PREPARED BY THE COURT

SKS HOLDINGS LLC, MOSHAEL STRAUS, HERBERT SEIF and MJS FAMILY INVESTMENTS LLC, Plaintiffs, v. BENNETT KAPLAN, IZIK TOURJEMAN, LARGE FORMAT LTD., YAEL KAPLAN, DAVID KAPLAN, MIRI KAPLAN, LAHAV FUND II, L.P., O.G. BIKURIM LTD. and JOHN DOE CORPORATIONS, Defendants. BENNETT KAPLAN, Third-Party Plaintiff, v. BRIAN HAIMM, Third-Party Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: **BER-L-6124-17** Civil Action **OPINION**

Argued: **April 24, 2020**
Decided: **July 22, 2020**

HONORABLE ROBERT C. WILSON, J.S.C.

Eric D. Herschmann, Esq., Michael Paul Bowen, Esq. and Israel J. Atkin, Esq. appearing on behalf of Plaintiffs SKS Holdings LLC, Moshael Straus, and MJS Family Investments LLC (from Kasowitz Benson Torres LLP)

R. James Kravitz, Esquire appearing on behalf of Plaintiff/Counterclaim Defendant, Herbert Seif (from Fox Rothschild, LLP)

Brian J. Molloy, Esq., Willard C. Shih, Esq. and Daniel A. Cozzi, Esq. appearing on behalf of Defendant Bennett Kaplan (from Wilentz, Goldman & Spitzer, P.A.)

Aurora Cassirer, Esq. and Daniel E. Gorman, Esq. appearing on behalf of Defendant Izik Tourjeman (from Troutman Sanders LLP)

Darren C. Barreiro, Esq., Luke J. Kealy, Esq. and Alexander W. Raap, Esq. appearing on behalf of Third-Party Defendant Brian Haimm (from Greenbaum, Rowe, Smith & Davis LLP)

PROCEDURAL HISTORY

THIS MATTER arises from Motions for Summary Judgment from both Plaintiffs and Defendants. The initial action was filed on September 12, 2017. On or about February 12, 2018, Plaintiffs filed an Amended Complaint against Defendants alleging nine causes of action, including breach of fiduciary duty, aiding and abetting fraud, and civil conspiracy. There has been extensive motion practice over the course of this case. In the instant action, Defendants Bennett Kaplan and Izik Tourjeman now file for summary judgment. Plaintiffs SKS Holdings, Moshael Straus and Herbert Seif also now move for summary judgment.

FACTUAL BACKGROUND

Plaintiff SKS Holdings LLC ("SKS") is a closely-held, three member limited liability company incorporated in Delaware with its principal place of business in New Jersey. The three members of SKS are Plaintiffs Moshael Straus and Herbert Seif and third-party Plaintiff Bennett Kaplan ("Kaplan"). Straus and Seif each own a 37.5% interest in SKS collectively making them the majority owners. Kaplan is the minority, non-managing member of SKS and holds a 25% ownership interest. SKS's principal business and primary asset is GlobusMax, an Israeli chartered development company that owns and operates movie theatres exclusively in Israel.

GlobusMax was formed in April 1998 by Bennett Kaplan and Peter Israelson, who left the company in 2003. Yoram Globus served as Chairman from 2007 until 2015. Kaplan then succeeded Mr. Globus as Chairman. Straus and Seif became involved in GlobusMax, as

individual investors in 1999 and 2000. In 2003, they loaned GlobusMax $7.3 million through SKS. At this point, SKS became the controlling shareholder of GlobusMax. Following the 2003 SKS loan, Straus and Seif contributed capital to GlobusMax and Kaplan was in charge of the management operations.

GlobusMax operated as a solvent company until 2013. At that point, Yoram Globus was facing financial difficulties and the banks threatened to terminate their relationship with GlobusMax if he retained his stake in the company. As a result, in June 2014, SKS entered into an agreement to purchase Yoram Globus' shares for New Israeli Shekels (hereinafter "NIS") 98,300,000.

In October 2014, GlobusMax obtained a NIS 80 million line of credit from Psagot Provident Funds & Pensions, Ltd. A condition of this financing was that GlobuxMax continue to have its financials audited by an outside accounting firm. Shortly after GlobusMax acquired this loan, the CFO of GlobusMax resigned and in the space of 24 months, the company hired three replacement CFO's who all resigned.

