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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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| ABSORPTION PHARMACEUTICALS, LLC, a Delaware limited liability company<br><br>Plaintiff,<br><br>v.<br><br>RECKITT BENCKISER, LLC, a Delaware limited liability company, and DOES 1-50,<br><br>Defendants. | Case No. 2:17-cv-00513-JCM-NJK<br><br>**DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(2) 12(b)(6), AND 9(b), OR, IN THE ALTERNATIVE, TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)** |

Defendant Reckitt Benckiser, LLC ("RB"), by and through its attorneys Bailey Kennedy and Sheppard Mullin Richter & Hampton LLP, move for an order dismissing the February 21, 2017 Complaint (the "Complaint") of plaintiff Absorption Pharmaceuticals, LLC ("Absorption" or "Plaintiff") pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction, 12(b)(6) and 9(b) for failure to state a cause of action for fraud or tortious interference, or, in the

alternative, transferring the action to the District of New Jersey pursuant to 28 U.S.C. § 1404(a), and for such other and further relief as the Court deems just and proper.

## MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

## I. INTRODUCTION

Plaintiff's Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(2) because this Court does not have personal jurisdiction over defendant Reckitt Benckiser, LLC ("RB"). In particular, Plaintiff's Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction because RB (i) is not subject to general jurisdiction in Nevada, since it does not have affiliations with Nevada that are so continuous and systematic as to render RB "at home" in this State; and (ii) has not engaged in any conduct that gives rise to specific jurisdiction in this Court with regard to this dispute.

To the extent this Court finds that Plaintiff has demonstrated that its allegations would establish a *prima facie* case for personal jurisdiction over RB, Plaintiff's causes of action for fraud (Count I), intentional interference with contract (Count IV), and tortious interference with prospective economic advantage (Count V), should be dismissed under Federal Rule of Civil Procedure 12(b)(6) and Rule 9(b) for failure to state a claim.

In the alternative, Plaintiff's lawsuit should be transferred to the United States District Court for the District of New Jersey, for the convenience of the parties and the witnesses.

## II. STATEMENT OF FACTS

***No Nevada Contacts During Period of Dispute***

RB is a limited liability company organized under the laws of Delaware with its principal place of business in Parsippany, New Jersey. (Complaint, ¶ 9; Exhibit D, Declaration of Terrence J. Farrell, Esq. ("Farrell Decl.") Decl. ¶ 3.) RB has no corporate ties to Nevada. It does not maintain any offices, manufacturing plants, or distribution facilities in Nevada; it does not maintain any accounts in a financial institution in Nevada; it does not own, rent, lease, or

otherwise occupy any real property in Nevada; it has never initiated a lawsuit or filed a complaint in Nevada; and it is not listed on any telephone, business or other informational directories in Nevada. (Farrell Decl. ¶¶ 4-8.)

Plaintiff is a Delaware limited liability company. (Complaint, ¶ 8.) The conduct allegedly giving rise to the claims in the Complaint is identified by Plaintiff as taking place between May 2014 (Complaint ¶ 32) and July 2016. (Complaint ¶ 80). Plaintiff in February 2016 identified the location of its principal office as Huntington Beach, California. (Exhibit E, Declaration of Damani C. Sims, Esq. ("Sims Decl.") ¶ 4, Exh. E.2.) Plaintiff did not register as a foreign limited-liability company in Nevada until October 18, 2016. (*Id.* ¶ 5, Exh. E.3.)

***Plaintiff's PROMESCENT Product***

PROMESCENT is an OTC male genital desensitizing drug product. (Exhibit A, Declaration of Volker Sydow ("Sydow Decl.") ¶ 4.) "Male Genital Desensitizing Drug Products for Over-the-Counter Human Use" are the subject of a final monograph issued by the U.S. Food and Drug Administration (the "Monograph"). (Sydow Decl. ¶ 5.) Products produced under the Monograph may be applied to the penis prior to intercourse to delay ejaculation. (Sydow Decl. ¶ 6.) Absorption does not identify or claim any patent protection for its PROMESCENT product. (Sydow Decl. ¶ 7.)

***Product Due Diligence***

Plaintiff alleges that, under the guise of entering a business relationship with Plaintiff, RB misappropriated trade secrets related to the PROMESCENT product. (Complaint ¶¶ 1, 32-55, 91-116.) The Complaint alleges that three meetings took place between the parties: a June 4, 2014 meeting between Jeff Abraham ("Abraham"), the CEO of Absorption, and Volker Sydow in New York City (Complaint ¶¶ 15, 34; Sydow Decl. ¶¶ 9-10); a June 6, 2014 meeting between Abraham and Corrie Mueller in Las Vegas[1] (*id.* ¶ 35; Mueller Decl. ¶ 3); and an August 18, 2014 meeting

[1] As stated in the Declaration of Corrie Mueller, Ms. Mueller did not travel to Nevada in connection with Absorption or her employment but rather, had already traveled to Las Vegas, Nevada on holiday before the meeting was arranged. (Exhibit B, Declaration of Corrie Mueller ("Mueller Decl.") ¶¶ 4-5.) Ms. Mueller did not otherwise meet with Mr. Abraham or anyone else from Absorption, in Nevada or otherwise. (Mueller Decl. ¶ 7.)

between Mr. Abraham and Alexander Lacik in New Jersey. (*Id*. ¶ 54.) All other communications between Absorption and RB, or a related entity, were conducted by phone, letter, or email. (*See* Complaint ¶¶ 32, 41, 44-46, 53, 60, 62, 72.)

