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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

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Civil Action No.:

[REDACTED]

[REDACTED] individually and on behalf of [REDACTED] LLC, f/k/a  
[REDACTED] LLC, f/k/a [REDACTED] LLC.,

Plaintiffs,

v.

[REDACTED] INC, JOHN DOES 1-10, and XYZ CORP.,

Defendants.

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**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION  
TO DISMISS OR TO STAY THE ACTION**

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## TABLE OF CONTENTS

PRELIMINARY STATEMENT .....	1
FACTS .....	1
POINT I	
THIS COURT LACKS PERSONAL JURISDICTION OF THE DEFENDANT.....	4
A. Standard for Rule 12(b)(3) Analysis.....	4
B. General Jurisdiction .....	6
C. Specific Jurisdiction .....	8
i. Events Do Not Arise Out of or Relate To Activities in New Jersey .....	10
POINT II	
THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO JOIN A NECESSARY AND INDISPENSIBLE PARTY .....	11
A. Standard for Rule 19 Analysis .....	12
B. [REDACTED] is a Necessary and Indispensible Party .....	14
C. [REDACTED] is Not Feasible .....	17
D. [REDACTED] is an Indispensible Party.....	20
POINT III	
VENUE IS IMPROPER .....	22
A. Venue Improper Under section 1391(b)(1) .....	24
B. Venue Improper Under section 1391(b)(2).....	24
POINT IV	
COUNTS III, VI, VII AND VIII FAIL TO STATE A CLAIM .....	29

A. Standard for Rule 12(b)(6) Analysis.....	30
B. Unjust Enrichment .....	31
C. Tortious Interference With Prospective Economic Advantage .....	29
i. Pursuit of Business.....	34
ii. Intentional Interference.....	34
iii. Causal Connection .....	37
POINT V	
THE ACTION SHOULD BE STAYED PENDING ARBITRATION.....	39
CONCLUSION .....	44

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Abel v. Kirbaran</i> , 267 F. App'x 106 (3d Cir. 2008) .....	8
<i>Abuhouran v. KaiserKane, Inc.</i> , 2012 WL 3027416 (D.N.J. Sept. 12, 2012).....	13
<i>Angstadt v. Midd-West Sch. Dist.</i> , 377 F.3d 338 (3d Cir. 2004) .....	28
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662, 129 S.Ct. 1937 (2009) .....	27, 28, 32, 33
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544, 127 S. Ct. 1955 (2007) .....	27, 28
<i>Bistrrian v. Levi</i> , 696 F.3d 352 (3d Cir. 2012) .....	27
<i>BP Chems. Ltd. v. Formosa Chem. &amp; Fibre Corp.</i> , 229 F.3d 254 (3d Cir. 2000) .....	6
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462, 105 S. Ct. 2174 (1985) .....	8
<i>Cafaro v. HMC</i> , 2008 WL 4224805 (D.N.J. Sept. 8, 2008).....	29
<i>Corpman v. Prudential-Bache Sec., Inc.</i> , 907 F.2d 29 (3d Cir. 1990) .....	35
<i>Daimler AG v. Bauman</i> , 134 S.Ct. 746, 187 L. Ed. 2d 624 (2014) .....	6, 7
<i>Fiscus v. Combust Fin. AG</i> , 2007 WL 4164388 (D.N.J. Nov. 20, 2007) .....	11, 13, 15

<i>Fowler v. UPMC Shadyside</i> , 578 F.3d 203 (3d Cir. 2009) .....	27
<i>Gen. Elec. Co. v. Deutz AG</i> , 270 F.3d 144 (3d Cir. 2001) .....	7
<i>Gen. Refractories Co. v. First State Ins. Co.</i> , 500 F.3d 306 (3d Cir. 2007) .....	12
<i>Goodyear Dunlop Tires Operation S.A. v. Brown</i> , 564 U.S. 915, 131 S.Ct. 2846 (2011) .....	6
<i>Helicopteros Nacionales de Colombia, S.A. v. Hall</i> , 466 U.S. 408, 104 S. Ct. 1868 (1984) .....	6, 9
<i>Henry Heide, Inc. v. WRH Prod. Co., Inc.</i> , 766 F.2d 105 (3d Cir. 1985) .....	5
<i>Horne v. Adolph Coors Co.</i> , 684 F.2d 255 (3d Cir. 1982) .....	23, 24
<i>HS Real Co., LLC v. Sher</i> , 526 F. App'x 203 (3d Cir. 2013) .....	8, 9, 10
<i>In re Burlington Coat Factory Sec. Litig.</i> , 114 F.3d 1410 (3d Cir. 1997) .....	28
<i>Int'l Shoe Co. v. Washington</i> , 326 U.S. 310, 66 S. Ct. 154 (1945) .....	5
<i>Lamorte Burns &amp; Co. v. Walters</i> , 167 N.J. 285, 770 A.2d 1158 (Sup. 2001) .....	33, 34
<i>Louis Kamm, Inc. v. Flink</i> , 113 N.J.L. 582, 175 A. 62 (E. & A. 1934) .....	25, 31
<i>Malik v. Cabot Oil &amp; Gas Corp</i> , 2017 WL 42060818 (3d Cir. Sept. 26, 2017){ TA \l " <i>Malik v. Cabot Oil &amp; Gas Corp</i> , 2017 U.S. App LEXIS 18540 *3 (3d Cir. 2017)" \s " <i>Malik v Cabot</i> " \c 1 } .....	7

<i>Mellon Bank v. Farino</i> , 960 F.2d 1217 (3d Cir. 1992) .....	5
<i>Mesalic v. Fiberfloat Corp.</i> , 897 F.2d 696 (3d Cir. 1990) .....	5
<i>Metcalf v. Renaissance Marine, Inc.</i> , 566 F.3d 324 (3d Cir. 2009) .....	6
<i>Miller Yacht Sales, Inc. v. Smith</i> , 384 F.3d 93 (3d Cir. 2004) .....	5
<i>Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1, 103 S.Ct. 927 (1983) .....	35
<i>Nelson v. Xacta 3000, Inc.</i> , 2009 WL 4119176 (D.N.J. Nov. 24, 2009) .....	29
<i>O'Connor v. Sandy Lane Hotel Co., Ltd.</i> , 496 F.3d 312 (3d Cir. 2007) .....	8, 9
<i>Organization Strategies, Inc. v. Feldman Law Firm LLP</i> , 604 Fed. App'x 116 (3d Cir. 2015) .....	16
<i>Printing Mart-Morristown v. Sharp Elec. Corp.</i> , 116 N.J. 739, 563 A.2d 31 (1989) .....	25, 30, 31, 32, 33
<i>Remick v. Manfredy</i> , 238 F.3d 248 (3d Cir. 2001) .....	8
<i>Republic of Philippines v. Pimentel</i> , 553 U.S. 851, 128 S. Ct. 2180 (2008) .....	11
<i>Ricketti v. Barry</i> , 2015 WL 1013547 (D.N.J. Mar. 9, 2015) .....	33
<i>Spathos v. Smart Payment Plan, LLC</i> , 2016 WL 3951672 (D.N.J. July 21, 2016) .....	23
<i>Staffing Plus, Inc. v. Team Rehab Servs.</i> , 2006 U.S. Dist. LEXIS 519 (D.N.J. Jan. 5, 2006) .....	23

<i>Tipton v. U-Go, Inc.</i> , 22014 WL 4231363 (N.J. Super. Ct. App Div. Aug. 28, 2014).....	34
<i>Trenton Metro. Area Local of the Am. Postal Workers Union, AFL-CIO v. United States Postal Serv.</i> , 636 F.3d 45 (3d Cir. 2011) .....	16
<i>Tullet Prebon PLC v. BGC Partners, Inc.</i> , 427 Fed. App'x 236 (3d Cir. 2011).....	19, 20
<i>Turner v. Gaskin</i> , 694 F. App'x 64 (3d Cir. 2017).....	7
<i>Va. Sur. Co. v. Macedo</i> , 2009 WL 3230909 (D.N.J. Sept. 30, 2009).....	29
<i>Varrallo v. Hammond, Inc.</i> , 94 F.3d 842 (3d Cir. 1996) .....	30
<i>Wellness Publ'g v. Barefoot</i> , 128 F. App'x 266 (3d Cir. 2005) .....	5

<u>Statutes</u>	<u>Page</u>
28 U.S.C. § 1391(b) .....	20, 21
28 U.S.C. § 1391(b)(1).....	22
28 U.S.C. § 1391(b)(2).....	9, 20
9 U.S.C. § 3.....	35
N.J.S.A § 42:2C-49 .....	34
N.J.S.A. § 42:2C-77(a)(2),(3). .....	31

<u>Rules</u>	<u>Page</u>
Fed. R. Civ. P. Rule 12(b)(2) .....	4, 10

Fed. R. Civ. P. Rule 12(b)(3) .....	20
Fed. R. Civ. P. Rule 12(b)(6) .....	27
Fed. R. Civ. P. Rule 12(b)(7) .....	10
Fed. R. Civ. P. Rule 19 .....	10, 11
Fed. R. Civ. P. Rule 19(a)(1)(A).....	13
Fed. R. Civ. P. Rule 19(a)(1)(B)(i) .....	14
Fed. R. Civ. P. Rule 19(a)(1)(B)(ii) .....	14, 15
Fed. R. Civ. P. Rule 19(b).....	19
N.J. Ct. R. 4:4-4(c).....	5



## **PRELIMINARY STATEMENT**

The defendant [REDACTED] Inc. and nominal defendant, [REDACTED] [REDACTED] LLC, move pursuant to Rules 12(b)(2),(3),(6),(7) and Rule 19 of the Federal Rules of Civil Procedure for an order: (1) dismissing the complaint for lack of personal jurisdiction of the defendant [REDACTED] Inc.; (2) dismissing the complaint for failure to join [REDACTED] [REDACTED] a required party; (3) dismissing the complaint for improper venue; (4) dismissing Counts III, VI, VII and VIII for failure to state a claim; and/or (5) staying this action pursuant to 9 U.S.C. § 3 until an arbitration is held on the material disputes in this action as required by the terms of [REDACTED] [REDACTED] LLC's Operating Agreement.