In March 2015, Kaplan hired Defendant Izik Tourjeman as a GlobusMax employee. Kaplan told Straus and Seif that he hired Tourjeman for a full-time position at GlobusMax and he would focus on securing and managing additional financing for the company. Tourjeman's title was "Co-Chairman" of GlobusMax. According to Tourjeman, he was hired part-time for a fee of NIS 100,000 per month plus expenses and a 5% stock bonus. Kaplan claims this was a stock option and not a grant.

In June 2015, Kaplan and Tourjeman agreed to secure a commercial loan from Amitech Real Estate Management and Development LTD ("Amitech"). This resulted in a convertible loan

of NIS 11 million from Amitech to SKS. This loan agreement gave Amitech the option of converting its debt into an equity stake in GlobusMax. The loan agreement provided that Kaplan, who was a signatory, personally guaranteed the loan and required him to provide checks as collateral for the loan. During this time, Tourjeman was also employed by Amitech.

Under the terms of the Psagot loan, GlobusMax was required to open six new theatres in Israel according to a schedule detailed in the loan covenants. By March 2016, three of the theatres were delayed for one year from the opening dates in the loan covenants. At the same time, various other accounting issues began to arise involving SKS and Yoram Globus. Kaplan hired Deloitte Touche Tohmatsu LLC (hereinafter "Deloitte"), specifically Deloitte Israel, as an outside auditor. On December 12, 2016, Psagot notified GlobusMax that it was in default of the loan since GlobusMax had violated two of the loan covenants.

Kaplan and Tourjeman issued 20 post-dated GlobusMax checks totaling more than NIS 15 million as collateral for the loan. They did not record these checks in GlobusMax records. Over the subsequent months, Kaplan and Tourjeman arranged for four additional loans from Amitech to SKS in the amount NIS 38 million, including: (i) a NIS 16 million loan in November 2015; (ii) a NIS 5 million loan in February 2016; (iii) a NIS 3 million loan in April 2016; and (iv) a NIS 3 million loan in October 2016. SKS claims that they did not know about these loans and did not authorize them. Kaplan and Tourjeman also issued unrecorded GlobusMax checks as collateral for these loans. In total, Kaplan and Tourjeman issued over NIS 50 million in unrecorded GlobusMax checks.

In May and June of 2016, Kaplan arranged for SKS to guarantee two loans from Lahav Fund entities in the amount of NIS 15 million. There are allegations that Kaplan falsified documents and meetings relating to those loans. There is no documentation from Straus or Seif

approving the loan and there is no record of meetings between the parties discussing the loan. Kaplan maintains that he discussed the loans over a series of phone calls with Straus and Seif and that they approved the loans during these telephone conversations.

During this time, Tourjeman also arranged other transactions on behalf of GlobusMax including: (i) a NIS 2 million loan from Erez Goldschmit at 59% interest per annum; (ii) a NIS 3 million loan from M.S. Valkyrie, LTD at 60% interest per annum, (iii) a NIS 7 million loan from Obligo Inc. at 41% per annum; and (iv) NIS 4.8 million in loans from GlobusMax's landlord Melisron Ltd. None of these loans were properly recorded in GlobusMax's financial records. Tourjeman and Kaplan issued additional unrecorded GlobusMax checks in connection with these transactions.

In 2016, Kaplan requested that SKS inject additional cash into GlobusMax. He also informed SKS that GlobusMax needed to refinance the NIS 80 million Psagot loan. Kaplan proposed to SKS that SKS make interim loans to GlobusMax to enable GlobusMax to make partial payments to Psagot. SKS agreed to do so based on Kaplan's representations.

In January of 2017, Kaplan emailed Straus and Seif the 2015 audited financial statement that had been signed by Tourjeman on behalf of GlobusMax. Kaplan sent both the Hebrew and English versions of the financial statement. Straus and Seif presently assert that the statements contain material omissions and withheld important information.

After SKS provided cash in the form of loans to GlobusMax in December of 2016 and January of 2017, Kaplan requested more cash infusions. In response, Straus and Seif sent Brian Haimm., an accountant, to Israel to conduct a comprehensive review of the financial records of GlobusMax. During the course of the review, Haimm attended a mid-March 2017 meeting

between Kaplan and Yoram Ezri, the head of Amitech. At that meeting Ezri revealed that millions in GlobusMax checks had been provided to Amitech as collateral.

