

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

JACK W. NICKLAUS,

Case No.: 50-02023-CA-009653XXXXMB

Plaintiff,

v.

HOWARD P. MILSTEIN,
ANDREW W. O'BRIEN, and
NICKLAUS COMPANIES, LLC

Defendants.

**DEFENDANTS, HOWARD P. MILSTEIN, ANDREW W. O'BRIEN, AND
NICKLAUS COMPANIES, LLC'S, MOTION TO STAY PROCEEDINGS
OR, IN THE ALTERNATIVE, TO DISMISS THE COMPLAINT**

Defendants, HOWARD P. MILSTEIN ("Milstein"), ANDREW W. O'BRIEN ("O'Brien"), and NICKLAUS COMPANIES, LLC ("the Company") (collectively, the "Defendants"), by and through the undersigned counsel, hereby move for the entry of an Order to stay all proceedings in this lawsuit pending the resolution of the related and previously-filed lawsuit pending before the Supreme Court of the State of New York, or alternatively, to dismiss Plaintiff, JACK W. NICKLAUS'S ("Mr. Nicklaus" or "Plaintiff") Complaint [D.E. 3] (the "Complaint") pursuant to the *forum non conveniens* doctrine, or alternatively, to dismiss the Complaint for failure to state a claim on which relief can be granted. In support of this motion, Defendants state:

PRELIMINARY STATEMENT

Although this action was removed to the United States District Court for the Southern District of Florida (the "Federal Court"), the Federal Court remanded the case to this Court following dismissal of all federal claims due to the priority of an action in New York County

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Supreme Court (the “New York Court”) that has been litigating substantially similar issues for more than a year. *Nicklaus v. Milstein*, No. 23-CV-80764, 2023 WL 4930317, at *3 (S.D. Fla. Aug. 1, 2023).¹ For the same reasons, Defendants are requesting that this Court stay or dismiss the remaining Florida state law claims. In this reactionary lawsuit, Mr. Nicklaus seeks to obtain more favorable rulings on issues that are not only being litigated in the New York Court, but are the subject of preliminary rulings that indicate that Mr. Nicklaus is likely to lose in that court. Although Mr. Nicklaus contractually agreed to litigate in that venue, he now asks this Court to decide those very issues that he has repackaged into defamation and unfair competition claims that fail to even state a cause of action.

This action is the third proceeding involving these parties dealing with issues relating to Mr. Nicklaus’s resignation as Co-Chairman of the Company on May 3, 2022, and his efforts to compete against the Company—of which he is still a Member. Upon his resignation, Mr. Nicklaus brought an arbitration proceeding to determine his rights under his narrow Employment Agreement. However, the Company initiated legal proceedings in the New York Court—the forum it was contractually bound to use—to seek relief from Mr. Nicklaus’s acts against the best interests of the Company, including competing against the Company and seeking to misappropriate assets, including the commercial rights to his name, image, and likeness, which Mr. Nicklaus and his closely-held corporation sold to the Company for more than \$145 million in 2007. That action was initiated in the New York Court on May 13, 2023, and is styled *Nicklaus Companies, LLC v. GBI Investors, Inc., and Jack W. Nicklaus*, Index No.: 656284/2022 (the “New York Action”).²

¹ The Order is filed in this action as Docket No. 15.

² The New York Action’s docket is available on New York State Courts Electronic Filing (“NYSCEF”), a New York government website of which this Court may take judicial notice of: https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=Nkr_PLUS_8fkrOIRyqwQ68W3LZg==&display=all.

For the past 17 months, Mr. Nicklaus and the Company have been litigating in the New York Court the issues of whether (1) the Company or Mr. Nicklaus owns the commercial rights to his name, image, and likeness, (2) Mr. Nicklaus is restrained from competing against the Company, and (3) Mr. Nicklaus engaged in conduct against the interests of the Company. The New York Court has denied Mr. Nicklaus's motion to dismiss the Company's claims on grounds of *forum non conveniens*, citing Mr. Nicklaus's express agreement to bring any claims against the Company in a New York court. It further entered a preliminary injunction restricting Mr. Nicklaus's use of the intellectual property he and his closely held corporation sold to the Company, including "Mr. Nicklaus' name, image, and likeness for commercial endorsements without the Company's prior written consent." See [NYSCEF No. 247](#) at 2.

Mr. Nicklaus has responded to the injunction by bringing this action, seeking rulings to undercut the decisions of the New York Court—including the injunction that is currently restraining him. For example, in Counts II and III of the Complaint, Mr. Nicklaus alleges the Company engaged in unfair competition and violated the Florida publicity rights statute by abusing its rights to use Mr. Nicklaus's name, image and likeness—the scope of which rights are currently being decided by the New York Court. In Counts I and II, Mr. Nicklaus bases causes of action for defamation and unfair competition on claims that the Company's allegations in its complaint in the New York Action are false. Thus, Mr. Nicklaus is actually asking this Court to rule on the merits of a pending litigation in another jurisdiction.

As the Federal Court has recognized, the essential issues that Mr. Nicklaus seeks to litigate in this action either arise out of or are currently being litigated in the New York Action—creating a significant risk of contradictory findings with the New York Court if this action is litigated at this time. Accordingly, Defendants respectfully request this Court stay this action and permit the

New York Court to resolve these issues in the venue that the parties freely chose as their agreed upon forum, and where they have been litigated for the past year.

Alternatively, this action should be dismissed on multiple grounds. Mr. Nicklaus is bringing his latest claims in an inconvenient forum—in contravention of his express agreement to bring all such claims in a New York court. These claims also fail to state a claim on which relief may be granted. Mr. Nicklaus’s allegations that Defendants’ statements made in the New York Action are false and defamatory fail to allege essential elements and are barred by Florida’s litigation and business interest privileges. Moreover, Mr. Nicklaus’s allegations of violations of Florida common law, and § 540.08, Fla. Stat., by way of improper use of Mr. Nicklaus’s name, image and likeness should be dismissed as a matter of law given that the rights to the intellectual property were transferred to the Company in return for more than \$145 million. The New York Court has already recognized this on a preliminary basis in granting the Company’s motion for a preliminary injunction restraining Mr. Nicklaus’s use of the very intellectual property rights that are the subject of his claims in this action. See [NYSCEF No. 247](#).

FACTUAL BACKGROUND

The following facts are derived from the factual allegations of the Complaint, documents referenced in the Complaint and publicly filed documents central to Mr. Nicklaus’s claims. *See, e.g., Veal v. Voyager Property & Casualty Insurance Co.*, 51 So. 3d 1246, 1249-50 (Fla. 2d DCA 2011) (trial court was “entitled to review” agreement incorporated by reference in complaint when ruling on motion to dismiss); *Steiner Transocean Ltd. v. Efremova*, 109 So. 3d 871, 873 (Fla. 3d DCA 2013) (“a court is permitted to consider evidence outside the four corners of the complaint where the motion to dismiss ... is based upon *forum non conveniens* or improper venue”).