Submitted in support of this motion are the Affidavit of [REDACTED] [REDACTED] sworn to October 13, 2017 ("[REDACTED] Aff.") with exhibits and the Declaration of Joshua Levin-Epstein dated October 13, 2017 ("Epstein Decl.") with exhibits.

## **FACTS**

The plaintiff [REDACTED] brings the action, individually, and derivatively on behalf of [REDACTED] [REDACTED] LLC. The complaint seeks compensatory and exemplary damages from the defendant [REDACTED] [REDACTED] Inc. for its alleged Misappropriation of Trade Secrets from [REDACTED] [REDACTED] LLC (Counts I and II), unjust enrichment (Count III), Aiding and Abetting Breach of Fiduciary Duty (Count IV), Tortious Interference with Contract (Count V), Tortious Interference with Prospective Economic Advantage (Counts VI, VII, and VIII), and Fraudulent Conveyance

(Count IX). Each of the forgoing claims is premised upon the alleged wrongful conduct of non-party [REDACTED] [REDACTED]

Mr. [REDACTED] and non-party [REDACTED] [REDACTED] were members and managers of [REDACTED] [REDACTED] LLC, a New Jersey limited liability company. The plaintiff and Mr. [REDACTED] were parties to an Amended and Restated Limited Liability Company Agreement dated January 1, 2013 ("Operating Agreement"). The Operating Agreement governed the duties and obligations of the company's members/managers and the administration of the company. In pertinent part, the Operating Agreement provided for the manner in which the company may be dissolved, provided for the manner of distributing its assets, established a duty amongst the company's members not to compete and required the parties to the Agreement to arbitrate all disputes arising from or relating to the Operating Agreement.

On December 4, 2014, [REDACTED] [REDACTED] LLC was dissolved when Mr. [REDACTED] filed a Certificate of Dissolution with the New Jersey Department of Treasury. The verified complaint alleges that the company was dissolved without the Plaintiff's knowledge and that, "upon information and belief," the Certificate of Dissolution "falsely asserted that the dissolution had been formally approved by the Member."

Mr. [REDACTED] avers that the company's accountant had recommended to [REDACTED] and the Plaintiff that the company should be dissolved by the end of 2014 due to its poor performance in New Jersey and that an S corporation should be formed in New York in early 2015. Mr. [REDACTED] states that based upon this recommendation, he and the Plaintiff agreed to dissolve [REDACTED] [REDACTED] LLC by December 2014 and to form the S corporation as recommended by the accountant. Two months after the company's dissolution, Mr. [REDACTED] formed the S corporation in New York on February 6, 2015 and certain assets of the dissolved company were ultimately acquired by the new corporation. That S corporation is the defendant [REDACTED] [REDACTED] Inc.

The Plaintiff alleges that he did not know about the formation of [REDACTED] [REDACTED] Inc. until over a year after it was incorporated. Complaint ¶ 11. In the complaint, the Plaintiff alleges that non-party [REDACTED] had breached his fiduciary and contractual duties arising from the Operating Agreement by wrongfully dissolving the company, by transferring the company's assets and trade secrets to the defendant. These breaches form the basis of Plaintiff's claims against the defendant [REDACTED] [REDACTED] Inc. for misappropriation, unjust enrichment, tortious interference, aiding and abetting breach of fiduciary duty, and fraudulent conveyance.

In stark contrast to the Plaintiff's claim that he was unaware of the defendant

corporation's existence until over a year after its formation, payroll stubs from the defendant show that the plaintiff was employed by the defendant within at least two months of after its incorporation. Non-party ██████ maintains that he did not breach any duty and that he dissolved the company and distributed its assets in accordance with the term of the Operating Agreement and with the knowledge and consent of the Plaintiff.

**POINT I**  
**THIS COURT LACKS PERSONAL JURISDICTION**  
**OF THE DEFENDANT**

Each and every Count in this action should be dismissed pursuant to Fed. R. Civ. P. Rule 12(b)(2){ TA \l "Fed. R. Civ. P., Rule 12(b)(2)" \s "Rule 12(b)(2)" \c 4 } for lack of personal jurisdiction of the defendant ██████ ██████ Inc. The defendant ██████ ██████ Inc is a New York corporation organized under the laws of that state on February 6, 2015. ██████ Aff. ¶ 5. Its principal place of business is located in Nyack, New York. *Id.* It is not authorized or registered to conduct business in the State of New Jersey and it has no office, assets, or employees in this State. *Id.* at ¶ 6. Nor does it own or lease real or personal property in New Jersey. *Id.* It has no bank accounts or other assets in New Jersey. *Id.* Further, the alleged events which give rise to the plaintiff's claims all occurred in the State of New York.

**A. Standard for Rule 12(b)(3) Analysis**

When a defendant moves to dismiss a complaint for lack of personal

jurisdiction, the plaintiff has "the burden of demonstrating that the defendants' contacts with the forum state are sufficient to give the court in personam jurisdiction." *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 699 (3d Cir. 1990){ TA \l "Mesalic v. Fiberfloat Corp., 897 F.2d 696, 699 (3d Cir. 1990)" \s "Mesalic v. Fiberfloat Corp" \c 1 }. "These contacts must be shown 'with reasonable particularity.'" *Wellness Publ'g v. Barefoot*, 128 F. App'x 266, 268 (3d Cir. 2005){ TA \l "Wellness Publ'g v. Barefoot, 128 F. App'x 266, 268 (3d Cir. 2005)" \s "Wellness Publ'g v. Barefoot" \c 1 } (quoting *Mellon Bank v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992)){ TA \l "Mellon Bank v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992)" \s "Mellon Bank v. Farino" \c 1 }.

"A federal court sitting in New Jersey has jurisdiction over parties to the extent provided under New Jersey state law." *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 96 (3d Cir. 2004){ TA \l "Miller Yacht Sales, Inc., 384 F.3d 93, \*96 (3d Cir. 2004)" \s "Miller Yacht Sales, Inc." \c 1 }. "New Jersey's long-arm statute provides for jurisdiction coextensive with the due process requirements of the United States Constitution." *Id.* (citing N.J. Ct. R. 4:4-4(c)){ TA \l "N.J. Ct. R. 4:4-4(c)" \s "N.J. Ct. R. 4:4-4(c)" \c 4 }. A New Jersey district court may therefore exercise personal jurisdiction over a non-resident defendant if the defendant has "certain minimum contacts with [New Jersey] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Henry Heide, Inc. v. WRH*

*Prod. Co., Inc.*, 766 F.2d 105, 108 (3d Cir. 1985){ TA \l "*Henry Heide, Inc. v. WRH Prods. Co., Inc.*, 766 F.2d 105, 108 (3d Cir. 1985)" \s "Henry Heide, Inc. v. WRH Prods. Co.," \c 1 } (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945){ TA \l "*Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, (1945)" \s "Int'l Shoe Co. v. Washington" \c 1 }). A foreign party's contacts with the forum "can be analyzed in the context of general jurisdiction or specific jurisdiction." *Metcalf v. Renaissance Marine, Inc.*, 566 F.3d 324, 334 (3d Cir. 2009).{ TA \l "*Metcalf*, 566 F.3d 324, 334 (3d Cir. 2009)" \s "Metcalf v. Renaissance Marine, Inc., 566 F.3d at 334" \c 1 }

## **B. General Jurisdiction**

General jurisdiction exists where the defendant has "continuous and systematic" contacts with the forum, whether or not those contacts are related to the plaintiff's cause of action. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, 104 S. Ct. 1868 (1984){ TA \l "*Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416, 104 S. Ct. 1868 (1984)" \s "Helicopteros Nacionales de Colombia, S.A. v. Hall," \c 1 }; *BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 259 (3d Cir. 2000){ TA \l "*BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 259 (3d Cir. 2000)" \s "BP Chems. Ltd. v. Formosa Chem. & Fibre Corp." \c 1 }.

