

interest, Plaintiff CMG Worldwide, Inc. (“CMG”), served as the exclusive representative for the post-mortem intellectual property rights associated with Marilyn Monroe. During that time period, the Estate and its successors warranted their ownership rights in the intellectual property and CMG negotiated hundreds of agreements for the use of the property rights and policed the marketplace for the unauthorized use of those rights. In 2011, an agreement was reached between CMG and MM-ABG, LLC, a successor in interest to the Estate, ending CMG’s exclusive representation of the post-mortem intellectual property rights. CMG claims that things have not gone as agreed since the termination agreement and, accordingly, filed this lawsuit in state court, which Defendants have since removed to this court. Prior to the lawsuit being removed, CMG reached a settlement agreement with Defendants MM-ABG, LLC and its parent, Authentic Brands Group, LLC. However, CMG continues to pursue RALS-MM LLC, another successor in interest to the Estate, Stanley Buchthal, a member of MM-ABG, LLC, and three members of of RALS-MM LLC, Anna Strasberg, David Strasberg and the Anna Freud Center (“the Center”).¹

II. Discussion

A. Failure of Service of Process

The Complaint is not a model of clarity and, in reviewing it, there are occasions

¹Defendants deny that David Strasberg is a member of RALS-MM LLC.

when it is difficult to understand exactly what CMG alleges each of the Defendants did to contribute to its claimed damages. Nevertheless, there are four Counts to the Complaint: (1) Breach of Contract (all remaining defendants), (2) Fraud (all remaining defendants), (3) Fraud (all remaining defendants), and (4) Tortious Interference with Contract (Buchthal). However, before any required substantive analysis of the allegations of the Complaint, Defendants assert that the court lacks personal jurisdiction over the Strasbergs or the Center because they have not been served. Accordingly, Defendants argue that the Strasbergs and the Center should be dismissed pursuant to Rule 12(b)(2) and 12(b)(5) of the Federal Rules of Civil Procedure. CMG does not maintain that the Strasbergs or the Center were served with the Complaint and summons, or even that any effort was made to do so. It does claim that these particular defendants should not be dismissed because of a combination of factors. First, CMG points out that these Defendants are members of a limited liability company which was properly served and that they have actual knowledge of this lawsuit. Further, the Strasbergs and the Center agreed to the removal of the action to this court from state court. Unfortunately for CMG, none of those reasons is sufficient to excuse its failure to serve or attempt to serve these three Defendants.

In order for a court to assert personal jurisdiction over a defendant, that defendant must be validly served, and it is incumbent upon the plaintiff to prove that it accomplished the same. *Claus v. Mize*, 317 F.3d 725, 727 (7th Cir. 2003). Whether or not service of process was sufficient so as to provide a federal court with jurisdiction over a matter

removed from state court depends upon whether the state court would have had jurisdiction if the matter remained in state court. *Lambert Run Coal Co. v. Baltimore & O.R. Co.*, 258 U.S. 377, 382 (1922).

The record reveals that the Hamilton County, Indiana Clerk issued only four summonses in this case, none of which were for the Center or the Strasbergs. In Indiana, due process requires service of notice in a manner reasonably calculated to inform a defendant of the pending lawsuit. *Spangler v. State*, 607 N.E.2d 720, 725 (Ind. 1993). Actual knowledge of the lawsuit does not satisfy the due process requirements. *Overhauser v. Fowler*, 549 N.E.2d 71, 73 (Ind. Ct. App. 1990). The Indiana Business Flexibility Act, Indiana Code § 23-18-1-1 *et seq.*, provides no authority for service upon a limited liability company being effective as to its individual members and, in fact, the Act proscribes the making of an individual member of such a limited liability company a party to a lawsuit based solely on membership in the company. Ind. Code § 23-18-3-5. Furthermore, a defendant does not waive any defense or objection to personal jurisdiction based upon an alleged deficiency in service of process simply by removing an action from state court. *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 449 (1943); *Block v. Block*, 196 F.2d 930, 932-33 (7th Cir. 1952).

