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CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
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IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

BENJAMIN MURPHY, WILLIAM DULL, LINDSAY BLANKENSHIP, ALEXANDER BLANKENSHIP, GAIL WILSON, LOUIE WILSON, individually and derivatively on behalf of INNOMED ONE, LLC, and INNOMED FIVE, LLC, **Plaintiffs,** **v.** **PETER FALKNER, CARLA FALKNER, and INNOVATIVE MEDICINE PARTNERS, LLC,** **Defendants.**	**CIVIL ACTION NO: CV-2022-901720**

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendants Peter Falkner, Carla Falkner, and Innovative Medicine Partners, LLC, ("IMP"), respectfully submit this Brief in support of their Motion to Dismiss Plaintiff's Complaint. In support thereof, Defendants state as follows:

I. INTRODUCTION

This is a lawsuit brought by six shareholders individually and derivatively on behalf of two IMP subsidiaries, InnoMed One, LLC and InnoMed Five, LLC. The defendants are Peter Falkner, Carla Falkner, and Innovative Medicine Partners, LLC. Plaintiffs' claims are premised on numerous alleged acts of fraud, deceit, and misuse/waste of corporate assets by Defendants. Plaintiffs accuse Defendants of conducting a "scheme" to lure and ultimately defraud investors by lying or suppressing their educational backgrounds, prior bankruptcies, IMP's litigation history, outstanding payables and whether/how much the founders were paying themselves.

Plaintiffs further accuse the Defendants of diverting investor money from the InnoMeds and IMP to themselves and using said funds for their own personal enrichment.

Plaintiffs' Complaint should be dismissed for several reasons. First and foremost, this is the second such derivative action that has been filed against these same Defendants in violation of the Alabama Code § 6-5-440. A separate derivative action was filed by other shareholders and is currently pending before the Honorable Michael Youngpeter.[1] Second, pursuant to Rule 12(b)(7) of the Alabama Rules of Civil Procedure for failure to join necessary parties Kirby Plessala, M.D., and Deneen Plessala, M.D. ("the Plessalas"). The Plessalas are the other two co-owners of IMP with the Falkners and have played just as large a role in the company as the Falkners. As 50% owners, Plessalas have joint authority with the Falkners over the business decisions of IMP (and thus the InnoMeds). Additionally, Kirby Plessala is the co-inventor of one of the medical devices InnoMeds One and Five were created to commercialize. The delay or potential failure of IMP and the InnoMeds commercialize Dr. Plessala's invention is as much the fault of the Plessalas (if not more so as discussed below) than the Falkners. Despite this, Plaintiffs have omitted the Plessalas as defendants in this litigation. The Plessalas are necessary parties without whom this litigation cannot proceed.

Finally, Plaintiffs' Complaint should be dismissed for a combination of the following: the individual Defendants are immune because of an exculpation clause, failure to state a claim upon which relief can be granted as Plaintiffs' direct claims are not allowed, failure to plead alleged fraudulent conduct with requisite particularity, statute of limitations, failure to properly plead futility and pleading a count of conspiracy barred by the intracorporate conspiracy doctrine.

[1] Case number CV-2022-901579 is also a derivate shareholder action that virtually mirrors the allegations in this case.

II. FACTS PLED IN COMPLAINT[2]

1. Plaintiffs allege that they have, collectively, invested more than $2 million in InnoMed One, LLC and InnoMed Five, LLC, both subsidiaries of Innovative Medicine Partners. Plaintiffs also state that IMP has raised more than $10 million in funds from over one hundred investors in nine states. See Complaint, DOC #2, Intro., p. 1.[3]

2. IMP was "created to own and manage subsidiary companies that create and commercialize medical devices and medical innovations." Id., ¶ 9.

3. Defendants Peter and Carla Falkner are 50% equity owners of IMP. Id., ¶ 10.

4. Kirby Plessala and Deneen Plessala ("the Plessalas") are co-founders and 50% equity owners of IMP. Id., ¶11.

5. "The Falkners and the Plessalas are the only members of IMP and IMP is a member-manager of the IMP subsidiaries." Id., ¶12.