According to Plaintiff, during the course of the negotiations, RB promised to make an offer to acquire Absorption. Plaintiff alleges that representatives from RB "assured [Abraham] verbally of RB's intention to move forward with an acquisition" (Complaint ¶ 42); "assured Abraham that an offer would be forthcoming" (Complaint ¶ 53); and "continued assuring Absorption of its continued interest every time Absorption indicated that it was growing impatient and considering other options." (Complaint ¶ 58.) Plaintiff thereupon alleges that based on these alleged 'false promises,' it did not pursue opportunities for an acquisition with Auxilium, a pharmaceutical company from whom it had received an offer "worth over $150 million" on January 27, 2013. (Complaint ¶ 15.)

***RB's KY-DURATION Product***

RB in September 2016 launched KY-DURATION, an OTC male genital desensitizing drug product. (Exhibit C, Declaration of Ben M. Smith ("Smith Decl.") ¶ 6.) Plaintiff alleges that this product "mimick[s] PROMESCENT's packaging, marketing, and sales strategy" (Complaint ¶ 75), and is built upon Plaintiff's claimed trade secrets. (Complaint ¶¶ 73-74.) RB markets and advertises its product nationally. (Smith Decl. ¶ 8.) RB does not sell KY-DURATION products directly to consumers, including in the State of Nevada. (Smith Decl. ¶ 9.) RB has sales contracts with third-party distributors and retailers throughout the United States, including Target, Walmart, CVS, Amazon.com, Walgreens, and Kroger, which are KB's direct customers for KY-DURATION products. (Smith Decl. ¶ 12.) In connection with its sales of KY-DURATION products to Target and Amazon.com, RB does not ship KY-DURATION products to any distribution centers located in Nevada. (Smith Decl. ¶ 13.) According to available data from Nielsen, between September 2016, and February 2017, sales in Nevada accounted for 0.9% of RB's total U.S. sales of KY-DURATION products. (Smith Decl. ¶ 15.)

## III. ARGUMENT

### A. THIS COURT LACKS PERSONAL JURISDICTION OVER RB

Federal Rule of Civil Procedure 12(b)(2) allows a defendant to move to dismiss for lack of personal jurisdiction. To avoid dismissal under Rule 12(b)(2), a plaintiff bears the burden of demonstrating that its allegations would establish a *prima facie* case for personal jurisdiction. *See Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). As recognized by this Court, "allegations in the complaint must be taken as true and factual disputes should be construed in the plaintiff's favor." *Freestream Aircraft (Bermuda) Ltd. v. Aero Law Group*, 2016 WL 7018524, at *1 (D. Nev. Nov. 29, 2016).

An assertion of personal jurisdiction must comport with due process. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)) ("For a court to exercise personal jurisdiction over a nonresident defendant, that defendant must have at least 'minimum contacts' with the relevant forum such that the exercise of jurisdiction 'does not offend traditional notions of fair play and substantial justice'"). Two categories of personal jurisdiction exist: (1) general jurisdiction; and (2) specific jurisdiction. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-15 (1984); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002).

General jurisdiction arises where a defendant has continuous and systematic ties with the forum, even if those ties are unrelated to the litigation. *See Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir. 2015) (citing *Goodyear Dunlap Tires Ops., S.A. v. Brown*, 564 U.S. 915, 919 (2011)). "[T]he plaintiff must demonstrate the defendant has sufficient contacts to constitute the kind of continuous and systematic general business contacts that approximate physical presence." *In re W. States Wholesale Nat. Gas Litig.*, 605 F. Supp. 2d 1118, 1131 (D. Nev. 2009) (internal quotation marks and citations omitted). In other words, defendant's affiliations with the forum state must be so "continuous and systematic" as to render it essentially "at home" in that forum. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

Specific jurisdiction exists when a case arises out of the defendant's contacts with the forum. *Helicopteros Nacionales*, 466 U.S. at 414 n.8. The Ninth Circuit has established a three-prong test for analyzing an assertion of specific personal jurisdiction: (1) the defendant has performed some act or transaction within the forum or purposefully availed himself of the privileges of conducting activities within the forum; (2) the plaintiff's claim arises out of or results from the defendant's forum-related activities; and (3) the exercise of jurisdiction over the defendant is reasonable. *Schwarzenegger*, 374 F.3d at 801-02. "The plaintiff bears the burden of satisfying the first two prongs of the test. If the plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established in the forum state." *Id*. at 802 (citations omitted).

**1. RB Is Not "At Home" in Nevada to Be Subject to General Jurisdiction**

Under *Daimler AG v. Bauman*, general jurisdiction over a foreign defendant is limited to states in which the defendant is "at home," such as a corporation's place of incorporation and principal place of business. 134 S. Ct. 746, 761 (2014). Plaintiff admits in the Complaint that RB is incorporated in Delaware and its principal place of business is in New Jersey. (Complaint ¶ 9) It maintains no places of business, real estate, or bank accounts in Nevada. (Farrell Decl. ¶¶ 4-6.) Under such circumstances, merely alleging business activity within the state does not subject RB to jurisdiction in Nevada. *See Ranza v. Nike, Inc.*, 793 F.3d 1059, 1069-70 (9th Cir. 2015); *Cahen v. Toyoto Motor Corp.*, 147 F. Supp. 3d 955, 964 (N.D. Cal. 2015) ("approving the exercise of general jurisdiction in every state in which a corporation does business would be unacceptably grasping") (internal quotation marks omitted). Because Plaintiff has failed to allege any facts supporting a claim that RB is "at home" in Nevada, RB is not subject to general jurisdiction here.