Prior to May 2007, Mr. Nicklaus engaged in his business ventures – principally golf-course design and management—“through Golden Bear International, Inc. (“GBI”), a closely-held corporation owned by Mr. Nicklaus and his family.” Complaint ¶¶ 18, 19, 38. As Mr. Nicklaus acknowledged in multiple documents, including Registration Statements that he signed and filed with the U.S. Securities and Exchange Commission, prior to May 2007 GBI held the “exclusive ownership of ... the Nicklaus Image,” which was defined as “the rights to use the name, image, likeness, nickname, biographical data, and other identifying characteristics of Jack W. Nicklaus” [NYSCEF No. 323](#) at pgs. 337/491, 347/491. *See also* [NYSCEF No. 316](#) ¶¶ 6, 7; [NYSCEF No. 320](#); [NYSCEF No. 321](#).³ The law firm that represents Mr. Nicklaus in this action was listed as the counsel of record in the Registration Statements and attested to the accuracy of the above acknowledgements by Mr. Nicklaus. *See, e.g.,* [NYSCEF No. 322](#) at pgs. 205/491, 208/491, 209/491

In May 2007, Mr. Nicklaus and GBI consummated the sale of Mr. Nicklaus’s intellectual property rights—including commercial rights to Mr. Nicklaus’s name, nickname (“Golden Bear”), image, and likeness and “a host of trademarks, service marks, copyrights, patents, and other specified intellectual property”—to the Company for \$145 million and 100% of the Class A Units in the Company, Complaint, ¶¶ 38-40. As acknowledged by the Complaint, the May 2007 transaction was effectuated through a series of related agreements, including a Purchase and Sale Agreement (the “PSA”) among the Company, GBI and others, and an Amended and Restated

³ This Court can take judicial notice of SEC Registration Statements signed by Plaintiff. *See* § 90.202(12), Fla. Stat., provides for judicial notice of “[f]acts that are not subject to dispute because they are capable of accurate ... determination by resort to sources whose accuracy cannot be questioned.” § 90.202(12), Fla. Stat.

Limited Liability Company Agreement (the “LLC Agreement”) among the Company, Mr. Nicklaus, GBI, and others. *Id.*, § 38.

The PSA provided that the Company was purchasing “[a]ll of the intangible rights and property of GBI, including all of the publicity and related commercial rights held by GBI to use and/or license the use of the endorsement, name, nickname, likeness, signature and/or other identifying characteristics of Jack W. Nicklaus and biographical information related to his career” [NYSCEF No. 113](#), PSA Annex A, § 15. As noted above, Mr. Nicklaus had acknowledged in documents filed with the United States Government prior to the May 2007 transaction that GBI held the “exclusive ownership” of “the rights to use the name, image, likeness, nickname, biographical data, and other identifying characteristics of Jack W. Nicklaus” [NYSCEF No. 323](#) at pgs. 337/491, 347/491. Mr. Nicklaus’s closely-held corporation GBI represented that Mr. Nicklaus did not retain any interest in those commercial rights to use his name, image and likeness by warranting in the PSA that “aside from certain specified exceptions, the assets sold to the Company “include all ... interests ... heretofore held by a member of the Nicklaus Family in ... any ... asset held by, GBI” [NYSCEF No. 113](#) § 4.19 at 25.

The parties clearly delineated the scope of the rights to Mr. Nicklaus’s name, image and likeness being purchased by the Company by expressly identifying the limited carve-out of rights that were *not* being transferred to the Company. Schedule 4.10(b) to the PSA explicitly states that:

For the avoidance of doubt, the right of Jack W. Nicklaus to utilize his endorsement, name, nickname (the “Golden Bear”), likeness, signature and biographical information to identify himself as a professional golfer and for personal, investment and charitable purposes is not an asset of GBI and continues to be retained by Mr. Nicklaus individually.

[NYSCEF No. 113](#), Schedule 4.10(b) at 24. The PSA did not exclude any other portion of the rights to Mr. Nicklaus's name, image and likeness from the sale to the Company. Thus, the Company acquired all of the rights to use Mr. Nicklaus's name, image and likeness for commercial purposes.

In the LLC Agreement, Mr. Nicklaus acknowledged that the Company was acquiring the commercial rights to his name, image and likeness, which was referred to as the "Nicklaus IP" and defined as "mean[ing] the name, photograph, likeness, and image of [Mr. Nicklaus] and the [Nicklaus]-related brands and trademarks now existing or owned by or licensed to the Company in the future, including, but not limited to, Nicklaus, Jack Nicklaus, Jack Nicklaus Signature and Golden Bear." [NYSCEF No. 114](#), at p. 13. In the LLC Agreement, Mr. Nicklaus agreed that the Company was acquiring the right to "to, use, exploit, license, assign, sell [and] otherwise transfer the Nicklaus IP," subject only to a limited right by Mr. Nicklaus, as a Member of the Company, to object to certain new activities, which right Mr. Nicklaus could not exercise unreasonably. [NYSCEF No. 114](#) § 6.3 at 33; Complaint, ¶ 47. Mr. Nicklaus also agreed that the Company had been formed to acquire and hold GBI's assets "and engag[e] in the businesses of, among other things, golf course design and management, licensing of certain intellectual property . . . and marketing personal service contracts related to the personal endorsement and other publicity rights of [Mr. Nicklaus]" [NYSCEF No. 114](#) § 1.4 at 2; *see also* Complaint, ¶45.

In the LLC Agreement, Mr. Nicklaus and the Company also agreed to a broad forum selection clause. With respect to jurisdiction, Mr. Nicklaus and the Company agreed that each of them "irrevocably and unconditionally submits, for itself and its property, to the jurisdiction of the courts of the State of New York, and of the United States District Court of the Southern District of New York, and any appellate court from any thereof, in any action or proceeding arising out of or relating to this Agreement" With respect to choice of forum, they agreed that all disputes

between them - not just disputes relating to the LLC Agreement - would be brought in a New York court: “Each party further agrees that any action or proceeding brought against the other, shall be brought only in a court of the State of New York, or to the extent permitted by law, in such federal court.” [NYSCEF No. 114](#) § 9.18 at 51.

On May 3, 2022, Mr. Nicklaus resigned his executive position at the Company and initiated an arbitration against the Company to determine his rights solely under his Employment Agreement. Complaint ¶¶ 122, 123. On May 13, 2022, the Company filed a complaint against Mr. Nicklaus and GBI alleging breaches of the LLC Agreement and the PSA. [NYSCEF No. 1](#); *see also* Complaint ¶¶ 126, 127. On August 22, 2022, the Company filed an amended complaint (the “Amended Complaint”) that added a claim for Mr. Nicklaus’s breach of his Non-Competition Agreement with the Company. [NYSCEF No. 54](#); *see also* Complaint ¶ 127.