In 2014, the United States Supreme Court confirmed the narrow applicability of the general jurisdiction doctrine in *Daimler AG v. Bauman*, 134 S.Ct. 746, 187 L. Ed. 2d 624 (2014){ TA \l "*Daimler v. AG v. Bauman*, 134 S.Ct. 746, 187 L.Ed2d 624 (2014)" \s "*Daimler v. AG v. Bauman*" \c 1 }. There, the Court rejected a formulation of the doctrine that "would approve the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business,'" characterizing this broad definition as "unacceptable grasping." *Id.* at 749{ TA \s "*Daimler v. AG v. Bauman*" } (internal citation omitted). In rejecting this formulation, the Court held that the correct inquiry for general jurisdiction "is whether [the foreign] corporation's 'affiliations with the State are so 'continuous and systematic' as to render it essentially at home in the forum State." *Id.* at 761 (*quoting Goodyear Dunlop Tires Operation S.A. v. Brown*, 564 U.S. 915, 131 S.Ct. 2846, 2851 (2011){ TA \l "*Goodyear Dunlop Tires Operation S.A. v. Brown*, 564 U.S. 915, 131 S.Ct. 2846, 2851 (2011)" \s "*Goodyear*" \c 1 }. "For a corporation, 'the place of incorporation and principal place of business' are where it is 'at home' and are therefore, the paradigm bases for general jurisdiction." *Malik v. Cabot Oil & Gas Corp.*, 2017 WL 42060818, at \*2 (3d Cir. Sept. 26, 2017){ TA \l "*Malik v. Cabot Oil & Gas Corp.*, 2017 U.S. App LEXIS 18540 \*3 (3d Cir. 2017)" \s "*Malik v Cabot*" \c 1 } (*quoting Daimler*, 134 S.Ct. at 761 n.19){ TA \s "*Daimler v. AG v. Bauman*" }. Hence, as the

Third Circuit acknowledged, "it is 'incredibly difficult to establish general jurisdiction [over a corporation] in a forum *other* than the place of incorporation or the principal place of business." *Malik* at \*2.

In the case at bar, the Verified Complaint acknowledges that the defendant ██████████ Inc. is a New York corporation with a principle place of business in New York. (ECF Doc. 1, Complaint ¶ 3.) However, the Complaint does not allege any facts which would suggest that the defendant ██████████ Inc. has substantial or continuous and systematic contact with New Jersey that would render the defendant "at home" in this State. Under these circumstances, general jurisdiction is not established. *Malik* at \*3{ TA \s "Malik v Cabot" }; *see also Turner v. Prince George's Cty. Pub. Sch.*, 694 F. App'x 64 (3d Cir. 2017){ TA \l "Turner v. Gaskin, 2017 U.S. App LEXIS 14563 \*4 (3d Cir. 2017)" \s "Turner v. Gaskin" \c 1 }(affirming lack of jurisdiction because the plaintiff failed to plead facts establishing that the Defendants had any contacts with the forum, let alone systematic and continuous ones.)

### **C. Specific Jurisdiction**

"Specific jurisdiction is established when a non-resident defendant has 'purposefully directed' his activities at a resident of the forum and the injury arises from or is related to those activities." *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 150 (3d Cir. 2001){ TA \l "Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 150 (3d Cir.



2001)" \s "Gen. Elec. Co. v. Deutz AG" \c 1 } (*quoting Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174 (1985)){ TA \l "Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174 [1985])" \s "Burger King Corp. v. Rudzewicz," \c 1 }. In other words, specific jurisdiction exists where the "cause of action arises out of [t]he defendant's forum-related activities, such that the defendant should reasonably anticipate being haled into court in that forum." *Abel v. Kirbaran*, 267 F. App'x 106, 108 (3d Cir. 2008){ TA \l "*Abel v. Kirbaran*, 267 F. App'x 106, 108 (3d Cir. 2008)" \s "Abel v. Kirbaran" \c 1 } (internal citations and quotations omitted).

Three elements must be met to establish specific jurisdiction. *HS Real Co., LLC v. Sher*, 526 F. App'x 203, 206 (3d Cir. 2013){ TA \l "*HS Real Co., LLC v. Sher*, 526 F. App'x 203, 206 (3d Cir. 2013)" \s "HS Real v Sher" \c 1 }. First, the defendant must have purposefully availed itself of the privilege of conducting activities within the forum. *Id.* Second, the "plaintiffs' claims must arise out of or relate to at least one of the contacts with the forum." *Id.* (internal citations and quotations omitted). Third, the exercise of jurisdiction must comport with traditional notions of fair play and substantial justice. *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 317 (3d Cir. 2007){ TA \l "*O 'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 317 (3d Cir. 2007)" \s "O 'Connor v. Sandy Lane Hotel Co., Ltd." \c 1 }.

Because the existence of specific jurisdiction depends on a link between the defendant's activity and the resulting harm, a specific jurisdiction analysis is necessarily claim specific. *Remick v. Manfredy*, 238 F.3d 248, 255 (3d Cir. 2001){ TA \l "*Remick v. Manfredy*, 238 F.3d 248, 255 (3d Cir. 2001)" \s "Remick v. Manfredy" \c 1 }

**i. Events Do Not Arise Out of or Relate To Activities in New Jersey**

The complaint does not allege that the defendant has the requisite minimum contacts with the State of New Jersey. Assuming without conceding, the defendant [REDACTED] Inc. has sufficient minimum contacts with New Jersey, specific jurisdiction cannot be established under the second element of the doctrine which requires the plaintiffs' claims to "arise out of or relate to at least one of the [defendant's] contacts with [New Jersey]." *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 317 (3d Cir. 2007){ TA \s "O 'Connor v. Sandy Lane Hotel Co., Ltd." } (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1886 [1984]){ TA \s "Helicopteros Nacionales de Colombia, S.A. v. Hall," }. The Third Circuit has held that "satisfying this element 'requires a closer and more direct causal connection than that provided by the but-for-test.'" *HS Real Co., LLC v. Sher*, 526 Fed. App'x 203, 206 (3d Cir. 2013). In the case at bar, the complaint is devoid of any allegation which suggests that the defendant's contacts or activities in New Jersey have a "direct causal connection" to any of the plaintiff's claim.

Instead, the allegations in complaint show that the claims arise from events which occurred in New York.

The Complaint contains nine counts, all of which are premised upon intentional torts. Although the Complaint states in a conclusory fashion that "a substantial portion of the events giving rise to the claim" occurred in the District of New Jersey (Complaint ¶ 9), this allegation applies only to venue (28 U.S.C. § 1391[b][2]{ TA \l "28 U.S.C. § 1391(b)(2)" \s "28 U.S.C. § 1391[b][2]" \c 2 }) and falls short of establishing specific jurisdiction. Absent from the complaint is any assertion that the defendant had contacts or activities in New Jersey and that the activities or contacts have a "direct causal connection" to the events giving rise to the claims. *Sher*, 526 Fed, App'x at 206{ TA \s "HS Real v Sher" }. As explained in POINT III (c) below, the events giving rise to the Plaintiff's alleged claims are not related to the any contacts or activities in New York.

Because general or specific jurisdiction does not exist, this action should be dismissed pursuant to Rule 12(b)(2){ TA \s "Rule 12(b)(2)" } of the Federal Rules of Civil Procedure for lack of personal jurisdiction over the defendant [REDACTED] Inc., a New York corporation.

## **POINT II**

### **THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO JOIN A NECESSARY AND INDISPENSIBLE PARTY**

Each and every count in the complaint should be dismissed pursuant to Rule 12(b)(7){ TA \l "Fed. R. Civ. P. Rule 12(b)(7)" \s "Rule 12(b)(7)" \c 4 } of the Federal Rule of Civil Procedure for failure to join Jonathan [REDACTED] who is a necessary and indispensable party to this action. Rule 12(b)(7) provides that an action may be dismissed due to the plaintiff's failure to join an indispensable party pursuant to Rule 19. Fed R. Civ. P. 19{ TA \l "Fed. R. Civ. P. Rule 19" \s "Fed R. Civ. P. 19" \c 4 }. [REDACTED] is a necessary and indispensable party because all of the claims against the defendant [REDACTED] Inc. are premised upon allegations that non-party [REDACTED] had breached his fiduciary/contractual duties or had otherwise committed misconduct.

#### **A. Standard for Rule 19 Analysis**

Dismissal under Rule 19 generally requires a three step analysis. First, a court must determine "whether it is necessary that the absent party be joined." *Fiscus v. Combustion Fin. AG*, 2007 WL 4164388, at \*4 (D.N.J. Nov. 20, 2007){ TA \l "*Fiscus v. Combustion Fin. AG*, 2007 U.S. Dist. LEXIS 85275 \*19, 2007 WL 4164388 \*4 (D.N.J. Nov. 20, 2007)" \s "Fiscus" \c 1 }; see *Republic of Philippines v. Pimentel*, 553 U.S. 851,128 S. Ct. 2180 (2008){ TA \l "*Republic of Philippines v. Pimentel*, 553 U.S. 851,128 S. Ct. 2180, 2189, (2008)" \s "Republic of Philippines v. Pimentel" \c 1 }. Second, a court must see "whether it is [feasible] for the absent necessary party to be joined." *Fiscus*, 2007 WL 4164388, at \*4{ TA \s "Fiscus" }. Third, "if joinder of

the absent party is not feasible," a court must evaluate "whether 'in equity and good conscience the action should proceed among the parties before it, or should be dismissed,' the absent person being thus regarded as indispensable." *Id.* (quoting Fed. R. Civ. P. Rule 19{ TA \s "Fed R. Civ. P. 19" }).