At this point, SKS notified Deloitte of these checks and thereafter Deloitte publicly retracted its audit opinion on the 2015 financials. SKS in turn launched an investigation with legal counsel and forensic accounting firm, Barlev Associates. Haimm discovered the list of unrecorded checks that Kaplan had provided were different than a list of unrecorded checks that Tourjeman and Kaplan had given to Klirmark Capital. Kaplan was unable to explain the discrepancy.

SKS nonetheless made additional cash infusion through May 2017 to prevent GlobusMax from filing for bankruptcy. SKS provided GlobusMax in excess of $20 million in cash. The majority of this financing was provided by Straus through his company, plaintiff MJS Family Investments LLC.

SKS was ultimately unable to salvage its investments in GlobusMax. No third-party were willing to invest in GlobusMax. The company was placed in liquidation in Israel in June 2017 and SKS lost the $20 million provided to the company from December 2016 through May 2017.

SUMMARY JUDGMENT STANDARD

The New Jersey procedural rules state that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. § 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a

case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under R. § 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on R. § 4:37-2(b) or R. § 4:40-1, or a judgment notwithstanding the verdict under R. § 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that "there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of R. § 4:46-2." Id. at 540.

RULE OF LAW AND DECISION

I. Defendant Tourjeman is Entitled to Summary Judgment

a. This Court Lacks Personal Jurisdiction over Tourjeman

New Jersey courts may only exercise jurisdiction over out-of-state defendants where doing so is "consistent with due process of law." Baanyan Software Servs., Inc v. Kuncha, 433 N.J. Super. 466, 473 (App. Div. 2013). Personal jurisdiction requires that the defendant have "certain minimum contacts" with New Jersey and that "the minimum contacts must be of a nature and extent such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Banyaan, 433 N.J. Super. at 473-74 (quoting Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945)).

Jurisdiction "over one defendant may not be based on the activities of another defendant" nor on "the plaintiff's connection to the forum state." Waste Mgmt. v. Admiral Ins. Co., 138 N.J. 106, 118 (1994), cert. denied, 513 U.S. 1183 (1995). Where "a suit contains multiple defendants, their individual contacts to the forum state cannot be aggregated to find minimum contacts for a

single defendant." Waste Mgmt. Inc., 138 N.J. at 127. The minimum contacts test is evaluated using the quality and quantity of the Defendant's contacts. Baanyan, supra at 473.

This Court lacks general jurisdiction over Defendant Tourjeman. Tourjeman does not have continuous and systematic contacts in New Jersey to be "at home" in the forum. Fairfax Fin. Holdings Ltd., 450 N.J. Super. at 68. In their Complaint, Plaintiffs allege that Tourjeman "conducts business in New Jersey" and "directly targeted" Plaintiffs who reside in New Jersey. However Plaintiffs failed to put forth facts that show Tourjeman ever visited New Jersey, ever corresponded with the Plaintiffs, or conducted business in New Jersey. This Court cannot impose jurisdiction on a Defendant who has not purposely availed himself of benefits in the forum state. Plaintiff has failed to prove that Defendant had undertaken such conduct.

b. Defendant Tourjeman Is Not Subject to General Jurisdiction

For a Plaintiff to prove general jurisdiction, they must show that Defendant had contacts with New Jersey that are "so continuous and substantial as to justify subjecting the defendant to the jurisdiction." Patel, 437 N.J. Super at 425 (quoting Baanyan, 433 N.J. Super at 474). In the instant case, Plaintiffs have failed to show that Tourjeman had any contacts with New Jersey, and certainly not continuous and substantial ones.

As stated above, Plaintiffs have not shown that Tourjeman had ever visited New Jersey or had ever conducted business in New Jersey. Straus confirmed at his deposition that he never spoke with Tourjeman in New Jersey, never e-mailed or spoke with Tourjeman on the phone, and never had direct or indirect communications with respect to GlobusMax. Seif also testified that he had never discussed substantial business matters with Tourjeman, that Tourjeman had never induced Seif to loan money to GlobusMax, and that Tourjeman never lied to him.

Plaintiffs have not asserted any facts to show that Tourjeman ever visited New Jersey or conducted business in New Jersey. Plaintiffs have not shown that Tourjeman "purposely availed" himself of the benefits of doing business in New Jersey. Plaintiffs have failed to satisfy their burden of establishing Tourjeman's continuous and systematic contacts with New Jersey. For this reason, the Complaint against Tourjeman must be dismissed.