6. It is undisputed that InnoMed One was formed on January 3, 2017, and InnoMed Five was formed on February 19, 2019. Id., ¶16.

7. InnoMed One was created to commercialize SemSecure IUI Delivery System ("SemSecure") and InnoMed Five was created primarily to develop intellectual property related to the SemSecure fertility device. Id., ¶¶17-18.

III. LEGAL ARGUMENT

a. PLAINTIFFS' CASE IS BARRED BY ALABAMA CODE § 6-5-440.

Plaintiffs' case is barred by section 6-5-440 of the Alabama Code, which prohibits simultaneous actions for the same cause against the same party. Plaintiffs' have brought a

[2] Defendants do not admit the truth of the factual allegations contained in the Complaint but instead cite them solely for the purpose of its Motion to Dismiss and Brief in Support of the same.

[3] The other InnoMed entities are not at issue in this a case as they involved different medical devices and systems. It appears this was added just to inflate numbers.

derivative action against Peter Falkner, Carla Falkner, and Innovative Medicine Partners, LLC. This lawsuit mirrors a separate derivative action brought by Kirby and Deneen Plessala against the Falkners in this same Court on September 8, 2022 ("Plessala suit").[4] The Plessala suit also accuses the Falkners of converting investor funds to their personal use, misrepresenting their educational and business backgrounds, concealing prior personal bankruptcies and paying themselves exorbitant salaries.

"It is uniformly held that where two or more courts have concurrent jurisdiction, the one which first takes cognizance of a cause has the exclusive right to entertain and exercise such jurisdiction, to the final determination of the action and the enforcement of its judgments or decrees." Ex parte Burch, 236 Ala. 662, 665 (1938); see also Ex parte State Farm Fire & Cas. Co., 300 So. 3d 562, 565 (Ala. 2020) ("The purpose of § 6-5-440, by its own terms, is procedural in nature: No plaintiff is entitled to prosecute two actions in the courts of this state at the same time for the same cause and against the same party. The purpose of this rule is to avoid multiplicity of suits and vexatious litigation." (citation and internal quotation marks omitted).

"The application of § 6-5-440 is guided by whether a judgment in one suit would be res judicata of the other." Id. The elements of *res judicata* are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both actions. Greene v. Jefferson Cnty. Comm'n, 13 So. 3d 901, 910 (Ala. 2008) (quotation marks omitted). The instant case and the Plessala suit meet all four requirements. First, a judgment on the merits in favor of the shareholders in the Plessala derivative suit would produce a substantially identical outcome to that being sought by Plaintiffs in this case (removal of the Falkners from their positions, repayment of allegedly diverted investor funds, forfeiture of interest in LLCs, etc.). Second, a judgment rendered in the

[4] Kirby Plessala, et al. v. Peter Falkner, et al., 02-CV-2022-901579.00

Plessala suit would be rendered by a court of competent jurisdiction (this Court). Third, this lawsuit and the Plessala suit involve substantially identical parties (shareholders, IMP, InnoMed One, InnoMed Five and the Falkners). Fourth, this lawsuit and the Plessala suit present the same causes of action (derivative actions for fraud, breach of duty of good faith and fair dealing, breach of fiduciary duty, conversion and conspiracy, etc.).

Based on these facts, this entire case must be dismissed as it was the second filed action.

b. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO JOIN NECESSARY PARTIES.

Plaintiffs' Complaint should also be dismissed for failure to join necessary parties Drs. Kirby and Deneen Plessala. The Plessalas are co-owners of IMP with the Falkners, with each of the four members owning 25% of the LLC. They actively solicited investors, had access to/control over all company bank accounts, received compensation and payables, approved and important company decisions and, perhaps most importantly executed documents which called for founder payments that Plaintiffs now state was impermissible.