Pursuant to Rule 19(a)(1) of the Federal Rule of Civil Procedure

A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interests; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. Rule 19(a)(1). Because the subsections of Rule 19 are stated in the disjunctive, if either subsection is satisfied, the absent party is a necessary party that should be joined if feasible. *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 312 (3d Cir. 2007){ TA \l "*Gen. Refractories,Co. v. First State Ins. Co.*, 500 F.3d 306, 312 (3d Cir. 2007)" \s "*Gen. Refractories,Co. v. First State Ins. Co*" \c 1 }.

**B. ██████████ ██████████ is a Necessary and Indispensible Party**

Non-party ██████████ is the original founder of ██████████ LLC having organized the company in the State of New Jersey under the name ██████████. ██████████ Aff. ¶¶ 4, 8. Since its formation in 2010, the name of the company has changed twice with its final name being ██████████ LLC. *Id.* at ¶ 8. On or about January 1, 2013, ██████████ and the plaintiff ██████████ entered into an Amended Operating Agreement for ██████████ LLC which, *inter alia*, made ██████████ a member of the company. ██████████ Aff. ¶ 9.

██████████ commenced this action in his individual capacity and derivatively on behalf of ██████████ LLC. All of the claims against the defendant ██████████ Inc. are based upon allegations that non-party ██████████ breached his fiduciary/contractual duties or had committed other misconduct and that the defendant induced or facilitated this breach or otherwise had knowledge of ██████████ misconduct. (ECF Dkt. 1, Complaint.)

However, there has been no determination by any tribunal, nor has there been an admission by ██████████ that he breached any duty or committed any misconduct as alleged in the complaint.<sup>1</sup> Hence, any finding by this Court that the defendant ██████████ Inc. had facilitated or had induced non-party ██████████ to breach his fiduciary and/or contractual duties, or that the defendant had knowledge

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<sup>1</sup> ██████████ ██████████ denies that he breached any fiduciary or contractual duties or committed any misconduct. ██████████ Aff. ¶¶ 15-20.

of the breach or [REDACTED] misconduct, as alleged in the complaint, would necessarily be predicated upon an initial determination that [REDACTED] had indeed breached these duties or committed the misconduct.

Under similar circumstances, this District Court, held that the non-parties were necessary and indispensable parties under Rule 19(a)(1) "because in their absence the Court cannot accord complete relief among the existing parties." *Abuhouran v. KaiserKane, Inc.*, 2012 WL 3027416, at \*7 (D.N.J. Sept. 12, 2012){ TA \l "*Abuhouran v. Kaiser Kane, Inc.* 2012 U.S. Dist, LEXIS 129997 \*21, 28-30 (D.N.J. 2012)" \s "*Abuhouran v. Kaiser Kane*" \c 1 }; Fed. R. Civ. P. Rule 19(a)(1)(A){ TA \l "Fed. R. Civ. P. Rule 19(a)(1)(A)" \s "Fed. R. Civ. P. Rule 19(a)(1)(A)" \c 4 }; *see also Fiscus*, 2007 WL 4164388 { TA \s "*Fiscus*" }(holding that the non-party is a necessary and indispensable party because a finding of the non-party's breach of the subject Letter Agreement "is a necessary factual predicate to all of the plaintiff's claims.")

Further, [REDACTED] has "an interest relating to the subject of the action and is so situated that disposing of the action in [his] absence may . . . as a practical matter impair or impede [his] ability to protect the interests." Fed. R. Civ. P. Rule 19(a)(1)(B)(i){ TA \l "Fed. R. Civ. P. Rule 19(a)(1)(B)(i)" \s "Fed. R. Civ. P. Rule 19(a)(1)(B)(i)" \c 4 }. In this action, the Plaintiff seeks compensatory and exemplary damages against the Defendant [REDACTED] Inc. and the disgorgement of the

corporation's assets based upon claims that non-party ██████ had breached his fiduciary and contractual duties and that ██████ had wrongfully transferred the company's assets to the Defendant. (ECF Dkt 1, Complaint.) ██████ is the founding shareholder of the Defendant ██████ Inc. and has invested substantial capital into the corporation. A judgment against the Defendant and enforcement thereon would divest ██████ of all his financial and capital investment or any other investment in the corporation. Hence, ██████ has an interest in this action that may be impaired or impeded in his absence.

Additionally, ██████ is a necessary party because he "claims an interest relating to the subject of the action and is so situated that disposing of the action in [his] absence may . . . leave an existing party subject to . . . inconsistent obligations because of the interest. Fed. R. Civ. P. Rule 19(a)(1)(B)(ii){ TA \l "Fed. R. Civ. P. Rule 19(a)(1)(B)(ii)" \s "Fed. R. Civ. P. Rule 19(a)(1)(B)(ii)" \c 4 }. As explained fully in the following paragraphs and in Point V below, the Operating Agreement contains an arbitration clause which requires ██████ and/or ██████ LLC to submit to arbitration the very dispute which is central to this action (i.e. ██████ alleged breach of his fiduciary and contractual duties and wrongful transfer of company assets).

Mr. ██████ and ██████ LLC, through their attorney, had recently forwarded correspondence to ██████ and his attorney Jay R. Weiner



demanding that the Plaintiff arbitrate, as required by the Operating Agreement, the allegations that non-party ██████ breached his fiduciary and contractual duties. Mr. Weiner responded that he and the Plaintiff would consider arbitrating the issue of Mr. ██████'s breach together with this lawsuit, but "[i]n the meantime, however, we will proceed against ██████ Inc. and when we have secured recovery against ██████ Inc. in favor of ██████ LLC, we will proceed with the claims under the Operating Agreement." Epstein Decl. Exh. A.

Litigating the claims in this Court and then later in arbitration risks subjecting the parties to this action to incur "double, multiple, or otherwise inconsistent obligations." Fed. R. Civ. P. Rule 19(a)(1)(B)(ii){ TA \s "Fed. R. Civ. P. Rule 19(a)(1)(B)(ii)" }. For example, a judgment entered in this action may render the Defendant liable to the Plaintiff ██████ and to ██████ ██████ LLC for compensatory and exemplary damages as well as attorney fees. While an arbitration award in favor of ██████ and against ██████ and/or ██████ LLC based on the same claims will not relieve ██████ Inc. from the judgment entered in this action, if any.

### **C. Joinder of ██████ is Not Feasible**

Under the second prong of the Rule 19 analysis, the Court must assess whether it is feasible for the absent necessary party to be joined. *Fiscus*, 2007 WL 4164388{ TA \s "Fiscus" }. Joinder of non-party ██████ is not feasible because,

under the terms of the Operating Agreement, the plaintiff [REDACTED] [REDACTED] and [REDACTED] LLC are required to arbitrate disputes arising from or relating to [REDACTED] breach of his fiduciary or contractual duties. As a result of this requirement to arbitrate, the joinder of [REDACTED] in this action is not feasible because this Court would lack subject matter jurisdiction of the claims if [REDACTED] were joined as a party. "Where a dispute is subject to a binding arbitration agreement, a district court [is] . . . without jurisdiction to address the merits of the complaint" (internal quotation marks and citation omitted). *Trenton Metro. Area Local of the Am. Postal Workers Union, AFL-CIO v. United States Postal Serv.*, 636 F.3d 45, 46 (3d Cir. 2011){ TA \l "*Trenton Metro. Area Local of the Am. Postal Workers Union v. United States Postal Service*, 636 F.3d 45 (3d Cir. 2011)" \s "Trenton Metro" \c 1 }. See *Organization Strategies, Inc. v. Feldman Law Firm LLP*, 604 Fed. App'x 116 (3d Cir. 2015){ TA \l "*Organization Strategies, Inc. v. Feldman Law Firm, LLP*, 604 Fed. Appx. 116 (3d Cir. 2015)" \s "Organization Strategies, Inc. v. Feldman Law Firm, LL" \c 1 }

The complaint alleges that:

- [REDACTED] [REDACTED] LLC] was dissolved when [REDACTED] without the knowledge of [REDACTED] filed a certificate of dissolution with the New Jersey Department of Treasury, Division of Revenue and Enterprise Services" and that "the Certificate falsely asserted that the dissolution had been formally approved by the Members" (Complaint ¶ 19);
- [REDACTED] transferred the trade secrets of [REDACTED] LLC to [REDACTED] Inc. by "improper means" (Complaint ¶ 29);

- [REDACTED] breached "his duty to maintain the secrecy of [REDACTED] LLC's] trade secrets and "breach[ed] his fiduciary and contractual duties to [REDACTED] LLC]" by transferring its trade secrets to the defendant [REDACTED] Inc. (Complaint ¶¶ 37, 42);
- [REDACTED]'s breached "his fiduciary and contractual duties in transferring the assets and good will of [REDACTED] LLC to [the defendant] without consideration or approval of all its Members" (Complaint ¶ 46);
- [REDACTED] "knowingly participated in the breach of fiduciary duty, causing damage to [REDACTED] LLC]" (Complaint ¶ 50);
- [REDACTED] violated his contractual duties of loyalty and care, and a restrictive covenant that prohibited competition by [REDACTED] with [REDACTED] LLC . . ." (Complaint ¶¶ 53-54, 57-61);
- [REDACTED] violated his contractual obligations by being employed by [REDACTED] Inc. (Complaint ¶¶ 63-64, 67-69); and
- [REDACTED] wrongfully and/or fraudulently transferred the tangible and intangible assets of [REDACTED] LLC. (Complaint ¶¶ 71-73).