II. The Complaint Must be Dismissed Due to Forum Non Conveniens

The doctrine of forum non conveniens states that the Court may decline to exercise jurisdiction where the Plaintiffs' choice of forum is "demonstrably inappropriate". Yousef v. Gen. Dynamics Corp., 205 N.J. 542 (2011). The Court must consider whether the Plaintiffs' choice of forum imposes a real hardship on defendants or results in undue harassment to Defendants or to the legal system. See Creative Bus. Decisions, Inc. v. Magnum Commc'ns Ltd., 267 N.J. Super. 560, 572 (App. Div. 1993).

New Jersey Courts use the framework set forth in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) to determine whether Plaintiff's choice of forum is appropriate or not. Gulf Oil establishes a number of factors to consider when determining the appropriate forum. These include access to evidence, availability of due process, cost and inconvenience to witnesses, trial delays, benefit of having decisions governed at home, and whether the law of the case will be the law of the forum. Gulf Oil, supra at 508-09.

In the instant case, Plaintiffs have failed to show that Tourjeman, who is a citizen and resident of Israel, should be subject to jurisdiction in New Jersey. All of the work Tourjeman performed on behalf of GlobusMax was done in Israel. Most of the evidence and witnesses are located in Israel. GlobusMax filed for the Israeli equivalent of bankruptcy on or about June 13, 2017. The allegations consist of mismanagement that occurred in Israel. The documentary

evidence, most of the necessary witnesses and the underlying activities are predominantly located outside of New Jersey. Therefore, dismissal based upon the doctrine of forum non conveniens is appropriate.

III. Israeli Law Governs Kaplan's Fiduciary Duties

New Jersey utilizes the "internal affairs doctrine" to assess the choice of law that governs any fiduciary duty that Kaplan may owe. Krys v. Aaron, 106 F.Supp.3d 472, 484-85 (D.N.J. 2015). This doctrine is "a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs-matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders- because otherwise a corporation could be faced with conflicting demands." Id. at 484. The law of the state of incorporation governs. Id. at 484 (quoting Fagin v. Gilmartin, 432 F.3d 276, 282 (3d. Cir. 2005).

Kaplan is an Israeli resident and the alleged causes of action occurred in Israel. In Krys, the Court stated that "the disputed claim concerns alleged acts of a former director in his capacity as a director of a Cayman corporation, the internal affairs doctrine presumptively requires the application of Cayman law." Id. at 484-85. Kaplan was acting in his capacity as a director of GlobusMax, an Israeli corporation. For this reason, Israeli law applies.

IV. Bennett Kaplan Is Entitled to Summary Judgment Based on Plaintiff's Lack of a Factual Basis for Their Claim

Plaintiffs have invoked privilege over the forensic accounting report of Barlev Associates (the "Report"). The New Jersey Supreme Court has ruled that "a party may not abuse a privilege, including the attorney-client privilege, by asserting a claim or defense and then refusing to provide the information underlying that claim or defense based on the privilege." Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 553 (1997). The Appellate Division has acknowledged

that there is "inherent inequity in permitting plaintiff to use the privilege as a sword rather than a shield." United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 568 (App. Div. 1984).

Kaplan is accused of using company funds for personal expenses. Plaintiffs base these allegations on information contained in the Report. Plaintiffs also assert that the facts surrounding this conclusion are privileged. Plaintiffs cannot hide behind privilege as a reason to refuse to grant the Defendant access to the factual allegations supporting Plaintiffs claim. For this reason, all claims regarding Kaplan's misuse of GlobusMax's funds are dismissed.

V. Kaplan is Entitled to Summary Judgment on the Third Cause of Action Asserting Breach of Fiduciary Duty

a. Plaintiffs Cannot Assert Claims that Belong to GlobusMax

The named Plaintiffs in the instant case are SKS, an LLC that is the majority shareholder of GlobusMax; Straus and Seif, are simply individuals who are managing members of SKS and directors of GlobusMax; and the MJS, Straus' holding company. GlobusMax is not a party to this action. Plaintiffs' claims are not based on harms done by Kaplan directly to the Plaintiffs, but rather harm done by Kaplan against GlobusMax.

Each of the allegations of misconduct impacts all of the company's shareholders equally. SKS is the majority shareholder in GlobusMax, but it is not the sole shareholder. Plaintiffs testified that their damages were based on losses sustained as a result of their investment in GlobusMax. Plaintiffs' claims are not direct claims for which they can recover individual damages. The claims are derivative claims that belong to GlobusMax, an Israeli formed and based company.

