IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHADOWBOX PICTURES, LLC et al.	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 05-2284
GLOBAL ENTERPRISES, INC. et al.	:	

MEMORANDUM

Padova, J. **January 11, 2006**

Plaintiffs, co-producers in the motion picture industry and limited liability companies organized under Pennsylvania law, have brought this action against Defendants Global Enterprises, Inc. ("Global") and its president, Anthony Stroup; Tessler, Rubin & Co. ("Tessler Rubin") and one of its partners, Alan Rubin, CPA; and Strategic Securities, Inc. ("Strategic") and its president, William Leyton, alleging violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962, and pendant state law claims for breach of contract, conversion, common law fraud, and unjust enrichment. Presently before the Court is a Motion, submitted by Defendants Tessler Rubin and Alan Rubin ("Moving Defendants"), to dismiss for lack of personal jurisdiction or for failure to state a claim upon which relief can be granted, or in the alternative, to compel arbitration and stay legal proceedings. For the reasons stated below, the Motion is granted in part and denied in part.

I. FACTUAL BACKGROUND

Plaintiffs Shadowbox Pictures, LLC, ("Shadowbox") and Last Conspiracy, LLC, both Pennsylvania companies wholly owned by Kenneth Barbet and operating from the same address, were co-

producers on a film project, a thriller entitled Last Conspiracy (hereinafter "the Motion Picture"). Kenneth Barbet formed Shadowbox in early 2000 for the purpose of producing television commercials, infomercials, and independent feature length films. He formed Last Conspiracy, LLC, in December 2003 as a single purpose entity to produce the Motion Picture. Plaintiffs contend they were victimized in a funding scheme, designed to defraud them out of $250,000, of which Alan Rubin and his California-based accounting firm, Tessler Rubin, were a part.

Plaintiffs allege the following facts. In October 2003, Anthony Stroup represented to Kenneth Barbet that Global, a Delaware corporation, would fund the Motion Picture, subject to certain conditions, if Kenneth Barbet or Shadowbox posted 20% of the film's 1.25 million dollar budget as collateral. (Barbet Aff. ¶¶ 6-7.) Anthony Stroup assured Kenneth Barbet that the collateral would be held by his accounting firm in a restricted custodial account and managed by a CPA. (Barbet Aff. ¶ 10.) Global then sent to Plaintiffs in Pennsylvania a Motion Picture Financing Agreement ("MPFA") and related Custody Instructions Agreement ("CIA"), which incorporated the MPFA. (Barbet Aff. ¶ 15.) The MPFA stated that Tessler Rubin and its approved principal, Alan Rubin, would be the custodial agents of the bank account into which the loan proceeds and the collateral were to be deposited, and that they would manage the custodial account in accordance with the CIA.

(Compl. Ex. A, MPFA ¶ 5.) Tessler Rubin committed in the CIA to providing Plaintiffs with written verification when funds had been deposited in the custodial account. (Compl. Ex. A, CIA ¶ 3.) Tessler Rubin was also to disburse funds to a "Production Account" on a weekly basis upon receipt of authorized certificates prepared by Plaintiffs. Tessler Rubin additionally had to supply Plaintiffs with a written statement of account following each weekly draw down of funds and at such other times as Plaintiffs requested. (Id. at ¶¶ 3, 6.) The CIA anticipated that the custodial account would be in existence through the completion of the Motion Picture or the completion of the final draw down of funds, whichever was later, an estimated period of at least nine months. (Id. at ¶ 9.) Shadowbox entered into the MPFA with Global, and into the CIA with Global and Tessler Rubin, in December 2003, by means of facsimile transmission to Plaintiffs' Pennsylvania Office. (Compl. ¶ 18; Barbet Aff. ¶ 15, Oct. 25, 2005.) In January 2004, Tessler Rubin took custody via interstate wire transmission of Plaintiffs' collateral, which Plaintiffs had raised from investors in Pennsylvania and New Jersey. (Compl. ¶ 24; Barbet Aff. ¶ 16.)

