IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DOUG VANDER WEIDE, ET AL, Plaintiffs, vs. SETH BURGETT, Defendant.	)	NO.: LACL135549 **DEFENDANT'S TRIAL BRIEF**

COMES NOW the Defendant, Seth Burgett, by and through the undersigned counsel, and for his Trial Brief, states:

FACTUAL BACKGROUND

Seth Burgett is the founder and CEO of Verto Medical Solutions, LLC ("Verto"). Verto created, patented, and sold sport ear buds called Yurbuds. The plaintiffs were shareholders of Verto. Two plaintiffs – Jason Hellickson and Ron King – were members of the Verto Board of Directors in addition to being shareholders. This case, though, does not stem from the plaintiffs' status as shareholders of Verto; rather, this case rises from separate, but identical, contracts by and between individual plaintiffs and Mr. Burgett.

On June 2, 2014, Verto entered into an Asset Purchase Agreement with Harman International Industries ("Harman"). Harman paid Verto $37,000,000, but held back ten percent ($3,700,000) of that purchase price as a form of insurance related to representations made by Verto during the transaction. The Asset Purchase Agreement

also included the potential for Verto to earn an additional $38,000,000 of "Earn-Out" depending on the sales performance of Yurbuds ear buds.

In August of 2014, Plaintiff Doug Vander Weide threatened Mr. Burgett with litigation concerning the Harman transaction. In order to appease Mr. Vander Weide, Mr. Burgett entered into Re-Allocation Agreements with shareholders. The Re-Allocation Agreements speak for themselves, and in them, Burgett, inter alia, offers to "re-allocate" his pro rata share of any future Earn-Out payments Verto receives from Harman to members who signed a Re-Allocation Agreement, up to the signing member's initial investment. No other funds are to be reallocated; only earn-out funds are to be reallocated. Each Plaintiff signed a Re-Allocation Agreement except for Mr. Vander Weide. For this reason, Mr Vander Weide has no cause of action in this proceeding.

Approximately eighteen months after the Harman sale, the relationship between Verto and Harman had completely deteriorated. Harman refused to pay the holdback amount, which had become due to Verto eighteen months after the sale, and later refused to pay any earn-out to Verto. Additionally, Harman terminated Mr. Burgett's employment and stated that it had a claim of $12,000,000 against Verto. In response to Harman's refusal to pay holdback and earn-out, in addition to the $12,000,000 claim, Verto engaged the well-respected Gibson & Dunn law firm to negotiate a resolution with Harman. With Gibson & Dunn's assistance, Verto submitted a draft lawsuit to Harman claiming that it was entitled to holdback and earn-out. After various rounds of

negotiations, Verto and Harman reached a settlement whereby Harman would pay Verto $3,500,000.

After reaching an agreement on the settlement amount, Verto presented Harman with a draft settlement agreement. See Trial Ex. C. This initial draft included various references to "earn-out." Several days later, Harman sent a redlined version of the agreement back to Verto. See Trial Ex. D. This version deleted references to "earn-out" and also added a subparagraph, which stated: "For the avoidance of any doubt, Harman shall not owe Verto any Earn-Out payments pursuant to Section 2.4 of the APA under any circumstances." Following receipt of Harman's version of the agreement, the Verto Board conducted a line-by-line review of this version. See January 26, 2016 Board Meeting Minutes. After several more rounds of exchanging drafts of the agreement, the Verto Board ultimately approved the final version of the settlement agreement, which still excluded references to "earn-out" from the initial draft and still included the subparagraph stating: "For the avoidance of any doubt, Harman shall not owe Verto any Earn-Out payments pursuant to Section 2.4 of the APA under any circumstances."