The complaint continues by alleging that the defendant [REDACTED] Inc. had induced [REDACTED] to breach his duties or had otherwise knowingly benefited from [REDACTED] violation of his duties to the company [REDACTED] LLC and its members.

Each of the foregoing allegations of [REDACTED] breach or misconduct arise from or relate to the provisions in the following Articles of the Operation Agreement:

- Article X, Non-Compete; Non-solicitation;
- Article XI General Provisions (section 11.2 Confidentiality);
- Article VI (Sections 6.2 Dissolution and 6.3 Termination)

Operating Agreement, [REDACTED] Aff. Exh. A.

The Operating Agreement requires all disputes arising from the agreement or any breach of the agreement to be submitted to arbitration for resolution.

[REDACTED] Aff. Exh. A. This broad arbitration clause is contained in section 11.8 of the Operating Agreement and states, in pertinent part:

(b) In the event of any dispute, claim, question or disagreement arising from or relating to this Agreement, or breach thereof . . . the disputing parties shall . . . submit the dispute to binding arbitration in accordance with this Section 11.8.

Operating Agreement Section 11.8, [REDACTED] Aff. Exh. A.

The Operating Agreement defines "Dispute" as "any dispute, controversy of claim of any nature between the parties to this Agreement arising out of, in connection with, or in relation to the interpretation, performance, enforcement or breach of this Agreement." *Id.* The allegations that [REDACTED] breached his contractual duties or committed misconduct toward [REDACTED] LLC clearly fall within the ambit of this definition of dispute and fall within the broad scope of the Arbitration provision. [REDACTED] Aff., Exh. A, Operating Agreement, Section 11.8

**D. [REDACTED] is an Indispensible Party**

[REDACTED], being a necessary party whose joinder is not feasible, the Court is required to determine under the last step of the Rule 19 analysis whether [REDACTED] is indispensable and, if so, whether the action should be dismissed. To determine

whether a party is indispensable, the Court considers four factors: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. Fed. R. Civ. P. Rule 19(b){ TA \l "Fed. R. Civ. P. Rule 19(b)" \s "Fed. R. Civ. P. Rule 19(b)" \c 4 }; *see also Tullet Prebon PLC v. BGC Partners, Inc.*, 427 Fed. App'x 236, 240 (3d Cir. 2011){ TA \l "Tullet Prebon PLC v. BGC Partners, Inc.", 427 Fed. Appx. 236, 240 (3d Cir. 2011)" \s "Tullet Prebon PLC v. BGC Partners, Inc." \c 1 }.

In the case at bar, non-party ██████ would be prejudiced by a judgment in this action because this action "necessarily calls for a determination of" his alleged breach of fiduciary and contractual duties under the Operating Agreement thereby "prejudicing the rights" of the non-party ██████ *See Tullet Prebon*, 427 Fed. App'x 236 at 240. As previously mentioned, there is a "'real threat of duplicative recovery' and 'contradictory rulings' because the same alleged wrongdoing [is] at the heart of" the mandated arbitration and this action. *Id.*

Further, should this action be dismissed, the plaintiff will not be left without a remedy. The Plaintiff can proceed to arbitration as required by the Operating Agreement where the arbitrator can determine the issues of whether ██████ had

breached his fiduciary and contractual duties. Such a determination is a prerequisite to the claims in this action that the Defendant [REDACTED] Inc. had interfered with [REDACTED] fiduciary and/or contractual duties or that the defendant had misappropriated assets by reason of [REDACTED] wrongful conveyance of the assets. (ECF Doc. 1, Complaint.) Should the arbitrator find that [REDACTED] had breached his duties, the issue would then be ripe for the Plaintiff to pursue his claims against [REDACTED] Inc. in a State or federal court. *See e.g., Tullet Prebon PLC*, 427 Fed. App'x 236 at 240{ TA \s "Tullet Prebon PLC v. BGC Partners, Inc." } (finding that the plaintiff had an adequate remedy of proceeding in arbitration and later in state court).

Based upon the foregoing, [REDACTED] is a necessary and indispensable party that cannot be joined and, therefore, each and every count in the complaint should be dismissed.

### **POINT III**

#### **VENUE IS IMPROPER**

This action should be dismissed pursuant to Rule 12(b)(3){ TA \l "Fed. R. Civ. P Rule 12(b)(3)" \s "Rule 12(b)(3)" \c 4 } of the Federal Rules of Civil Procedure because venue is improper in the District of New Jersey. The Complaint alleges that

"Venue lies in this District pursuant to 28 U.S.C. § 1391(b)(2){ TA \l "28 U.S.C. § 1391(b)(2)" \s "28 U.S.C. §

1391(b)(2)" \c 2 } in that Ember LLC is *organized under the laws of the State of New Jersey* and a substantial portion of the events giving rise to the claim occurred in this District." (emphasis added)

Complaint ¶ 9. Venue is improper in two aspects: First, the laws under which a corporate party is organized is not a basis for venue under section 1391. Second, none of the events which give rise to the plaintiff's claims occurred in the State of New Jersey.

Section 1391(b){ TA \l "28 U.S.C. § 1391(b)" \s "§ 1391(b)" \c 2 } does not authorize venue to be based upon the defendant's place of organization or upon the laws under which it is organized. In pertinent part, section 1391(b) states

Venue in General. - A civil action may be brought in -

(1) a judicial district in which any defendant resides, if all the defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal with respect to such action.

28 U.S.C. § 1391(b). Absent from the above quoted section is any provision that authorizes venue to be based upon a party's place of organization. Rather, section 1391(b)(1) provides that the plaintiff may bring this action in the District of New Jersey only if two conditions are met: (1) a defendant must "reside" in the District

of New Jersey and (2) all the defendants must be "residents" of the State of New Jersey. Neither condition is satisfied in this action.

**A. Venue Improper Under section 1391(b)(1)**

Although [REDACTED] LLC was organized under the laws of the State of New Jersey, it has not resided in New Jersey since August 2013. [REDACTED] Aff. ¶ 12. [REDACTED] LLC did not maintain any office in New Jersey during this period. *Id.* ¶¶ 11-12. Since August 2013, [REDACTED] LLC has maintained its principal place of business in the State of New York. *Id.*

Assuming without conceding that [REDACTED] LLC did reside in the District of New Jersey, the second condition of Section 1391(b)(1){ TA \l "28 U.S.C. § 1391(b)(1)" \s "§ 1391(b)(1)" \c 2 } has not been met. All of the defendants in this action are not residents of the State of New Jersey. [REDACTED] Aff. ¶¶ 11-14. The defendant [REDACTED] Inc. is a New York corporation having a principal place of business in West Nyack, New York. [REDACTED] Aff. ¶ 5; *see also* Complaint ¶ 3 (alleging that defendant [REDACTED] Inc is a New York corporation with a principal place of business in West Nyack, New York).

**B. Venue Improper Under section 1391(b)(2)**

Nor is venue proper under section 1391(b)(2){ TA \s "28 U.S.C. § 1391(b)(2)" }. This section permits venue to be placed where a substantial part of the events or omissions giving rise to the claim have occurred. 28 U.S.C. § 1391(b)(2). The



Complaint contains nine counts, all of which are premised upon intentional torts. Although the Complaint states in a conclusory fashion that "a substantial portion of the events giving rise to the claim" occurred in the District of New Jersey (Complaint ¶ 9), as explained below, the allegations in the complaint establish that the events occurred in New York, if they occurred at all.

First, the complaint alleges that [REDACTED] LLC was wrongfully dissolved on December 4, 2014 when non-party [REDACTED] filed a certificate of dissolution with the New Jersey Department of Treasury, Division of Revenue and Enterprise Services without the plaintiff's knowledge. Complaint ¶ 19. The wrongful dissolution cannot be attributed to the defendant [REDACTED] Inc. because the corporation was not formed until two months later on February 6, 2015. Complaint ¶ 20.