In February 2004, Tessler Rubin sent Plaintiffs an allegedly fraudulent statement indicating that $690,100 was on deposit in the custodial account. (Compl. ¶104, Ex. H.) Global then made a series of excuses as to why it could not fully fund the account. (Compl. ¶ 27.) In April 2004, Kenneth Barbet requested that Alan

Rubin confirm the collateral was still on deposit in the custodial account. (Comp. ¶ 31; Barbet ¶ 26.) Alan Rubin did not initially respond. (Barbet Aff. ¶ 26.) Plaintiffs demanded verification of the funds on deposit from Anthony Stroup at Global. (Compl. ¶ 36; Id.) Anthony Stroup replied that Tessler Rubin would have to be replaced as the custodial agent and named Strategic and William Leyton as the new custodial agents. (Compl. ¶ 37; Barbet Aff. ¶ 26.) Alan Rubin refused to transfer any funds to the new custodial account until he received a Release and Indemnity Agreement, which Kenneth Barbet signed. (Compl. ¶¶ 36, 41, Ex. E.) Alan Rubin then advised Plaintiffs that the funds in the custodial account had been transferred to Strategic. (Barbet Aff. ¶ 27.)

Throughout May 2004, Anthony Stroup made the following contradictory statements: that Global would fund the account, that Global had already funded the account, and that Global could not make funds available at the present time. (Compl. ¶ 42-47.) By June 2004, Anthony Stroup's email was inactive and he was not returning telephone calls. (Compl. ¶ 48.) In July 2004, Anthony Stroup finally informed Plaintiffs that no funding would take place. (Compl. ¶ 52.) When Plaintiffs demanded the return of their collateral, they learned that Alan Rubin had distributed the collateral to Anthony Stroup as "financing fees" over the months between January and April, despite the fact that Global had not actually provided the required financing. (Compl. ¶¶ 34, 104,

Barbet Aff. ¶ 31.) As of the date of the Complaint, no portion of Plaintiffs' money had been returned and the Motion Picture had not been produced. (Barbet Aff. ¶ 32.)

II. DISCUSSION

A. Motion to Dismiss for Lack of Personal Jurisdiction

1. Standard and burden

A federal district court can exercise personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by state law and by the United States Constitution. Provident Nat'l Bank v. Cal. Fed. Savs. & Loan Ass'n, 819 F.2d 434, 436-37 (3d Cir. 1987) (citing Fed. R. Civ. P. 4(e)). "First, the court must apply the relevant state long-arm statute to see if it permits the exercise of personal jurisdiction; then the court must apply the precepts of the Due Process Clause of the Constitution." IMO Indus., Inc. v. Kiekart AG, 155 F.3d 254, 259 (3d Cir. 1998). Pennsylvania's long-arm statute provides that its reach is coextensive with the limits placed on the states by the federal Constitution. 42 Pa. Cons. Stat. § 5322(b). Thus, the Court need only look to whether the Court's assertion of jurisdiction complies with the federal constitutional doctrine of due process to determine if Defendants are susceptible to jurisdiction in Pennsylvania. Verotext Certainteed Corp. v. Consol. Fiber Glass Prods. Co., 75 F.3d 147, 150 (3d Cir. 1996).

The Court employs a two-prong test in order to exercise

specific jurisdiction without offending the Due Process Clause of the Fourteenth Amendment.[1] "First, the defendant must have made constitutionally sufficient 'minimum contacts' with the forum. . . . [Second], jurisdiction may be exercised where the court determines, in its discretion, that to do so would comport with 'traditional notions of fair play and substantial justice.'" Id. (citations omitted). In evaluating whether minimum contacts exist, the Court must determine whether the defendant has "'purposefully directed' [its] activities at residents of the forum" and whether "the litigation results from alleged injuries that 'arise out of or relate to' those activities." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (U.S. 1985) (citations omitted).