Importantly, this settlement was approved by the Verto Board before Mr. Burgett had made any commitment on how he would allocate the settlement proceeds. Various emails by and between the members of the Verto Board and Verto's legal counsel, Chris Reid, show that the Board's priority was to complete the settlement and that they would then consider what decisions the Board could make, if any, concerning allocation of the settlement proceeds. In fact, Mr. Burgett had stated on January 14, 2016 that the settlement proceeds should be distributed on a pro-rata basis based on Verto's Second

Amended and Restated Operating Agreement, and that he did not intend to re-allocate any Harman Settlement proceeds because Harman never paid any earn-out. Furthermore, on January 23, 2016 – more than one month before the Board voted to accept the Harman settlement agreement – Verto's counsel Mr. Reid informed the Board members that the Board could not determine the allocation because Verto was not a party to the agreements, and any recommendation by the Board would not be binding on Mr. Burgett or any shareholder. The minutes of the February 12, 2016 Verto Board meeting state, "Jason and Ron made it clear they did not know Seth's intention on re-allocation."

In spite of the clear language of the Harman settlement which states that "For the avoidance of any doubt, Harman shall not owe Verto any Earn-Out payments pursuant to Section 2.4 of the APA under any circumstances," Plaintiffs have initiated this litigation in the hopes that the Court and a jury will re-write the Harman settlement agreement so that it can be construed to state that Harman did pay earn-out to Verto, and Mr. Burgett is then responsible to reallocate funds to all shareholders who signed a reallocation agreement. Neither the facts of this case, nor the applicable law, can change that fact that Harman did not pay earn-out to Verto. Because no earn-out was ever paid, Mr. Burgett did not breach his re-allocation agreements between the plaintiffs[1] and himself.

[1] Except for Doug Vander Weide who did not sign a re-allocation agreement and who does not even have standing to pursue this cause of action.

Mr. King and Mr. Hellickson are also attempting to get a second bite of the apple. Verto attorney Chris Reid specifically advised Mr. Hellickson and Mr. King early in the negotiation process with Harman and well before Verto and Harman agreed to settle, that, with voting control of the Verto Board, "the board could have negotiated with Seth to say unless Seth adopts a more favorable allocation toward these shareholders, the board will not approve the settlement agreement…Essentially, a shareholder would be saying that the board had some leverage to negotiate with Seth for a better outcome for shareholders and chose not to do so." Mr. King and Mr. Hellickson did not take Mr. Reid's advice and approved a settlement with Harman that specifically states Harman is not paying any earn-out, and they approved the Harman settlement knowing Mr. Burgett's intention to treat 100% of the settlement as holdback.

Following Mr. Burgett's Motion for Summary Judgment, Plaintiffs have dropped: 1) their conversion claims in full; 2) their unjust enrichment claims, except for Plaintiff Doug Vander Weide; and 3) the fraud claims of all plaintiffs except for Jason Hellickson and Ron King. Because Plaintiffs have conceded that the aforementioned claims have no merit, they will not be addressed any further.

ARGUMENT

I. Applicable Law

For reasons more fully set forth in Mr. Burgett's brief in support of his motion for summary judgment, Missouri law governs Plaintiffs' breach of contract claim because

Missouri has the most significant relationship to the transaction and the parties.[2] *See Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 58 (Mo. 2005); *First Midwest Corp. v. Corporate Finance Associates*, 663 N.W.2d 888 at 893 (Iowa 2003). Additionally, Iowa Code § 489.801 dictates that Plaintiffs' fraud and breach of fiduciary duty claims are governed by Delaware state law because the law of the state of the limited liability company's formation governs its internal affairs. Internal affairs are those "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." *See Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). Since Verto is a Delaware entity, Delaware law governs plaintiffs' breach of fiduciary duty and fraud claims. *MHC Inv. Co. v. Racom Corp.*, 254 F. Supp. 2d 1090, 1097-98 (S.D. Iowa 2002). Throughout the remainder of this trial brief, counsel cites Missouri cases in the body of the brief, and cites in footnotes to Iowa cases supporting the same proposition, argument, or law.

II. The Parol Evidence Rule Bars Extrinsic Evidence on the Reallocation Agreements and the Harman Settlement Agreement

Absent ambiguity in a contract, the Court must enforce the contract as written, and no construction is necessary when the intent of the parties is expressed in clear and unambiguous language. *Patterson v. Rough Rd. Rescue, Inc.*, 529 S.W.3d 887, 894-95 (Mo.