"Rule 19, Ala.R.Civ.P., provides for joinder of persons needed for just adjudication. Its purposes include the promotion of judicial efficiency and the final determination of litigation by including all parties directly interested in the controversy." Byrd Companies, Inc. v. Smith, 591 So. 2d 844, 846 (Ala. 1991).

i. Drs. Kirby and Deneen Plessala are Necessary Parties

Courts considering a Rule 12(b)(7) motion must look to Rule 19, which sets forth "a two-step process for the trial court to follow in determining whether a party is necessary or indispensable." Ex parte Advanced Disposal, 280 So. 3d at 360 (quoting Holland v. City of Alabaster, 566 So.2d 224, 226 (Ala. 1990)).

Under Rule 19's two-step process, the trial court must first determine whether the nonparty in question is one who should be joined if feasible. Rule 19(a) provides, in relevant part, that:

> [a] person who is subject to jurisdiction of the court shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Ala. R. Civ. P. 19.

The Plessalas meet the criteria for joinder as necessary parties under Rule 19(a). Complete relief cannot be accorded to either party in the absence of the Plessalas. Plaintiffs' claims center on the potential failure of IMP and the InnoMeds to bring to market certain medical devices, including the SemSecure insemination product. If liability is to be had, the Plessalas bear responsibility for this failure as co-owners of IMP and the parties that was responsible for certain studies for SemSecure. The Plessalas' failure to deliver on their responsibilities to secure FDA approval for SemSecure is one of the main reasons IMP and the InnoMeds have yet to reach commercialization with any of their products. Dr. Kirby Plessala and his practice Mobile Obstetrics & Gynecology, P.C., was responsible for performing an FDA approved efficacy study. Instead, Dr. Plessala and his practice failed to obtain the required approvals and consents to comply with FDA guidelines, therefore delaying the ultimate approval of the SemSecure product among others. Moreover, the Plessalas actively solicited investors and utilized the same investor materials Plaintiffs now allege contained lies and omissions

concerning the status of commercialization, founder disbursements, timelines, founder backgrounds, etc.

ii. Plaintiffs Have Failed to Plead Reasons for Nonjoinder

"A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)–(2) hereof who are not joined, and the reasons why they are not joined." Ala. R. Civ. P. 19(c). Plaintiffs' Complaint does not identify why the Plessalas were not joined and fails to even reference the Plessalas beyond a cursory mention of them being co-owners of IMP with the Falkners. The decisions at issue required three of the four members of IMP to agree to the corporate action. Deneen Plessala was responsible for certifying R&D and management costs on an annual basis which confirmed the amounts each founds was receiving in annual fees and compensation. Because of this and the reasons stated above, this action must be dismissed for failure to join necessary parties. Ala. R. Civ. P. 12(b)(7).

c. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

To state a claim upon which relief can be granted, Plaintiff is required to plead a "short and plain statement of the claim showing [it] is entitled to relief." Ala. R. Civ. P. 8(a). To that end, to survive a Motion to Dismiss for failure to state a claim, Plaintiff must plead facts which, if assumed to be true, state a claim under a cognizable theory of law. See Dempsey v. Denman, 442 So. 2d 63 (Ala. 1983); American Suzuki Motor Corp. v. Burns, 81 So. 3d 320, 324 (Ala. 2011) ("a ruling on a motion to dismiss . . . is an adjudication as to whether a cognizable legal claim has been stated") (internal quotations omitted). Plaintiffs have failed to plead facts in the Complaint sufficient to state a claim upon which relief can be granted against the Defendants, and the claims against Defendants should be dismissed as outlined below.

i. Peter and Carla Falkner must be Dismissed as they are Exculpated from Certain Claims by the Operating Agreements for InnoMed One, InnoMed Five, and IMP

The LLC's founding documents exculpate the Falkners from liability for the alleged errors and omissions referenced in the Complaint. The Amended and Restated Operating Agreement for IMP contains exculpatory language:

> *Section 6.11 Exculpation*
>
> No Member, Manager or Officer of the Company shall be liable for any honest mistake in judgment or for any action or the omission to take any action in good faith or for any loss due to any of the foregoing, **or due to the negligence, dishonesty, fraud or bad faith of such Member, Manager or** Officer.