To survive a motion to dismiss for lack of personal

---

[1]Under Pennsylvania law, two approaches exist for determining whether a court may exercise personal jurisdiction over a non-resident corporate defendant: general jurisdiction and specific jurisdiction. Peek v. Golden Nugget Hotel & Casino, 806 F.Supp. 555, 557 (E.D. Pa. 1992). "General jurisdiction exists where the defendant has maintained continuous and substantial forum affiliations. This basis is used when the claim does not arise out of or is unrelated to the defendant's contacts with the forum." Grand Entm't Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 481 n.3 (3d Cir. 1993) (citations omitted). In the absence of general jurisdiction, courts examine whether specific jurisdiction exists. Specific jurisdiction occurs when the plaintiff's claim is related to or arises out of the defendant's contacts with the forum state. Mellon Bank (East) PSFS Nat'l Ass'n v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992). The parties agree that this case involves a question regarding specific jurisdiction. (Pl. Mem. 11.)

jurisdiction, plaintiffs "need only establish a prima facie case of personal jurisdiction." Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 97 (3d Cir. 2004) (citing Pinker v. Roche Holdings Ltd., 292 F.3d 361, 368 (3d Cir. 2002)). Plaintiffs make a prima facie showing if they establish, "with reasonable particularity sufficient contacts between the defendant and the forum state." Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992) (citing Provident, 819 F.2d at 434). Plaintiffs must meet their burden through affidavits or competent evidence; they may not rely on general averments in the pleadings. See Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1302 (3d Cir. 1996). However, a "plaintiff is entitled to have its allegations taken as true and all factual disputes drawn in its favor." Miller, 384 F.3d at 97 (citing Pinker, 292 F.3d at 368). If the plaintiffs make out a prima facie case in favor of personal jurisdiction, the burden shifts to the defendants to establish that the presence of "some other considerations would render jurisdiction unreasonable." Carteret Sav. Bank, F.A. v. Shushan, 954 F.2d 141, 150 (3d Cir. 1992) (quoting Burger King, 471 U.S. at 477).

2. Jurisdiction over Tessler, Rubin & Co. and Alan Rubin

Moving Defendants argue that the Court does not have specific personal jurisdiction over them because they have not purposely directed their activities towards Pennsylvania. They contend that the primary connection alleged between them and Pennsylvania is the

CIA to which they and Shadowbox are parties. They assert that the CIA does not itself provide sufficient grounds for jurisdiction because they did not reach out to Plaintiffs to form the contractual relationship but were brought into the transaction by Anthony Stroup, a California resident. Moving Defendants emphasize that they played no roll in the contract negotiations and never spoke to Plaintiffs until after the contract had been finalized.

A contract with a resident of the forum state may provide a basis for the exercise of personal jurisdiction that meets due process standards. The United States Court of Appeals for the Third Circuit has detailed the approach district courts should take in determining whether there are minimum contacts in contract cases as follows:

> In contract cases, courts should inquire whether the defendant's contacts with the forum were instrumental in either the formation of the contract or its breach. Parties who reach out beyond their state and create continuing relationships and obligations with citizens of another state are subject to the regulations of their activity in that undertaking. Courts are not reluctant to find personal jurisdiction in such instances.

General Elec. Co. v. Deutz AG, 270 F.3d 144, 150 (3d Cir. 2001) (quotations and citations omitted). Furthermore, "[i]n modern commercial business arrangements, . . . communication by electronic facilities, rather than physical presence, is the rule. Where these types of long-term relationships have been established,

actual territorial presence becomes less determinative." Id. at 150-51 (citing Burger King, 471 U.S. at 476); see also Grand Entm't Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 482 (3d Cir. 1993) ("Mail and telephone communications sent by the defendant into the forum may count toward the minimum contacts that support jurisdiction."). Moreover, "[i]t is not significant that one or the other party initiated the relationship," because "[i]n the commercial milieu, the intention to establish a common venture extending over a substantial period of time is a more important consideration." Id. at 151 (citing Carteret, 954 F.2d at 150).

In support of their contention that the Court has specific personal jurisdiction over Moving Defendants, Plaintiffs have provided the Court with a copy of the MPFA and of the CIA (Compl. Ex. A), which lists Shadowbox's place of business as Yardley, Pennsylvania and anticipates a contractual relationship of at least nine months between Plaintiffs and Moving Defendants, with Tessler Rubin sending regular communications into Pennsylvania in order to verify and account for the funds in the custodial account. Plaintiffs have also submitted a copy of the Release Agreement that Moving Defendants solicited from Plaintiffs (Compl. Ex. E), which concluded their contractual dealings. The record additionally contains the affidavit of Kenneth Barbet, which states that Moving Defendants transmitted documents to him in his Pennsylvania Office. (Barbet Aff. ¶ 22.)