VI. Third-Party Defendant Brian Haimm is Entitled to Summary Judgment

a. Defendant Bennett Kaplan has Failed to Present Evidence Creating a Genuine Issue of Material Fact

Defendant Bennett Kaplan alleges defamation and false light claims against Brian Haimm. A defamation claim has three elements: (1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting [to] at least to negligence by the publisher." G.D. v. Kenny, 411 N.J. Super. 176, 186 (App. Div. 2009). False light requires defendants to: (1) give publicity to a matter placing plaintiffs before the public in a false light; (2) that is highly offensive to a reasonable person; and (3) they had knowledge or acted in reckless in disregard as to the falsity of the publicized matter and the false light in which he would be placed. Leang v. Jersey City Bd. of Educ., 198 N.J. 557 (2009). The published material must "invade a protectable privacy interest" and constitute a "major misrepresentation of [the plaintiffs'] character, history, activities or belief." Romaine v. Kallinger, 109 N.J. 282, 295-97 (1988),

In the instant case, Kaplan has not shown the necessary elements of either defamation or false light. Haimm is not a public figure, and even if he were, Kaplan has not shown the actual-malice necessary to prove defamation and false light for a public official. A negligence standard applies for comments made about ordinary people. The standard is met when the "speaker acted negligently in failing to ascertain the truth of the statement." Senna v. Florimont¸196 N.J. 469, 474 (2008). Straus and Seif sent Haimm to investigate Kaplan and his work. Haimm's statements were made based upon his investigation and observations surrounding Kaplan and GlobusMax.

Kaplan fails to set forth the necessary elements to establish defamation. Paragraphs 126, 127, and 130 of the Third-Party Complaint assert that Haimm, Straus and Seif "made statements about Kaplan that subjected him to contempt or ridicule and harmed [his] reputation in the

community." The allegations are too broad and do not identify specific instances of defamatory statements. Additionally, these allegations do not show that Haimm "recklessly disregarded" the truth as required for defamation. Finally, Kaplan does not point to specific statements that were publicized by Haimm.

Kaplan also alleges that Haimm inferred that a child of a company employee was Kaplan's child and that Haimm "told employees of the Company, and others, that Kaplan was to be fired because he had stolen from the Company." Kaplan does not provide any evidence for these statements, nor evidence that they were published. Kaplan also does not provide evidence that Haimm knew or recklessly disregarded the truth of the alleged statements. Kaplan does not identify the statements Haimm allegedly made, when they were made, to whom they were made, and how the statements place him in a false light. For this reason, Haimm's motion for Summary Judgment is Granted.

b. Kaplan Has Not Presented Evidence Creating a Genuine Issue of Material Fact Concerning Whether Haimm Committed Tortious Interference.

The Sixth Count of the Counterclaim and Third-Party Complaint alleges that Straus, Seif, and Haimm tortuously interfered with Kaplan's contractual arrangement with GlobusMax. The elements necessary to prove tortious interference are: (1) interference with an actual contract; (2) malice defined as "defendant's intentional interference without justification"; (3) a reasonable likelihood that the interference caused the loss of prospective gain; and (4) resulting damages. DiMaria Const., Inc. v. Interarch, 351 N.J. Super. 558, 567 (App. Div. 2001) (citing MacDougall v. Wiechart, 144 N.J. 380, 404 (1996)).

Haimm could not have interfered with Kaplan's contractual arrangement because Haimm was acting as an employee of Straus and Seif. An individual acting as an employee cannot be liable for tortious interference unless the employee is shown to be acting outside the scope of his

employment. See Vosough v. Kierce, 437 N.J. Super. 218, 234 (App. Div. 2014). Kaplan does not assert any facts to show that Haimm was acting outside the scope of his employment. Haimm was acting at the behest of Seif and Straus and reported back to them. Haimm did not take any actions that interfered with the contract, rather he just reported his findings to Straus and Seif.

c. Kaplan Has Not Presented Evidence Creating a Genuine Issue of Material Fact Concerning Whether Haimm Participated in a Civil Conspiracy

