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INTERTRUST GCN, LP, INTERTRUST GCN GP, LLC,	:	**COURT OF COMMON PLEAS PHILADELPHIA COUNTY**
and	:	**October Term, 2013**
H.F. LENFEST, THE LENFEST GROUP,	:	**No. 000654**
Plaintiffs,	:	
v.	:	
INTERSTATE GENERAL MEDIA, LLC, and ROBERT J. HALL,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ROBERT J. HALL'S PRELIMINARY OBJECTIONS TO COMPLAINT

Defendant Robert J. Hall ("Hall"), by his undersigned attorneys, hereby submits this Memorandum of Law in support of his Preliminary Objections to the Complaint.

INTRODUCTION

The instant lawsuit arises from the decision by the Publisher of The Philadelphia Inquirer ("The Inquirer"), Robert J. Hall, to fire the Editor, William Marimow, because of Marimow's longstanding refusal to follow directives or implement much-needed editorial, journalistic and personnel changes at The Inquirer. Marimow's poor job performance resulted in a significant decline in circulation and morale problems in the newsroom during his second

troubled tenure as Editor. He was previously fired as Editor of The Inquirer by the prior Publisher in 2010, and was also fired as Editor of The Baltimore Sun by the Publisher of that newspaper in 2004. Marimow had been warned by both Hall and plaintiff H. F. "Gerry" Lenfest ("Lenfest") in July, 2013 that a failure to improve his job performance would result in termination, but unfortunately he did not remedy his deficiencies, resulting in Hall's decision to fire him three months later, on October 7, 2013.

This lawsuit was filed not by Marimow, but instead by two of the six Members of defendant Interstate General Media, LLC ("IGM"), which owns The Inquirer. Plaintiffs are Intertrust GCN, LP, and its general partner, Intertrust GCN GP, LLC, whose principal is Lewis Katz (the Intertrust plaintiffs are referred to hereafter as "Katz" or "the Intertrust entities"), and Lenfest. Katz and Lenfest collectively own a minority stake of 42.5456% of IGM, and comprise only two of the six members of the IGM Board of Directors.

IGM is a Delaware limited liability company whose Limited Liability Company Agreement ("IGM Agreement") contains a Delaware choice of law clause. (Section 15.9). The plaintiffs' Complaint alleges that, under the IGM Agreement, the firing of the Editor supposedly required the unanimous approval of IGM's two-member Management Committee, one of whom is Katz, who opposes the Marimow firing. Plaintiffs seek extraordinary and indeed legally unprecedented relief, namely, judicial reinstatement of Marimow as Editor and also a declaration by the Court that Hall must be removed as Publisher.

However, as discussed below, plaintiffs' novel claims for relief find no support whatsoever in the IGM Agreement or under Delaware law. Plaintiffs' reliance on Section 5.2(a) of that Agreement is misplaced, because the last sentence of that provision (which was

misleadingly omitted from plaintiffs' purported quotation of Section 5.2(a) in paragraph 8 of their Complaint) provides as follows:

> **The authority of the Management Committee shall be confined to the business and operational aspects of the Company, and the members of the Management Committee shall have no authority with respect to editorial or journalistic policies and decisions of the Company and will not attempt to control or influence such policies and decisions.** (emphasis added).

Nor does plaintiffs' Complaint make any mention of the non-interference policy reiterated in Section 5.6 of the IGM Agreement:

> **Neither the Management Committee, the Board of Directors, the Community Board nor any Member, Manager or Officer shall attempt to directly or indirectly control or influence any of the editorial or journalistic policies and decisions of the Company.** (emphasis added).

The Editor is in charge of the newspaper's editorial department and makes editorial and journalistic decisions and policies on a daily basis. Thus, the decision to fire the Editor is a quintessential "editorial or journalistic" decision that Sections 5.2(a) and 5.6 of the IGM Agreement clearly place outside the purview of the IGM Management Committee. See Opinion Letter attached as Exhibit "B" to Preliminary Objections. Both at The Inquirer and throughout the newspaper industry, the firing of editorial staff, particularly the Editor, has historically been considered the Publisher's responsibility. Significantly, as discussed more fully below, when Marimow was previously fired as Editor of The Inquirer by the prior Publisher (Gregory Osberg) in October 2010 and earlier when he was fired as Editor of The Baltimore Sun by that newspaper's Publisher in January 2004, he repeatedly and publicly acknowledged in the press that the termination of an Editor is within the "absolute prerogative" of the Publisher.