Plaintiffs' evidence establishes a prima facie case that Moving Defendants purposely directed their activities towards Pennsylvania. It shows that Tessler Rubin and Alan Rubin deliberately entered into a contract with Shadowbox, a Pennsylvania company. Through that contract, Moving Defendants induced Plaintiffs to entrust them with $250,000 and assumed ongoing obligations toward Plaintiffs in the forum. See TJF Assoc. v. Kenneth J. Rotman & Allianex, LLC, No. Civ. A. 05-705, 2005 WL 1458753, at *5 (E.D. Pa. Jun 17, 2005) ("As it happened, the mutual benefits and obligations of a long-term alliance did not come to pass, but the fact that the parties contemplated such benefits and obligations is significant in and of itself." (citing Mellon Bank (East) PSFS National Assoc., 960 F.2d at 1223)). Moving Defendants subsequently sent documents to Plaintiffs in their Pennsylvania office. Plaintiffs' current claims stem from Moving Defendants' potentially fraudulent mishandling of the Plaintiffs' collateral under the CIA, and thus are undisputably related to Moving Defendants' contractual endeavors.

Moving Defendants argue, in reliance on Verotext Certainteed Corp. v. Consol. Fiber Glass Prods. Co., 75 F.3d 147 (3d Cir. 1996), that their contract and communications with Plaintiffs are insufficient to establish personal jurisdiction in Pennsylvania. In Verotext, the defendant, a California corporation, had contacts with Pennsylvania that consisted of a supply agreement with the

plaintiff, a Pennsylvania corporation, for the plaintiff's fiber glass products and some telephone calls and letters written to the plaintiff in Pennsylvania. Id. at 152. The Third Circuit affirmed the district court's holding that it could not exercise personal jurisdiction over the defendant. Id. at 153-54. The Third Circuit found it persuasive that no product shipped under the agreement ever passed through Pennsylvania, as the plaintiff serviced the agreement from its offices in other states, and that payments under the agreement were made to the plaintiff's office in California. Id. at 151. The court noted that the communications sent to Pennsylvania were merely "'informational communications'" designed to aid in the development of the contract. Id. at 152. (quoting Sunbelt Corp. v. Noble, Denton & Assoc., 5 F.3d 28, 32 (3d Cir. 1993)). The contacts with Pennsylvania in Verotex were thus considerably less substantial than those in the instant case, where the contract at issue contemplated forum-related activities occurring on a weekly basis. Cf. id. (stating that the court might have found jurisdiction if the defendant had sent payments to the plaintiff in the forum state). The financial statements Moving Defendants committed to send Plaintiffs involve "more entangling contacts than the mere 'informational communications' at issue in Vetrotex." Remick v. Manfredy, 238 F.3d 248, 256 (3d Cir. 2001).[2]

---

[2]The Court notes that the contacts with Pennsylvania in the instant case are also considerably more significant than those in Rotondo Weinreich Enters., Inc. v. Rock City Mech., Inc., No. Civ.

Accordingly, the Court finds that Moving Defendants' contacts with Pennsylvania are adequate to support a finding of specific jurisdiction.[3]

Moving Defendants argue that, even if Plaintiffs have shown sufficient minimum contacts exist to warrant the Court's exercise of personal jurisdiction, other considerations render jurisdiction unreasonable. Moving Defendants emphasize that they have no presence in Pennsylvania and are based in California. They contend

---

A. 04-5285, 2005 WL 119571 (E.D. Pa. Jan. 19, 2005). In Rotondo, this Court held that it did not have specific personal jurisdiction over a supplier of concrete prison cells that had contracted with a Pennsylvania company to perform work on a one-year construction project. Id. at *6. Unlike the contract in the instant case, the contract in Rotondo did not anticipate that any part of its performance would involve contacts with Pennsylvania. Id. at *5.