**2. RB Is Not Subject to Specific Jurisdiction in Nevada**

RB is not subject to specific jurisdiction here because the Complaint lacks any allegations that RB took any actions or had any contacts with the forum State of Nevada. Critically, the allegations pled against RB all took place in New Jersey (and New York): the parties had meetings there (Complaint ¶¶ 34, 54), RB conducted is product diligence there (Complaint ¶¶ 56-65), and RB developed KY-DURATION there. (Complaint ¶¶ 71, 73.)

Under the first element of the specific jurisdiction test, Plaintiff must establish that RB either (1) purposefully availed itself of the privilege of conducting its activities in the forum or (2) purposefully directed its activities toward the forum. *See Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006). "A purposeful availment analysis is most often used in suits sounding in contract" and a "purposeful direction analysis, on the other hand, is most often used in suits sounding in tort." *Schwarzenegger*, 374 F.3d at 802. Plaintiff's claims here (for fraud, misappropriation of trade secrets, and tortious interference with contract) sound in tort.

Purposeful direction is analyzed under the "*Calder*-effects" test, wherein "the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010) (quoting *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006)); *see also Calder v. Jones*, 465 U.S. 783, 788-89 (1984) (establishing an "effects doctrine" for intentional action aimed at the forum). Further, the *Calder* effects test requires that the plaintiff show "something more" than that the defendant could have foreseen harm that would have been felt in the forum state. *Pebble Beach*, 453 F.3d at 1156. Under *Calder*, Absorption must show that RB expressly targeted Nevada with its allegedly improper actions. As set forth in detail below, RB has not alleged any facts to show that RB targeted Nevada with its alleged conduct.

a. The Complaint Fails to Plead Specific Jurisdiction

In the Complaint, Plaintiff pleads three grounds for this Court to exercise specific jurisdiction: (a) RB's business in Nevada, including promoting and selling its KY-DURATION product here; (b) the existence of a 2014 "Mutual Confidentiality Agreement" between Plaintiff and Reckitt Benckiser Household Products (China) Co. Ltd.; and (c) RB's alleged misappropriation of trade secrets from Plaintiff, which Plaintiff claims were "obtained from Nevada, and have harmed and continue to harm Absorption in" Nevada, despite the fact that Absorption was based in California when the misappropriation and harm allegedly occurred. (Complaint ¶¶ 6, 32.) None of these proffered bases for jurisdiction, however, can convey jurisdiction over RB.

(1) *Plaintiff Fails to Plead that RB Targeted Nevada.*

Plaintiff's allegation that "Defendants conduct or have conducted substantial business and have promoted their DURATION products in the state of Nevada" (Complaint ¶ 6) is a conclusory allegation that is devoid of any facts, let alone substantive facts, whatsoever. As such, Plaintiff has failed to plead jurisdictional facts to support this allegation as a basis for jurisdiction. *See Digitone Indus. Co. v. Phoenix Accessories, Inc.*, 2008 WL 2458194, at *2 (D. Nev. June 13, 2008) (finding a plaintiff "must assert particular jurisdictional facts which establish the necessary ties between the defendant and the forum state").

Even if the Court were to consider the Defendant's conclusory allegations, RB's KY-DURATION product is marketed and sold across the United States generally. (Smith Decl. ¶ 8.) Further, RB does not sell KY-DURATION products directly to consumers, including in the State of Nevada (Smith Decl. ¶ 9), and Nevada accounts for only 0.9% of RB's total U.S. sales of KY-DURATION products. (Smith Decl. ¶ 15.) This is not enough. To exercise specific jurisdiction over RB based upon product sales in the forum, Plaintiff must allege not only that RB promotes its products in Nevada, but that it specifically targeted Nevada in doing so. *See Pebble Beach*, 453 F.3d at 1156-60; *see also Minelab Americas, Inc. v. UKR Trade, Inc.*, 2013 WL 1314991, at *5 (D. Nev. Mar. 28, 2013) (sale of products in Nevada are insufficient where defendant did not target Nevada consumers); *Adobe Sys. Inc. v. Cardinal Camera & Video Ctr., Inc.*, 2015 WL 5834135, at *5 (N.D. Cal. Oct. 7, 2015).

Furthermore, to the extent that Plaintiff is attempting to base jurisdiction on the KY-DURATION product being available for consumers to purchase in Nevada, it is clear from the face of the Complaint that RB is merely a manufacturer whose products are distributed here by third parties, such as Target and Amazon.com. (Complaint ¶¶ 50, 81-83; *see also* Smith Decl. ¶ 12.) As stated by the court in *Abraham v. Agusta, S.P.A.*, 968 F. Supp. 1403, 1408 (D. Nev. 1997), "merely placing a product into the 'stream of commerce' does not itself give rise to the requisite 'expectation' that the product will enter a particular state." Indeed, even assuming that RB knew KY-DURATION would be sold, marketed, and promoted by third-parties exclusively in Nevada, "the plaintiff must point to some *affirmative conduct* by the defendant to deliver its

product to the forum." *Id.* at 1409 (emphasis in original). Here, not only has Plaintiff failed to allege any affirmative actions by RB related to the sale or production of KY-DURATION in Nevada, but it has failed to allege any Nevada-based actions at all.

