IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

BIOMEME, INC., a Delaware corporation, Plaintiff, v. MARK McANALLEN Defendant.	)	C.A. No. N19C-12-079 WCC

Submitted: July 12, 2021
Decided: November 10, 2021

Defendant's Motion to Dismiss pursuant to Rule 12(b)(2) is DENIED.

Defendant's Motion to Dismiss pursuant to Rule 12(b)(6) is STAYED pending the filing of an Amended Complaint.

MEMORANDUM OPINION

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CARPENTER, J.

Before the Court is Defendant Mark McAnallen's ("McAnallen" or "Defendant") Motion to Dismiss pursuant to Superior Court Civil Rules 12(b)(2) and 12(b)(6). For the reasons set forth below in this Opinion, Defendant's Motion pursuant to Rule 12(b)(2) is **DENIED** and Defendant's Motion pursuant to Rule 12(b)(6) is **STAYED** for thirty days.

I. FACTUAL BACKGROUND

This case arises from the employment relationship between McAnallen and Biomeme, Inc. ("Biomeme" or "Plaintiff"). Biomeme is a Delaware biotechnology corporation and McAnallen is a Pennsylvania resident.[1] In April 2018, Biomeme hired McAnallen as its Sales and Marketing Director and, to formalize the relationship, provided him with the Employment Letter and the Restrictive Covenants Agreement ("RCA").[2] The Employment Letter outlines McAnallen's salary, benefits, stock options, among other specifics and was signed by both McAnallen and Max Perelman, Biomeme's Vice President & Treasurer.[3] The enclosed RCA details McAnallen's responsibilities for handling Biomeme's confidential information, information from third parties, company property, assignment of inventions, and other covenants.[4]

[1] Compl., D.I. 1, ¶¶ 1, 2 (Dec. 6, 2019).
[2] Emp't Letter, D.I 24, 1 (Mar. 17, 2021).
[3] *Id*. at 1-4.
[4] Def.'s Ex. B, D.I. 12, 1-9 (Restrictive Covenants Agreement).

The RCA contains a forum selection clause subjecting McAnallen to litigate Biomeme's related claims in Delaware, although, a similar clause does not exist in the Employment Letter.[5] Specifically, the clause states:

> [McAnallen] consent[s] to personal jurisdiction of the state and federal courts located in the State of Delaware for any lawsuit filed there against [McAnallen] by the Company arising from or related to this Agreement, to the exclusion of all other courts, and [McAnallen] accept[s] service of process by registered or certified mail to the address set forth above…as if you were personally served within the State of Delaware.[6]

Additionally, the Employment Letter combined with the RCA, "constitutes the full and entire understanding and agreement between Biomeme and [McAnallen]" (collectively, the "Employment Agreement").[7]

McAnallen started on May 21, 2018, in Biomeme's Philadelphia office, located at 1015 Chestnut Street, Suite 1401, Philadelphia, PA 19107.[8] In June 2019, McAnallen was terminated for lack of knowledge and inability to explain Biomeme's products.[9] Following his termination, McAnallen received a commission payout, but he believed Biomeme owed him additional monies.[10] McAnallen informed Biomeme that he intended to pursue litigation, and

[5] *Id*. at 7.
[6] *Id*.
[7] Emp't Letter at 2.
[8] *Id*. at 1.
[9] *Id*. at ¶ 15.
[10] *Id*. at ¶ 19.

subsequently, sued Biomeme in the Philadelphia Court of Common Pleas.[11] Around that time, Biomeme was preparing another fundraiser to continue and grow its operations.[12]

Biomeme filed the instant action on December 6, 2019, asserting that McAnallen intentionally interfered with prospective business opportunities by making significant misrepresentations to expected customers and alarming potential investors with frivolous litigation.[13] More specifically, during McAnallen's employment, Biomeme allegedly had opportunities to sell its products to five different businesses, including:

> (a) an Italian designer and manufacturer of electrical systems for special vehicles and agricultural machinery, (b) a DNA biotechnology company specializing in certifying the authenticity of ingredients in food and natural health products, (c) an Australian University, (d) a state-wide department that oversees the conservation of its fish and wildlife, and (e) an owner/operator of several wastewater treatment plants.[14]

Those businesses either stopped pursuing the relationship or reduced their overall purchase of Biomeme's products and services.[15]

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[11] Def.'s Op. Br. of Mot. of Def. Mark McAnallen to Dismiss Compl., D.I. 12, 3-4 (Jan. 25, 2021)(*hereinafter* "Def.'s Op. Br."); *See Mark McAnallen v. Biomeme, Inc., et al.*, PA Court of Common Pleas, Philadelphia County, Case No. 210101528 (Jan. 22, 2021).
[12] Compl. at ¶¶ 17-18.
[13] *Id*. at ¶¶ 22-33.
[14] Compl. at ¶ 10.
[15] *Id*. at ¶ 11.