[3]Plaintiffs also argue that the Court has specific personal jurisdiction over Moving Defendants by virtue of the role they played in the fraud perpetrated upon the Plaintiffs in Pennsylvania. The direction of a tortious act at Pennsylvania may provide the necessary minimum contacts with the state to make the exercise of personal jurisdiction constitutionally permissible. See Calder v. Jones, 465 U.S. 783, 789-90 (1984). Personal jurisdiction based on the commission of a tort "requires more than a finding that the harm caused by the defendant's intentional tort was felt primarily within the forum." IMO Industries, Inc. v. Kiekart AG, 155 F.3d 254, 265 (3d Cir. 1998). Plaintiff must "point to contacts which demonstrate that the defendant *expressly aimed* its tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity." Id. (emphasis in original). "Simply asserting that the defendant knew that the plaintiff's principal place of business was located in the forum would be insufficient in itself to meet this requirement." Id. Since the Court has already found contacts between Plaintiffs and Moving Defendants sufficient for the exercise of personal jurisdiction, the Court need not decide whether it can base personal jurisdiction on Moving Defendants' alleged intentional tort.

that defending this suit in Pennsylvania would be prohibitively expensive and that if Alan Rubin were required to be away from California for any extended period of time, that would jeopardize Tessler Rubin’s two-person tax practice. Moving Defendants maintain that most of the witnesses in the case are from California and that California is an available alternative forum for judicial resolution, as evidenced by the fact that Shadowbox agreed in the MPFA to submit itself to arbitration there.

Courts describe a defendant’s burden of showing jurisdiction is unreasonable as "heavy." Grand Entm’t, 988 F.2d at 483. In assessing whether the exercise of personal jurisdiction offends traditional notions of fair play and substantial justice, the Courts evaluates “the interests of the forum State, and the plaintiff’s interest in obtaining relief. It must also weigh in its determination the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental social policies." Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (quotations and citations omitted).

The relevant interests in the instant case tip the scales in Plaintiffs’ favor. Pennsylvania has a strong interest in this litigation. The suit involves Pennsylvania companies that contend that they have been defrauded. The money for the missing collateral was initially raised from Pennsylvania investors. The

mishandling of Plaintiffs' collateral barred the production of a movie that would have been partially filmed in Pennsylvania. The hardship suffered by Moving Defendants does not rise to the level of unreasonableness. See Leonard A. Feinberg, Inc. v. Central Asia Capital, 936 F. Supp. 250, 258-59 (E.D. Pa. 1996) (requiring defendant to submit to jurisdiction even though all witnesses and evidence were located thirteen time zones away in Hong Kong); Deutz, 270 F.3d at 150 ("'Modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.'" (quoting Burger King, 471 U.S. at 474)). Accordingly, the Court holds that the exercise of specific personal jurisdiction over Moving Defendants comports with constitutional requirements and is therefore proper in relation to Plaintiffs' claims. The Court consequently denies Defendants' Motion to the extent it seeks dismissal for lack of personal jurisdiction.

B. Motion to Compel Arbitration

Having found that the Court has jurisdiction over Moving Defendants, the Court must address Moving Defendants' request that the Court compel arbitration in accordance with the Arbitration Agreement contained in the MPFA. The Agreement states:

> The parties hereto agree that any dispute under this Agreement shall be resolved by mandatory binding arbitration under the rules of International Arbitration of the American

> Arbitration Association (AAA) in effect as of the date the request for arbitration is filed.

(Compl. Ex. A, MPFA ¶ 12.) Moving Defendants seek enforcement of the Arbitration Agreement as a party to the CIA, which incorporates the MPFA by explicit reference.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, provides that:

> [A] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Section 3 of the FAA states that a federal court hearing a case concerning issues which the parties have agreed to arbitrate shall, upon application of one of the litigants, stay a trial until arbitration has been completed in accordance with the terms of the agreement. 9 U.S.C. § 3. Before compelling arbitration, courts must "engage in a limited review to ensure that the dispute is arbitrable - i.e., that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." PaineWebber, Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990), overruled by implication on other grounds, Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002); see also Par-Knit Mills,

Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 (3d Cir. 1980).