The first numbered paragraph of the Amended Complaint summarizes the main issues in the New York Action:

This is a breach of contract, tortious interference with contract and breach of fiduciary duty action in which [Mr. Nicklaus and GBI] are reneging on a deal worth more than \$145 million in which they agreed to transfer the exclusive rights to valuable intellectual property and services. Despite being paid an enormous sum, [Mr. Nicklaus and GBI] have wrongfully continued to use these rights, acted in bad faith, wrongfully diverted opportunities to the detriment of [the Company’s] business and willfully engaged in activities damaging to the brand and other intellectual property owned by the Company. [The Company] seeks damages and injunctive and declaratory relief.

[NYSCEF No. 54](#) § 1.

The Amended Complaint alleges that although the Company purchased the exclusive commercial rights to the Nicklaus IP for more than \$145 million, Mr. Nicklaus has attempted to renege on that deal and wrongfully repossess those rights for the sole purpose of competing against the Company—and that Mr. Nicklaus otherwise engaged in conduct against the best interests of

the Company for financial gain—in breach of his duties under the LLC Agreement and his Non-Competition Agreement. [NYSCEF No. 54](#) §§ 1-13.

Mr. Nicklaus asked the New York Court to dismiss the New York Action on grounds of *forum non conveniens*, but that court denied the motion, citing Mr. Nicklaus’s agreement to the LLC Agreement’s forum selection clause. [NYSCEF No. 240](#); *see also* [NYSCEF No. 246](#) at p. 338.

On November 23, 2022, following a three-day evidentiary hearing, at which Mr. Nicklaus testified, the New York Court granted the Company’s motion for a preliminary injunction prohibiting Mr. Nicklaus from exploiting the Nicklaus IP that the Company had purchased. The New York Court ruled that the Company had shown “a likelihood of success” on its claim that it owns the subject intellectual property, including “the exclusive right to license Mr. Nicklaus’s personal name and likeness rights. [NYSCEF No. 246](#), at 349:7-16; *see also* Complaint, ¶ 130. On December 9, 2022, the New York Court issued the preliminary injunction order, which enjoined Mr. Nicklaus and GBI from:

(i) using or authorizing the use of Transferred Intellectual Property as defined in Section 4.10(a) of the Purchase and Sale Agreement (“PSA” [NSYCEF 113]), including Schedule 4.10(a) thereto, without the Company’s prior written consent; and (ii) *licensing Mr. Nicklaus’s name, image, and likeness for commercial endorsements without the Company’s prior written consent*; provided, however, that nothing in this paragraph shall restrain Defendants from using or authorizing the use of Mr. Nicklaus’s name, image, and likeness to identify Mr. Nicklaus as a professional golfer, or for other personal, investment, and charitable purposes

[NYSCEF No. 247](#), at p. 2 (emphasis added); *see also*, Complaint, ¶130.

On April 12, 2023, the New York Court granted in part and denied in part Mr. Nicklaus’s motion to dismiss the Company’s claims. While the court dismissed certain claims alleging breaches of the implied covenant of good faith and fair dealing, the court suggested that the Company could seek to replead those claims. [NYSCEF No. 313](#), 4/12/23 Tr. at 68-69. On June

12, 2023, the company filed a motion to replead those claims, which is currently sub judice.

[NYSCEF No. 335](#).

Mr. Nicklaus has made repeated applications to the New York Court to modify the preliminary injunction restraining his use of the Nicklaus IP, but has not been successful to date. On December 19, 2022, the New York Court rejected an application by Mr. Nicklaus to modify the preliminary injunction. [NYSCEF No. 270](#). On June 2, 2023, the New York Court heard oral argument and accepted additional evidence on another application by Mr. Nicklaus to modify or vacate the preliminary injunction. [NYSCEF No. 334](#). That motion is currently sub judice.

Although the New York Court has already heard evidence of Mr. Nicklaus's misconduct at the three-day evidentiary hearing, has ruled on a preliminary basis that the Company owns the exclusive commercial rights to the Nicklaus IP, and has heard additional evidence regarding the Company's rights to the Nicklaus IP, Mr. Nicklaus now seeks to litigate those issues in this Court.

On April 21, 2023, Mr. Nicklaus filed his Complaint in Florida state court. Mr. Nicklaus alleged claims of defamation (Count I), unfair competition (Count II), false endorsement in violation of Fla. Stat. § 540.08 (Count III), false statements in violation of the federal Lanham Act (Count IV), and false endorsement in violation of the Lanham Act (Count V). Complaint ¶¶ 240-88. All of the claims in the Complaint raise issues that are being litigated in the New York Action. Counts II through V of the Complaint raise issues of the extent of the Company's rights as owner of the Nicklaus IP—issues at the heart of the New York Court's preliminary injunction. The defamation and unfair competition causes of action (Counts I and II) are based on claims that the Company's allegations in its pleadings in the New York Action are false.

Based upon the federal claims asserted in the Complaint, Defendants removed the case to federal court where Mr. Nicklaus's federal claims could be heard in the appropriate venue. On May 11, 2023, Mr. Nicklaus's claims were removed to federal court. [D.E. 14].

Defendants asked the Federal Court to stay or to dismiss Mr. Nicklaus's claims, primarily on the grounds that the New York Action has priority given the substantial similarity of issues and parties in the two cases. The Federal Court agreed with this argument and dismissed Mr. Nicklaus's federal claims. The Federal Court stated that "[t]he exclusive or non-exclusive right to use the Property [Mr. Nicklaus's name, image, and likeness and other intellectual property] is at the heart of almost every claim in the Plaintiff's Complaint." *Nicklaus v. Milstein*, 2023 WL 4930317, at *1. As that court explained:

The central issue in dispute is the ownership of certain intangible property rights.

...

The Defendants contend that when the Plaintiff sold the Property [the intangible intellectual property rights], he sold the *exclusive* right to use his name and likeness, while the Plaintiff contends that he sold the *non-exclusive* right.

The exclusive or non-exclusive right to use the Property is at the heart of almost every claim in the Plaintiff's Complaint.

....

[T]he Property in this case and the New York case is the same, the ownership of the Property forms the core of and is intertwined with all of the Plaintiff's federal claims (Count IV and Count V), the Plaintiff's federal claims necessarily would seek adjudication on the rightful ownership and/or the exclusive right to use the Property, and the New York court previously has exercised its jurisdiction by restricting the Plaintiff's use of the Property.

Nicklaus v. Milstein, 2023 WL 4930317, at *1, *2 (emphasis in original) (internal citation omitted).

The Federal Court held that under these circumstances, it had no jurisdiction to hear this case pursuant to the doctrine of prior exclusive jurisdiction, which is known in federal courts as "the *Princess Lida* doctrine." *Nicklaus v. Milstein*, 2023 WL 4930317, at *2. In *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939), the Supreme Court held that "if two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of

the property which is the subject of the litigation in order to proceed with the case and grant the relief sought[,] the jurisdiction of the one court must yield to that of the other.” Accordingly, the Federal Court dismissed Mr. Nicklaus’s federal claims (Count IV and V) and remanded his three state claims back to this Court. *Id.*, p. 6. Before the Court now are Mr. Nicklaus’s claims for defamation (Count I), unfair competition (Count II), and false endorsement in violation of Fla. Stat. § 540.08 (Count III).