The Seventh Count of Kaplan's Counterclaim and Third-Party Complaint asserts a claim against Straus, Seif, and Haimm for civil conspiracy. A civil conspiracy is established when: (1) a combination of two or more persons; (2) have a true agreement or confederation with a common design; (3) which exists because of an unlawful purpose to be achieved by unlawful means; and (4) there is proof of damages. Banco Popular North America v. Gandi, 184 N.J. 161, 177 (2005). Kaplan claims that Haimm: (1) terminated Kaplan from his employment, (2) mismanaged GlobusMax, (3) failed to hold directors or shareholders' meetings before authorizing Company action, (4) caused the Company to file for bankruptcy, and (5) made false statements about Kaplan designed to harm his reputation in the business community. Haimm did not have the ability to make any decisions regarding Kaplan's employment. Kaplan has not shown evidence that the actions taken by Haimm had an "unlawful purpose to be achieved by unlawful means". As discussed above, Kaplan has also not shown that Haimm made defamatory statements about Kaplan.

d. Kaplan Has Not Presented Any Evidence Creating a Genuine Issue of Material Fact Concerning Whether Haimm Intentionally Inflicted Emotional Distress (IIED)

The Eighth Count of the Counterclaim and Third-Party Complaint alleges Kaplan suffered from emotional distress that Haimm intentionally inflicted. To prove IIED, a plaintiff must show that: (1) the defendant acted intentionally; (2) the defendant's conduct was "so outrageous in

character, and so extreme in degree, as to go beyond all possible bound of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community;" (3) the defendant's actions proximately caused him or her emotional distress; and (4) the emotional distress could not be endured by a reasonable person. Soliman v. Kushner Companies, Inc., 433 N.J. Super. 153, 177 (App. Div. 2013). This is an extremely high standard. See Griffin v. Tops Appliance City, Inc., 337 N.J. Super. 15, 23 (App. Div. 2001).

Kaplan fails to plead any facts that show that he suffered from extreme emotional distress. It is difficult for employees to prove that they suffered IIED because of their employer's or coworkers' conduct. Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988). Kaplan does not specify any of Haimm's conduct that could have caused him severe harm. Kaplan does not allege specific facts that meet the threshold requirement for intentional infliction of emotional distress.

For these reasons, Defendant Bennett Kaplan's Third-Party Complaint against Brian Haimm is **DISMISSED.**

VII. Plaintiffs Are Not Entitled to Summary Judgment as a Matter of Law

a. Israeli Law is Controlling

When there is a question of which law controls a case, New Jersey law mandates that the laws of the state with the greatest interest in resolving the issue apply. D'Agostino v. Johnson & Johnson, 115 N.J. 491, 497 (1989). To determine which law controls, first the Court must determine whether there is a conflict between the laws and second the Court must determine the interest that each state has in resolving the dispute and which interest is more compelling,

The first consideration in performing a choice-of-law analysis is "whether the laws of the states with interests in the litigation are in conflict." McCarrell v. Hoffman LaRoche, Inc., 227

N.J. 569, 584 (2017). A conflict of law "arises when the application of one or another state's law may alter the outcome of the case, or when the law of one interested state is offensive or repugnant to the public policy of the other." In re Accutane Litigation, 235 N.J. 229, 254 (2018). Defendants assert that Israeli law denies Plaintiffs standing. Plaintiffs claim that under New Jersey law, they have standing to bring the derivative claims. Clearly there is some conflict between Israeli law and New Jersey.

The second consideration in performing a choice-of-law analysis is to invoke "the Restatement's most significant relationship test, which New Jersey applies in tort cases." Ginsberg ex rel Ginsberg v. Quest Diagnostics, 441 N.J. Super. 198, 217 (App. Div. 2015), aff'd, 227 N.J. 7 (2016). In New Jersey, the most significant relationship test controls the courts choice-of-law conclusions for tort claims. Fairfax Fin. Holdings Ltd. v. S.A.C. Capital Mgmt., LLC, 450 N.J. Super. 1, 34 (App. Div. 2017). The New Jersey Supreme Court "formally adopted the Second Restatement's most-significant relationship test in sections 146, 145 and 6 for deciding the choice of substantive law in tort cases involving more than one state." McCarrell, 227 N.J. at 589.