Plaintiffs argue that the MPFA Arbitration Agreement does not constitute a valid arbitration agreement between themselves and Moving Defendants. According to Plaintiffs, Moving Defendants were not a party to the MPFA and thus cannot enforce the Agreement it contains. Plaintiffs acknowledge, however, that Moving Defendants and Shadowbox are parties to the CIA and that the language of the CIA says that the "[Motion Picture] Finance Agreement is incorporated herein by this reference." (Compl. Ex. A.) The doctrine of incorporation by reference dictates that "'[w]here a writing refers to another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing.'" Carver v. Global Sports, Inc., 2000 WL 378072, at *3 (E.D. Pa. 2000) (quoting 4 Williston on Contracts § 628 (3d ed. 1961)). It is not necessary that the document incorporated be one to which the parties to the underlying contract are signatories. 11 Williston on Contracts § 30.25 (4th ed. 1990). "Incorporation by reference is proper where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship." Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 447 (3d Cir. 2003). The CIA makes clear reference to the MPFA, the MPFA is an identifiable document, and Plaintiffs have not demonstrated that being compelled to

arbitrate their claims will result in surprise and hardship. Accordingly, the Court finds that the terms of the MPFA, including the Arbitration Agreement, have been incorporated by reference into the CIA. The Court holds, therefore, that Moving Defendants and Shadowbox are parties to a valid Arbitration Agreement, which is enforceable against Shadowbox by Moving Defendants.

Plaintiffs suggest that, even if Moving Defendants can enforce the Arbitration Agreement in the MPFA, they cannot do so against Last Conspiracy, LLC, because Last Conspiracy, LLC, was not a party to the MPFA or the CIA, and therefore, did not enter into an agreement to arbitrate disputes under those contracts. "As a matter of contract, no party can be forced to arbitrate unless that party has entered into an agreement to do so." Painewebber, 921 F.2d at 511 (citing AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643 (1986)). In deciding whether an arbitration agreement can be enforced against a non-signatory, the courts "ask whether he or she is bound by that agreement under traditional principles of contract and agency law." Bel-Ray Co. v. Chemrit (Pty) Ltd., 181 F.3d 435, 444 (3d Cir. 1999) (citations omitted). The courts have recognized "six theories for binding a non-signatory to an arbitration agreement: (a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing/alter ego; (e) estoppel; and (f) third party beneficiary." Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347, 356 (5th Cir. 2003); see also E.I.

DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 195 (3d. Cir. 2001). The third party beneficiary theory applies to the instant dispute.

The Third Circuit has recognized that a third party beneficiary of a contract is bound by contract terms requiring arbitration "where its claim arises out of the underlying contract to which it was an intended third party beneficiary." E.I. DuPont de Nemours, 269 F.3d at 195. Last Conspiracy, LLC's, claims against Moving Defendants stem from Moving Defendants' mishandling of the collateral entrusted to them pursuant to the terms of the MPFA and CIA. Under California law, which is the law under which the parties contracted to construe the provisions of the MPFA, "'[a] third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that third party and such intent appears on the terms of the contract.'" Johnson v. Superior Court, 95 Cal. Rptr. 2d 864, 873 (Cal. Ct. App. 2000) (quoting Jones v. Aetna Casualty & Surety Co., 33 Cal. Rptr. 2d 291, 295 (Cal. Ct. App. 1994)). "Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered." Jones, 33 Cal. Rptr. 2d at 296. Both the MPFA and CIA state in their introduction that they were formed with respect to the motion picture entitled Last Conspiracy, in order to

enable its financing. (Compl. Ex. A.) Kenneth Barbet organized Last Conspiracy, LLC, contemporaneously with executing those agreements as an entity with the single purpose of producing the film Last Conspiracy. (Barbet Aff. ¶ 12.) Accordingly, the Court finds that the terms of the MPFA and the CIA which profess an intent to benefit the Motion Picture indicate an intent to benefit Last Conspiracy, LLC. The Court thus holds that the Arbitration Agreement in the MPFA, as incorporated into the CIA, requires arbitration of the claims brought by Last Conspiracy, LLC as a third party beneficiary of those contracts.

Plaintiffs argue finally that the language of the Arbitration Agreement does not cover the instant dispute. Plaintiffs contend that the language is limited to "any dispute *under* this Agreement" (emphasis added). Plaintiffs rely upon case law which suggests that the phrase "under this Agreement," as used in arbitration agreements, is narrower than the phrase "any dispute relating to this Agreement" in order to assert that their Arbitration Agreement is highly restrictive in scope.

