On August 11, 2010, counsel for Plaintiff sent via registered mail, return receipt requested, a copy of the complaint and process issued by the Prothonotary of this Court to Defendant Micco. Defendant Micco was served on August 17, 2010. An affidavit that Defendant Micco received the complaint and a copy of the return receipt card was e-filed on August 31, 2010.³⁹ Defendant Micco's motion to dismiss for insufficient service of process is denied.

B. Service of Defendant Steven Brisker was Proper.

Plaintiff properly sued Defendant Steven Brisker. On August 11, 2010, Plaintiff sent a copy of the complaint and process issued by the Prothonotary to Defendant Brisker via registered mail, return receipt requested. Counsel for Plaintiff e-filed an affidavit and a copy of the return receipt card on August 31, 2010 indicating Defendant Brisker received the complaint. Defendant Brisker's motion to dismiss for insufficient service of process is denied.

C. Service of Defendant Lundquist was Proper.

Defendant Lundquist was also properly served. On August 11, 2010, Plaintiff's counsel sent via registered mail, return receipt requested, a copy of the complaint and process issued by the Prothonotary to Defendant Lundquist. On September 14, 2010, Defendant Lundquist's counsel indicated he would accept service of process on behalf of his client. On September 23, 2010, the complaint and process were returned as undeliverable. On September 28, 2010, the

³⁷ *Palmer v. Moffat*, 2001 WL 1221749, at *1 (Del. Super. Oct. 10, 2001).

³⁸ *Id.*

³⁹ Affidavit of Return of Service of Aug. 31, 2010 (Lexis Transaction I.D. 32977371).

complaint and process were once again mailed to Defendant Lundquist's counsel.⁴⁰ An affidavit stating the above facts was e-filed on September 30, 2010. While the Plaintiff did not attach a copy of the return receipt card, it is important to note that counsel for Defendant Lundquist filed this motion to dismiss for insufficient service of process and lack of personal jurisdiction on September 30, 2010. Defendant Lundquist's motion to dismiss for insufficient service of process is denied.

D. Service of Defendant Ridenour was Proper

Defendant Ridenour was also properly served. On August 11, 2010, counsel for Plaintiff sent via registered mail, return receipt requested, a copy of the complaint and process issued by the Prothonotary to Defendant Ridenour. In his affidavit, counsel for Plaintiff states he received the return receipt card on September 22, 2010.⁴¹ The affidavit containing a copy of the return receipt card was e-filed on September 30, 2010. Accordingly, Defendant Ridenour's motion to dismiss for insufficient service of process is denied.

II. Personal Jurisdiction

A. This Court Has Personal Jurisdiction Over Defendant Micco World, Inc.

This Court has personal jurisdiction over Defendant Micco pursuant to 10 Del. C. § 3104 (c)(1) and (3). Subsection (1) applies to transactions that occur within this State, and (3) applies to contracts that cause tortious injury in this State. "Where personal jurisdiction is asserted on a transactional basis, even a single transaction is sufficient if the claim has its origin in the asserted transaction."⁴² The specific conduct enumerated in subsection (1) of the long arm statute may provide personal jurisdiction "only with respect to claims which have a nexus to the designated conduct."⁴³

⁴⁰ Affidavit of Service of Sept. 30, 2010 (Lexis Transaction I.D. 33549202).

⁴¹ *Id.*

⁴² *LaNuova D & B, S.p.A. v. Bowe Co., Inc.*, 513 A.2d 764, 768 (Del. 1986) (citing *Speakman Co. v. Harper Buffing Machine Co.*, 583 F. Supp. 273, 275 (D. Del. 1984)).

⁴³ *Id.*

In the current case, the Plaintiff's claims stem directly from the two contracts formed with Defendant Micco's predecessor entity. While it is true that the act of merging with a Delaware corporation or a contract "between a Delaware corporation and a nonresident to . . . transact business outside Delaware, which has been negotiated without any contacts with this State," without more, is insufficient to establish personal jurisdiction,⁴⁴ this Court's jurisdiction over Defendant is predicated on Defendant's conduct, pursuant to the contract, after the merger transaction was completed. That is, while the timeline is not precisely articulated in the moving papers, this Court's jurisdiction stems from Defendant Micco's conduct, in its own right, in perpetuating, and allegedly breaching, the contractually defined obligations of the parties.

The contracts were created when Micco was operating as Constellation Group; Constellation Group was originally organized under Delaware law and solicited the services of Plaintiff. When Constellation Group merged into Defendant Micco, it organized under Georgia law; critically, however, even after Constellation Group changed its name and state of incorporation, it continued to operate under the terms of the two contracts it formed with Plaintiff. The record reveals that Constellation Group was officially merged into Defendant Micco as of August 1, 2008.⁴⁵ As of December 2008, Defendant Micco was nevertheless continuing to transact business with Plaintiff regarding the solicitation of investors for Defendant, as provided by the July 2008 contract, thereby receiving Plaintiff's "management services,"⁴⁶ services which Plaintiff provides within Delaware.⁴⁷ Indeed, Micco apparently did not formally attempt to terminate its agreement with Plaintiff until July 2009.⁴⁸ Therein, Defendant is sufficiently alleged to have caused injury in Delaware, by an act or omission outside of Delaware, while Defendant "derives substantial revenue from services, or things used or consumed in this State."⁴⁹ Accordingly, this Court has personal jurisdiction over Defendant Micco.