McAnallen filed this Motion to Dismiss on January 25, 2021, and oral arguments were heard on March 17, 2021.[16] Now, the Court issues its decision.[17]

II. DISCUSSION

A. McAnallen moves to dismiss Biomeme's Complaint for lack of personal jurisdiction under Superior Court Civil Rule 12(b)(2).

1. Standard of Review

On a motion to dismiss for lack of personal jurisdiction, the plaintiff has the burden of showing a basis for the trial court's exercise of jurisdiction over a nonresident defendant.[18] In Delaware, "courts will apply a two-prong analysis to the issue of personal jurisdiction."[19] First, the Court considers "whether Delaware's long arm statute is applicable, recognizing that 10 Del. C. § 3104(c) is to be broadly construed to confer jurisdiction to the maximum extent possible under the Due Process Clause."[20] Second, the Court must "determine whether subjecting the

[16] Def.'s Op. Br. at 1.
[17] It appears to the Court that Defendant's Rule 12(b)(1) subject matter jurisdiction claim was abandoned during oral argument. If mistaken, however, the Court has subject matter jurisdiction over Biomeme's tortious interference claims. *See Clark v. Teeven Holding Co.*, 625 A.2d 869, 880 (Del. Ch. 1992)(The Delaware Superior Court is a court of general jurisdiction.); *See also* Del. Const., art. IV, § 7; *Pot-Nets Coveside Homeowners Assoc. v. Tunnell Cos., L.P.*, 2015 WL 3430089, at *3 (Del. Super. Ct. May 26, 2015)(Absent a statute to the contrary, the Delaware Superior Court is presumed to have jurisdiction over any dispute at law, provided that jurisdiction does not conflict with the Delaware Constitution.).
[18] *Herman v. BRP, Inc.*, 2015 WL 1733805, at *3 (Del. Super. Ct. Apr. 13, 2015).
[19] *Id*.
[20] *Hercules Inc. v. Leu Tr. & Banking (Bahamas) Ltd.*, 611 A.2d 476, 480 (Del. 1992).

nonresident defendant to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment."[21]

2. Mark McAnallen consented to personal jurisdiction when he validly executed the Employment Agreement with Biomeme.

McAnallen argues that the Court lacks personal jurisdiction under the traditional two-step analysis.[22] First, he asserts that he is not a Delaware resident and has not acted in any way that would confer jurisdiction under § 3104(c).[23] Second, he maintains that he has no contacts with the State, thereby, offending "traditional notions of fair play and substantial justice."[24] Moreover, McAnallen contends that the mere existence of a Delaware forum selection clause in the RCA cannot satisfy personal jurisdiction because Plaintiff's claims do not arise from that agreement.[25]

Conversely, Biomeme asserts that the Court has personal jurisdiction because McAnallen freely and knowingly consented to litigate in Delaware by signing an agreement with a forum selection clause.[26] Biomeme broadly interprets the forum selection clause to govern all claims arising from the Employment Agreement.[27]

[21] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 438 (Del. 2005).
[22] Def.'s Op. Br. at 6-7.
[23] *Id*. at 7.
[24] *Id*. at 9.
[25] *Id*. at 10-11.
[26] Pl.'s Br. at 4.
[27] *Id*. at 6-7.

The Court agrees with McAnallen that it cannot confer personal jurisdiction under the traditional analysis.[28] But the inquiry does not stop there. Personal jurisdiction is a waivable right and one legal arrangement recognized by Delaware law is a forum selection clause in a contract.[29] A forum selection clause permits parties to expressly agree to a specific forum to litigate their disputes.[30] Such clauses are presumptively valid, and the Court need not consider the Delaware long arm statute or the nonresident's minimum contacts with the forum.[31] Delaware courts defer to forum selection clauses and routinely "give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation."[32]

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[28] *Herman*, 2015 WL 1733805, at *4 ("It is well settled law that 'a contract between a Delaware corporation and a nonresident to…transact business outside Delaware which has been negotiated without any contacts with this State, cannot alone serve as a basis for personal jurisdiction over the nonresident for actions arising out of that contract.'"); *Mobile Diagnostic Grp. Holdings LLC v. Suer*, 972 A.2d 799, 805 (Del. Ch. 2009)(finding that agreeing to a provision in a contract that provides for "service of process by any means permitted under Delaware law is not a jurisdiction-conferring act within the State.").