As the Federal Court noted, two of Mr. Nicklaus’s three remaining claims are based on the Company’s alleged wrongful assertion of exclusive rights to the Nicklaus IP—just like the dismissed federal claims. *Nicklaus v. Milstein*, 2023 WL 4930317, at *1-*2. Specifically, Counts II (unfair competition), and III (false endorsement) are based on allegations that the Company wrongfully used the Nicklaus IP and misrepresented Mr. Nicklaus’s supposed rights to that intellectual property. *See* Complaint, ¶¶ 258, 260-265, 266, 273, 275, 282, 285.

Further, two of Mr. Nicklaus’s claims actually seek to litigate—in this forum—the truth of the Company’s allegations in the New York Action. Specifically, Counts I (defamation) and II (unfair competition) are based on allegations that the Company’s allegations in the Amended Complaint are false and have been used by the Company to defame Mr. Nicklaus or to compete unfairly against him. *See*, Complaint, ¶¶ 142-46, 241-43, 258, 260, 273, 275.

Thus, this action is both an attempt to relitigate issues that Mr. Nicklaus has been litigating unsuccessfully in the New York Action and a collateral attack on the propriety of that action and the injunctive relief entered against Mr. Nicklaus by the New York Court. Florida law is clear that actions such as this one should be stayed pending litigation of the previously-filed action.

ARGUMENT**I. This Action Should be Stayed Pending Resolution of the New York Action**

Florida courts follow the principle of priority, which mandates that, absent extraordinary circumstances, a court must stay an action if it involves substantially the same issues and parties as a previously-filed action in another court. Florida courts have described the principle of priority as “the well-established law of Florida that where two courts have concurrent jurisdiction of a cause of action, the first court to exercise jurisdiction has the exclusive right to hear all issues or questions arising in the case.” *Hirsch v. DiGaetano*, 732 So. 2d 1177, 1177–78 (Fla. 5th DCA 1999) (citation omitted). The principle of priority is supported by numerous authorities, including the *Princess Lida* doctrine—the basis of the Federal Court’s holding. *See, e.g., Blake v. Blake*, 172 So. 2d 9, 10 (Fla. 3d DCA 1965) (citing *Princess Lida* and other authorities for the principle that “[a]s between courts of concurrent jurisdiction, it has generally been held that the court which first exercises jurisdiction over a matter retains such jurisdiction to the termination of the cause”).

“The rationale for the application of the principle of priority, as a matter of comity, is the avoidance of wasting judicial resources in duplicative and unnecessary proceedings and the risk of inconsistent judgments regarding the application of law to the same factual dispute.” *Inphynet Contracting Servs., Inc. v. Matthews*, 196 So. 3d 449, 464 (Fla. 4th DCA 2016). *See also Reliable Restoration, LLC v. Panama Commons, L.P.*, 313 So. 3d 1207, 1209 (Fla. 1st DCA 2021) (“[i]t is well-established that in instances where co-sovereigns both maintain jurisdiction regarding a single dispute, principles of comity dictate that the court in which jurisdiction first attaches should be given priority regarding adjudication of its case”).

Florida courts have consistently applied the principle of priority to stay cases that are substantially similar to cases that have previously been filed in other states. As one court has

explained, “[p]rinciples of comity between sovereigns suggest that a court of one state should stay a proceeding pending before it on grounds that a prior-filed case involving substantially the same subject matter and parties is pending in another state's courts.” *Polaris Pub. Income Funds v. Einhorn*, 625 So.2d 128, 129 (Fla. 3d DCA 1993) (citation omitted). “Absent extraordinary circumstances, a trial court abuses its discretion when it fails to respect the principle of priority.” *Perelman v. Estate of Perelman*, 124 So. 3d 983, 986 (Fla. 4th DCA 2013) (citation omitted).

Thus, “[a]lthough a trial court has broad discretion to order or refuse a stay of an action pending before it, it is nonetheless an abuse of discretion to refuse to stay a subsequently filed state court action in favor of a previously filed [state] action which involves the same parties and the same or substantially similar issues.” *Pilevsky v. Morgans Hotel Group Management, LLC*, 961 So. 2d 1032, 1034-35 (Fla. 3d DCA 2007) (internal quotation marks and citation omitted). *See also OPKO Health, Inc. v. Lipsius*, 279 So. 3d 787, 793 (Fla. 3d DCA 2019) (“[t]he ‘principle of priority’ dictates that the first court to exercise jurisdiction retains the exclusive right to hear the questions and issues arising from the case”).

The principle of priority does not require an absolute identity of either parties or causes of action “to justify a stay of the second-filed action.” *Toth v. Toth*, 359 So. 3d 352, 354 (Fla. 3d DCA 2023). “Rather, it is sufficient that the two actions involve a single set of facts and that resolution of the [earlier-filed] case will resolve many of the issues involved in the subsequently filed case.” *Id.* (internal quotation marks and citation omitted) (brackets in original). As another court has noted, “[t]he pivotal question is whether the Florida action is so similar in parties and issues as to be unnecessarily duplicative of the prior-filed New York state proceedings.” *Polaris*, 625 So. 2d at 129. *See also Reliable Restoration*, 313 So. 3d at 1210 (“[w]here the two actions involve a single set of facts such that resolution of the one case will resolve many of the issues involved in the

subsequently filed case, the cases are substantially similar and comity principles will apply” (internal quotation marks and citations omitted).

This action and the New York Action clearly raise substantially similar issues regarding a common set of facts. Both actions raise issues requiring litigation to define the relationship of ■■■■■ to the Company that not only bears his name, but to which he has sold the rights to his name, image and likeness. Both suits turn on whether Mr. Nicklaus or the Company owns the commercial rights to the Nicklaus IP. Mr. Nicklaus’s conduct is also central to both suits because it is the Company’s allegations regarding that conduct in the New York Action that Mr. Nicklaus now claims are false and defamatory in this action. Mr. Nicklaus’s claims of unfair competition in this action are dependent on his establishing that he has any right to compete against the Company—which is also being litigated in the New York Action, where the Company asserts Mr. Nicklaus is still subject to his Non-Competition Agreement with the Company.