The instant lawsuit is one of two suits relating to the firing of Marimow. On October 17, 2013, a derivative suit was filed in the Delaware Court of Chancery on IGM's behalf

by one of its Members, General American Holdings, Inc. (Exhibit "C" to Preliminary Objections). That derivative suit involves the same operative facts and legal issues as this case, and asks the Delaware court to declare, inter alia, that Hall was authorized under the IGM Agreement to fire Marimow, and that Hall is entitled to continue to act as The Inquirer's Publisher. Katz and his Intertrust entities are also named as defendants in the Delaware lawsuit, and General American Holdings alleges direct claims against them for breach of the IGM Agreement and breach of fiduciary duty.

Inasmuch as IGM is a Delaware limited liability company and its controlling Agreement provides for application of Delaware law, this Court should stay or dismiss this action in favor of the Delaware action under the internal affairs doctrine and/or the doctrine of forum non conveniens. Plaintiffs have expressly acknowledged in their Commerce Court Civil Cover Sheet that this case relates to the internal affairs or governance of IGM – in fact, they are seeking judicial authorization to terminate The Inquirer's Publisher and reinstate its Editor, the two most critically-important positions in a newspaper. Allowing this action to proceed at the same time as the Delaware action would cause duplication of effort and expenditure of resources by the respective courts and the parties, and would also raise the specter of possibly inconsistent rulings based on the exact same facts and legal issues.

Plaintiffs' Complaint is legally infirm in a number of other respects as well. In reality, it is a derivative suit, because the alleged harm was to IGM, **not** the plaintiffs, and relief is sought for the benefit of IGM, **not** the plaintiffs. Plaintiffs failed to make the required pre-suit demand on the Board or show that such demand would have been futile. The claim against Hall fails as a matter of law because he is not a Member of IGM or signatory to the IGM Agreement, and thus cannot be held liable for breach of that Agreement. Also, since the Intertrust entities

have brought this suit on the basis that their appointed representative to the two-person Management Committee, Lewis Katz, opposes the firing of Marimow, General American Holdings is an indispensable party in this declaratory judgment action because it appointed the other member of the Management Committee (George Norcross, III). The interests of General American Holdings will be affected by this suit just as much as the interests of the Intertrust entities are affected. Plaintiffs' failure to join General American Holdings as a defendant requires dismissal of the Complaint. See 42 Pa.Cons. Stat. § 7540(a). Finally, Lenfest, who is not a member of the Management Committee, does not claim any personal injury or seek any relief on his own behalf, so he lacks standing to pursue this case.

FACTUAL BACKGROUND

This lawsuit arises from the decision by Hall to terminate the employment of Marimow as Editor of The Inquirer because of his longstanding ineffective job performance, which entailed his stubborn and indeed often insubordinate refusal to follow directives or implement important editorial, journalistic and personnel changes that are required for The Inquirer to survive in the increasingly difficult newspaper industry. Hall, Associate Publisher Michael Lorenca and plaintiff Gerry Lenfest met with Marimow on July 16, 2013 to specifically warn him that a failure to improve his job performance would result in termination. His poor job performance persisted, resulting in his firing by Hall on October 7, 2013. Significantly, however, he continues to receive his salary and benefits under his employment agreement.

While Marimow himself has not claimed, nor could he claim, wrongful termination, Katz and Lenfest nevertheless filed this lawsuit in an effort to obtain truly unprecedented declaratory and injunctive relief, including a judicial declaration that the firing of Marimow was "null and void" (Complaint, ¶ 20); reinstatement of Marimow as Editor; and a declaration that Hall's employment as Publisher ended as of September 1, 2013.

The Complaint alleges that Hall's termination of Marimow's employment as Editor was improper under Section 5.2(a) of the IGM Agreement because it was not approved by Katz, who is one of the two members of IGM's Management Committee. Under Section 5.2(d), any action within the purview of the Management Committee requires approval by both members of the Committee.

The full text of Section 5.2(a) states as follows:

> (a) The day-to-day business and operations of the Company (which for purposes of ARTICLES 5 and 6 shall be deemed to include its Subsidiaries) shall be managed by, or under the direction of, a Management Committee (the "Management Committee"), which shall be appointed by the Managing Members or their Managing Member Designees as provided in Section 5.2(b). The Management Committee shall have the right, power and authority to make decisions with respect to all business and operational matters in the ordinary course of business and will oversee and advise the senior management of the Company regarding the performance and execution of the business and strategic plans. **The authority of the Management Committee shall be confined to the business and operational aspects of the Company, and the members of the Management Committee shall have no authority with respect to editorial or journalistic policies and decisions of the Company and will not attempt to control or influence such policies and decisions.** (emphasis added).

Remarkably, the purported quotations of Section 5.2(a) in the Complaint (¶ 8) and in the subsequently-filed Petition for Injunctive Relief (¶ 8) and accompanying Memorandum of Law (p. 3) filed by plaintiffs completely omit the all-important last sentence of Section 5.2(a), emphasized above, using an ellipsis in lieu of this critical sentence. Indeed, the plaintiffs make no mention of the non-interference limitation contained in the last sentence of Section 5.2(a) **anywhere** in their Complaint, Petition for Injunctive Relief or Memorandum of Law.

