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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.	:	

DEFENDANT ROBERT J. HALL'S PRELIMINARY OBJECTIONS TO COMPLAINT

Defendant Robert J. Hall ("Hall"), by his undersigned attorneys, hereby submits the following Preliminary Objections to the Complaint pursuant to Pa.R.Civ.P. 1028. (A copy of the Complaint is attached hereto as Exhibit "A").[1]

Preliminary Statement

1. The instant lawsuit involves a dispute over the internal affairs and governance of defendant Interstate General Media, LLC ("IGM"), a Delaware limited liability

[1] In order to avoid duplication, the copy of the Complaint attached hereto does not include the 50-page Limited Liability Company Agreement. Instead, that Agreement is attached hereto as part of Exhibit "C."

company governed by Delaware law. IGM is the owner of The Philadelphia Inquirer ("The Inquirer"), Philadelphia Daily News, and Philly.com, among other assets. The Complaint was brought by two of the six Members of IGM: 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"), and H.F. "Gerry" Lenfest ("Lenfest"). Katz and Lenfest collectively own a minority stake of 42.5456% of IGM. Katz and Lenfest also comprise only two of the six members of the IGM Board of Directors.

2. IGM is a Delaware limited liability company formed in March 2012. It is governed by a Limited Liability Company Agreement dated as of March 30, 2012 (the "IGM Agreement"), which is attached to plaintiffs' Complaint. The IGM Agreement contains a Delaware choice of law clause. (Section 15.9).

3. Defendant Hall has been the Publisher of The Inquirer since May 1, 2012. He is not a Member of IGM, not a signatory to the IGM Agreement, nor is he a member of IGM's Board of Directors.

4. The lawsuit arises from the decision by Hall to terminate the employment of William Marimow as Editor of The Inquirer on October 7, 2013 because of Marimow's longstanding ineffective job performance, which entailed his stubborn and indeed often insubordinate refusal to follow directives or implement much-needed editorial, journalistic and personnel changes at The Inquirer, resulting in a significant decline in circulation and morale problems in the newsroom during his second troubled tenure as The Inquirer's Editor. Hall, Associate Publisher Michael Lorenca and Lenfest met with Marimow on July 16, 2013 to specifically warn him that a failure to improve his job performance would result in termination, but unfortunately his deficiencies and poor job performance persisted, resulting in his

termination by Hall three months later, on October 7, 2013. However, Marimow is still receiving salary and benefits under his employment agreement.

5. Even though Marimow has not claimed, nor could he claim, wrongful termination, Katz and Lenfest nevertheless filed this lawsuit in an effort to obtain wholly 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.

6. 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 to be taken by the Management Committee requires approval by both members of the Committee.

7. 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).

Significantly, 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 last sentence of Section 5.2(a) **anywhere** in their Complaint, Petition for Injunctive Relief or Memorandum of Law.

8. Nor do any of the papers filed by plaintiffs make any mention whatsoever of 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).

9. 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 hereto 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)

10. As Editor, Marimow was in charge of the Editorial Department of The Inquirer. He made editorial and journalistic decisions and policies on a daily basis. Accordingly, his firing was a paradigmatic editorial and journalistic decision that was within Hall's exclusive prerogative as Publisher, and outside the carefully delineated authority of the Management Committee. IGM Agreement, § § 5.2(a), 5.6. Indeed, when Marimow was previously fired as Editor by the prior Publisher of The Inquirer (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. 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.

11. 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. This entirely groundless lawsuit represents the latest and most egregious manifestation of such improper interference, and the extensive publicity this lawsuit has engendered is causing significant reputational harm to IGM and The Inquirer.

12. 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.

13. 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.

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

15. The Delaware derivative suit names IGM as a nominal defendant, and also names Katz and his two 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, inter alia, declaratory relief, namely, a declaration by the court that Hall was authorized and empowered under the IGM Agreement to fire Marimow because it was an editorial or journalistic decision that did not require Management Committee approval. It also seeks a declaration that Hall has been and continues to be the Publisher of The Inquirer. In addition, the Complaint in Delaware asserts direct claims against Katz and his Intertrust entities for breach of the IGM Agreement and breach of fiduciary duty.

A. **Demurrer– Internal Affairs Doctrine**

16. 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.

17. Plaintiffs are seeking the termination of the Publisher and reinstatement of the former Editor of The Inquirer, the two most critically-important positions in a newspaper. Thus, it cannot be gainsaid 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.

18. 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).

19. The "internal affairs" doctrine is well established in the law. For example, in the leading decision in Rogers v. Guaranty Trust Co. of New York, 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.

20. Similarly, 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).

21. Numerous Pennsylvania cases have applied the internal affairs doctrine and consistently 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 doctrine has been applied even when the foreign corporation has offices or officers in Pennsylvania and where the events at issue occurred in Pennsylvania. See, e.g., Nat'l Baptist Convention U.S.A. Inc. v. Taylor, 166 A.2d 521 (Pa. 1961); Moore v. NAACP, 229 A.2d 447 (Pa. 1967); Ski Roundtop Inc. v. Hall, 401 A.2d 1203 (Pa. Super. Ct. 1979); Tanzer v. Warner Co., 9 D. & C.3d 534 (Phila. C.P. Ct. 1978), aff'd, 263 Pa. Super. 600, 400 A.2d 626 (1978); Hopkins v. Great Western Fuse Co., 22 A.2d 717 (Pa. 1941); and Perilstein v. United Glass Corp., 213 F.R.D. 252 (E.D. Pa. 2003).

B. **Improper Venue – Forum Non Conveniens**

22. 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. Ct. 2005).

23. 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").

24. This Court should stay this case, if not outright dismiss it, in favor of the pending Delaware Court of Chancery action involving the exact same operative facts and legal issues.

25. As shown above, Delaware is the proper forum to resolve issues concerning the internal governance 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).

26. 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 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 International, 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 headquarters in 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.'" (citation omitted)).

C. Demurrer – Plaintiffs' Failure to Make Demand on Board Before Filing Derivative Suit

27. 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."

28. In Tooley, the Delaware Supreme Court analyzed the differences between direct and derivative actions. The Court explained that "[t]he analysis 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?" 845 A.2d 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).

29. 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 (rather than the majority Members), 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.").

30. 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 and n. 7 (E.D. Pa. 2010).

31. Plaintiffs' claim is derivative, not direct, and therefore they were required to make a pre-suit demand on the Board or show that such demand would be futile. They failed to do so, and therefore the Complaint should be dismissed.

D. Demurrer – Failure to State a Claim Against Hall

32. Hall is not a Member of IGM or a member of its Board, 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 Energy 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.").

33. Moreover, plaintiffs' 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 by the IGM Agreement. Under Section 5.3(e)(v) of the IGM Agreement, 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).

34. 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. Demurrer – Failure to Join An Indispensable Party

35. 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).

36. 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 Chem. 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.

37. "The 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)).

38. 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). Plaintiffs' failure to include General American Holdings as a defendant compels dismissal of the 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 absence of indispensable parties).

F. Demurrer – Lenfest Lacks Standing to Pursue This Action

39. The Complaint turns on the allegation that the approval of both members of the Management Committee (Katz and Norcross) was needed for Marimow to be fired as Editor.

40. Although Katz is a member of the Management Committee, Lenfest is not.

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

WHEREFORE, Defendant Robert J. Hall respectfully requests that the Court sustain the foregoing Preliminary Objections to the Complaint and dismiss it with prejudice.

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