Mr. Nicklaus’s Counts II (unfair competition) and III (false endorsement in violation of Fla. Stat. § 540.08) are both premised on Mr. Nicklaus’s claim that he—not the Company—owns the commercial rights to the Nicklaus IP. *See, e.g.*, Complaint ¶¶ 258, 260, 265, 266. Yet, for more than the past year, in the New York Action, Mr. Nicklaus and the Company have been litigating the issues of the extent of the Company’s rights as owner of the Nicklaus IP and the extent to which Mr. Nicklaus retained interests in the Nicklaus IP after selling those intangible rights and other assets to the Company for \$145 million in 2007. The New York Court is not only hearing this issue—but it has preliminarily ruled against Mr. Nicklaus on this issue by granting the Company a preliminary injunction protecting its rights to the Nicklaus IP. [NYSCEF No. 247](#); [NYSCEF No. 246](#) at 349:7-18; *see also* Complaint ¶ 130. With this reactive lawsuit Mr. Nicklaus is simply seeking to relitigate his supposed rights to the Nicklaus IP in a different venue.

Furthermore, Mr. Nicklaus's Counts I and II (for defamation and unfair competition) are based on claims of the alleged falsity of the Company's allegations in the New York Action. *See, e.g.,* Complaint ¶¶ 241, 242, 258, 260. Mr. Nicklaus is actually seeking to have this Court rule on the truth of allegations in the New York Action. The truth of the factual allegations asserted in the New York Action's complaint are at issue in that proceeding. In this action, Mr. Nicklaus bases his claims of defamation and unfair competition on those very allegations. So, if this action proceeds, the Company will once again seek to prove the truth of those allegations as a defense.

Thus, the two actions are inextricably intertwined. The resolution of the New York Action will determine essential issues in this action. As the Federal Court held in this matter—regarding all of Mr. Nicklaus's claims except for defamation—“[t]he exclusive or non-exclusive right to use the Property [the Nicklaus IP] is at the heart of almost every claim in the Plaintiff's Complaint.” *Nicklaus v. Milstein*, 2023 WL 4930317, at *1. And the defamation claim is even more intertwined with the New York Action since it requires litigating the truth of the allegations in the Company's complaint in the New York Action. Given that the New York Action and this action are substantially similar proceedings, this Court should stay this action under the principle of priority.

II. In the Alternative, This Action Should Be Dismissed

If this Court does not stay this action, the Court should dismiss the Complaint on multiple grounds. First, the Complaint should be dismissed under the doctrine of *forum non conveniens* because Mr. Nicklaus agreed to a forum selection clause that makes the New York Court the only proper venue for his claims. Second, the Complaint should be dismissed for failure to state a claim on which relief can be granted.

A. Mr. Nicklaus's Claims Should Be Litigated In New York Based Upon A Valid and Enforceable Forum Selection Clause

The forum selection clause of the LLC Agreement makes courts in New York the exclusive forum for any litigation between Mr. Nicklaus and the Company. That clause provides that “[e]ach party further agrees that *any action or proceeding brought against the other*, shall be brought *only* in a court of the State of New York, or to the extent permitted by law, in such federal court.” [NYSCEF No. 114](#) § 9.18 at 51 (emphasis added). All claims against the Company should be dismissed on the grounds of *forum non conveniens*.

“[A] court is permitted to consider evidence outside the four corners of the complaint where the motion to dismiss ... is based upon *forum non conveniens* or improper venue.”. *Steiner Transocean Ltd. v. Efremova*, 109 So. 3d 871, 873 (Fla. 3d DCA 2013). Forum selection clauses like the one at issue here are presumptively valid. *See Corsec, S.L. v. VMC Intern. Franchising, LLC*, 909 So. 2d 945, 947 (Fla. 3d DCA 2005). “Courts are reluctant to interfere with parties’ agreements generally concluding, as did the United States Supreme Court in *Zapata*, that ‘[w]hatever ‘inconvenience’ [the plaintiff] would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting.’” *Id.* (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17–18 (1907)). As the Florida Supreme Court has noted, “the test of unreasonableness is not mere inconvenience or additional expense,” rather it is the equivalent of no forum at all:

[I]t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

Manrique v. Fabbri, 493 So.2d 437, 440 n. 4 (Fla.1986) (quoting *Zapata*, 407 U.S. at 18).

Mr. Nicklaus cannot make a strong showing that there is anything unfair or unreasonable about enforcing the LLC Agreement's forum selection clause given that he agreed to that provision as a part of a deal that enriched him and his family by more than \$145 million. Indeed, this issue has already been decided by the New York Court, which has found that forum selection clause to be valid and enforceable. [NYSCEF No. 240](#); *see also*, [NYSCEF No. 246](#) at 338.

As signatories to the LLC Agreement, both Mr. Nicklaus and the Company are bound to the unambiguous terms of the forum selection clause. Likewise, as executives of the Company, Messrs. Milstein and O'Brien can enforce this clause. The law is clear that "a non-signatory may invoke a signatory's forum selection clause where the non-signatory and signatory are related." *Citigroup Inc. v. Caputo*, 957 So. 2d 98, 102 (Fla. 4th DCA 2007). *See also St. Francis Holdings, LLC v. Pawnee Leasing Corp.*, No. 8:20-CV-1101-T-02AAS, 2020 WL 6746329, at *3 (M.D. Fla. Nov. 17, 2020) ("the mere fact a party is a non-signatory to an agreement is not a basis to preclude enforcement of a forum-selection clause").

Mr. Nicklaus's claims allege that the Defendants have used and licensed his name, image and likeness in ways to which he has not consented. *See* Complaint ¶¶ 58-61, 265. Mr. Nicklaus's claims largely depend on the resolution of the issue of who owns the commercial rights to Mr. Nicklaus's name, image and likeness, the rights to which are derived from the PSA and the LLC Agreement. It is the Company's position that under the LLC Agreement it owns the Nicklaus IP while Mr. Nicklaus merely has a limited veto right with respect to that intellectual property. *See* [NYSCEF No. 114](#) § 6.3 at 33. Such claims are covered by the LLC Agreement's forum selection clause, which states that it applies to all claims "arising out of or relating to [the LLC] Agreement" [NYSCEF No. 114](#) § 9.18 at 51.

Under Delaware law, which governs the LLC Agreement ([NYSCEF No. 114](#) § 9.17 at 51), such a forum selection clause must be read broadly. *See, e.g., CA, Inc. v. Ingres Corp.*, 2009 WL 4575009, at *46 (Del. Ch. Dec. 7, 2009), *aff'd*, 8 A.3d 1143 (Del. 2010) (forum selection clause with “[l]anguage such a[s] ‘relate to’ or ‘arise out of’ is to be read broadly”). Mr. Nicklaus’s claims fall within the scope of this broad forum selection clause.

Accordingly, if this Court does not stay this action, the Court should enforce the LLC Agreement’s forum selection clause by dismissing the Complaint under the doctrine of *forum non conveniens*.