Nor do any of the papers filed by plaintiffs acknowledge the non-interference policy reiterated in Section 5.6 of the IGM Agreement, which is also of critical importance to the parties' internal governance dispute here:

> **Neither the Management Committee, the Board of Directors, the Community Board nor any Member, Manager or Officer shall attempt to directly or indirectly control or influence any of the editorial or journalistic policies and decisions of the Company.** (emphasis added)

As a result of repeated instances of Katz improperly interjecting himself into employment decisions relating to the editorial staff, Hall consulted with distinguished outside counsel Cozen O'Connor several months ago to determine the scope of the Publisher's authority with respect to hiring and firing of editorial staff, including the Editor. The Cozen opinion letter (attached to the Preliminary Objections as Exhibit "B") concluded as follows:

> In our opinion, it is likely that a court would interpret the Specified Provisions [Sections 5.2(a) and 5.6] in a manner which would restrict the Management Committee, the Board of Directors, the Community Board, and any Member, Manager or Officer from **involvement in the hiring or termination of employees who determine and make the journalistic and editorial policies and decisions of the Company or PMN in an attempt to directly or indirectly control or influence any of the editorial or journalistic policies or decisions of the Company or PMN.** We have been advised that: the hiring and termination of such employees has, since the Company and PMN were formed as limited liability companies last year, been made by the Publisher of The Philadelphia Inquirer, and that the Publisher is not a Member, Manager or Officer of the Company. (emphasis added).

As Editor, Marimow was in charge of the Editorial Department of The Inquirer, and he made editorial and journalistic decisions on a regular basis. Accordingly, his firing was a paradigmatic editorial and journalistic decision that was well within Hall's exclusive prerogative as Publisher and outside the carefully delineated authority of the Management Committee. See IGM Agreement, § § 5.2(a), 5.6. The firing of an Editor has historically been considered the

Publisher's responsibility, both at The Inquirer and throughout the newspaper industry. Indeed, when Marimow was previously fired as Editor of The Inquirer by the prior Publisher (Gregory Osberg) in October 2010 and earlier when he was fired as Editor of The Baltimore Sun by the Publisher of that newspaper in January 2004, he repeatedly and publicly acknowledged in the press that the termination of an Editor is within the "absolute prerogative" of the Publisher:

- "'The new CEO has the absolute prerogative to select an editor, and Greg has exercised his prerogative,' Marimow said in a brief telephone interview. 'It's a prerogative I understand and respect.'" Warner, Bob, *Inquirer editor steps down a day before new owners step in*, PHILLY.COM, Oct. 8, 2010, *available at* http://articles.philly.com/2010-10-08/news/24979925_1_inquirer-editor-william-k-marimow-new-owners.

- "'My feeling, honestly, is that [Osberg as Publisher] has the prerogative to replace me, and I said that at the time,' Marimow said. 'And he has the prerogative to rehire me.'" Davies, Dave, *Holy smokes: Bill Marimow returns to the Inquirer*, Apr. 4, 2012, *available at* http://www.newsworks.org/index.php/off-mic/item/36469-holy-smokes-bill-marimow-returns-to-the-inquirer.

- "'It's the publisher's prerogative to choose an editor whom the publisher wants to work with. In this case, the publisher exercised that prerogative, and I respect that,' said Marimow." Times Wire Reports, *Baltimore Sun Fires Award-Winning Editor*, L.A. TIMES, Jan. 7, 2004, *available at* http://articles.latimes.com/2004/jan/07/nation/na-briefs7.3.

- "Outgoing editor William Marimow of The Sun in Baltimore . . . would not comment on his firing, other than to say Publisher Denise Palmer had the right to hire whom she wished. 'I believe strongly that that is her prerogative,' he said." Strupp, Joe, *Marimow Plans to Stay in Newspaper Biz*, EDITOR & PUBLISHER, Jan. 8, 2004, *available at* http://www.editorandpublisher.com/PrintArticle/Marimow-Plans-to-Stay-in-Newspaper-Biz.

- "'It's the publisher's prerogative to have the editor that the publisher wants. In this case, the publisher has exercised her prerogative. I respect that,' said Marimow..." Atkinson, Bill and David Folkenflik, *Florida news executive chosen as top Sun editor*, THE BALTIMORE SUN, Jan. 7, 2004, *available at* http://articles.baltimoresun.com/2004-01-07/news/0401070210_1_marimow-sun-palmer.

Katz has repeatedly interfered in editorial and journalistic policies and decisions of IGM, in direct violation of Sections 5.2(a) and 5.6 of the IGM Agreement quoted above. The instant lawsuit represents the latest and most egregious manifestation of such improper

interference. The continued maintenance of this entirely groundless and highly publicized lawsuit has caused and will continue to cause significant reputational harm to IGM and The Inquirer.