[29] *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 130 (Del. 2016).

[30] *Nat'l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 385 (Del. 2013)

[31] *Id*. at 381; *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985)("Where such forum selection provisions have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust,' their enforcement does not offend due process."); *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1228 (Del. 2018)("Where a party commits to the jurisdiction of a particular court or forum by contract, such as through a forum selection clause, a 'minimum contacts' analysis is not required as it should clearly anticipate being required to litigate in that forum.").

[32] *Loveman v. Nusmile, Inc.*, 2009 WL 847655, at *2 (Del. Super. Ct. Mar. 31, 2009)(quoting *Halpern Eye Assocs., P.A. v. E.A. Crowell & Assocs., Inc.*, 2007 WL 3231617, at *1 (Del.Com.Pl. Sept. 18, 2007)).

In this case, the governing forum selection clause states, in relevant part, that "*any* lawsuit filed…against [McAnallen] by [Biomeme] *arising from or related to this Agreement*" must be brought in Delaware.[33] Based on the alleged facts, McAnallen's misrepresentations occurred during his employment as Biomeme's Sales and Marketing Director. Those misrepresentations were made to potential customers and were the basis for his termination in 2019. Likewise, McAnallen's alleged threats of litigation over unpaid monies arose from his contractual, employment relationship with Biomeme.

The Court finds that the operative facts relevant to the claims arise from the contractual relationship between the parties. The Employment Letter and the RCA are incorporated and referenced together, and it is a reasonable inference that the forum selection clause applied to the overall employment relationship. Therefore, the forum selection clause is applicable to both of Biomeme's claims and McAnallen's Motion to Dismiss pursuant to Rule 12(b)(2) is **DENIED**.

[33] Restrictive Covenants Agreement at ¶19 (emphasis added); *See CA, Inc. v. Ingres Corp.*, 2009 WL 4574009, at *46 (Del. Ch. Dec. 7, 2009)("Language such as 'relate to' or 'arise out of' is to be read broadly.").

B. Mark McAnallen moves to dismiss Biomeme's Complaint for failure to state a claim under Superior Court Civil Rule 12(b)(6).

1. Standard of Review

When considering a Rule 12(b)(6) motion to dismiss, the Court "must determine whether the claimant 'may recover under any reasonably conceivable set of circumstances susceptible of proof.'"[34] It must also accept all well-pleaded allegations as true and draw every reasonable factual inference in favor of the non-moving party.[35] This reasonable "conceivability" standard asks whether there is a "possibility" of recovery.[36] And, the Court need not give weight to conclusory allegations of fact or law.[37] At this preliminary stage, dismissal will be granted only when the claimant would not be entitled to relief under "any set of facts that could be proven to support the claims asserted" in the pleading."[38]

2. Biomeme's Complaint fails to state claims for tortious interference with prospective business opportunities.

McAnallen argues that the Complaint fails to state claims for tortious interference with prospective business opportunities because essential elements, namely, the reasonable probability of the business opportunities prong, are unsupported.[39]

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[34] *Sun Life Assurance Co. of Can. v. Wilmington Tr., Nat'l Ass'n*, 2018 WL 3805740, *1 (Del. Super. Ct. Aug. 9, 2018) (quoting *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).
[35] *Id.*
[36] *Sustainable Energy Generation Grp., LLC v. Photon Energy Projects B.V.*, 2014 WL 2433096, at *12 (Del. Ch. May 30, 2014).
[37] *Cantatore v. Univ. of Delaware*, 2021 WL 2745107, at *2 (Del. Super. Ct. June 30, 2021).
[38] *See Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *3–4 (Del. Super. Ct. Apr. 16, 2014) (quoting *Clinton v. Enter. Rent–A–Car Co.*, 977 A.2d 892, 895 (Del. July 29, 2009)).
[39] Def.'s Op. Br. at 14, 18.