B. Mr. Nicklaus’s Complaint Fails to State a Cause of Action

1. Legal Standard for a Motion to Dismiss

A motion to dismiss should be granted when a complaint alleges no set of facts, which if proven, would entitle a plaintiff to relief. *See*, Fla. R. Civ. P. 1.140(b). “The function of a motion to dismiss [] is to raise as a question of law the sufficiency of the facts alleged to state a cause of action.” *Connolly v. Sebeco, Inc.*, 89 So. 2d 482, 484 (Fla. 1956); *see also, Chiang v. Wildcat Groves, Inc.*, 703 So. 2d 1083, 1087 (Fla. 2d DCA 1997). To withstand a motion to dismiss, a complaint must allege a *prima facie* case. Whether a *prima facie* case has been pled depends on the sufficiency of the plaintiff’s allegations of fact, excluding the bare conclusions of the plaintiff. *Frank v. Lurie*, 157 So. 2d 431, 433 (Fla. 2d DCA 1963).

On a motion to dismiss, a court must accept as true all well-pled facts and determine whether they constitute an actionable claim. *Xavier v. Leview Boymelgreen Marquis Developers, LLC*, 117 So. 3d 773, 775 (Fla. 3d DCA 2012). Moreover, “[a] complaint must contain the ‘ultimate facts’ necessary to support the claim for relief.” *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004) (citing Fla. R. Civ. P. 1.110(b)(2)); *see also, Ranger Contr. Indus., Inc. v. Martin Companies of Daytona, Inc.*, 881 So. 2d 677, 680 (Fla.

5th DCA 2004) (“pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient”). When a “complaint impliedly incorporates [a document] by reference,” a court may consider that document on a motion to dismiss. *Veal*, 51 So. 3d at 1249–50.

2. The Absolute Immunity Conferred by the Litigation Privilege Bars Mr. Nicklaus’s Defamation and Unfair Competition Claims in Counts I and II

“Absolute immunity must be afforded to any act occurring during the course of a judicial proceeding.” *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380, 384 (Fla. 2007). This “litigation privilege applies in all causes of action, statutory as well as common law.” *Id.*, 950 So. 2d at 380–81.

The litigation privilege applies to the alleged false statements contained in the New York Amended Complaint that form the basis of Count I (defamation) and Count II (unfair competition). *See* Complaint ¶ 241 (“the Company’s Complaint in the New York litigation included false statements”). *See DelMonico v. Traynor*, 116 So. 3d 1205, 1217 (Fla. 2013) (Florida’s absolute litigation privilege applies when “the defamatory statements at issue were made either in front of a judicial officer or in pleadings or documents filed with the court or quasi-judicial body”). This immunity bars all causes of action “without qualification as to the nature of judicial proceedings, whether based on common law, statutory authority, or otherwise.” *Echevarria*, 950 So. 2d at 384.

The litigation privilege acts as an absolute bar to Mr. Nicklaus’s defamation and unfair competition claims.⁴ As the Court in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So.2d 606, 607-08 (Fla 1994) stated:

Under Florida law, “defamatory statements made in the course of judicial proceedings are *absolutely privileged*, no matter *how false or malicious* the statements may be. Consequently, the torts of perjury, libel, slander, *defamation*, and similar proceedings that are based on statements made in connection with a

⁴ *Fariello v. Gavin*, 873 So. 2d 1243, 1245 (Fla. 5th DCA 2004) (the litigation privilege may be raised in a motion to dismiss when based on the four-corners of the pleading).

judicial proceeding *are not actionable*. The immunity afforded to statements made during the course of a judicial proceeding extends not only to the parties in a proceeding but to judges, witnesses, and counsel as well.”

(internal citations omitted) (emphasis added).

The allegations made in the New York Amended Complaint are afforded immunity as they are part of a judicial proceeding. *See Gandy v. Trans World Computer Tech. Group*, 787 So. 2d 116, 119 (Fla. 2d DCA 2001) (“Florida recognizes that defamatory words published during the course of a judicial or quasi-judicial proceeding are absolutely privileged if they are connected with, or relevant or material to, the cause at hand or subject of inquiry”).

Mr. Nicklaus alleges that a separate “publication” occurred when the Company provided copies of its pleading to the news media. However, such publications are covered by the litigation privilege. *See Wolf v. Menh*, CV 19-305 (RMC), 2019 WL 3753121, at *3 (D.D.C. Aug. 8, 2019) (“[p]ublication to the media of material that the media was independently entitled to view ... cannot provide a basis for a claim of defamation.”), *aff’d on other grounds*, 810 Fed. Appx. 10 (D.C. Cir. 2020). Indeed, a publication to the media of the public complaint does not give rise to defamation as a complaint is a public document and entirely accessible by the media. *See Universal Express, Inc. v. U.S. S.E.C.*, 177 Fed. Appx. 52, 53 (11th Cir. 2006) (“complaint filed in the Southern District of New York is a public document”).

Moreover, the absolute privilege is extended to any alleged transmittal of the Company’s pleading to the media as it was a response to media inquiries in relation to *Mr. Nicklaus’s* public statements that “he’s not constrained by any of the agreements.” Complaint ¶ 184. Mr. Nicklaus is a notable “public” figure, who has made public representations relating to both the arbitration he initiated and the New York Action that “he’s not constrained by any of the agreements.” Complaint ¶¶ 13, 184. The Company received inquiries from the press in relation to Mr. Nicklaus’s

own statements and, instead of providing a statement, it opted to simply produce an already-public record to avoid ambiguity relative to its position in the ongoing judicial proceeding. Complaint ¶ 184. *See also Wright v. Yurko*, 446 So. 2d 1162, 1164 (Fla. 5th DCA 1984) (“[p]arties, witnesses and counsel are accorded absolute immunity as to civil liability to what is said or written in the course of a lawsuit, providing the statements are relevant to the litigation”). Regardless of whether the Company’s public relations firm sent the record to the media, or the media found it on its own, this does not change the fact that the media, and anyone else for that matter, had access to the filing that was made in a judicial proceeding. Therefore, Mr. Nicklaus’s allegations that the Company sent its pleading to the media are insufficient to overcome the litigation privilege.

Mr. Nicklaus also alleges a separate “publication” by the Company’s sending of copies of news articles that discussed the Amended Complaint to the Company’s clients. Complaint ¶ 192. Initially, the statements made in the articles are not those of the Defendants, even if they discuss the Amended Complaint and its allegations. There is no rule that precludes a party to a lawsuit from sharing a news article about the lawsuit with others.

The sharing of the news articles discussing the New York Action are also protected by the litigation privilege because they are “a report on the status of the lawsuit” filed by the Company which is an issue of public interest as it relates to Mr. Nicklaus, a public figure. *See Huszar v. Gross*, 468 So. 2d 512, 515 (Fla. 1st DCA 1985); *see also Gursky Ragan, P.A. v. Association of Poinciana Villages, Inc.*, 314 So.3d 594, 595 (Fla. 3d DCA 2020) (“[i]n determining whether a statement bears some relation or connection with the subject inquiry [of the judicial proceedings], Florida courts apply a broad standard”) (emphasis added).