(*See* Amended and Restate Operating Agreement for IMP, p. ##) (emphasis added).[5]

Operating agreements of limited liability companies serve as contracts that set forth the rights, duties and relationships of the parties to the agreement. Harbison v. Strickland, 900 So. 2d 385, 391 (Ala. 2004). As such, all claims other than a claim of an implied contract of good faith and fair dealing must be dismissed. Ala. Code § 10A-5A-1.08(b)(1).

Based on the Exculpatory clause, Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 17, 18, and 19 of the Complaint must be dismissed against the Falkners as they are for claims against the Falkners for actions other than good faith and fair dealing.

ii. Plaintiffs' Direct Actions Must be Dismissed

Plaintiffs have pled a multitude of both derivative and direct actions against Defendants, including, but not limited to fraud, fraudulent misrepresentation of material facts, fraudulent suppression of material facts, deceit and fraudulent deceit, etc. All of Plaintiffs' direct claims center around a core set of allegations, namely that the Falkners as managers of IMP:

[5] The Court may consider the Exhibits attached hereto without converting the present Motion to Dismiss into a motion for summary judgment, as the documents are referred to in Plaintiff's Complaint and are central to its claims. See Donoghue v. Am. Nat. Ins. Co., 838 So.2d 1032, 1035 (Ala. 2002).").

misrepresented educational backgrounds, IMP's payment structure, lied about distributing money to the founders, misrepresented the timeline for IMP commercialization, and concealed and litigation history of IMP. Plaintiffs allege that some of the misrepresentations were made in investor pitch materials provided to investors. In other words, Plaintiffs are alleging that Defendants made these misrepresentations to the class of people who constitute Class II shareholders in InnoMed One and/or InnoMed Five who Plaintiffs allege they can fairly and adequately represent. (See Complaint, DOC #2, ¶64).

In 2011, the Supreme Court of Alabama distinguished direct actions from derivative actions in the context of shareholder derivative lawsuits, such as this matter. The Court wrote:

> Where the damages sought to be recovered are incidental to the plaintiff's status as a shareholder, including damages based on a claim of fraudulent suppression, the claim is a derivative one and must be brought on behalf of the corporation . . . Although the plaintiffs have cast their claim for damages as a fraudulent-suppression claim, the actual harm—the diminution of their Altrust stock based on the actual state of affairs at the company—was caused by the alleged mismanagement and wrongdoing of the Altrust officers and directors. This harm is not unique to the plaintiffs; rather, it is suffered equally by all remaining eligible shareholders in Altrust. Because the harm suffered by the plaintiffs also affects all other remaining eligible shareholders in Altrust, the plaintiffs do not have standing to assert a direct action.

Altrust Fin. Servs., Inc. v. Adams, 76 So. 3d 228, 246 (Ala. 2011).

In the instant case, every direct action plead by the Plaintiffs stems from alleged harm suffered by the Plaintiffs that also affects all other Class II Members of InnoMed One and InnoMed Five. In shareholder derivative cases, the law in Alabama is clear: "[i]t is only when a stockholder alleges that certain wrongs have been committed by the corporation as a direct fraud upon him, and such wrongs do not affect other stockholders, that one can maintain a direct action in his individual name." Green v. Bradley Const., Inc., 431 So. 2d 1226, 1229 (Ala. 1983); see

also Pegram v. Hebding, 667 So.2d 696, 702 (Ala.1995) ("It is well settled that when individual damages sought to be recovered by a plaintiff are incidental to his or her status as a stockholder in a corporation, the claim is a derivative one and must be brought on behalf of the corporation.").

In Green, the plaintiff filed a complaint alleging that the defendant's fraudulent conduct "resulted in Green's suffering a loss of his share of certain equities and income of the corporation." Green, 431 So. 2d at 1227. Green alleged that the defendants' conversion of funds was, essentially, a conversion of his personal assets, id. at 1228, and sought to maintain a direct action against the defendants on the basis of establishment of "constructive trust for funds which should have accrued to him but were fraudulently converted by individuals to their personal use." Id.