In response to this lawsuit being filed against IGM, a majority of the Board of Directors called a Special Meeting of the Board for October 15, 2013. The Special Meeting proceeded on October 15, 2013 with five of the six directors participating initially, and four of them participating in the entire meeting. Katz sent an email just eight minutes before the scheduled start time of the Meeting seeking a one-week postponement, which was disapproved by a majority of the Board. At the Special Meeting, a majority of the Board approved the following actions:

- Formation of a Special Committee to (1) determine IGM's response to the instant lawsuit, and (2) appoint counsel to represent IGM in this suit.
- Formation of a Special Committee to (1) investigate whether Katz has attempted to control or influence the editorial or journalistic policies and decisions of The Philadelphia Inquirer, by among other things, filing this lawsuit, and (2) hire counsel for that purpose.
- Formation of a Special Committee to (1) investigate alleged conflicts of interest and breaches of fiduciary duty by Katz, and (2) hire counsel for that purpose.

On October 17, 2013, a derivative lawsuit was filed on behalf of IGM in the Delaware Court of Chancery by General American Holdings, whose principal is George E. Norcross, III (hereinafter referred to as "Norcross"). General American Holdings, Inc. v. Intertrust GCN, LP, et al., No. 9013 (Del. Court of Chancery) (Exhibit "C" to Preliminary Objections). Norcross holds a 26.1819% ownership interest in IGM and is one of the two members of the Management Committee along with Katz. The Delaware lawsuit also names Katz and his Intertrust entities as defendants.

The Delaware derivative lawsuit, like the instant lawsuit, relates to the propriety of the firing of Marimow by Hall under the IGM Agreement. It seeks declaratory relief, namely, a declaration by the Delaware Court of Chancery that Hall was authorized and empowered under the IGM Agreement to fire Marimow, as it was an editorial or journalistic decision that was outside the authority of the Management Committee under Sections 5.2(a) and 5.6 of the IGM Agreement. It also seeks a declaration by the court that Hall has been and continues to act as Publisher of The Inquirer. The Delaware suit also alleges direct claims against Katz and his Intertrust entities for breach of the IGM Agreement and breach of fiduciary duty.

ARGUMENT

A. Dismissal is Warranted Under the "Internal Affairs" Doctrine

Under the "internal affairs" doctrine, Pennsylvania courts have consistently held that disputes over the internal affairs and management of a foreign corporation governed by a foreign state's laws should be adjudicated in that state rather than Pennsylvania. Plaintiffs are seeking extraordinary relief: the termination of the Publisher and reinstatement of the Editor of The Inquirer, the two most critically-important positions in a newspaper. Thus, it is readily apparent that this lawsuit involves a dispute over the internal affairs and governance of IGM, which is a Delaware corporation whose governing Agreement provides for application of Delaware law.

Significantly, plaintiffs themselves have acknowledged that their Complaint relates to the internal affairs and governance of IGM, as they checked the following box in the Commerce Court Addendum to Civil Cover Sheet:

> x 1. **Actions relating to the internal affairs or governance,** dissolution or liquidation, **rights or obligations between or among owners (shareholders, partners, members),** or liability or indemnity of managers (officers, directors, managers, trustees, or members or partners functioning as managers) of

> business corporations, partnerships, limited partnerships, limited liability companies or partnerships, professional associations, business trusts, joint ventures or other business enterprises, including but not limited to any actions involving interpretation of the rights or obligations under the organic law (e.g., Pa. Business Corporation Law), articles of incorporation, by-laws or agreements governing such enterprises; (emphasis added).

The internal affairs doctrine is well-established in the law. For example, in the leading decision in Rogers v. Guaranty Trust Co. of N.Y., 288 U.S. 123, 130 (1933), the Supreme Court stated:

> It has long been settled doctrine that a court–state or federal–sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another state but will leave controversies as to such matters to the courts of the state of the domicile.

The internal affairs doctrine has also been applied for many decades in Pennsylvania. In Kahn v. American Cone & Pretzel Co., 74 A.2d 160, 161 (Pa. 1950), the Pennsylvania Supreme Court emphasized that "[i]t is well settled in this State that a court will not take jurisdiction for the purpose of regulating or interfering with the internal management or affairs of a foreign corporation." The "internal affairs" doctrine is applied "where the suit is predicated upon rights derived from some status within the corporate association, and where the suit is brought by or against persons in their capacities as shareholders, officers and directors . . . [or where] the internal affairs of a foreign corporation were inextricably involved." Plum v. Tampax, Inc., 160 A.2d 549, 551-52 (Pa. 1960).