Counts I and II allege that the misappropriation of [REDACTED] LLC's trade secrets occurred when non-party [REDACTED] in breach of his fiduciary and contractual duties to [REDACTED] LLC, transferred the trade secrets to the defendant [REDACTED] Inc. Complaint ¶¶ 36-37. The Third Circuit has long held that trade secrets and intellectual property "should be deemed to have their fictional situs at the residence of the owner." *Horne v. Adolph Coors Co.*, 684 F.2d 255, 259 (3d Cir. 1982){ TA \l "*Horne v. Adolph Coors Co.*, 684 F.2d 255, 259 (3d Cir. 1982)" \s "Horne v. Adolph Coors Co." \c 1 }. At the time of the alleged misappropriation, [REDACTED]

[REDACTED] LLC and both of its members resided in New York. [REDACTED] Aff. ¶¶ 13-14. Limited liability companies are "deemed citizens of each state in which their members are citizens." *Staffing Plus, Inc. v. Team Rehab Servs.*, 2006 U.S. Dist. LEXIS 519, at \*2 (D.N.J. Jan. 5, 2006){ TA \l "*Staffing Plus, Inc. v. Team Rehab Servs.*, 2006 U.S. Dist. LEXIS 519 \*2 (D.N.J. 2006)" \s "Staffing Plus, Inc. v. Team Rehab Servs.," \c 1 }; *see also Spathos v. Smart Payment Plan, LLC*, 2016 WL 3951672, at \*3(D.N.J. July 21, 2016){ TA \l "*Spathos v. Smart Payment Plan, LLC*, 2016 U.S. Dist LEXIS 95152, n.2 (D.N.J. 2016)" \s "Spathos v. Smart Payment Plan, LLC," \c 1 } (noting that the case could have been brought in Texas because the defendant is limited liability company, and one of its members resides in Texas.) Assuming without conceding that [REDACTED] LLC owned trade secrets or confidential information, the trade secrets and the confidential information were located in New York where [REDACTED] LLC and its member reside. *See Horne*{ TA \s "Horne v. Adolph Coors Co." }, *supra*. Hence, the alleged wrongful transfer of the trade secrets occurred in New York where the trade secrets were located and where they were transferred between the two entities that resided in New York.

Count III alleges that the defendant was unjustly enriched by [REDACTED] transferring the company assets to the defendant. Complaint ¶ 46. Since August 18, 2013 and at all times thereafter, all of [REDACTED] LLC's assets were located in

New York. ██████ Aff. ¶ 12. Hence, the transferring of assets occurred in New York where ██████ LLC and the defendant were located.

Count IV alleges that the defendant aided and abetted non-party ██████ to breach his fiduciary duty to the plaintiff and to ██████ LLC. Complaint ¶¶ 50-51. Assuming without conceding this is true, this event would have occurred in the State of New York where ██████ LLC and the defendant maintained their principal place of business.

In Counts V (Tortious Interference with Contract), the complaint alleges that the defendant maliciously interfered with the contractual relationship (Operating Agreement) between ██████ LLC and non-party ██████ by employing ██████ Complaint ¶¶ 50-51. Such employment would have necessarily occurred in New York State, where the defendant maintains its principal place of business.

Counts VI, VII and VIII (Tortious Interference with Prospective Economic Advantage) allege the defendant interfered with the prospective economic advantage of ██████ LLC by acquiring the assets and the trade secrets of the company (Complaint ¶¶ 58-59, 63-64) and by interfering with the contractual relationship between ██████ and ██████ LLC. (Complaint ¶ 68-70). The complaint is silent as to what these assets are and where they were located. The company's assets, however, were not located in the State of New Jersey, but were located in New York. ██████ Aff. ¶ 12. And any acquisition of them by the

defendant would have necessarily occurred in New York State where [REDACTED] LLC and the defendant resided. Moreover, as previously mentioned, the alleged transfer of trade secrets would have occurred in New York, where the parties reside. Simply, the complaint is devoid of any factual allegation indicating otherwise.

Notably, the "actionable" conduct in a claim for tortious interference with a prospective economic advantage is the "luring away, by devious, improper and unrighteous means, of the customer of another." *Printing Mart-Morristown v. Sharp Elec. Corp.*, 116 N.J. 739, 750, 563 A.2d 31 (1989){ TA \l "*Printing Mart-Morristown v. Sharp Elec. Corp.*, 116 N.J. 739, 750, 563 A.2d 31 (1989)" \s "*Printing Mart-Morristown v. Sharp Elec. Corp.*" \c 1 } (quoting *Louis Kamm, Inc. v. Flink*, 113 N.J.L. 582, 586, 175 A. 62 (E. & A. 1934)){ TA \l "*Louis Kamm, Inc. v. Flink*, 113 N.J.L. 582, 586, 175 A. 62 (E. & A. 1934)" \s "*Louis Kamm, Inc. v. Flink*," \c 1 }. There is no allegation in the complaint that the defendant lured away any customer of [REDACTED] LLC in New Jersey or in any other State. Hence, it cannot be said that the events giving rise to Counts VI, VII and/or VIII occurred in New Jersey.<sup>2</sup>

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<sup>2</sup> As set forth in Point IV below, this claim, as wells as Counts VI and VII, does not state a claim for tortious interference with prospective economic advantage and, therefore, should not be considered as a basis for venue.

Lastly, Count IX claims a Fraudulent Conveyance. This Count alleges that "Nominal Defendant [sic] ██████ who has possession of the tangible and intangible assets of ██████ [LLC], directly participated in the wrongful transfer of the [assets] from ██████ [LLC] to [the defendant ██████ Inc.] . . . . " Complaint ¶ 73. As previously mentioned, all of ██████ LLC's assets were located in New York since August 2013. ██████ and all parties to this action resided in New York. Assuming a wrongful transfer occurred, the transfer had to occur in New York.

For the foregoing reasons, all, if not a substantial part of the events giving rise to the alleged claims, occurred in New York. Therefore, venue is improper under section 1391(b)(1),(2){ TA \s "28 U.S.C. § 1391(b)(2)" } and the action should be dismissed.

#### **POINT IV**

#### **THE COUNTS III, VI, VII AND VIII FAIL TO STATE A CLAIM**

The Complaint asserts one Count for unjust enrichment (Count III) and three counts for tortious interference with prospective economic advantage (Counts VI, VII and VIII). Each of the four Counts should be dismissed as they fail to state a claim.

## A. Standard for Rule 12(b)(6) Analysis

Federal Rule of Civil Procedure 12(b)(6){ TA \l "Fed. R. Civ. P. Rule 12(b)(6)" \s "Rule 12(b)(6)" \c 4 } provides that a court may dismiss a claim "for failure to state a claim upon which relief can be granted." When reviewing a motion to dismiss, courts must first separate the factual and legal elements of the claims, and accept all of the well-pleaded facts as true. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009){ TA \l "*Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009)" \s "*Fowler v. UPMC Shadyside*," \c 1 }. In order to survive a motion to dismiss, the plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955 (2007){ TA \l "*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955 (2007)" \s "*Bell Atl. Corp. v. Twombly*," \c 1 }.

The Third Circuit requires a three-step analysis to meet the plausibility standard mandated by *Twombly*{ TA \s "*Bell Atl. Corp. v. Twombly*," }. First, the court should "outline the elements a plaintiff must plead to state a claim for relief." *Bistrrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012){ TA \l "*Bistrrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012)" \s "*Bistrrian v. Levi*," \c 1 }. Next, the court should "peel away" legal conclusions that are not entitled to the assumption of truth. *Id.*; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 1940 (2009){ TA \l "*Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S.Ct. 1937 (2009)" \s "*Ashcroft v.*

*Iqbal*" \c 1 } ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."). It is well-established that a proper complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal quotations and citations omitted). The third step of the analysis is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Generally, when determining a motion under Rule 12(b)(6), the court may only consider the complaint and its attached exhibits. However, while "a district court may not consider matters extraneous to the pleadings, a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment." *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 342 (3d Cir. 2004){ TA \l "*Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 342 (3d Cir. 2004)" \s "*Angstadt v. Midd-West Sch. Dist.*" \c 1 } (citation omitted); *see also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997){ TA \l "*In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)" \s "*In re Burlington Coat Factory Sec. Litig.*," \c 1 }.

## **B. Unjust Enrichment**

Count III (Unjust Enrichment) should also be dismissed for failure to state a claim. In pertinent part, the Count alleges that

Defendant [REDACTED] Inc] has been unjustly enriched by [REDACTED] breach of his fiduciary duty and contractual duties in transferring the assets and goodwill of [REDACTED] LLC to EI without consideration or approval of all of the Members.

Complaint ¶ 46. This Count is presented as a tort-based theory of recovery. The complaint is devoid of any claim of an express or implied contract between the defendant and Plaintiff. "New Jersey law does not recognize unjust enrichment as an independent tort cause of action." *Nelson v. Xacta 3000, Inc.*, 2009 WL 4119176, at \*7 (D.N.J. Nov. 24, 2009){ TA \l "*Nelson v. Xacta 3000, Inc.*, 2009 U.S. Dist. LEXIS 109580 \*18, 2009 WL 4119176 (D.N.J. 2009)" \s "*Nelson v. Xacta 3000, Inc.*, 2009 U.S. Dist." \c 1 }. Under New Jersey law, to establish unjust enrichment, a plaintiff must show

"both that the defendant received a benefit and that retention of that benefit without payment be unjust. The unjust enrichment doctrine requires that the plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that failure of remuneration enriched defendant beyond its contractual rights.