This alleged disclosure is protected by the litigation privilege and afforded absolute immunity as it is akin to the facts in *Huszar* where the court found the privilege to apply to “[t]he

newspaper article [that] was a report on the status of a lawsuit filed by the Comptroller against Huszar's client, an official action of public interest, including the remarks of Gross, a government attorney involved, relating to the prosecution and possible further action by the Comptroller's office." *Huszar*, 468 So. 2d at 515. The court in *Huszar* explained that "[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported." *Id.* (citing to Restatement of Torts (Second), Section 611).

3. Count I's Alleged Statements to the Company's Clients are Protected by the Business Interest Privilege

Count I's allegations that the Company make allegedly defamatory statements to its clients fail for the additional reasons that such statements are protected by the business interest privilege.

In Florida, "a publication in regard to business made by one having an interest therein and solely to others having an interest in the business is privileged." *Schreidell v. Shoter*, 500 So. 2d 228, 232 (Fla. 3d DCA 1986). While that privilege may be overcome if the plaintiff can show that publication of the statement was made with express malice, that would require showing that "the defendant's *primary motive* in making the statements was the intent to injure the reputation of the plaintiff." *DelMonico v. Traynor*, 116 So. 3d 1205, 1215 (Fla. 2013) (emphasis added) (internal quotation marks omitted). The Complaint actually alleges to the contrary, namely that the purpose of such alleged statements was to "hinder [Mr. Nicklaus's] ability to compete with the Company" Complaint ¶¶ 196, 241.

Conclusory allegations that a defendant acted to injure the plaintiff's ability to compete are inadequate as a matter of law to overcome the business interest privilege. For example, in *Samara v. Juice Plus+ Co., LLC*, No. 6:20-CV-520-GAP-EJK, 2021 WL 8894301, at *4 (M.D. Fla. Mar.

1, 2021), the court dismissed a claim for libel because a “conclusory allegation” that defendant’s “actions were taken not for the purpose of protecting its interests, but rather for the purpose of destroying one of its competitors and co-opting his business” was insufficient to overcome the business interest privilege. Mr. Nicklaus’s similar conclusory allegations are also insufficient to overcome the business interest privilege.

4. Count I Fails to Adequately Allege a Claim for Defamation

In addition to being barred by the litigation and business interest privileges, Count I is deficient for failing to allege the essential elements of a claim for defamation.

Under Florida law, a claim for defamation is deficient if it fails to specifically identify the persons to whom the allegedly defamatory statements were made. *See, e.g., Jackson v. N. Broward Cnty. Hosp. Dist.*, 766 So. 2d 256, 257 (Fla. 4th DCA 2000) (defamation count failed to state a cause of action because it failed to “specifically identify the persons to whom the allegedly defamatory comments were made”); *Buckner v. Lower Fla. Keys Hosp. Dist.*, 403 So. 2d 1025, 1027 (Fla. 3d DCA 1981) (defamation claim must “identify the particular person to whom the remarks were made with a reasonable degree of certainty”). Count I is deficient because it fails to identify any specific persons to whom the alleged defamatory statements were made.

Moreover, the alleged false statements to unnamed clients that Mr. Nicklaus “needed to have his car keys taken away” cannot serve as a basis for a defamation claim because such statements are mere rhetorical hyperbole, which are not actionable. Complaint ¶ 194.

Courts have repeatedly called a “false statement of fact” the “*sine qua non* for recovery in a defamation action.” *Fortson v. Colangelo*, 434 F. Supp. 2d 1369, 1378 (S.D. Fla. 2006) (internal quotation marks and citations omitted). “Although rhetorically hyperbolic statements may at first blush appear to be factual[,] ... they cannot reasonably be interpreted as stating actual facts about their target.” *Id.*, 434 F. Supp. 2d at 1378–79 (internal quotation marks and citations omitted). “It

is for the Court to decide, as a matter of law, whether the complained of words are actionable expressions of fact or non-actionable expressions of pure opinion and/or rhetorical hyperbole.” *Id.*, 434 F. Supp. 2d at 1379.

In *Fortson*, the court held that describing someone with colorful phrases, such as calling him a “vacant lot” was not defamatory “because the phrase ‘vacant lot’ cannot conceivably be read as a statement of fact—that [plaintiff] is what the statement literally describes, an unimproved parcel of real property.” 434 F. Supp. 2d at 1383. Similarly, the alleged statement that Mr. Nicklaus “needed to have his car keys taken away” cannot conceivably be read as a statement of fact. Such a statement would be unactionable rhetorical hyperbole.

Count I should also be dismissed for the additional reason that it fails to adequately allege the elements of either defamation *per se* or defamation *per quod* (which requires an explanation of the words used to show that they have a defamatory meaning). A claim of defamation rises to the level of defamation *per se* if “when considered alone without innuendo: (1) it charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to hatred, distrust, ridicule, contempt, or disgrace; or (4) it tends to injure one in his trade or profession.” *Blake v. Giustibelli*, 182 So. 3d 881, 884 (Fla. 4th DCA 2016) (quoting *Shafran v. Parrish*, 787 So. 2d 177, 179 (Fla. 2d DCA 2001)). The Complaint contains no such allegations.

A statement actionable *per quod* is one whose meaning is not readily apparent and requires innuendo. *See, IBP, Inc. v. Hady Enterprises, Inc.*, 267 F.Supp.2d 1148, 1164 (N.D. Fla. 2002) (applying Florida law). “Innuendo simply means that facts extrinsic to those published must be known in order to inflict an injury.” *Boyles v. Mid-Florida Television Corp.*, 431 So. 2d 627, 633 (Fla. 5th DCA 1983). Statements actionable *per quod* are not injurious on their face; they require

additional proof sufficient to supply their defamatory meaning and show how they injured the plaintiff. *See, Campbell v. Jacksonville Kennel Club*, 66 So. 2d 495, 497-98 (Fla. 1953). Defamation *per quod* requires allegations and proof of malice and *special damages*. *See Barry College v. Hull*, 353 So. 2d 575, 578 (Fla. 3d DCA 1977) (emphasis added). “Special damages are actual, out of pocket losses which must be proven by specific evidence as to the time, cause and amount; whereas, general damages encompass the more customary harms inflicted by a defamatory falsehood, such as impairment of reputation and standing in the community.” *Falic v. Legg Mason Wood Walker, Inc.*, 347 F. Supp. 2d 1260, 1268 (S.D. Fla. 2004) (construing Florida law). The Complaint contains no allegations of special damages.

5. Counts II and III Are Dependent on Mr. Nicklaus’s Ownership of Intellectual Property Rights, and Due to an Established Lack of Ownership, Must Be Dismissed

Mr. Nicklaus asserts claims that are wholly dependent on his owning the rights to commercially exploit his name, image and likeness—i.e., the Nicklaus IP. Those claims are Common Law Unfair Competition (Count II) and Violation of Florida Statute §540.08 (Count III). *See* Complaint ¶¶ 258, 260 265, 266. Because documents cited by the Complaint establish that Mr. Nicklaus cannot establish ownership of that intellectual property, and therefore the ability to use and exploit it, each of these two counts fail and should be dismissed with prejudice.