Numerous Pennsylvania cases have applied the internal affairs doctrine and held that jurisdiction should be declined where, as here, the lawsuit seeks to regulate or interfere with the internal management or affairs of a foreign corporation. Significantly, the internal affairs

doctrine has been applied even in cases where the foreign corporation had offices or officers in Pennsylvania or the events at issue took place in Pennsylvania:

- Nat'l Baptist Convention U.S.A., Inc. v. Taylor, 166 A.2d 521 (Pa. 1961): The Court affirmed dismissal of counterclaims by a corporation organized under the laws of the District of Columbia alleging that the election of certain officers was invalid. Although the disputed officer election took place in Philadelphia, the Court applied the internal affairs doctrine, holding that a court "will not ordinarily interfere in controversies relating merely to the internal management of the affairs of the foreign corporation." Id. at 523. The Supreme Court emphasized that "[n]o great hardship should result from this conclusion since the courts of the District of Columbia are open." Id.

- Ski Roundtop, Inc. v. Hall, 401 A.2d 1203 (Pa. Super. Ct. 1979): Plaintiff was a Pennsylvania corporation and minority shareholder of Ski Yellowstone, Inc., a Montana corporation "with its principal executive offices in Pennsylvania." Id. at 1204. The other defendants were various officers and board members of Ski Yellowstone, Inc., all of whom were residents of Pennsylvania. Id. The lawsuit was a derivative and direct suit involving the Montana corporation's proposals for stock offerings and an alleged scheme involving misrepresentations concerning the offers. The Superior Court affirmed the trial court's ruling that the internal affairs doctrine applied because Ski Yellowstone was incorporated in Montana, notwithstanding the fact that its principal executive offices, officers and board members were all located in Pennsylvania.

- Tanzer v. Warner Co., 9 Pa. D. & C.3d 534 (Phila. C.P. Ct. 1978), aff'd, 263 Pa. Super. 600, 400 A.2d 626 (1978). This dispute arose from a merger of a Texas corporation and a Delaware corporation, both of which maintained their principal places of business in Philadelphia prior to the merger (one continued to maintain its principal place of business in Philadelphia after the merger). The plaintiffs were shareholders in the Texas corporation, and sued for an injunction rescinding the merger, or alternatively, for damages resulting from the merger. The court dismissed the action based on "the well-established principle that Pennsylvania courts will not interfere with the internal management of foreign corporations." Id. at 537. The court found "the rights on which plaintiffs base their suit are derived exclusively from the fact that plaintiffs are shareholders in defendant corporations and are suing directors of defendant corporations in their capacity as directors." Id. The court noted it would need to construe the Texas merger statute if it maintained jurisdiction, something Pennsylvania courts have declined to do. Id. at 538.

  Plaintiffs argued that the "internal affairs" doctrine should not apply because defendants owned property and were doing business in Pennsylvania. Id. at 539. The court rejected that argument, stating that "'[t]he fact that the corporate defendant's principal place of business and its visible tangible property are within our borders is immaterial' and does not bar the application of the 'internal affairs'

doctrine." Id. at 539 (quoting Kelly v. Brakenridge Brewing Co., 178 A. 670 (Pa. 1935)). The court stated that "in order to grant the relief [the court] would have had to look carefully into the affairs of the corporation to ascertain whether the action the directors had taken was for the best interest of all concerned. This is exactly the type of situation in which our courts have applied the doctrine and have refused to interfere." Id. at 541.

- Moore v. NAACP, 229 A.2d 447 (Pa. 1967): Plaintiff was the local Philadelphia chapter of the NAACP. It sued the national organization, which was incorporated under the laws of New York, to prevent it from establishing additional Philadelphia NAACP chapters. The trial court dismissed the action, ruling it would be inappropriate to exercise jurisdiction over the internal affairs of the foreign corporation. The Supreme Court affirmed the dismissal on the basis of the internal affairs doctrine, concluding that "the proposed act of the foreign corporation affects appellant solely in his capacity as a member of the organization, and he must seek relief of his grievance in the incorporating state." Id. at 479.

- Perilstein v. United Glass Corp., 213 F.R.D. 252 (E.D. Pa. 2003): Pennsylvania-based individual shareholders of a Georgia corporation brought an action to inspect corporate documents. The court held that "under longstanding Pennsylvania law," the internal affairs doctrine required dismissal of the case. Id. at 255 (citing Kahn v. Am. Cone & Pretzel Co., 74 A.2d 160, 163 (Pa. 1950)).

In light of the foregoing cases and the many other Pennsylvania decisions cited therein which have repeatedly and consistently applied the internal affairs doctrine, Hall respectfully submits that this Court should dismiss this case in favor of the pending action in Delaware, which is IGM's state of incorporation and the jurisdiction whose laws are controlling in this internal governance dispute.