When there is no legislative directive concerning the application of substantive law, New Jersey Courts apply the factors enumerated the Restatement (Second) Conflict of Laws to determine the predominate governmental interest. See Fairfax, 450 N.J. Super. at 47. The Restatement § 145 states:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in Section 6.
>
> (2) Contracts to be taken into account in applying the principles of Section 6 to determine the law applicable to an issue include:
>
> a. The place where the injury occurred;
> b. The place where the conduct causing the injury occurred;

> The domicil[e], residence, nationality, place of incorporation and place of business of the parties, and
>
> The place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Section 6 of the Restatement sets forth criteria for the Court to determine whether "a competing state bears a more significant relationship to the issues and parties." Ginsberg v. Quest Diagnostics, Inc., 227 N.J. at 12. For defamation claims, "the local law of the state where the publication occurs determines the rights and liabilities of the parties, except as stated in [section] 150, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in [section] 6 to the occurrence and the parties." Fairfax, 450 N.J. Super at 54 (quoting Restatement (Second) Torts, § 149).

In Nubenco Enterprises, Inc. v. Inversiones Barberena S.A., the Court held that Nicaraguan law controlled over New Jersey law with respect to the tort claim choice-of-law analysis because the defendant corporations were formed under Nicaraguan laws, the individual defendant is a citizen of Nicaragua, and the tortious conduct occurred in Nicaragua. 963 F. Supp. 353, 374 (D.N.J. 1997). The Court states that "[a]lthough New Jersey may have a legitimate interest in awarding compensation for tortious acts against its domestic corporations, Nicaragua has a greater interest in applying Nicaraguan law against Nicaraguan domiciliaries for actions that occurred in Nicaragua." Id.

In the instant case, Plaintiffs directed the tortious conduct in Israel against Kaplan, who is an Israeli resident, to cause damage in Israel. Plaintiffs were in Israel when they made the statements to the Israeli press which purportedly defamed Kaplan. Plaintiffs also supposedly

gave instructions in Israel to have Israeli employees of an Israeli company (GlobusMax) access to the email account of an Israeli employee (Kaplan), invading his privacy in violation of Israeli law. Finally, Plaintiffs are alleged to have induced Kaplan, an Israeli resident, to offer a personal guarantee to Israeli lenders so that GlobusMax, an Israeli company, could obtain financing, exposing Kaplan to lawsuits pending in Israel concerning GlobusMax defaulted on debts.

Israeli law applies as Israel has the predominant interest in resolving the issues in the Complaint. GlobusMax is an Israeli company formed in Israel, Kaplan is an Israeli resident and with such conduct occurred in Israel. For this reason, Plaintiffs' claim for Summary Judgment must be Denied.

VIII. Plaintiffs Are Entitled to Summary Judgment on Kaplan's Fraud Claims.

Bennett Kaplan personally guaranteed GlobusMax's loans and the Yoram Globus share purchase agreement under the impression that Plaintiffs' would indemnify Kaplan if the loans were defaulted. The loans are currently in default and Plaintiffs' have not indemnified Kaplan. Kaplan has now sued for fraudulent inducement and equitable fraud.

Kaplan's fraud claims are based on the allegation that Straus promised that he would indemnify Kaplan if Kaplan provided his personal guarantee. Straus alleges that he never made that representation to Kaplan or to anyone. Kaplan's personal loan guarantees would only constitute a promise by Straus to perform a future act. A mere naked oral promise to do "something" in the future is not actionable and cannot meet the criteria for a cause of action sounding in fraud. Gennari v. Weichert Co. Realtors 148 N.J. 582,610 (1997)

a. Straus' Alleged Promise of Indemnification is Barred by the Statute of Frauds

An oral agreement to be liable for the obligation of another person is unenforceable under the Statute of Frauds. "A promise to be liable for the obligation of another person, in order to be enforceable, shall be in a writing signed by the person assuming the liability or by that person's agent." NJ Rev. Stat. § 25:1-15 (2013). Kaplan is a sophisticated businessman who had negotiated numerous loans and had dealt with all of the attendant documents. The Statute of Frauds requires any indemnification promise to be in writing. Kaplan has not presented any evidence of a written promise from Straus to indemnify Kaplan. For this reason, Defendant Bennett Kaplan's Summary Judgment Motion is Denied.

CONCLUSION

For the aforementioned reasons, Defendants Izik Tourjeman and Bennett Kaplan's Motions for Summary Judgment are hereby **GRANTED.** Plaintiffs' Moshael Straus, SKS Holdings LLC, MJS Family and Herbert Seif's Motions for Summary Judgment are hereby **DENIED.** Third-Party Defendant Brian Haimm Motion for Summary Judgment is hereby **GRANTED.**