In upholding the trial court's decision that Green lacked standing to sue, the Alabama Supreme Court found:

> An action brought by a stockholder to recover assets for the corporation or to prevent a dissipation of corporate assets is derivative in nature. Stockholders as such may not maintain actions to recover possession of corporate property. Thus, **a stockholder may not bring an action in his own name for an alleged fraudulent transfer of corporate property to another stockholder; such a suit must be by or in behalf of the corporation**. Id. at 1229 (quoting 19 Am.Jur.2d, Corporations § 534 (1979)) (emphasis original) (quotation marks omitted).

The Plaintiffs in the instant case are similarly situated to the plaintiff in Green, i.e., they have alleged that the Falkners have, in essence, converted funds that should have accrued to them but were instead diverted for the Falkners' personal use. Like the plaintiff in Green, Plaintiffs here have no standing to bring direct actions for damages incidental to their status as

members of InnoMed One and InnoMed Five. As such, Plaintiffs' direct claims, Counts 1, 3, 5, 7, 9, 11, 17, and 19 must be dismissed.

d. PLAINTIFFS HAVE FAILED TO PLEAD ALLEGED FRAUDULENT CONDUCT WITH REQUIRED PARTICULARITY.

i. Rule 9 Failure(b)

Alabama Rules of Civil Procedure Rule 9(b) sets forth that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be pleaded with particularity." Ala. R. Civ. P. 9(b). "The pleading must show time, place and contents or substance of the false representations, the facts misinterpreted, and the identification of what has been obtained." Miller v Mobile Cty. Bd. of Health, 409 So. 2d 420, 422 (Ala. 1981) (quoting the Committee Comments to Rule 9(b)).

Of the ***19*** total counts in Plaintiffs' Complaint, Counts 1-10 involve causes of action that are subject to the heightened pleading requirements of Rule 9(b) of the Alabama Rules of Civil Procedure. In all ten counts, Plaintiffs make generic, general allegations of alleged misrepresentations made by Defendants. By way of example, Count 1 (Fraud, Direct Action) states, "Peter Falkner misrepresented that he worked with multiple global companies in the area of surgical research and device development, and he trained surgeons across the world." See Complaint, DOC #2, ¶71. Count 3 (Fraudulent Misrepresentation of Material Facts, Direct Action) accuses Defendants of "willfully or recklessly" making misrepresentations about their educational backgrounds, IMP's payment structure, and litigation history. Id., ¶¶93-97. Count 8 (Deceit, Direct Action) accuses Defendants of misrepresenting material facts about IMP's litigation history and the timeline for commercializing intellectual property, etc. Id., ¶¶125-126, 128). However, there is no information concerning the time and place or context of these alleged misrepresentations as to each individual Plaintiff and each statement. Therefore, they do not

satisfy the heightened pleading requirement of Rule 9(b) and, as such, the corresponding claims should be dismissed.

ii. Plaintiffs' Claims of Fraud, Misrepresentation, Deceit and Suppression Based on Future Events are due to be Dismissed

In Counts 1-10, Plaintiffs base numerous claims of fraudulent conduct on alleged promises made by Defendants in various dealings with Plaintiffs that were to occur in the future. By way of example, Plaintiff Benjamin Murphy alleges that during a 2017 phone call with Peter Falkner, Falkner "represented that SemSecure would be commercialized by 2019." See Complaint, DOC #2, ¶29. Additionally, Plaintiffs base multiple claims on promises made in investor materials they received from Defendants. See, e.g., id., ¶24 ("According to 2017 Investor Materials, regulatory clearance for SemSecure would be achieved by 2018, with a licensing deal being established, and returns to investors by 2018.").

Where the alleged fraud is "predicated upon a promise, it is essential that the [pleader allege that the] promisor intended not to perform at the time of making the promise." Bethel v. Thorn, 757 So. 2d 1154, 1158 (Ala. 1999). Plaintiffs have failed to allege that Defendants intended not to perform at the time of making any said promises. See Robinson v. Allstate Ins. Co., 399 So. 2d 288, 290 (Ala. 1981) (holding that plaintiff's attempt to "predicate fraud on a promise which is not a representation of a material fact" violated Rule 9(b)).