McAnallen contends that Biomeme merely restates the legal elements of the tortious interference claim and relies only on conclusory allegations to support both counts.[40] McAnallen urges the Court to reject those allegations and dismiss the claims without permitting discovery to prevent "a fishing expedition."[41]

In response, Biomeme asserts that it has sufficiently pleaded both counts of tortious interference and highlights the liberally construed pleading standard, which, according to Plaintiff, only requires that McAnallen receive fair notice of the claims.[42] Biomeme contends that Count I adequately alleges that McAnallen diminished Biomeme's reputation and forfeited Biomeme's opportunity to grow its business with at least five potential customers.[43] And, Count II sufficiently alleges that McAnallen's frivolous litigation stopped Biomeme from securing additional funding from potential investors.[44]

To establish a claim for tortious interference with prospective business relations, Biomeme must allege "(1) the reasonable probability of a business opportunity, (2) the intentional inference by defendant with that opportunity, (3) proximate cause, and (4) damages, all of which must be considered in light of defendant's privilege

[40] *Id*. at 16, 18.
[41] Def.'s Reply Br. at 9.
[42] Pl.'s Br. at 11, 14.
[43] *Id*. at 12.
[44] *Id*.

to compete or protect his business interests in a fair and lawful manner."[45] The most crucial element is the reasonable probability of the business opportunity which must be assessed at the time of the alleged interference.[46] Moreover, "[t]o be reasonably probable, a business opportunity must be something more than a mere hope or the innate optimism of the salesman or a mere perception of a prospective business relationship."[47]

Prospective business opportunities are "by definition, not as susceptible of definite, exacting identification as the case with an existing contract."[48] Delaware courts "permit[] a broad range of legitimate business expectancies, including the 'prospect of … [any] relations leading to potentially profitable contracts.'"[49] It is required, however, that the factual allegations establish some basis of "a *bona fide* expectancy."[50] This fact-intensive inquiry must reveal that the business opportunities are more than speculative and have an objectively reasonable probability of materializing.[51] Additionally, Biomeme cannot rely on generalized allegations and must "identify a specific party who was prepared to enter into a

[45] *Kable Prod. Servs., Inc. v. TNG GP*, 2017 WL 2558270, at *10 (Del. Super. Ct. June 13, 2017).
[46] *Id*.
[47] *Carney v. B & B Serv., Co.*, 2019 WL 5579490, at *2 (Del. Super. Ct. Oct. 29, 2019).
[48] *World Energy Ventures, LLC v. Northwind Gulf Coast LLC*, 2015 WL 6772638, at *7 (Del. Super. Ct. Nov. 2, 2015)(quoting *Wolf v. Teledyne Indus. Inc.*, 475 F.Supp.2d 491, 512 (E.D. Pa. 2007)).
[49] *Id*. (quoting *Kimbleton v. White*, 2014 WL 4386760, at *8 (D. Del. Sept. 4, 2014)).
[50] *Id*.
[51] *KT4 Partners LLC v. Palantir Tech. Inc.*, 2021 WL 2823567, at *20 (Del. Super. Ct. June 24, 2021).

business relationship [with Biomeme] but was dissuaded from doing so by [McAnallen]."[52] Delaware courts do not require that the party be specifically named, however, there must be enough detail for the Court to reasonably infer that specific parties were involved.[53]

The Court of Chancery offers guidance on the reasonable probability prong in both *Agilent Technologies, Inc. v. Kirkland* and *O'Gara v. Coleman*.[54] In *Agilent Technologies*, plaintiff adequately pled this element, without specific names or identity, when it sufficiently described the limited number of manufacturers in an already small market, and that a potential customer had serious interest after testing the product.[55] Conversely, the *O'Gara* claim was dismissed because it failed to show that shareholders, relying on their status alone, were reasonably expected to make another investment in the company and, therefore, the plaintiff had nothing more than a "mere hope" of a prospective business opportunity.[56]

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[52] *Orthopaedic Assocs. of S. Delaware, P.A. v. Pfaff*, 2018 WL 822020, at *2 (Del. Super. Ct. Feb. 9, 2018).
[53] *Agilent Tech., Inc. v. Kirkland*, 2009 WL 119865, at *7 (Del. Ch. Jan. 20, 2009)(rejecting that a party must supply the names of its potential business affiliates as long as the party provides sufficient allegations permitting the court to reasonably infer specific parties were involved).
[54] *Id*.; *O'Gara v. Coleman*, 2020 WL 752070 (Del. Ch. Feb. 14, 2020).
[55] *Agilent Tech.*, 2009 WL 119865, at *8.
[56] *O'Gara*, 2020 WL 752070, at 8* (The *O'Gara* court explained that the "mere status as stockholder does not, standing alone, allow the court to reasonably infer that [the company] had anything more than 'a mere hope…or mere perception of a prospective business relationship' with that stockholder.").