[2] Among these factors are: the place where the injury occurred and conduct causing the injury occurred; the residence or place of business of the parties; the place where the relationship between the parties is centered; and the place of contracting, performance, and the contract's subject matter. *See Thompson by Thompson v. Crawford*, 833 S.W.2d 868, 870 (Mo. 1992) (applying Restatement (Second) of Conflict of Laws § 145 tort factors); *First Midwest Corp.*, 663 N.W.2d at 893 (applying Restatement (Second) of Conflict of Laws § 188 contract factors).

Ct. App. 2017)[3]. A contract is not ambiguous simply due to disagreement over its meaning. *Lowery v. Air Support Int'l, Inc.*, 982 S.W.2d 326, 329 (Mo. Ct. App. 1998). In order to prevail on a breach of contract claim in Iowa and Missouri, plaintiffs must prove (1) the existence of a contract, (2) the terms and conditions of the contract, (3) that plaintiffs have performed all the terms required under the contract and all conditions have occurred, (4) the defendant's breach of the contract in some particular way, and (5) that plaintiffs have suffered damages as a result of defendant's breach. *Keveney v. Missouri Military Acad.*, 304 S.W.3d 98, 104 (Mo. 2010)[4].

Because a condition precedent in the Reallocation Agreements did not occur, there is no breach of contract. Plaintiffs conceded in their resistance to Mr. Burgett's motion for summary judgment that Mr. Burgett had no obligation to re-allocate funds unless those funds are earn-out. See Plaintiff's Brief in Support of Resistance to Summary Judgment p. 10. Mr. Burgett maintains his assertion that the payment of earn-out by Harman to Verto was a condition precedent to his obligation to re-allocate funds, and that since Harman did not pay any earn-out to Verto ("For the avoidance of any doubt, Harman shall not owe Verto any Earn-Out payments pursuant to Section 2.4 of the APA under any circumstances"), Mr. Burgett is not liable for breach of contract because the condition precedent has not occurred. *Gillis v. New Horizon Dev. Co.*, 664

[3] *RPC Liquidation v. Iowa DOT*, 717 N.W.2d 317, 321 (Iowa 2006).
[4] *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010); *see also Iowa Arboretum, Inc. v. Iowa 4-H Found.*, 886 N.W.2d 695, 706 (Iowa 2016).

S.W.2d 578, 580 (Mo. Ct. App. 1983) (holding that plaintiff failed to prove occurrence of all conditions precedent)[5].

Even if the Court does not apply a "condition precedent" analysis to this case, the clear and unambiguous language of the contract dictates one conclusion: that Burgett has not breached the contract in any way. "The cardinal principle of contract interpretation is to ascertain the intention of the parties and to give effect to that intent" and the contract's terms "are read as a whole to determine the intention of the parties and are given their plain, ordinary, and usual meaning." *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. 2003)[6]. Verto never received any earn-out payments from Harman even though Verto made demands for an earn-out payment and even presented Harman with a draft complaint which stated that it was entitled to an earn-out payment. Despite the demand, Harman's attorney deleted the reference to earn-out in the settlement agreement and included a provision specifically stating that no portion of the settlement was allocated as earn-out. ("For the avoidance of any doubt, Harman shall not owe Verto any Earn-Out payments pursuant to Section 2.4 of the APA under any circumstances"). The plain language of the Harman Settlement Agreement that Harman would not pay earn-out to Verto under any circumstances

[5] *Nat'l Farmers Org., Inc. v. Lias*, 271 N.W.2d 751, 754 (Iowa 1978) (citing 3A Corbin on Contracts § 628 at 16 (1960)) (holding that because a condition precedent did not occur, defendant had no legal obligation to perform under the contract).

[6] *See also* Iowa Rule of Appellate Procedure 6.904(3)(n) ("The following propositions are deemed so well established that authorities need not be cited in support of them: In the construction of written contracts, the cardinal principle is that the intent of the parties must control, and except in the case of ambiguity, this is determined by what the contract itself says.").

dictates that Mr. Burgett cannot be liable for breach of contract when he was only obligated to re-allocate if Harman paid earn-out to Verto.