B. This Action Should be Stayed or Dismissed in Favor of The Delaware Action on The Basis of Forum Non Conveniens

In addition to the internal affairs doctrine, another closely related basis for a stay or dismissal of this case in favor of the pending Delaware Court of Chancery action is the doctrine of forum non conveniens.

Under Pennsylvania law, "[w]hether a trial court should exercise jurisdiction over a declaratory judgment action is a matter of sound judicial discretion." Consol. Coal Co. v.

White, 875 A.2d 318, 325 (Pa. Super. 2005). Pennsylvania law provides that "[w]hen a tribunal finds in the interest of substantial justice the matter [before it] should be heard in another forum, the tribunal may stay or dismiss the matter in whole or in part on any conditions that may be just." 42 Pa. Cons. Stat. § 5322(e); see also 42 Pa. Cons. Stat. § 323 (Pennsylvania courts have the general power to enter "orders of court as the interest of justice or the business of the court may require").

This Court should stay this case, if not outright dismiss it, in favor of the pending Delaware Court of Chancery action, which involves the exact same operative facts and legal issues. As discussed above, Delaware is the only proper forum to resolve the parties' disputes concerning the internal governance and management of IGM, a Delaware LLC whose controlling Agreement specifies the application of Delaware law. Importantly, not only is IGM a Delaware entity, so too are plaintiffs Intertrust GCN, LP (a Delaware limited partnership) and Intertrust GCN GP, LLC (a Delaware limited liability company), which also both have a Delaware business address (see caption of Complaint).[1]

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[1] In Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981), the Court discussed why, under a forum non conveniens analysis, the "strong presumption in favor of the plaintiff's choice of forum... applies with less force when the plaintiff or real parties in interest are foreign." It observed: "In Koster [v. Lumbermens Mut. Cas. Co.], the Court indicated that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. 330 U.S. at 524. When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference." Id. at 255-56. Accord Bogollagama v. Equifax Information Servs., LLC, No. 09-1201, 2009 WL 4257910 at *2 (E.D. Pa. Nov. 30, 2009) ("[W]hen the plaintiff is not a resident of the chosen forum, he must make a strong showing of convenience in order for his choice to be given deference.") (quoting Gunder v. CSX Transp., Civ. A. No. 08-6029, 2009 WL 2004377 at *2 (E.D. Pa. July 9, 2009) (citing Windt v. Quest Commc'ns Int'l, Inc., 529 F.3d 183, 190 (3d Cir. 2008)).

Allowing this action to proceed at the same time as the Delaware Court of Chancery action would cause duplication of effort and expenditure of resources by the respective courts and the parties. It would also raise the possibility of inconsistent rulings involving the exact same operative facts and legal issues. Under similar circumstances, courts have repeatedly applied the doctrine of forum non conveniens, stressing the desirability of avoiding piecemeal litigation and deferring to the lawsuit in the state where the subject corporation is incorporated. See, e.g., Sturman v. Singer, 213 A.D.2d 324, 623 N.Y.S.2d 883, 884 (N.Y. App. Div. 1995):

> Dismissal on the ground of forum non conveniens was not an improvident exercise of discretion in this case. Delaware, the State of incorporation, has a paramount interest . . . .
>
> * * *
>
> Applying the traditional forum non conveniens analysis . . . we conclude that the New York court would be burdened with the task of deciding a dispute with the knowledge that the State of incorporation could decide quite differently, the moving defendants would be burdened with defending in two forums, risking inconsistent decisions and a possible State-by-State evaluation of their actions, and Delaware is an adequate forum . . . .

Accord Lowenschuss v. Resorts Int'l, 1989 U.S. Dist. LEXIS 7407 at *24-30 (E.D. Pa. June 29, 1989), aff'd, 947 F.2d 936 (3d Cir. 1991) (deferring to pending Delaware action because case involved internal affairs of a Delaware corporation and it was "desirable to avoid piecemeal litigation" and "inconsistent adjudications," and Delaware law was controlling); Bushansky v. Armacost, 2012 U.S. Dist. LEXIS 112315 at *13, *21 (N.D. Cal. Aug. 9, 2012) (even though Chevron has its headquarters in California, the California court stayed derivative action in favor of similar action in Delaware to avoid "duplicative and piecemeal litigation"; "Defendant is a Delaware corporation, there is a lawsuit already underway in Delaware, and judges in Delaware are more familiar with Delaware state law than judges in California. Given the high likelihood

that this entire case is governed by Delaware law, there is wisdom in letting Delaware judges decide these issues"); Hart v. General Motors Corp., 129 A.D.2d 179, 517 N.Y.S.2d 490, 494 (N.Y. App. Div. 1987) ("Given Delaware's paramount interest in determining whether a Delaware corporation properly purchased securities from a group of its shareholders, including one of its directors, the pendency of virtually identical actions in that jurisdiction and the need for uniformity in the application of the pertinent law to this controversy, the court erred in denying the motion to dismiss on the ground of forum non conveniens. A court may dismiss 'where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere.'"); Mantei v. Creole Petroleum Corp., 61 A.D.2d 910, 402 N.Y.S.2d 822, 823 (N.Y. App. Div. 1978) ("Whether considered under the rubric of 'internal affairs of a foreign corporation' or 'forum non conveniens,' we think that the action should be pursued, if at all, in the courts of the State of Delaware rather than New York. Accordingly, the dismissal of the complaint was proper.").