In the instant matter, Biomeme sufficiently identifies five different businesses it would have sold products to by either listing each company's nationality, industry, specialty, or sub-specialty.[57] But its potentially viable claim stops there. Biomeme, then, baldly asserts "[the five businesses] were all ready to engage in business with Biomeme," without furthering any facts to indicate the reality of those relationships.[58] The Complaint provides no information regarding the stages of negotiations, reasons that Biomeme was likely to secure the business, or when the opportunities were lost. As such, Biomeme's allegations mirror those in *O'Gara* because the mere status as a "potential" customer alone is insufficient to support this cause of action. The Court is left without enough information to evaluate these examples for a *bona fide* expectancy.

Moreover, the remaining elements of the claim also fail. Biomeme only connects McAnallen to its failed business deals by generally asserting that McAnallen "knowingly and intentionally made significant misrepresentations about Biomeme and its products" to the five businesses.[59] It fails to explain what the misrepresentations were, when they happened, or to whom they were made. Such

[57] Compl. at ¶ 10; Pl.'s Br. at 13.
[58] Compl. at ¶ 11.
[59] *Id*. at ¶12.

conclusory allegations, unsupported by facts, do not survive McAnallen's Motion to Dismiss.

Similarly, under Count II, Biomeme argues that McAnallen's threats of litigation prevented it from beginning a successful fundraiser.[60] Again, Biomeme fails to allege any facts describing how close it was to securing funding or the identity of any investors impacted by McAnallen. Nor is there any indication that McAnallen knew of any such investors or fundraising, or that the investors knew of McAnallen's threats.[61] Moreover, Biomeme admits that it has yet to begin the process of fundraising but furthers a claim contending that it would have been successful.[62] Without more, Biomeme's mere "perception" of a future fundraiser will not form the basis of a *bona fide* expectancy.

3. Biomeme may amend its Complaint without the Court's permission because McAnallen has not filed a responsive pleading.

Biomeme asks the Court for leave to amend its Complaint should it not survive McAnallen's motion to dismiss.[63] Biomeme highlights that leave to amend the Complaint is liberally given when justice requires it.[64] McAnallen contends that

[60] *Id*. at ¶32.
[61] See *Browning v. Data Access Sys., Inc.*, 2011 WL 2163555, at *4 (Del. Super. Ct. Jan. 31, 2011)("Plaintiffs do not plead facts showing that [the Defendant] knew of Plaintiffs or their business opportunities. Without that, Plaintiffs fail to state a claim that [the Defendant] tortiously interfered.").
[62] Pl.'s Br. at 14; Compl. ¶¶ 32-33.
[63] Pl.'s Br. at 15.
[64] *Id*.

leave should be denied because Biomeme has failed to show that it would be entitled to relief under any reasonable set of facts and amendment would be futile because the court lacks personal jurisdiction over him.[65]

To start, a request for leave to amend is governed by Superior Court Civil Rule 15(a).[66] Rule 15(a) provides, in relevant part, "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served."[67] The Delaware Superior Court has established that "a motion to dismiss is not a responsive pleading that would require [a plaintiff] to seek leave of the Court to file an amended Complaint."[68] In this case, McAnallen has only filed this Motion to Dismiss and has yet to file a responsive pleading. Also, amendment is not futile because the Court has personal jurisdiction over McAnallen. Therefore, Biomeme may file an Amended Complaint as a matter of course without the Court's permission or opposing party's consent.

Accordingly, McAnallen's Motion to Dismiss under Rule 12(b)(6) will be **STAYED** until December 10, 2021. If an Amended Complaint addressing the concerns raised in this memorandum opinion is filed by that date, then the Motion

[65] Def.'s Reply Br. at 11.
[66] Super. Court Civ. R. 15(a).
[67] *Id*.
[68] *R. Keating & Sons, Inc. v. Huber*, 2020 WL 975435, at *3 (Del. Super. Ct. Feb. 27, 2020).

to Dismiss under Rule 12(b)(6) will be denied. If no Amended Complaint is filed by December 10, 2021, the case will be dismissed.

III. CONCLUSION

For the foregoing reasons, the Defendant's Motion to Dismiss under Rule 12(b)(2) is **DENIED**. The Motion filed pursuant to Rule 12(b)(6) is **STAYED** for thirty days.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.