Finally, even assuming Plaintiff alleged sufficient facts to support its jurisdictional allegations, Plaintiff cannot show that its claims arise out of RB's "forum-related activity." Plaintiff is asserting five causes of action against RB for: (i) fraud; (ii) misappropriation of trade secrets pursuant to the Defend Trade Secrets Act, 18 U.S.C. §§ 1836, 1839; (iii) misappropriation of trade secrets under Nevada State law; (iv) intentional interference with contract; and (v) tortious interference with prospective economic advantage. (Complaint, Counts I-V.) Yet, none of the claims specifically relate to RB's distribution and sale of KY-DURATION products in Nevada. RB's promotional efforts are not the "but for" cause of these claims and thus cannot subject RB to specific jurisdiction. *See Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 561 (9th Cir. 1995); *Issod v. Diagem Res. Corp.*, 2006 WL 1788374, at *4 (D. Nev. June 26, 2006).

(2) *The 2014 "Mutual Confidentiality Agreement" Does Not Subject Non-Party RB to Jurisdiction in Nevada*

Plaintiff's second proffered basis for jurisdiction is the "Mutual Confidentiality Agreement" it entered with a non-party, Reckitt Benckiser Household Products (China) Co. Ltd. (Complaint ¶¶ 6, 32.)[2] This agreement, however, cannot serve as a basis for jurisdiction over RB. RB was not a party to the agreement, and, further, a defendant cannot be subjected to jurisdiction based merely on the existence of a contract.

In order to attribute the contacts of a separate but related entity to RB, Plaintiff must show that either the companies "share such unity of interest and ownership that the companies' separateness no longer exists and failure to disregard their separate identities would result in fraud or injustice," or that one entity was the other's "general agent in the forum." *In re Western States*

[2] Plaintiff further alleges that the "Mutual Confidentiality Agreement' contains an arbitration clause that requires Absorption to arbitrate any disputes in the United Kingdom. (Complaint ¶ 32.) In the event that Plaintiff asserts any substantive rights against RB under such agreement, RB expressly reserves any and all rights thereunder.

*Wholesale Natural Gas Antitrust Litig.*, 2009 WL 455601, at **9-11 (D. Nev. Feb. 23, 2009) (internal quotation marks omitted). Plaintiff's allegations do not even address the fact that RB and Reckitt Benckiser Household Products (China) Co. Ltd. are distinct entities, much less allege sufficient facts to subject RB to jurisdiction in Nevada based upon a contract signed by a non-party. Furthermore, the Complaint pleads no facts whatsoever actually tying the "Mutual Confidentiality Agreement" to Nevada. Plaintiff merely alleges that Reckitt Benckiser Household Products (China) Co. Ltd. and Absorption entered into an agreement in 2014 (notably, two years before Plaintiff registered as a company in Nevada). (Complaint ¶ 32.) Finally, and notwithstanding the foregoing, it is well-established that "the mere existence of a contract with a party in the forum state does not alone constitute sufficient minimum contacts for jurisdiction." *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990).

(3) *RB Cannot Be Subjected to Jurisdiction in Nevada Without "Something More" than Allegations of Tortious Misconduct*

Plaintiff's last basis for jurisdiction rests on the allegation that RB "misappropriated trade secrets that they obtained from Nevada, and ha[s] harmed and continue[s] to harm Absorption in this District by misappropriating and using Absorption's trade secrets and interfering with Absorption's contracts and business opportunities." (Complaint ¶ 6.) In essence, Plaintiff attempts to base jurisdiction on the mere fact that it has *alleged* misappropriation and tortious interference against RB. Such allegations, however, lack the "something more" required under *Pebble Beach*, 453 F.3d at 1156 ("we have warned courts not to focus too narrowly on the test's third prong . . . holding that 'something more' is needed . . .").

Indeed, allegations of "harm to Absorption in this District" would appear to be an attempt to subject RB to jurisdiction based solely on Plaintiff's claim that its principal place of business is in Nevada. (*See* Complaint ¶ 8.) However, as the Supreme Court warned in *Walden v. Fiore*, "the plaintiff cannot be the only link between the defendant and the forum." 134 S. Ct. 1115, 1122 (2014). Rather, "it is the defendant's conduct that must form the necessary connection with the forum state." *Id.* Here, the Complaint fails to allege that RB directed any conduct toward Nevada, but rather, outlines exchanges between the parties outside the forum. Without more, this does not

satisfy Plaintiff's pleading requirements. *See Caracal Enterprises LLC v. Suranyi*, 2017 WL 446313, at *3 (N.D. Cal. Feb. 2, 2017) (allegations of misappropriation were insufficient to confer jurisdiction on defendant where contact was based solely on the fact that the plaintiff was located in California).

b. RB Was Not a Resident of Nevada at the Time of the Alleged Misconduct

Finally, it is clear that Plaintiff cannot pass the *Calder* effects test because Plaintiff was not, in fact, a Nevada corporation until October 18, 2016. It is well-established that due process requires that contacts be analyzed at the time of the events giving rise to the suit occurred. *Morris v. Gomez*, 2016 WL 2905397, at *4 (D. Nev. May 16, 2016). Here, the latest allegation that can possibly be attributed to Plaintiff's claims occurred in July 2016. (Complaint ¶ 80.) However, Absorption did not register as a foreign limited-liability company in Nevada until October 18, 2016, months later. (Sims Decl. ¶ 5, Exh. E.3.) Accordingly, at the time of the events giving rise to Plaintiff's suit, Absorption was a Delaware limited liability company whose principal place of business was in California.