Plaintiffs have not pled that Defendants intended not to perform at the time of making the alleged promises. Of course, the reason Plaintiffs did not plead this is because there are no facts to suggest any such allegations. Plaintiffs simply ignore delays that were caused by issues outside of the Falkners control such as the COVID-19 pandemic that shut down many of the laboratories that had to sign off for FDA approval.

Therefore, all claims of fraud in Counts 1-10 that stem from alleged future promises made by Defendants should be dismissed for failure to plead with particularity under Rule 9(b).

e. THE CLAIMS OF PLAINTIFFS ALEXANDER BLANKENSHIP, LINDSAY BLANKENSHIP, GAIL WILSON, LOUIE WILSON AND BENJAMIN MURPHY ARE BARRED BY THE STATUTE OF LIMITATIONS.

All actions pled by the Blankenships, the Wilsons, and Benjamin Murphy stemming from alleged lies and misrepresentations made to them when initially invested in the InnoMeds are barred by Alabama's statute of limitations on fraud actions. Plaintiffs allege that they were defrauded by the Falkners' failure to disclose their personal bankruptcies from 2015 (Peter) and 2012 (Carla). Complaint, ¶41. Plaintiffs also allege throughout the Complaint that they were also defrauded by Defendants' suppression of IMP's litigation history. Id., ¶76.

According to the Complaint, Plaintiffs Alexander and Lindsay Blankenship met with Peter Falkner at Dr. Blankenship's office on June 22, 2017. Id., ¶27. Plaintiffs allege that during meeting Falkner "represented that he graduated from Auburn University, attended veterinarian school at Auburn University, and earned his master's degree at the University of Alabama in Birmingham." Id. Plaintiffs allege that the Blankenship invested "[a]s a result of Peter Falkner's representation during the foregoing meeting." Id., ¶28. Interestingly, they do not allege that they invested because of said degrees.

Plaintiffs Gail and Louie Wilson allege they met with Peter Falkner in person on or around June 25, 2017. Id., ¶31. During this meeting, Peter Falkner allegedly made representations concerning when the founders would receive payment and provided the Wilsons with investor materials. Id. The Wilsons allege they were persuaded to invest in the venture "[a]s a result of Peter Falkner's representation" during the June 2017 meeting. Id., ¶32.

The Complaint also alleges that Plaintiff Benjamin Murphy spoke with Peter Falkner over the phone on November 28, 2017, at which time Falkner allegedly made the same representations about his education that he made to the Blankenships. Id., ¶29. Falkner also allegedly represented that "SemSecure would be commercialized by 2019." Id. Like the Blankenships and Wilsons before him, Murphy allegedly decided to invest "[a]s a result of Peter Falkner's representations" made during the November 2017 phone call. Id., ¶30.

Actions for fraud are subject to a two-year statute of limitations under Alabama law. Ala. Code § 6-2-38. Given that the alleged and misrepresentations the Blankenships, the Wilsons, and Benjamin Murphy rely on all happened in 2017, their claims are barred by the two-year statute of limitations. Therefore, as it relates to the Blankenships, the Wilsons and Mr. Murphy, counts 1-10 must be dismissed.

f. PLAINTIFFS' CONSPIRACY COUNT FAILS AS A MATTER OF LAW

Count 18 of the Complaint alleges that the Falkners "acted in concert" to "engineer their fundraising scheme". Complaint, DOC #2, ¶196. Essentially, Plaintiffs are alleging that the Falkners conspired among themselves as "de facto managers of IMP" to fraudulently induce the Plaintiffs into investing $2,000,000. Id. Plaintiffs' Conspiracy claim fails under the intracorporate conspiracy doctrine, which holds a corporation may not be held liable for any alleged conspiracy with its own employees or agents. M & F Bank v. First Am. Title Ins. Co., 144 So. 3d 222, 234 (Ala. 2013).