This court has no reservation finding that CMG's failure to make any effort at serving the Center or the Strasbergs and its dependence on them learning of the lawsuit solely through indirect means is, as a matter of law, not reasonably calculated to inform

merely because of their ownership in the entity. Rather, liability for the obligations of the LLC can only fall on an individual member if they disregarded the “corporate form” so as to control or manipulate it as an instrumentality of their own, similar to piercing the corporate veil. *Ketchem v. American Acceptance, Co., LLC*, 641 F.Supp.2d 782, 786 (N.D.Ind. 2008); *Troutwine Estates Development Co. LLC v. Comsub Design and Engineering, Inc.*, 854 N.E.2d 890, 899 (Ind. Ct. App. 2006). CMG has not alleged any facts which would support a pursuit of these defendants on that basis. Consequently, there are no direct or inferential allegations respecting the necessary material elements to sustain a recovery under a viable legal theory, and the breach of contract claim is dismissed as to all defendants other than RALS-MM LLC. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

2. Tortious Interference

Count IV of CMG’s Complaint is titled “Tortious Interference of Contract” and asserts claims against only two defendants, one of which has previously been dismissed, leaving Stanley Buchthal as the lone remaining targeted Defendant. In order to prove tortious interference with contract, a plaintiff must show: 1) the existence of a valid and enforceable contract; 2) defendant’s knowledge of the existence of the contract; 3) defendant’s intentional inducement of breach of the contract; 4) the absence of justification; and 5) damages resulting from defendant’s wrongful inducement of the breach. *Levee v. Beeching*, 729 N.E.2d 215, 221 (Ind. Ct. App. 2000). A defendant must

have acted intentionally or knowingly, as mere negligence will not support a recovery. *DBS Constr., Inc. v. New Equip. Leasing, Inc.*, 2011 WL 1157531, *4 (N.D.Ind. March 28, 2011)(citing *Tenta v. Guraly*, 221 N.E.2d 577, 580 (Ind. Ct. App. 1966)). Buchthal claims the tort claim must be dismissed because CMG has failed to plead that he induced the breach of any contract or that he acted with any type of tortious intent.

In response, CMG points to paragraph 29 of its Complaint alleging that despite Buchthal's awareness of the Representation Agreement giving CMG exclusive agency rights to the relevant intellectual property, and his knowledge of the Termination Agreement, giving certain rights to receive royalties to CMG, Buchthal intentionally negotiated license agreements that interfered with those rights – the agreement between CMG and MM LLC and third-party license agreements which CMG had negotiated. Further, CMG points to its allegations with regard to Buchthal's ownership interest in MM-ABG LLC and its allegations that Buchthal took steps to require third-party licensees to pay royalties to MM-ABG LLC instead of CMG, in contravention of the Termination Agreement.

The court finds Buchthal's retort, that the Complaint fails to describe what third-party contract was breached, to be insufficient to require dismissal of the claim at this point. Taking all the allegations of the Complaint into account, and allowing for all favorable inferences in CMG's favor, the court is comfortable that the minimum standard of "plausibility" has been met. Because the claim is not one for fraud, like Counts II and III,

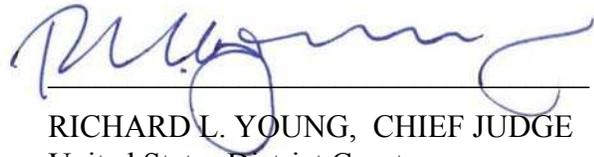
there is no “who, what, where and when” requirement for pleading. Rather, based on the allegations, there need only be a plausible set of facts that could lead to a successful prosecution. *Twombly*, 550 U.S. at 563. If, after discovery, CMG is unable to adduce all of the supporting facts necessary to sustain the claim, then a motion for summary judgment would eliminate that claim from further prosecution. Accordingly, Defendants’ motion is denied with respect to CMG’s claim for tortious interference with contract, and that claim will survive as against Stanley Buchthal.

III. Conclusion

For the reasons explicated in this entry, Defendants’ Motion to Dismiss (Docket # 25) is **GRANTED IN PART** and **DENIED IN PART**. All of CMG’s claims against Defendants Anna Strasberg, David Strasberg and the Anna Freud Center are dismissed without prejudice for failure to serve process. Counts II and III of CMG’s Complaint, alleging fraud, are dismissed without prejudice against all Defendants. Count I of CMG’s Complaint, alleging breach of contract, is dismissed as to all Defendants other than RAL-MM LLC. Count IV of CMG’s Complaint, alleging tortious interference with contract against Stanley Buchthal survives and may move forward along with the breach of

contract claim against RAL-MM LLC.

SO ORDERED this 28th day of September 2012.

A handwritten signature in blue ink, appearing to read 'R. Young', is written over a horizontal line.

RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana

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