It is axiomatic that RB could not have purposefully directed its purported tortious conduct to Plaintiff in Nevada if Absorption was not even located here at the time. Courts have consistently held that a plaintiff cannot survive the *Calder* effects test where either the defendant is not aware of the plaintiff's residency or the plaintiff is not, in fact, a resident of the forum. *See, e.g.*, *Menalco, FZE v. Buchan*, 602 F. Supp. 2d 1186, 1194-95 (D. Nev. 2009); *Caracal Enterprises*, 2017 WL 446313, at *2 (finding that plaintiffs cannot satisfy the *Calder* test for purposeful direction where they could not show that defendant knew the plaintiffs were based in forum); *Rongxiang Xu v. Nobel Assembly at Karolinska Institute*, 2013 WL 5420984, at *6 (C.D. Cal. Sep. 17, 2013) (finding there was no jurisdiction where complaint did not allege that defendant knew plaintiff was forum resident). In *Menalco*, for instance, the plaintiff alleged nearly identical allegations to those alleged here—that the defendant fraudulently entered into negotiations for a transaction in order to misappropriate the plaintiffs' trade secrets. *Id.* at 1189-91. The court found, however, that the defendant could not have expressly aimed its conduct to Nevada because the plaintiffs were not Nevada residents. *Id.* at 1194-95. Here, Absorption was

not a resident of Nevada at the time of the events alleged in the Complaint, nor did RB believe that Absorption was a resident of Nevada. (*See* Sydow Decl. ¶ 12.) Accordingly, Plaintiff's Complaint cannot survive the *Calder* test. *See id.*; *see also Pebble Beach*, 453 F.3d at 1155.

**B. IF NOT DISMISSED PURSUANT TO FRCP 12(B)(2), THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO FRCP RULE 12(b)(6) AND RULE 9(b)**

To the extent this Court finds that Plaintiff has personal jurisdiction over RB, Plaintiff's causes of action for fraud and tortious interference should be dismissed. In order to survive a motion to dismiss, "a complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (citation, quotation marks, and emphasis omitted). While the Court "should assume the veracity of well pleaded factual allegations," allegations that "are no more than conclusions" are "not entitled to the assumption of truth." *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (quotations and citation omitted); *see also Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (a court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences"). A complaint that sets forth a mere "formulaic recitation of the elements" will not survive a motion to dismiss; indeed, Plaintiffs must provide "enough facts to state a claim to relief that is plausible on its face" and bear the burden of "nudg[ing] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

Further, fraud claims require a higher standard of pleading. *See* FED R. CIV. P. 9(b). Rule 9(b) requires that a party alleging fraud "state with particularity the circumstances constituting fraud or mistake." *Id.* Under Rule 9(b), fraud allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Accordingly, "Rule 9(b) requires that the pleader state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 541 (9th Cir. 1989).

**1. Plaintiff Fails to Plead Fraudulent Intent**

In order to state a claim for fraud under Nevada law, a plaintiff must show: "(1) a false representation made by the defendant; (2) defendant's knowledge or belief that the representation is false (or insufficient basis for making the representation); (3) defendant's intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4) plaintiff's justifiable reliance upon the misrepresentation; and (5) damage to the plaintiff resulting from such reliance." *Nebab v. Bank of Am.*, 2012 WL 2860660, at *4 (D. Nev. July 11, 2012). Plaintiff's fraud claim is premised on allegations that RB misrepresented its intention to acquire Absorption in order to induce Plaintiff to divulge its proprietary information and/or forego its relationship with Auxilium. (*See* Complaint ¶ 91.) However, Plaintiff ignores the fact that future promises cannot constitute fraudulent conduct. Further, except for bald, conclusory allegations, Plaintiff fails to plead fraudulent intent.

The crux of Absorption's claims is that RB, during its due diligence of his company, communicated to Mr. Abraham that it was interested in Absorption. (*See, e.g.*, Complaint, ¶ 42 (RB's employee "called Abraham and assured him verbally of RB's intention to move forward with an acquisition"); *id.* at ¶ 53 ("In mid-July 2015, Abraham had a phone call with Stewart in which Stewart assured Abraham that an offer would be forthcoming . . . ."); *id.*at ¶ 58 ("RB continued assuring Absorption of its continued interest . . . .").) These allegations, however, all consist of future promises to perform which cannot form the basis of a fraud claim. *See Nebab*, 2012 WL 2860660, at *4 ("[t]he mere failure to fulfill a promise or perform in the future . . . will not give rise to a fraud claim absent evidence that the promisor had no intention to perform at the time the promise was made"); *see also Parker v. Bank of Am.*, 2012 WL 3222150, at *3 (D. Nev. Aug. 3, 2012) ("Plaintiff here has not alleged any facts that would give rise to the reasonable inference that Defendants had no intention to perform at the time they promised to work with Plaintiff[.]").

As explained by the Ninth Circuit, it is insufficient just to plead the "neutral facts" of fraud, a plaintiff must also "set forth an explanation as to why the statement or omission complained of was false or misleading." *Yourish v. California Amplifier*, 191 F.3d 983, 993 (9th

Cir. 1999). Here, each alleged "misrepresentation" is related to RB's due diligence with Absorption, and yet there is neither allegation nor evidence that RB failed to pursue a transaction in good faith before deciding not to complete that transaction. Plaintiff essentially pleads a failed negotiation, and then alleges that RB engaged in misappropriation and tortious interference. These allegations are insufficient to support a fraud claim.