The Eleventh Circuit Court of Appeals explained the intracorporate conspiracy doctrine thusly:

> The intracorporate conspiracy doctrine holds that acts of corporate agents are attributed to the corporation itself, thereby negating the multiplicity of actors necessary for the formation of a conspiracy. Simply put, under the doctrine, a corporation cannot conspire with

> its employees, and its employees, when acting in the scope of their employment, cannot conspire among themselves. The doctrine is based on the nature of a conspiracy and the legal conception of a corporation. It is by now axiomatic that a conspiracy requires a meeting of the minds between two or more persons to accomplish a common and unlawful plan . . . However, under basic agency principles, the acts of a corporation's agents are considered to be those of a single legal actor . . . Therefore, just as it is not legally possible for an individual person to conspire with himself, it is not possible for a single legal entity consisting of the corporation and its agents to conspire with itself . . .

McAndrew v. Lockheed Martin Corp., 206 F.3d 1031, 1036 (11th Cir. 2000).

Under the intracorporate conspiracy doctrine, Peter Falkner and Carla Falkner—as agents of IMP—legally cannot conspire among themselves. Therefore, Plaintiffs' Conspiracy claim should be dismissed.

g. PLAINTIFFS HAVE FAILED TO SUFFICIENTLY PLEAD FUTILITY TO MAINTAIN DERIVATIVE CLAIMS

Under Alabama law, a member of an LLC may only commence a derivative action on behalf of the LLC if: (a) the member first makes a written demand upon the limited liability company or the series, as the case may be, to bring an action to enforce the right and the limited liability company or the series, as the case may be, does not bring the action within a reasonable time; or (b) a demand under subsection (a) would be futile. Ala. Code § 10A-5A-9.04. Additionally, the pleading in a derivative action must state with particularity: (a) the date and content of plaintiff's demand and the response by the limited liability company or the series, as the case may be, to the demand; or (b) why the demand should be excused as futile. Id. § 10A-5A-9.05.

Plaintiffs claim that they have "continuously demanded the Falkners . . . to correct their wrongs against IMP Subsidiaries and its Class II Members". Complaint, DOC 2, ¶63. To support this contention, Plaintiffs point to **one** demand letter allegedly mailed to Carla Falkner in

April 2022. The Complaint includes no details other than a mediation was canceled. Plaintiffs point to no demand made on all owners.

Rule 23.1 of the *Alabama Rules of Civil Procedure*, requires that a derivative action complaint must "allege ***with particularity*** the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority, and if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort." Ala. R. Civ. P. 23.1 (emphasis added). The Alabama Supreme Court has held that derivative plaintiffs must first make a demand upon the corporation's board of directors before filing suit, unless they can demonstrate that such a demand would be futile. See, e.g., Ex parte 4tdd.com, Inc., 306 So. 3d 8 (Ala. 2020) (noting that the rule sets forth a heightened pleading requirement known as the "director demand").

Here, Plaintiffs fail to allege with particularity that they attempted to obtain relief. In fact, they do not plead any facts that they actually made a demand on the four owners of IMP. Instead, Plaintiffs state in conclusory fashion that it would have been futile for them to do so. See Complaint, ¶67.

For the demand to be found futile, "the reasons for not making…an effort [to make a demand]" must be alleged with particularity and it must "clearly appear from the complaint…that the directors would have refused such a demand," Cooper v. USCO Power Equip. Corp., 655 So. 2d 972, 974-75 (Ala. 1995), or that their efforts would have been wholly useless" or "unavailing," see, e.g., Mudd v. Lanier, 24 So. 2d 550 (Ala. 1945); Crow v. Florence Ice & Coal Co., 39 So. 401 (Ala. 1905); Ellis v. Vandergrift, 55 So. 781 (Ala. 1911). "[T]he plaintiff shareholder[s] must demonstrate such a degree of antagonism between the directors and the corporate interest that the directors would be incapable of performing their duty." Ex parte