Plaintiffs will argue that the Harman settlement also states Harman does not owe payments under Section 10.10 of the APA, and therefore it also states the settlement payment is not holdback. Section 10.10 of the APA discussed the *timing* of the holdback payment and other indemnity issues. Importantly, the Harman settlement does not identify Section 2.3, which discussed holdback in the "Consideration and Manner of Payment" portion of the APA, as it does with Section 2.4, discussing earnout, as an area where Harman shall not owe Verto any payments. The different treatment of these sections further shows the Harman settlement was not earnout.

The contracts at issue in this case, the Reallocation Agreements and the Harman Settlement, are fully integrated, and this Court should not consider parol evidence to change the meaning of the agreements. "[G]enerally a writing will be reformed only if the party seeking reformation clearly and convincingly establishes that it does not express the true agreement of the parties because of fraud or duress, mutual mistake of fact, mistake of law, or mistake of one party and fraud or inequitable conduct on the part of the other." *Montgomery Properties Corp. v. Economy Forms Corp.*, 305 N.W.2d 470, 474 (Iowa 1981). None of these conditions are present in this case. The clear language of the Harman Settlement states Harman is not paying earn-out. The clear language of the Reallocation Agreements state Mr. Burgett is only required to reallocate earn-out payments. This Court should not consider extrinsic evidence, in the form of testimony or exhibits, in an effort by Plaintiffs to alter these terms and facts.

III. Plaintiffs' Fraud Claims Fail as a Matter of Law Because Defendant Did Not Make Any Representation, and Even if He Did, There was No Reliance

Plaintiffs conceded in their resistance to Mr. Burgett's motion for summary judgment that no plaintiff other than Jason Hellickson and Ron King have a cause of action for fraud. Thus, the now defunct fraud claims previously made by all other plaintiffs are now irrelevant. Furthermore, because the fraud claims of Hellickson and King have been briefed in detail in Defendant's summary judgment motion, and since there are no novel issues or complicated facts associated with these claims, this trial brief will not address such claims and the portions pertaining to such claims in Defendant's brief in support of his motion for summary judgement are hereby incorporated into this trial brief.

IV. The Plaintiffs' Promissory Estoppel Claim Fails Due to the Presence of a Written Contract

In his motion for summary judgment, Mr. Burgett asserted that promissory estoppel claims are precluded when a written contract concerning the same issues exists. *Hamra v. Magna Grp., Inc.*, 956 S.W.2d 934, 939 (Mo. Ct. App. 1997); *see also Chesus v. Watts*, 967 S.W.2d 97, 106 (Mo. Ct. App. 1998)[7]. Put another way, when a promissory estoppel claim only includes allegations arising from the forms of a written contract, recovery under a promissory estoppel theory is not permissible. *Id.*[8] Promissory estoppel cannot be used to create rights not included within an existing written

[7] *PFS Distribution Co. v. Raduechel*, 574 F.3d 580, 599 (8th Cir. 2009) (citing *Schoff*, 604 N.W.2d at 48).
[8] *DeJong v. City of Sioux Ctr.*, 980 F. Supp. 1010, 1014 (N.D. Iowa 1997), *aff'd sub nom. DeJong v. Sioux Ctr., Iowa*, 168 F.3d 1115 (8th Cir. 1999) ("[A] claim for promissory estoppel cannot be used to enforce an oral promise where the parties have executed a valid, fully integrated document subsequent to the alleged oral representations").

contract. *Blackburn v. Habitat Dev. Co.*, 57 S.W.3d 378, 389 (Mo. Ct. App. 2001); *see also Hamra v. Magna Grp., Inc.*, 956 S.W.2d 934, 939 (Mo. Ct. App. 1997) ("Promissory estoppel cannot be utilized to engraft a promise on a contract that is different from its written terms."). Because there is a written contract and the Plaintiffs' promissory estoppel claim directly with that written contract, promissory estoppel in not applicable to this case. Plaintiffs did not respond to this assertion in their resistance. Additionally, in Plaintiffs' lackluster response concerning promissory estoppel, Plaintiffs contended that Mr. Burgett made other promises. However, Plaintiffs did not identify any such promises. Even after extensive discovery and motions for summary judgment, Mr. Burgett is still not on notice of which promises he allegedly made and to whom they were made. Plaintiffs' promissory estoppel claims ought to be dismissed without even reaching the jury for the reasons described herein.