Further, excepting Plaintiff's conclusory assertion that "Defendants intentionally misrepresented or concealed material facts from Absorption" (Complaint ¶ 91), there is no allegation regarding RB's alleged fraudulent intent either at the time the statements were made or after. While Rule 9(b) does not require a Plaintiff to plead intent with particularity, "[i]t does not give [it] license to evade the less rigid—though still operative—strictures of Rule 8." *Ashcroft v. Iqbal*, 556 U.S. 662, 686-87 (2009). As stated by the Supreme Court in *Ashcroft*, "Rule 8 does not empower [a plaintiff] to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Id.* Likewise, Plaintiff's failure to plead anything but bare legal conclusions regarding RB's purported fraudulent intent is fatal to its fraud claim.

**2. Plaintiff's Tortious Interference with Contract Claim Is Properly Dismissed**

To plead tortious interference with contractual relations under Nevada law, the plaintiff must establish: "(1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual disruption of the contract; and (5) resulting damage." *Carrington Mortgage Services, LLC v. Absolute Bus. Solutions, LLC*, 2016 WL 1465339, at *2 (D. Nev. Apr. 14, 2016). While Plaintiff has alleged that RB tortiously interfered with its contractual relationships with Target and Amazon.com (Complaint ¶¶ 118-122), this argument fails for the simple fact that Plaintiff has not alleged that RB took *any* intentional acts with respect to these entities. Quite the contrary, Plaintiff's tortious interference with contract claim is premised purely on Plaintiff's supposition that because Target reduced the number of SKUs of PROMESCENT it would carry, and because Amazon.com classified PROMESCENT as an "adult" product, RB must be responsible. (*See, e.g.*, ¶ 80 (alleging that RB was responsible because Abraham asked Target whether RB diverted

PROMESCENT's shelf space and Target did not deny it); *id.*at ¶ 82 (alleging that RB was responsible because "PROMESCENT was suddenly relegated to the 'hidden' 'adult section' of Amazon.com").) This does not meet the plausibility requirements of *Iqbal* and *Twombly*. *See also Nevada Ass'n Services, Inc. v. First Am. Title Ins. Co.*, 2012 WL 3096706, at *5 (D. Nev. July 30, 2012) (dismissing intentional interference claim where plaintiff did not plead that defendants "took or intended any action that would cause interference with those relationships").

Moreover, Plaintiff's tortious interference with contract claim must also fail because Plaintiff has failed to plead the existence of valid and existing contracts of which RB was aware. With respect to Amazon.com, the Complaint is devoid of any non-conclusory allegations suggesting that there was an agreement between Plaintiff and Amazon.com, much less one that required PROMESCENT to not be classified as an "adult" product. At most, Plaintiff alleges that "PROMESCENT had always been among the general merchandise at Amazon." (Complaint ¶ 82.) With respect to Target, while Plaintiff alleges the existence of an agreement (*see* Complaint ¶ 77), the only allegation indicating that RB was aware of this agreement is Plaintiff's conclusory allegation that "Defendants" knew of this contract. (*See* Complaint ¶ 119.) This is insufficient. *See Tate v. Univ. Med. Cntr. of S. Nevada*, 2010 WL 3829221, at *9 (D. Nev. Sept. 24, 2010) (finding plaintiff failed to allege facts plausibly showing that defendant knew he had entered into an agreement with a third-party).

**3. Plaintiff Cannot Maintain a Claim for Tortious Interference with Prospective Economic Advantage**

"To state a claim for intentional interference with prospective economic advantage, a plaintiff must plausibly allege (1) a prospective contractual relationship between the plaintiff and a third party, (2) the defendant knew of the prospective relationship, (3) intent to harm the plaintiff by preventing the relationship, (4) the absence of privilege or justification by the defendant, and (5) actual harm to the plaintiff as a result of the defendant's conduct." *Kraja v. Bellagio, LLC*, 202 F. Supp. 3d 1163 (D. Nev. 2016). Here, Plaintiff has alleged that Defendants are liable for tortious interference with Plaintiff's prospective economic advantage with Target, Amazon.com, and Auxilium. (*See* Complaint ¶¶ 125-133.)

Plaintiff's claim with respect to Target and Amazon.com, however, fails for the same reasons as its tortious interference with contractual relations claim—because Plaintiff has failed to plead anything but conclusory allegations that RB took any action or that RB was even aware of Plaintiff's relationship with these third-parties. *See Uranga v. Adams*, 2011 WL 147909, at *5 (D. Nev. Jan. 14, 2011) (dismissing claim where plaintiff only alleged that he entered into relationship and anticipated economic advantage). Further, Plaintiff's tortious interference with prospective relationship claim must also fail with respect to Auxilium because Plaintiff has not plead that RB took any intentional action with respect to Auxilium. Rather, Plaintiff pleads, at most, that it turned down competing offers in the hopes that negotiations with RB would result in an acquisition. (*See* Complaint ¶¶ 15, 16.) Plaintiff's own business decision in this regard cannot be attributed to RB as purportedly tortious conduct.

Moreover, excepting Plaintiff's conclusory allegation that "Defendants intended to harm Absorption by preventing the relationship with Auxilium" (Complaint ¶ 129), no facts are pled suggesting that RB had any intent or motive to disrupt the relationship between RB and Auxilium. The mere (false) claim that RB "intended to harm Absorption" is insufficient to support Plaintiff's claim. Rather, Plaintiff must plead facts demonstrating a "motive to interfere." *Carrington*, 2016 WL 1465339, at *2. Here, there is no allegation suggesting that at the time of RB's due diligence, it had any other intent but to pursue a possible transaction.