*Id.* (quoting, *Va. Sur. Co. v. Macedo*, 2009 WL 3230909, at \*11 (D.N.J. Sept. 30, 2009)){ TA \l "*Va. Sur. Co. v. Macedo*, 2009 U.S. Dist. LEXIS 90603, 2009 WL 3230909, at \*11 (D.N.J. 2009)" \s "*Va. Sur. Co. v. Macedo*" \c 1 }.

In the case at bar, the allegations in the complaint are clear that plaintiff did not perform or otherwise confer a benefit on the defendant under a quasi-



contractual relationship nor did the plaintiff expect remuneration from the defendant. Instead, the complaint alleges that the assets of [REDACTED] LLC were wrongfully transferred by non-party [REDACTED] and misappropriated by the defendant (Complaint ¶¶ 33, 35-44, 73). Where, as here, the plaintiff asserts tort claims against the defendant for which the plaintiff clearly did not expect remuneration, the Plaintiff's claim for unjust enrichment fails to state a claim. *Cafaro v. HMC*, 2008 WL 4224805, at \*6 (D.N.J. Sept. 8, 2008){ TA \l "*Cafaro v. HMC*, 2008 U.S. Dist, LEXIS 71724 \*19-20 (D.N.J. 2008)" \s "*Cafaro v. HMC*," \c 1 }.

### **C. Tortious Interference With Prospective Economic Advantage**

The complaint contains three Counts of tortious interference with prospective economic advantage (Counts VI, VII and VIII). To state a claim for tortious interference with a prospective economic advantage, the complaint must allege: "(1) a reasonable expectation of economic advantage to plaintiff, (2) interference done intentionally and with 'malice,' (3) causal connection between the interference and loss of prospective gain, and (4) actual damages." *Varrallo v. Hammond, Inc.*, 94 F.3d 842, 848 (3 Cir. 1996){ TA \l "*Varrallo v. Hammond, Inc.*, 94 F.3d 842, 848 (3 Cir. 1996)" \s "*Varrallo v. Hammond, Inc.*," \c 1 } (*citing Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 751, 563 A.2d 31, 37 (1989)){ TA \s "*Printing Mart-Morristown v. Sharp Elec. Corp.*" }. Under this four prong analysis, the complaint at bar fails to allege sufficient facts to state a claim for

tortious interference with prospective economic advantage.

### **i. Pursuit of Business**

Under the first prong of the analysis, Counts VI, VII and VII fail to allege any facts which show that ██████████ LLC was in pursuit of business at the time of the defendant allegedly interfered with its prospective economic advantage. To the contrary, the allegations in the complaint show that the members of ██████████ ██████████ LLC planned to terminate its existence by converting "██████████ LLC to a Subchapter S corporation" and that such "conversion would require a merger." Complaint ¶ 20.<sup>3</sup> Under a merger, ██████████ LLC would "cease to exist" and all its property would "vests in the surviving organization." N.J.S.A. § 42:2C-77(a)(2),(3).{ TA \l "N.J.S.A. § 42:2C-77(a)(2),(3)." \s "N.J.S.A. § 42:2C-77(a)(2),(3)." \c 2 }

### **ii. Intentional Interference**

Under the second prong of the analysis, the complaint fails to allege facts which show that the defendant ██████████ Inc. had intentionally interfered with the prospective economic advantage of ██████████ LLC. The Supreme Court of New Jersey has long held that the "actionable" conduct in a claim for tortious interference with a prospective economic advantage is the "luring away, by

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<sup>3</sup> The accountant for ██████████ LLC recommended to ██████████ and ██████████ that the company be dissolved by December 2014 because of its poor performance in New Jersey and that an S corporation be formed in New York by the beginning of 2015. ██████████ Aff. ¶¶ 15-16. Based upon this recommendation, ██████████ and ██████████ agreed to dissolve the company and to form an S corporation. *Id.*

devious, improper and unrighteous means, of the customer of another.” *Printing Mart-Morristown v. Sharp Elec. Corp.*, 116 N.J. 739, 750, 563 A.2d 31 (1989){ TA \s "Printing Mart-Morristown v. Sharp Elec. Corp." } (*quoting Louis Kamm, Inc. v. Flink*, 113 N.J.L. 582, 586, 175 A. 62 (E. & A. 1934)){ TA \s "Louis Kamm, Inc. v. Flink," }. "Therein lie the elements of a *prima facie* case." *Printing Mart-Morristown*, 116 N.J. 739 at 750{ TA \s "Printing Mart-Morristown v. Sharp Elec. Corp." }.

In the case at bar, the complaint is devoid of any allegation that the defendant "lur[ed] away" the customers of ██████████ LLC. In Count VI, the complaint reiterates the existence of a contractual relationship between ██████████ ██████████ LLC, ██████████ and ██████████ and continues by alleging that ██████████ LLC "acquired various assets, tangible and intangible, that it used to conduct its business" and that "Ember [LED] LLC had a reasonable expectation of economic advantage in the relationships that it had developed with its customers, suppliers, employees, members and managers." Complaint ¶¶ 58-60. The tort of intentional interference with a prospective relationship is "distinct from the tort of interference with the performance of a contract." *Printing Mart-Morristown*, 116 N.J. 739 at 750.

Although, Count VI concludes by alleging that the defendant "intentionally, maliciously and without justification interfered without justification [sic] with the prospective economic advantage of ██████████]LLC, causing damage to ██████████

LLC" (Complaint ¶ 61). There is no allegation whatsoever in the complaint that the defendant [REDACTED] Inc. had lured away any customer of [REDACTED] LLC or of [REDACTED]. *Printing Mart-Morristown*, 116 N.J. at 750{ TA \s "Printing Mart-Morristown v. Sharp Elec. Corp." }. These "[t]hreadbare recitals of the elements of a cause of action" are insufficient to state a claim for tortious interference. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009){ TA \s "Ashcroft v. Iqbal" }.

Similarly, Count VIII re-alleges the contractual relationship that was alleged in Counts VI and VII and states that "[REDACTED] had a reasonable expectation of economic advantage in the relationship he had with [REDACTED] LLC." Complaint ¶¶ 68-69. Like the two previous Counts, Count VIII fails to state a claim in that it does not allege that [REDACTED] LLC was in pursuit of business nor does it allege that the defendant lured away any customer or business. Count VIII concludes by alleging that "[REDACTED] had a reasonable expectation of economic advantage in the relationship that he had with [REDACTED] LLC" and that the defendant "intentionally, maliciously and without justification interfered with the prospective economic advantage of [REDACTED] causing damage." Complaint ¶¶ 69-70. Again, "[t]hreadbare recitals of the elements of a cause of action" are insufficient to state a cause of action. *Iqbal*, 129 S.Ct. at 1949{ TA \s "Ashcroft v. Iqbal" }.

Where, as here, a complaint fails to provide "factual allegations to support

[its] bare, conclusory claim of reasonable expectation of economic advantage" the tortious interference claim must be dismissed. *Ricketti v. Barry*, 2015 WL 1013547, at \*5 (D.N.J. Mar. 9, 2015){ TA \l "*Ricketti v. Barry*, 2015 U.S. Dist LEXIS 28503 \*15 (D.N.J. 2015)" \s "*Ricketti v. Barry*" \c 1 }.

### **iii. Causal Connection**

The third prong of the analysis requires the complaint to allege facts which show a causal connection between the interference and loss of prospective gain. *Printing Mart-Morristown*, 116 N.J. 739 at 751{ TA \l "*Printing Mart-Morristown*, 116 N.J. at 750" \s "*Printing Mart-Morristown*, 116 N.J. at 750" \c 1 }. Counts VI, VII and VIII fail to state a claim for tortious interference with a prospective economic advantage because the factual allegations do not show that the plaintiff's loss was the "direct result" of the defendant's alleged intentional and wrongful interference, if any. *Lamorte Burns & Co. v. Walters*, 167 N.J.285, 306, 770 A.2d 1158, 1170 (2001){ TA \l "*Lamorte Burns & Co. v. Walters*, 167 N.J.285, \*306, 770 A.2d 1158 (Sup. 2000)" \s "*Lamorte Burns & Co. v. Walters*" \c 1 }.

