

<b>Conway v Marcum &amp; Kliegman LLP</b>
2017 NY Slip Op 30729(U)
April 13, 2017
Supreme Court, New York County
Docket Number: 652236/2014
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

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SIMON CONWAY and JESS SHAKESPEARE, in their  
capacity as the Joint Official Liquidators of AJW  
OFFSHORE LTD., AJW MASTER FUND, LTD., AJW  
OFFSHORE II LTD., and AJW MASTER FUND II, LTD.,

Plaintiffs,

-against-

MARCUM & KLIEGMAN LLP, MARCUM &  
KLIEGMAN (CAYMAN), and MARCUM LLP,

Defendants.

-----X  
HON. ANIL C. SINGH, J.:

**DECISION AND  
ORDER**

Index No. 652236/2014

Mot. Seq. 009

In this action for, *inter alia*, accounting malpractice and negligence, gross negligence, fraud, breach of contract, and unjust enrichment, Marcum & Kliegman LLP, Marcum & Kliegman (Cayman), and Marcum LLP (collectively, "Defendants") seeks an order directing the issuance of letters rogatory to the appropriate authorities in the Cayman Islands, for the production of documents from Admiral Administration Ltd., d/b/a Maitland Administration Ltd. Simon Conway and Jess Shakespeare, in their capacity as the Joint Official Liquidators of AJW Offshore Ltd., AJW Master Fund, Ltd., AJW Offshore II Ltd., and AJW Master Fund II, Ltd. (collectively, "Plaintiffs") oppose (mot. seq. 009).

**Facts**

Plaintiffs are private investment funds managed by N.I.R. Group and its subsidiaries (“NIR”), a director from International Management Services, Ltd. (“IMS”), and Admiral Administration Ltd., d/b/a Maitland Administration Ltd. (“Admiral”). See Application for Issuance of Letter Request (“Rogatory”) at 4-5. Plaintiffs allege defendants produced “intentionally misleading audits” of plaintiffs financial statements, resulting in plaintiffs incurring avoidable expenses and an SEC investigation of their business affairs. See id. ¶¶ 3, 4, 6, 144, 208.

Defendants’ move this court to direct the issuance of letters rogatory to the applicable court in George Town, Cayman Islands, for the production of certain documents from Admiral, the Cayman-Islands-based administrator of defendants funds during the timeframe relevant to this dispute. See Defendants’ Affirmation (“Aff.”) ¶¶ 2, 4; Rogatory at 5-6. Defendants allege plaintiffs have not produced all documents relevant and necessary to this suit, such as Admiral’s correspondence, internal or otherwise, with NIR and the Cayman Islands Monetary Authority (“CIMA”), which relate to the valuation of plaintiffs’ funds. Aff. at ¶ 8. Specifically, defendants request an extensive list of documents, most of which are “from Admiral to NIR,” with the rest relating to “emails, letters and reports between CIMA and Admiral (on behalf of NIR and/or the [Plaintiffs] Funds).” Rogatory Schedule A.

Defendants’ request is made pursuant to The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commerical Matters, to which

both the United States and the Cayman Islands are parties. See Rogatory at 1; Plaintiffs' Opposition ("Opp.") at 4.

### Argument

Under New York law, a court may not subpoena a nonparty to the suit who is not a resident of New York state. Wiseman v. American Motors Sales Corp., 479 N.Y.S.2d 528 (2d Dept 1984). However, upon proper application, a court may issue letters rogatory to a court in a foreign jurisdiction requesting the same to assist in the production of documents relevant to the suit at hand. See CPLR § 3108; Laino v. Cuprum S.A. de C.V., 663 N.Y.S.2d 275 (2d Dept 1997). Whether to issue letters rogatory rests in the court's discretion in deciding whether the documents to be produced and obtained through the assistance of the foreign court are "crucial to the resolution of a key issue." See Richbell Inf. Servs., Inc. v. Jupiter Partners L.P., 32 A.D.3d 150, 157 (1st Dept 2006); Kahn v. Leo Schachter Diamonds, LLC, 139 A.D.3d 635 (1st Dept 2016).

Plaintiffs' argument that the sought-after documents are either "duplicative or cumulative," and that the Cayman Island courts would refuse to grant the discovery of the requested documents because the present dispute is in its "pre-trial" stages is without merit. See Opp. at 2, 4-5, 9. First, defendants have adequately alleged that correspondence between CIMA and Admiral and internal Admiral correspondence which relates to valuations of the Funds are crucial to the resolution of key issues in

this case. In the Amended Complaint, plaintiffs assert allegations that “CIMA would have caused the Funds to be shut down had Marcum disclosed [the Funds] overvaluations to it.” See Affirmation of Marianne Conklin at ¶160. Plaintiffs allege that their damages were a direct result of Marcum’s failure to disclose these overvaluations. Therefore, these requested communications are crucial in determining CIMA’s knowledge regarding the valuations of the Funds, which is directly at issue in this case.

Next, defendants are seeking Admiral’s Monthly Activity Reports that have not been supplied by plaintiffs. Crucial to this litigation is whether the Funds were able to survive as a result of NIR’s alleged wrongdoing. The Monthly Activity Reports speak directly to the financial health of the Funds and is crucial in determining the Funds financial health after NIR’s alleged mishandling and the ensuing SEC investigations.


As a result of the foregoing, defendants’ motion for an order directing the issuance of letters rogatory is granted.

Accordingly, it is hereby

ORDERED that defendants’ motion for letters rogatory is granted.

Date: April 13, 2017

New York, New York

  
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Anil C. Singh