Lastly, even assuming that Plaintiff adequately pled tortious interference with an economic advantage, it cannot overcome RB's competitive privilege. As stated by the Supreme Court of Nevada, "[p]erhaps the most significant privilege or justification for interference with a prospective business advantage is free competition." *J. R. Crockett v. Sahara Realty Corp.*, 95 Nev. 197 (Nev. 1979) (internal quotation marks omitted); *see also McLachlan v. Simon*, 31 F. Supp. 2d 731, 742 (N.D. Cal. 1998) (defendant "cannot be held liable for interference with the prospective economic relations of a competitor"). Here, the entirety of Plaintiff's claim is premised on RB pursuing its own economic interests in the competitive consumer products marketplace. Plaintiff has not pled that RB was not free to pursue a potential transaction, or that it

is not justified in leveraging its relationship with third-party vendors to pursue favorable distribution of its products. For this reason alone, Plaintiff's interference claims must fail.

**C. ALTERNATIVELY, THE COURT PURSUANT TO 28 U.S.C. § 1404(a) SHOULD TRANSFER THIS CASE TO THE DISTRICT OF NEW JERSEY**

In the event that the Complaint is not dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2), or Rules 12(b)(6) and 9(b), this case should be transferred to the District of New Jersey. "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district . . . where it might have been brought . . . ." 28 U.S.C. § 1404(a). To prevail on a motion to transfer, "a movant must show (1) another district where the action may have been brought and that (2) the district is more convenient." § 1404(a). "Additionally, the court has broad discretion when determining whether to transfer venue under § 1404(a)." *National Fitness Co., Inc. v. Procore Laboratories, LLC*, 2011 WL 2463266, at *2 (D. Nev. June 20, 2011).

**1. Plaintiff Could Have Filed Suit Against RB in the District of New Jersey**

The threshold requirement for a transfer of venue under § 1404(a) is whether the case could have been brought in the judicial district to which transfer is sought. § 1404(a). This case could have been brought in the District of New Jersey. It is undisputed that (i) RB conducts substantial business in New Jersey; (ii) has its principal place of business in New Jersey; and (iii) negotiated regarding a potential transaction with Absorption in New Jersey. (*See, e.g.*, Farrell Decl. ¶ 3) (Complaint ¶ 54.) Thus, the requirements of personal jurisdiction and venue in the District of New Jersey are satisfied.

**2. The Balance of Convenience Factors Favor Transfer**

To determine whether the second § 1404(a) element, convenience of the forum, is present, the Ninth Circuit has identified several factors which may be considered, including: the location where the relevant agreements were negotiated and executed; the state that is most familiar with the governing law; the plaintiff's choice of forum; the respective parties' contacts with the forum; the contacts relating to the plaintiff's cause of action in the chosen forum; the differences in the costs of litigation in the two forums; the availability of compulsory process to compel attendance

of unwilling non-party witnesses; and ease of access to sources of proof. *Nat'l Fitness Co.*, 2011 WL 2463266, at *2; *see Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000); *BTG180, LLC v. Fun Club USA, Inc.*, 2014 WL 6968593, at *2 (D. Nev. Dec. 8, 2014). When evaluating these factors, the courts adopt a balancing approach and do not regard one factor as necessarily dispositive with respect to determining whether to grant a motion to transfer. *See Lens.com, Inc. v. 1-800 CONTACTS, Inc.*, 2012 WL 1155470, at *6 (D. Nev. Apr. 4, 2012). The process is an "individualized case-by-case method." 2011 WL 2463266, at *2 (citing *Van Dusen v. Barrack*, 37 U.S. 612, 622 (1964)).

Here, the following factors are relevant and favor transfer to New Jersey: the convenience of the parties and the cost of litigation; the ability to compel attendance of unwilling non-party witnesses; the respective parties' lack of contact with Nevada; and the lack of deference due here to Plaintiff's choice of forum.[3]

a. The Convenience of the Parties and Witnesses and the Costs of Litigation Favor Transfer

The convenience of the witnesses is often the most important factor in ruling on a motion under § 1404(a). *Ironworkers Local Union No. 68 & Participating Employers Health & Welfare Fund v. Amgen, Inc.*, 2008 WL 312309, at *5 (D. Nev. Jan. 22, 2008) (citing 15 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3851, at 264) ("If the forum chosen by plaintiff will be most convenient for the witnesses, this is the most powerful argument against transfer"). Importantly here, with numerous non-party witnesses identified by Plaintiff in the Complaint (including Volker Sydow, Stephen De Petre, Corrie Mueller, Aditya Sehgal, Kavan Stewart and Brian Robertson), while the convenience of party witnesses is a factor to be considered, "the convenience of non-party witnesses is the more important factor." *Saleh v. Titan Corp.*, 361 F.Supp.2d 1152, 1160 (S.D. Cal. 2005) (citation omitted). The convenience of the parties and witnesses weighs heavily in favor of transfer to the District of New Jersey.

[3] Because Plaintiff does not allege any relevant agreements, and because trade secret law, under either the DTSA or the Uniform Trade Secrets Act, is uniform, the first two factors are neutral.

The testimony of witnesses located in the District of New Jersey, Pennsylvania and the United Kingdom is highly likely to be more material and important than any testimony proffered by any potential witness located in Nevada. This weighs in favor of transfer to the District of New Jersey. *See Stilwell v. SLH Vista, Inc.*, 2015 WL 5458805, at *5 (D. Nev. Sept. 15, 2015) (finding the plaintiff's forum state to be inconvenient because discovery would "likely require testimony from numerous individuals who were witness to the alleged unlawful conduct, all of whom are likely to be present in [the transferee state]"). Indeed, Plaintiff fails to plead that any facts relevant to RB's *intent* – the crux of Plaintiff's fraud claims – are to be found in Nevada. This likewise weighs in favor of transfer to New Jersey. *See Digcom, Inc. v. Pantech Wireless, Inc.*, 2014 WL 4232573, at *3-4 (D. Nev. Aug. 26, 2014) (transfer of jurisdiction is favored to the jurisdiction which is the "true locus" of the case).