Federal policy strongly favors enforcement of arbitration agreements. John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 137 (3d Cir. 1998). Therefore, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Arbitration "'should not be denied

unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" AT&T Techs., 475 U.S. at 650. Moving Defendants' alleged abuse of the collateral entrusted to them under the terms of the MPFA and CIA led to Plaintiffs' claims. Hence, the Court holds that it cannot be said with positive assurance that the instant dispute falls outside the scope of the Arbitration Agreement. Having found a valid Arbitration Agreement between Plaintiffs and Moving Defendants that covers the instant dispute, the Court grants Defendants' Motion to the extent it seeks to compel arbitration of Plaintiffs' claims.

Defendants, as part of their Motion, have also asked the Court to stay this matter pending arbitration of Plaintiffs' claims. The FAA provides that "whenever suit is brought on an arbitrable claim, the Court 'shall' upon application stay the litigation until arbitration has been concluded." Lloyd v. Hovensa LLC., 369 F.3d 263, 269 (3d Cir. 2004) (quoting 9 U.S.C. § 3). The Court accordingly stays the litigation between Plaintiffs and Moving Defendants.

C. Motion to Dismiss for Failure to State a Claim

Moving Defendants argue that Plaintiffs' Complaint should be dismissed for failure to state a claim upon which relief can be granted. Moving Defendants contend that Plaintiffs waived the right to pursue any claims against them when Kenneth Barbet signed

an agreement releasing Moving Defendants from liability. They also assert, in the alternative, that the Court should dismiss Plaintiffs' RICO claims, on the grounds that Plaintiffs have not adequately pled the elements of a RICO violation.

Courts must compel arbitration of any dispute falling within scope of a valid arbitration agreement. See 9 U.S.C.A. § 2. Since Plaintiffs' claims are covered by the Arbitration Agreement in the MPFA, the viability of those claims is a question for the arbitrator. Accordingly, Moving Defendants' Motion is dismissed without prejudice to the extent it asks the Court to find that Plaintiffs have failed to state a claim.

III. CONCLUSION

For the reasons stated above, the Court concludes that it has personal jurisdiction over Defendants Tessler Rubin and Alan Rubin, and that the Arbitration Agreement written into the MPFA and incorporated into the CIA may be enforced by Moving Defendants. The Court accordingly compels arbitration of Plaintiffs' claims. Moving Defendants' contention that Plaintiffs have failed to state a claim upon which relief can be granted is a matter for the arbitrator. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHADOWBOX PICTURES, LLC et al.	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 05-2284
GLOBAL ENTERPRISES, INC. et al.	:	

ORDER

AND NOW, this 11th day of January, 2006, upon consideration of Defendants Alan K. Rubin and Tessler, Rubin & Co.'s "Motion: (1) to Dismiss or Quash Service for Lack of Personal Jurisdiction; (2) to Dismiss for Failure to State a Claim upon which Relief Can be Granted; or in the Alternative (3) To Stay Proceedings Pending Arbitration" (Docket No. 24), and all submissions received in response thereto, **IT IS HEREBY ORDERED** as follows:

1. Defendants' Motion is **DENIED** to the extent it seeks dismissal for lack of personal jurisdiction;

2. Defendants' Motion is **DISMISSED** without prejudice to the extent it seeks dismissal for failure to state a claim;

3. Defendants' Motion is **GRANTED** to the extent it seeks to compel arbitration. Plaintiffs are to **PROCEED** with arbitration, as required by the Motion Picture Finance Agreement (Compl. Ex. A, MPFA ¶ 12);

4. Litigation between Plaintiffs and Defendants Alan Rubin

and Tessler, Rubin & Co. is **STAYED** pending arbitration of the claims raised in the Complaint; and

5. The Court **RETAINS** jurisdiction for the purpose of entering judgment on the arbitration award. Upon completion of the arbitration proceedings, the prevailing party shall bring the results of the arbitration to the attention of the Court so that an appropriate order may be entered.

BY THE COURT:

____

John R. Padova, J.