4tdd.com, Inc., 306 So. 3d at 15 (quoting Stallworth v. AmSouth Bank of Ala., 709 So. 2d 458, 464 (Ala. 1997)). Bare allegations that a majority of the directors are wrongdoers is insufficient, id., and instead, facts must be pled ***as to each defendant*** as to whether they were interested or lacked independence, Playford v. Lowder, 635 F. Supp. 2d 1303, 1308 (M.D. Ala. 2009); see also In re Coca-Cola Enters., Inc. Derivative Litig., 478 F. Supp. 2d 1369, 1374, 1376 (N.D. Ga. 2007), aff'd sub nom. Staehr v. Alm, 269 F. App'x 888 (11th Cir. 2008). That a majority of the board also were defendants is not enough to satisfy the futility exception. Plaintiffs must explain how each individual director was under control such that a majority of the board was powerless to make a decision free from influence.

In Cooper, the Alabama Supreme Court found the following conclusory statements did not support a justifiable excuse for the derivative plaintiff's failure to make a director demand: a majority of shares were owned and controlled by defendant directors and a defendant's family, who had "total control" of the board; "any demand upon the board of directors to institute this action w[as]…futile because the members of the board [were] implicated in the transactions that provide the basis for th[e] suit;" and "[a] demand w[as]…'unavailing' and 'idle' and 'futile' since the entire board of directors [were] defendants and [were] each liable to the plaintiffs for breach of their fiduciary duties to the corporation as officers and/or members of the board of directors. 655 So. 2d at 974.

The Alabama Supreme Court stated that merely because some of the directors were related, there was no indication that the directors would have refused such demand. Id., see also Haygood v. Smith, 50 So. 374 (Ala. 1909) (holding that evidence of control by members of a single family of the outstanding shares of stock of a corporation was insufficient to excuse

demand). These are the same allegations Plaintiffs attempt to assert here to support futility of the Rule 23.1 director demand requirement.

Rule 23.1 "is not a mere formality, but rather an important aspect of substantive corporate law that limits the respective powers of the individual shareholder[s] and of the directors to control corporate litigation." Ex parte 4tdd.com, Inc., 306 So. 3d at 15 (citing Blasband v. Rales, 971 F.2d 1034 (3d Cir. 1992); Kamen v. Kemper Fin. Srvcs., Inc., 500 U.S. 90 (1991)). "By its very nature, [a] derivative action impinges on the managerial freedom of directors…; [h]ence, the demand requirement of Rule 23.1…." Shelton v. Thompson, 544 So. 2d 845, 849 (Ala. 1989) (internal citations and quotations omitted). The purpose of this requirement is to alert the board so that it can take corrective action, Stallworth v. AmSouth Bank of Ala., 709 So. 2d 458, 463 (Ala. 1997), and "allow the corporation, on whose behalf the action is being brought, to take over the litigation, i.e., to give the directors the opportunity to act in their normal status as conductors of the corporation's affairs…," Cooper, 655 So. 2d at 975. "Practically speaking, the demand requirement promotes a form of alternative dispute resolution—that is, the corporate management may be in a better position to pursue alternative remedies, resolving grievances without burdensome and expensive litigation." Ex parte 4tdd.com, Inc., 306 So. 3d at 15 (internal citations and quotations omitted). Further, "[d]eference to directors' judgment may also result in the termination of meritless actions brought solely for their settlement or harassment value ('strike suits')," Shelton, 544 So. 2d at 850, which appears to be the case here.

Finally, the clear evidence that a demand would not have been futile is the fact that the Plessalas—the other two owners of IMP—did in fact initiate an action on behalf of the Company and its shareholders against the Falkners in this very Court. While ultimately their claims are meritless as well, it shows that had a proper demand have been made action could have been

taken without the need for this additional lawsuit which serves as only a drain on the assets of the parties. As such, this case must be dismissed.

IV. CONCLUSION

For the reasons outlined above, Plaintiffs' Complaint should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on the 1st day of December 2022, a true and correct copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access the filing through the Court's system.

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