⁴⁴ *Mobile Diagnostic Group Holdings, LLC v. Suer*, 972 A.2d 799, 805 (Del. Ch. Ct. 2009) (citations omitted).

⁴⁵ Compl. Ex. A.

⁴⁶ *Id.* Ex. B.

⁴⁷ *Id.* ¶ 15.

⁴⁸ *Id.* ¶ 21.

⁴⁹ 10 Del. C. § 3104(c)(4).

B. This Court Has Personal Jurisdiction Over Defendant Steven Brisker.

Defendant Brisker has purposefully availed himself to the laws of Delaware by contacting, negotiating, and executing two services contracts with Plaintiff. Under 10 Del. C. § 3104(c)(1) and (3) this Court has jurisdiction over someone who transacts business or causes tortious injury in this State. In July of 2008, Defendant Brisker, with Defendant Lundquist, sought the services of Plaintiff in an effort to have Constellation Group become a publicly traded company. Two contracts were negotiated and executed between Defendant Brisker and Plaintiff. Defendant Brisker contends that this is insufficient to establish personal jurisdiction. However, the effect of the contracts has been to cause tortious injury to Plaintiff in this State. Plaintiff has alleged that Defendant Brisker has misappropriated investor funds, investors it found for Defendant Micco. As a result, this Court has personal jurisdiction over Defendant Brisker.

C. This Court Has Personal Jurisdiction Over Defendant Phil Lundquist.

Defendant Lundquist purposefully availed himself to the laws of Delaware, under 10 Del. C. § 3104(c)(1) and (3), when he personally sought the services of Plaintiff in order to help his company find investors and then allegedly misappropriated investor funds. Pursuant to 10 Del. C. § 3104(c)(1) and (3) this Court has jurisdiction over someone who transacts business or causes tortious injury in this State. In May of 2008, Defendant Lundquist sought Plaintiff and began discussions to form a business relationship. In July of 2008, Defendant Lundquist and Defendant Brisker contracted with Plaintiff for its services in an effort to help their company become publicly traded through an IPO. Two contracts were negotiated and executed on behalf of Defendant Micco, then Constellation Group, and Plaintiff. Like Defendant Brisker, Defendant Lundquist contends that this is insufficient to establish personal jurisdiction. However, Defendant Lundquist is also alleged to have misappropriated investor funds, investors Plaintiff found, for his personal use. The effect of these two contracts has been to cause tortious injury to Plaintiff in this State. Therefore, this Court has personal jurisdiction over Defendant Lundquist.

D. This Court Has Personal Jurisdiction Over Defendant Tom Ridenour.

This Court has personal jurisdiction over Defendant Ridenour under the conspiracy theory of personal jurisdiction.

[A] conspirator who is absent from the forum state is subject to the jurisdiction of the court, assuming he is properly served under state law, if the plaintiff can make a factual showing that: (1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.⁵⁰

Therefore, a defendant who has voluntarily participated in a conspiracy has purposefully availed himself to the laws of this State.⁵¹

As the Chief Financial Officer and certified public accountant for Micco, Defendant Ridenour has purposefully availed himself to the laws of Delaware when he intentionally provided Plaintiff with an alleged incomplete and limited accounting information for Micco. Approximately three months after Plaintiff provided Micco with investors, Micco requested additional investors because nearly all the money provided to it had been exhausted. Defendant Ridenour provided the Plaintiff with incomplete accounting information, indicating Defendant Ridenour was involved in an alleged conspiracy to defraud investors and that he was a member of the alleged conspiracy.⁵² Upon reviewing the incomplete information received, Plaintiff allegedly discovered that Defendants Brisker and Lundquist were exhausting the investor money for their personal use. Plaintiff, as a Delaware resident, alleges that this damaged its reputation with current and potential future investors. Plaintiff also alleges Defendant Ridenour knew how providing incomplete accounting information would affect it in this State. Plaintiff contends that the results of the alleged conspiracy, the damage to its reputation in this State and the misappropriated investor funds, were a direct and foreseeable

⁵⁰ *Istitut Bancario Italiana SpA v. Hunter Engineering Co., Inc.*, 449 A.2d 210, 225 (Del. 1982).

⁵¹ *Id.*

⁵² Plaintiff allegedly made several requests for an accounting of the investor money from March to June of 2009. Compl. ¶ 18.

result of Defendant Ridenour's conduct of providing incomplete accounting information to hide how the investor money was actually being spent. Plaintiff has demonstrated that this Court has personal jurisdiction over Defendant Ridenour.

CONCLUSION

Based on the forgoing, Defendants' motion to dismiss Plaintiff's complaint based on lack of personal jurisdiction and insufficient service of process is **DENIED.**

IT IS SO ORDERED.

Richard R. Cooch, R.J.

RRC/rjc

oc: Prothonotary