V. Plaintiffs' Breach of Fiduciary Duty Claims are Derivative and Should Be Dismissed for Failure to Make a Demand, and Furthermore, Defendant's Actions Did Not Amount to a Breach of his Fiduciary Duties

As an initial matter, Plaintiffs' breach of fiduciary duty claims are equitable in nature and must be considered by the court, not the jury. *Weltzin v. Nail*, 618 N.W.2d 293, 299 (Iowa 2000). As to the (lack of) merits of the breach of fiduciary duty claims, they must be dismissed for three simple reasons: 1) the claims are derivative in nature and the plaintiffs failed to fulfill statutory prerequisites to bringing suit; 2) they are superfluous of the breach of contract claims; and 3) because no fiduciary duty was ever in fact breached. Since plaintiffs' breach of fiduciary duty claims have been briefed in detail in Defendant's summary judgment motion, and since there are no novel issues or

complicated facts associated with these claims, this trial brief will not address such claims and the portions pertaining to such claims in Defendant's brief in support of his motion for summary judgement are hereby incorporated into this trial brief.

VI. Plaintiffs Breached the Reallocation Agreements, and Mr. Burgett is Entitled to Indemnification of Attorney Fees

Mr. Burgett asserted counterclaims of breach of contract and indemnification against all Plaintiffs based on the language of the Reallocation Agreements. Paragraph 4(b) of each Reallocation Agreement states:

> "agree to and hereby do release and forever discharge, me, Yurbuds, YBInspired and Yurbuds' and YBInsipred's affiliates, successors, assigns, officers, directors, managers, members, employees, agents, administrators, trustees (collectively, the "**Released Parties**") from any and all claims, demands, proceedings, obligations, losses, damages, expenses, debts, liabilities, rights and entitlements of every kind and description, whether known or unknown, whether suspected or unsuspected, whether absolute or contingent upon future events or circumstances, whether matured or unmatured, both at law and in equity (collectively, the "**Released Claims**"), that you have now or may later claim to have had against any of the Released Parties in any way related to the Transaction, including, without limitation, the distribution of proceeds to you resulting from the Transaction and the achievement or nonachievement by Yurbuds of any or all of the Earn-Out Amount;"

Paragraph 4(c) of each Reallocation Agreement states:

> "agree to refrain from directly or indirectly asserting any claim or demand, or commencing, instituting or causing to be commenced or instituted any proceeding of any kind against any Released Party, based upon any matter released or purported to be released hereby and to indemnify and hold harmless each Released Party from and against all losses, damages and expenses (including attorneys' fees) sustained or incurred by such Released Party in connection with the assertion of any claim or demand, or the commencement or institution of any proceeding, by or on behalf of you, which is based upon any matter released or purported to be released hereby".

From the plain language of the Reallocation Agreements, each Plaintiff (except Mr. Vander Weide, who did not sign a Reallocation Agreement) agreed to indemnify Mr. Burgett from all losses and damages, including attorney fees, incurred by Mr. Burgett in connection with the assertion of any claim released by Paragraph 4, which is exactly what this current lawsuit is. By bringing this lawsuit, Plaintiffs have breached the Reallocation Agreements and Mr. Burgett is entitled to damages accordingly.

CONCLUSION

For the reasons discussed above, Plaintiffs will not prove any of their theories of recovery at trial, and Defendant Seth Burgett will be entitled to judgment in his favor on all counts, including judgment in his favor on his counterclaims of breach of contract and indemnification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July, 2018, I electronically filed the foregoing document with the Clerk of the Court by using the Iowa Judicial Branch electronic filing system which will send a notice of electronic filing to the following:

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I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-EDMS participants:

None

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