Accordingly, the Court should stay or dismiss this action under the doctrine of forum non conveniens in favor of the pending Delaware Court of Chancery action.[2]

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[2] The mere fact that this action was filed a week before the Delaware action is not significant. Courts have held that "[e]xceptions to the first-filed rule are not rare, and are made when justice or expediency requires, as in any issue of choice of forum." Hunt Mfg. Co. v. Fiskars Oy AB, 1997 U.S. Dist. LEXIS 15457 at *7 (E.D. Pa. Oct. 2, 1997). "Thus, the trial court's discretion tempers the preference for the first-filed suit, when such preference should yield to the forum in which all interests are best served." Id. Moreover, "[t]he importance of the earlier date of filing is diminished where, as here, the competing actions are filed within a short period of time of each other." Recotan Corp. v. Allsop, Inc., 999 F.Supp. 574, 577 (S.D.N.Y. 1998). The internal affairs doctrine trumps the first-filed rule, particularly inasmuch as the cases were filed within just a week of one another and are both still in their incipient stage.

C. This is, in Reality, a Derivative Suit, And Plaintiffs Failed to Make the Required Pre-Suit Demand on the Board

Although not labeled as such, the Complaint is, in reality, a derivative suit. In Tooley v. Donaldson, Lufkin & Jenrette, 845 A.2d 1031, 1035 (Del. 2004), the Delaware Supreme Court stressed that a court must "independently examine the nature of the wrong alleged and any potential relief" to determine if the action is direct or derivative, and "Plaintiffs' classification of the suit is not binding." The Court explained that a determination of whether an action is direct or derivative "must be based solely on the following questions: Who suffered the alleged harm . . . and who would receive the benefit of the recovery or other remedy?" Id. at 1035. In other words, "a court should look to the nature of the wrong and to whom the relief should go." Id. at 1039. A suit is direct, rather than derivative, only if the stockholder's claimed injury is "independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." Id. See also In re Tyson Foods, Inc., 919 A.2d 563, 601-02 (Del. Ch. 2007) (rejecting shareholder's argument that claim based on corporation's lack of disclosure in a proxy statement was direct, rather than derivative, because plaintiff did not demonstrate individual harm, but instead only harm to the corporation); In re J.P. Morgan Chase & Co. Shareholder Litig., 906 A.2d 808, 817-18 (Del. Ch. 2005) (rejecting shareholder argument that a claim challenging the purchase price of stock in a merger was a direct claim, because the resulting harm was to the entire corporation, not the individuals).

The fact that plaintiffs have sued IGM is, in and of itself, compelling evidence that this is a derivative suit. Moreover, not only have the plaintiffs sued IGM, the Complaint and Petition for Injunctive Relief also make it pellucidly clear that the alleged harm is to IGM, **not** to the plaintiffs individually, and relief is sought solely on behalf of IGM, **not** the plaintiffs

themselves. See, e.g., Plaintiffs' Memo. of Law at p. 9 (alleged wrongful conduct "will continue to undermine and irreparably harm the orderly and professional operation of IGM"); id. (alleged wrongful actions "do grave violence to the integrity of the newspaper and the chain-of-command that governs IGM"); id. at 10 ("the requested injunctive relief will do nothing more than require IGM to abide by its governing Agreement, enabling the Management Committee to make the decisions regarding the day-to-day business operations as set forth in the Agreement.").

Applying the analysis set forth in Tooley, it is clear that plaintiffs' claim is derivative, not direct. Under Delaware law, a prerequisite to the filing of a derivative suit is a pre-suit demand on the Board or a showing that such demand would be futile. Ryan v. Gifford, 918 A.2d 341, 352 (Del. Ch. 2007); Richelson v. Yost, 738 F. Supp. 2d 589, 596 (E.D. Pa. 2010). Plaintiffs did not make the required pre-suit demand or showing of futility, and therefore the Complaint should be dismissed.