Mr. Nicklaus and GBI sold and assigned the Nicklaus IP, and other assets, for the substantial sum of \$145 million in 2007 to the Company. This sale and assignment are clear upon a review of agreements that are incorporated by reference into the Complaint and that have been filed on the public docket of the New York Action. *See* Complaint ¶ 38. This Court is entitled to consider agreements incorporated by reference in a complaint when ruling on a motion to dismiss. *See Veal*, 51 So. 3d at 1249-50. This Court can also take judicial notice of the New York Action’s public docket as judicial notice can be taken of facts that are capable of accurate determination by

resorting to sources whose accuracy cannot be questioned. *See* § 90.202(12), Fla. Stat. Accordingly, this Court may consider the parties' agreements referenced in the Complaint.

As discussed above, the PSA and the LLC Agreement clearly transfer the Nicklaus IP to the Company. The PSA provided that the Company was purchasing all of the assets of GBI, including "all of the publicity and related commercial rights held by GBI to use and/or license the use of the endorsement, name, nickname, likeness, signature and/or other identifying characteristics of Jack W. Nicklaus" [NYSCEF No. 113](#), PSA Annex A, § 15. GBI warranted that Mr. Nicklaus did not retain any interest in those commercial rights. [NYSCEF No. 113](#) § 4.19 at 25. The parties expressly limited the rights being retained by Mr. Nicklaus as being limited to certain personal uses—not commercial uses. [NYSCEF No. 113](#) Schedule 4.10(b) at 24.

In the LLC Agreement, Mr. Nicklaus acknowledged that the Company was acquiring the commercial rights to his name, image and likeness, and the right "to, use, exploit, license, assign, sell [and] otherwise transfer the Nicklaus IP," subject to a limited veto by him, which could not be used unreasonably. [NYSCEF No. 114](#) at 13, § 6.3 at 33; *see also* Complaint, ¶ 47.

Given these clear statements that the Company was purchasing the commercial rights to the use of Mr. Nicklaus's name, image and likeness, it is not surprising that at the close of the three-day evidentiary hearing the New York Court concluded that the subject "intellectual property rights ... were unambiguously conveyed" to the Company in 2007. [NYSCEF No. 246](#) at 340.

To the extent the Complaint alleges that the Company did not hold the rights to the Nicklaus IP, Mr. Nicklaus's allegations conflict with the agreements referenced in the Complaint. In this situation, the documents supersede the allegations. *See Skupin v. Hemisphere Media Grp., Inc.*, 314 So. 3d 353, 356 (Fla. 3d DCA 2020) ("[e]xhibits attached to the complaint are controlling, where the allegations of the complaint are contradicted by the exhibits, the plain meaning of the

exhibits will control”). Thus, Mr. Nicklaus cannot establish any claim that is based on his supposed ownership of the Nicklaus IP.

6. Counts II For “False Statements Intended to Impair Competition” Under Common Law Unfair Competition Should Be Dismissed

To state a claim for unfair competition, a plaintiff must allege (1) deceptive or fraudulent conduct of a competitor and (2) likelihood of consumer confusion. *See Whitney Info. Network, Inc. v. Gagnon*, 353 F. Supp. 2d 1208, 1212 (M.D. Fla. 2005) (Florida common law). Significantly, however, for the claim for unfair competition to stand, there must be competition. *See King Ranch, Inc. v. King Ranch Contractors, LLC*, 2013 WL 2371246, at *11 (M.D. Fla. May 30, 2013) (noting that the competition requirement requires a showing of “similarity in businesses of the parties”) (applying Florida law) (internal citations omitted).

As discussed above, Mr. Nicklaus cannot assert a claim of unfair competition against the Company on the basis of its using his name, image, or likeness for commercial purposes or asserting its rights to such usage. As established above, these rights were clearly sold and transferred in exchange for a \$145-million payment to GBI for Mr. Nicklaus’s benefit. Thus, Mr. Nicklaus cannot base any claim of unfair competition on the Company’s use of his name, image or likeness. Accordingly, Count II should be dismissed with prejudice.

7. Count III for False Endorsement Under Florida Statute § 540.08 Should Be Dismissed

Mr. Nicklaus alleges that the Defendants have violated §540.08 (1)(a) and (b) by using his name, image, and likeness for purposes of trade and other commercial and advertising purposes without his consent. Complaint ¶¶ 265-66. Florida Statute §540.08 (1)(a) and (b) state:

(1) No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use given by:

(a) Such person; or

(b) Any other person, firm or corporation authorized in writing by such person to license the commercial use of her or his name or likeness

Mr. Nicklaus's allegations simply ignore the fact that in executing the LLC Agreement, Mr. Nicklaus confirmed in writing the Company's right to use the Nicklaus IP—defined to include his name, image and likeness—unless he objected in writing under certain limited circumstances. [NYSCEF No. 114](#) at p. 13, § 6.3 at p. 33. Mr. Nicklaus's closely-held corporation authorized the Company to use the commercial rights to his name, image and likeness by selling those rights to the Company for \$145 million. By consenting to the Company's use of the Nicklaus IP in exchange for this massive payment, Mr. Nicklaus waived any right to assert this claim. *See Nat'l Football League v. Alley, Inc.*, 624 F. Supp. 6, 10 (S.D. Fla. 1983) (plaintiff's contractual consent constituted waiver of his rights under the Florida statute).

If the parties had actually wanted to carve out additional rights from the intellectual property that the Company purchased, such a right would have been expressly included in the lengthy transaction agreements. In fact, as stated above, there *were* exceptions carved out. Mr. Nicklaus retained rights to his name and likeness as it relates to personal and charitable uses. *See* [NYSCEF No. 113](#), Schedule 4.10(b) at 24. This carveout and the limited veto given to Mr. Nicklaus by the LLC Agreement makes it clear that the Company did purchase the commercial rights to Mr. Nicklaus's name, image and likeness with only a limited carveout in favor of Mr. Nicklaus. *See* [NYSCEF No. 114](#) at 13, § 6.3 at 33; *see also*, Complaint, ¶47. Accordingly, Mr. Nicklaus's claim for false endorsement under § 540.08, should be dismissed.

CONCLUSION

WHEREFORE, Defendants, HOWARD P. MILSTEIN, ANDREW W. O'BRIEN and NICKLAUS COMPANIES, LLC, respectfully request that this Court enter an order staying the proceedings of this action to permit the New York Court to properly continue adjudicating the

New York Action, or in the alternative, to dismiss with prejudice the Complaint for *forum non conveniens*, or in the alternative, to enter an order dismissing all of Mr. Nicklaus's claims in accordance with the above, and granting any other relief this Court believes is just and proper.

Dated: October 27, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October, 2023, a true and correct copy of the foregoing was filed with the Clerk of Palm Beach County by using the Florida Courts e-Filing Portal, which will send an automatic e-mail message to all counsel of record.

By: /s/ Justin B. Levine
JUSTIN B. LEVINE

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