While identifying only one individual currently employed by Plaintiff (Jeff Abraham), the Complaint identities at least seven witnesses that RB could be compelled to produce for depositions and/or trial. The RB witnesses are located in Parsippany, New Jersey or at RB's offices in the United Kingdom and Thailand. (*See, e.g.*, Mueller Decl. ¶ 1; Farrell Decl. ¶ 3; Sydow Decl. ¶ 1.) Transporting seven or more witnesses back and forth from New Jersey, the United Kingdom and Thailand to Nevada, rather than transporting them to New Jersey, would substantially increase RB's litigation expenses. Accordingly, in an effort to reasonably reduce litigation costs, the District of New Jersey is the more favored venue. *See Lens.com*, 2012 WL 1155470, at *5 (finding that the costs of litigation factor weighed in favor of transfer where many of the defendant's witnesses and counsel were located in the transferor's state and the plaintiff had only identified one potential witness in the forum state).

b. The Availability of Compulsory Process to Compel Attendance of Unwilling Non-Party Witnesses is Greater in New Jersey

A critical allegation in the Complaint is that RB caused Plaintiff to forego an opportunity to enter into a merger with Auxilium. The testimony of this non-party witness will be central to RB's defenses to Plaintiff's claims. Auxilium, which was acquired by Endo International plc, is located in Malvern, Pennsylvania, is beyond the scope of this Court's authority to compel such a

non-party witness to testify at trial. *See Digcom, Inc. v. Pantech Wireless, Inc.*, 2014 WL 4232573, at *3 (D. Nev. Aug. 26, 2014). However, Malvern, Pennsylvania is within 100 miles of each of the courthouses in the U.S. District Court for the District of New Jersey, thereby placing those non-party witnesses from Auxilium firmly within the subpoena power of that court. (Sims Decl. ¶ 10, Exh. E.8.); FED. R. CIV. P. 45(c)(1)(A); *see Ironworkers Local Union No. 68 & Participating Employers Health and Welfare Fund v. Amgen, Inc.*, 2008 WL 312309, at *5 (D. Nev. Jan. 22, 2008).

c. Plaintiff's Choice of Forum is Entitled to No Deference

While the plaintiff's choice of forum is not determinative, it is entitled to substantial weight when it is also the plaintiff's place of residence. "The level of deference accorded to the plaintiff's choice of forum is substantially less, however, when plaintiff is not a resident of the chosen forum." *Miracle Blade, LLC v. Ebrands Commerce Group, LLC*, 207 F.Supp.2d at 1156. That is the case here. Plaintiff moved to Nevada only last year, *after* the conduct allegedly giving rise to the claims in the Complaint. (*See* Sims Decl. ¶¶ 3-5.) Thus, Plaintiff's choice of forum thus should be accorded minimal deference here. *See Pacific Car & Foundry*, 403 F.2d at 954-55 (finding that "[i]f the operative facts have not occurred in the forum of original selection and that forum has no particular interest in the parties or the subject matter, the plaintiff's choice is entitled only to minimal consideration."). Still further, a plaintiff's choice of forum should be accorded little weight "if the forum lacks significant contact with the activities alleged in the complaint, *regardless of residency*." *Nat'l Fitness Co.*, 2011 WL 2463266, at *3 (emphasis supplied). Nevada does not have any meaningful connection to the controversy. RB is not alleged in the Complaint to have conducted is product diligence in Nevada (Complaint ¶¶ 56-65), the KY-DURATION product is not alleged to have been developed there (Complaint ¶¶ 71, 73), and none of the substantive meetings subject of this dispute occurred in the forum (Complaint, ¶ 34, 54).

d. There is No Contact With Nevada Relating to Plaintiff's Claims

Finally, the fact that both Plaintiff and RB are alleged to sell their products in Nevada "does not establish a special connection between this lawsuit and the District of Nevada." *Weyerhaeuser NR*, 2012 WL 366967, at *4. Indeed, both parties market and sell their products

throughout the United States. (*See* Complaint ¶20; Smith Decl. ¶ 8.) That there is no evidence that Nevada is a primary or major market for either party in comparison to other jurisdictions favors transfer. *See id.* (fact that defendant's products were sold in Nevada bore no special significance because the same products are sold throughout the United States).

## IV.
## CONCLUSION

For the foregoing reasons, defendant Reckitt Benckiser, LLC respectfully requests that the Court grant this motion and issue an order dismissing Plaintiff's Complaint in its entirety against Reckitt Benckiser, LLC pursuant to Rule 12(b)(2), 12(b)(6) and 9(b) for failure to state a cause of action for fraud or tortious interference, or, in the alternative, transferring the Complaint pursuant to 28 U.S.C. § 1404(a), and for such other and further relief as the Court deems just and proper.

Dated: March 15, 2017.

BAILEY❖KENNEDY

By: */s/ Joshua M. Dickey*
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**CERTIFICATE OF SERVICE**

I certify that I am an employee of BAILEY❖KENNEDY and that on the 15th day of March, 2017, service of the foregoing **DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(2) 12(b)(6), AND 9(b), OR, IN THE ALTERNATIVE, TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)** was made by mandatory electronic service through the United States District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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