D. The Complaint Fails to State a Claim Against Hall

Hall is not a Member of IGM, nor is he a party to the IGM Agreement. Accordingly, he cannot be sued for any alleged breach of that Agreement, including the alleged violation of Section 5.2(a) that is the gravamen of this lawsuit. See, e.g., American Legacy Found. v. Lorillard Tobacco Co., 831 A.2d 335, 343 (Del. Ch. 2003) ("There is no doubt that a fundamental principle of contract law provides that only parties to a contract are bound by that contract."); Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872, 886 n. 29 (Del. Ch. 2009) (Plaintiff brought action seeking, inter alia, a declaration that he was entitled to certain payments under an LLC agreement to which he was a party, and that his formation of an investment fund did not violate the terms of the agreement. Three defendants moved to dismiss the declaratory judgment claims because they were not parties to the LLC agreement or members of the LLC. The court agreed and dismissed the declaratory judgment claims as to these defendants on those grounds);

Electron Engergy Corp. v. Short, 597 A.2d 175, 177 (Pa. Super. Ct. 1991) ("It is fundamental contract law that one cannot be liable for a breach of contract unless one is a party to that contract.").

Moreover, plaintiffs' audacious request for a declaration by this Court that Hall's employment as Publisher ceased as of September 1, 2013 constitutes a manifestly improper attempt to circumvent the power vested in the Board under the IGM Agreement. Section 5.3(e)(v) of the IGM Agreement expressly provides that the Board "shall have the right, power, and authority to make all decisions affecting the business and affairs of the Company, including, but not limited to... **hiring or termination of the Publisher.**" (emphasis added). Plaintiffs have not alleged, nor can they allege, that the Board has voted to terminate Hall's employment as Publisher. In fact, plaintiffs constitute only two of the six members of the IGM Board.

Accordingly, the claims against Hall are deficient as a matter of law and should be dismissed.

E. The Complaint Fails to Join An Indispensable Party

This case is governed by the Pennsylvania Declaratory Judgment Act, which provides that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim **any interest which would be affected by the declaration.**" 42 Pa. Cons. Stat. § 7540(a) (emphasis added). Satisfaction of Section 7540(a) in declaratory judgment actions is a jurisdictional prerequisite. Bolus v. United Penn Bank, 520 A.2d 433, 435 (Pa. Super. Ct. 1987) (citing Vale Chemical Co. v. Hartford Accident & Indem. Co., 516 A.2d 684 (Pa. 1986)). "Only in cases where the interest of the non-joined party is indirect has a declaratory judgment action been permitted to proceed without that party's participation." Bolus, 520 A.2d at 436. Moreover, "[t]he party seeking a declaratory judgment has the burden of proving that all interested parties have been made parties." Univ. Mech. & Eng'g Contractors Inc. v. Ins. Co. of

N. Am., 2002 WL 857105 (Phila. C.P. Ct. May 1, 2002) (citing Moraine Valley Farms, Inc. v. Connoquenessing Woodlands Club, 442 A.2d 767, 769 (Pa. Super. Ct. 1982)).

The Complaint alleges that Management Committee approval was required to fire Marimow, and that Katz is Intertrust's designated representative on that two-person Committee. (Complaint, ¶ 9). The other member of the Management Committee is Norcross, who is the designee of General American Holdings. To the extent that Intertrust's interests are affected by the actions at issue and the adjudication of this lawsuit by the Court, so too are the interests of General American Holdings equally affected. Since a judicial declaration as to the powers of the Management Committee vis-à-vis the termination of Marimow will affect the interests of **both** Intertrust and General American Holdings, the latter is an indispensable party in this lawsuit. 42 Pa.Cons. Stat. § 7540(a).

In an effort to gain a tactical advantage, plaintiffs sued IGM rather than General American Holdings, and have subsequently sought to block IGM from taking action to defend itself in this case. See Delaware Complaint at ¶ ¶ 39-49 and Exhibit "H" to Delaware Complaint. However, since General American Holdings is an indispensable party, plaintiffs' failure to name it as a defendant compels dismissal of their Complaint. See, e.g., Moraine Valley Farms, 442 A.2d at 769-70 and n. 2 (lot owners in a non-profit resort club sought a declaratory judgment that the by-laws of the club were invalid. Trial court dismissed for failure to join as parties the other members of the club. The Superior Court, citing Section 7540, affirmed dismissal based on failure to join indispensable parties).

F. Lenfest Lacks Standing to Pursue this Action

The Complaint turns on the allegation that the approval of both members of the Management Committee (Katz and Norcross) was supposedly needed for Marimow to be fired as Editor. Although Katz is a member of the Management Committee, Lenfest is not. Nor has

Lenfest alleged any direct injury to his personal interests, and he does not seek any relief for himself. Accordingly, he lacks standing to maintain this lawsuit.

CONCLUSION

For the reasons set forth above and in the Preliminary Objections, Defendant Robert J. Hall respectfully requests that the Court sustain his Preliminary Objections to the Complaint and dismiss it with prejudice.

Respectfully submitted,

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