Assuming, *arguendo*, the allegations in the complaint are true, the complaint shows that it was non-party [REDACTED] not the defendant, who was the direct result for the loss of the company's economic advantage. Specifically, the prospective economic advantage of the company and [REDACTED] were lost on December 30, 2014 when, as alleged in the complaint, non-party [REDACTED] dissolved [REDACTED] LLC

"without the knowledge of [REDACTED] by filing a "certificate of dissolution with the New Jersey Department of Treasury, Division of Revenue and Enterprise Services." Complaint ¶ 19. When a company is dissolved, it continues "only for the purpose of winding up" its activities. N.J.S.A § 42:2C-49{ TA \l "N.J.S.A § 42:2C-49" \s "N.J.S.A § 42:2C-49" \c 2 }. The defendant did not and could not have interfered with the company's prospective economic advantage since, as the complaint alleges, the defendant was not formed until February 6, 2015, approximately two months after [REDACTED] had dissolved [REDACTED] LLC. Complaint ¶20. Assuming [REDACTED] LLC and/or [REDACTED] lost a perspective economic advantage, the loss was not a result of the defendant but was a "direct result" of [REDACTED]'s actions, including his dissolution of the company. *See Lamorte Burns & Co. v. Walters*, 167 N.J. 285 at 306{ TA \s "Lamorte Burns & Co. v. Walters" }.

Along this same line of reasoning, the allegations in the complaint are insufficient to show that the plaintiff's loss was the direct result of the defendant's malicious interference. *Tipton v. U-Go, Inc.*, 2014 WL 4231363, at \*6 (N.J. Super. Ct. App Div. Aug. 28, 2014){ TA \l "*Tipton v. U-Go, Inc.*, 2014 N.J. Super Unpub. LEXIS 2117 \*15-16 (N.J. Super. 2014)" \s "Tipton v. U-Go, Inc." \c 1 }. A reading of the complaint suggests that prior to the defendant's existence, [REDACTED] had already embarked on a course to dissolve [REDACTED] LLC with a plan to create the defendant corporation to whom he would transfer the company's assets and where

he will be employed in violation of his fiduciary and contractual duties to the [REDACTED] LLC. (ECF Doc. 1, Complaint).

## POINT V

### **THE ACTION SHOULD BE STAYED** **PENDING ARBITRATION**

This action should be stayed pursuant to Section 3 of the Federal Arbitration Act (9 U.S.C. § 3{ TA \l "9 U.S.C. § 3" \s "9 U.S.C. § 3" \c 2 }) because the issues in the complaint are referable to arbitration under the Operating Agreement of [REDACTED] LLC. Section 3 states:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. §3{ TA \s "9 U.S.C. § 3" }. The stay under Section 3 includes not just the stay of the trial but also the stay of all pre-trial proceedings. *See Corpman v. Prudential-Bache Sec., Inc.*, 907 F.2d 29 (3d Cir. 1990){ TA \l "Corpman v. Prudential-Bache Secur., Inc.", 907 F.2d 29, \*31 (3d Cir. 1990)" \s "Corpman v. Prudential-Bache Secur., Inc" \c 1 }. The Federal Arbitration Act "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H.*

*Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20, 103 S.Ct. 927, 939 (1983).{ TA \l "Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, n.23, 103 S.Ct. 927 (1983)" \s "Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp" \c 1 }

The plaintiff, ██████ commenced this action individually and derivatively on behalf of ██████ LLC and has "aligned [the company] as a defendant" because it is "antagonistic to [the] plaintiff ██████ Complaint ¶ 7. ██████ LLC, as a party to this action and as a party to the Operating agreement, requests that this action be stayed until the issues in the complaint have been arbitrated as required by the arbitration provision of the Operating Agreement. The plaintiff ██████ and non-party ██████ are also parties to the Operating Agreement. Complaint ¶10. ██████ LLC is not in default in proceeding with arbitration as it had demanded of the plaintiff that he proceed with arbitration. Epstein Decl. Exh. B.

Additionally, ██████ LLC and the defendant ██████ Inc. request the Court to stay this action pending the outcome of arbitration as a matter of the Court's discretion. Although, the defendant ██████ Inc. is not a party to the Operating Agreement, the Court, as a matter of its discretion to control its docket, may stay the action where, as here, the claims against the defendant ██████



Inc. involve common question of fact that are within the scope of the arbitration provision of the Operating Agreement.

Pursuant to the arbitration provisions of the Operating Agreement, any dispute arising from or relating to the Operating Agreement, including a breach of the Agreement, shall be submitted to arbitration. Section 11.8, Agreement, [REDACTED] Aff. Exh. A. The Agreement defines "Dispute" as "any dispute, controversy of claim of any nature between the parties to this Agreement arising out of, in connection with, or in relation to the interpretation, performance, enforcement or breach of this Agreement." Agreement, Annex I - Definitions, *Id.* The complaint's allegations that [REDACTED] breached or violated his contractual duties clearly fall within the ambit of this definition of dispute and fall within the broad scope of Section 11.8 of the Operating Agreement which mandates the arbitration of the dispute.

Counts I and II of the complaint (Misappropriation of Trade Secrets) allege that "[non-party] [REDACTED] . . . in breach of his fiduciary and contractual duties to [REDACTED] LLC transferred the trade secrets of [REDACTED] LLC to [the defendant [REDACTED] Inc.]" and that the defendant knew or had reason to know "that the transfer was in breach of [REDACTED] duty to maintain the secrecy of [REDACTED] LLC' trade secrets . . . ." Complaint ¶¶ 37-38, 42-43. The complaint alleges that the trade secrets are in the "form of information . . . concerning [REDACTED] LLC's] customers, pricing,

distributors and past and potential projects." Complaint ¶36. Assuming without conceding this information qualifies as a trade secret, [REDACTED] contractual duty to maintain the alleged trade secrets, and his alleged breach thereof, arises under "Section 11.2 Confidentiality" of the Agreement which governs the disclosure of the company's Confidential Information. [REDACTED] Aff., Exh. A.

Count III alleges that the defendant "has been unjustly enriched by [REDACTED] breach of his fiduciary and contractual duties in transferring the assets and goodwill of [REDACTED] LLC to [the defendant [REDACTED] Inc.] without consideration or approval of all of the Members." Complaint ¶46. [REDACTED]'s contractual duties concerning the conveyance or distribution of the company's assets is provided under Article III, Section 3.1 Board of Managers, and under Article VI, Section 6.2 Dissolution of the LLC Operating Agreement, respectively.

In Count IV, the complaint alleges that the defendant [REDACTED] Inc. aided and abetted non-party [REDACTED] in the breach of his fiduciary duties. This Count merely incorporates the preceding allegations in the complaint and concludes that because non-party [REDACTED] was acting on the defendant's behalf, it is responsible for [REDACTED] action. Complaint ¶¶ 49-50. However, as outlined in the paragraphs above, the allegations in the complaint fail to allege conduct by [REDACTED] other than a breach of his duties established by the Operating Agreement. Hence there can be no breach of a fiduciary duty if [REDACTED] acted in accordance with the terms of the

Agreement. A dispute as to whether [REDACTED] violated the terms of the Operating Agreement is required to be submitted to Arbitration.

Counts V (Tortious Interference with Contract) alleges that [REDACTED] LLC had a "contractual relation with [REDACTED] and [REDACTED] which included "contractual duties of loyalty and care, and a restrictive covenant that prohibits competition by [REDACTED] with [REDACTED] LLC . . . ." Complaint ¶ 53. Count V continues by alleging that the defendant [REDACTED] Inc. "interfered with the contractual relationship between [REDACTED] LLC and [REDACTED] by employing [REDACTED] in violation of his contractual obligations." Complaint ¶ 54. Non-party [REDACTED] contractual duties not to compete, and the alleged breach thereof, arise under Article X of the LLC Operating Agreement. [REDACTED] Aff. Exh. A.

Counts VI, VII and VIII (Tortious Interference with Prospective Economic Advantage) is premised upon alleges that "[a]s a result of the Operating Agreement . . . [REDACTED] LLC had an existing contractual relation" with [REDACTED] and/or [REDACTED] "including contractual duties of loyalty and care, and a restrictive covenant that prohibited competition" by [REDACTED] during his employment with [REDACTED] LLC and for one year thereafter. Complaint ¶¶ 58, 63, 68. Non-party [REDACTED] contractual duties, including duties not to compete, and the alleged breach thereof arise under the Operating Agreement. [REDACTED] Aff. Exh. A.

Count IX, the last count in the complaint, seeks to enjoin the defendant from

transferring the assets of ██████████ LLC. In part, this count is premised upon the allegations that "Nominal Defendant [sic] ██████████ . . . directly participated in the wrongful transfer of" ██████████ LLC's tangible and intangible assets and that "██████████ has failed to make any distribution of assets to the Members of [██████████ ██████████ LLC]." As previously mentioned, ██████████'s authority to convey or to distribute the company's assets is established under Article III, Section 3.1 Board of Managers, and under Article VI, Section 6.2 Dissolution of the LLC Operating Agreement, respectively.

Each of the Counts against the defendant ██████████ Inc is premised upon some allegation that non-party ██████████ "breached," "violated", or "failed" to perform, the terms of the Operating Agreement or that the claims otherwise arise out of the contractual relationship with ██████████ LLC, ██████████ and/or ██████████ Such allegations implicate the terms of the Operating Agreement and its provision to Arbitrate.

### **CONCLUSION**

This Defendants' motion should be granted in whole or in part.

Respectfully submitted,

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