

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
Western Division  
Case No. 5:16-cv-872-D

TIMOTHY J. ARNETT,	)
	)
Plaintiff,	)
v.	)
	)
	)
ALAN EUGENE JACKSON, and	)
SONY MUSIC HOLDINGS, INC.	)
	)
Defendants.	)
	)

**MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants Alan Eugene Jackson and Sony Music Holdings Inc. (“Holdings”) submit this memorandum in support of their motion to dismiss Plaintiff Timothy J. Arnett’s First Amended Complaint (Doc. 17) for failure to state a claim.

The First Amended Complaint fails sufficiently to allege access. A conclusory allegation of “widespread dissemination,” without any supporting factual allegations, is insufficient to establish access. Arnett also has failed to allege a specific chain of events linking Arnett’s work to Jackson, either directly or through a third-party intermediary with a sufficiently close relationship. Additionally, Arnett’s claims arising from alleged exploitations more than three years before this suit was filed are time barred by the applicable statute of limitations.

Further, pursuant to Federal Rule of Civil Procedure 12(b)(2), Holdings submits this memorandum in support of its motion to dismiss the First Amended Complaint for lack of personal jurisdiction. While Holdings is a parent company of, and investor in, certain music-publishing and recorded-music companies, Holdings does not itself distribute or reproduce any

sound recordings in North Carolina or anywhere else. Furthermore, while Arnett alleges that Holdings is a general partner in Sony Music Entertainment (“SME”), a partnership’s contacts with a state are not attributable to the individual partners of that partnership. Holdings lacks the minimum contacts with North Carolina necessary for this Court to exercise personal jurisdiction.

### **STATEMENT OF FACTS**

Arnett claims that he wrote a musical composition called “Remember Me” in 2001. (Doc. 17 ¶ 13.) Arnett alleges Jackson infringed Arnett’s copyright in the musical composition “Remember Me” when in 2003 Jackson wrote a song titled “Remember When.” (Doc. 17 ¶¶ 21-23.)

To establish access, Arnett claims that “Remember Me” was “widely disseminated by, among other things, audio performances posted on the Internet” at his personal website and “sales of recordings.” (Doc. 17 ¶ 18.) Beyond his talismanic recitation of the phrase “widely disseminated,” Arnett alleges no specific facts—such as number of sales or hits on his personal website—establishing that his work reached a wide audience. (*See* Doc. 17 ¶ 18.)

Arnett alleges that Jackson had access to “Remember Me” through a series of highly attenuated relationships. Arnett alleges he submitted the work to: (1) a person “who had a business relationship” with unspecified “recording and publishing entities;” (2) an “acquaintance” of Jackson; (3) an artist who has recorded songs with a recording company with whom Jackson is “affiliated;” and (4) Faith Hill, “with whom Defendant Jackson performed during that time.” (Doc. 17 ¶ 19.) Arnett’s allegation about Hill is unquestionably false because the last time Jackson and Hill toured together was 1995—six years before Arnett allegedly authored “Remember Me.” (Doebler Decl. ¶ 3.)

Arnett also alleges Jackson infringed Arnett’s copyright “[b]eginning after [Jackson] created *Remember Me*, and at least by 2003.” (Doc. 17 ¶ 28.) Further, Arnett alleges that Defendants have infringed his copyright “[f]rom the time of the earliest acts set forth” in the First Amended Complaint, which appears to be 2003. (Doc. 17 ¶ 29.)

In his attempt to establish personal jurisdiction over Holdings, Arnett alleges Holdings is “authorized to do business in the State of North Carolina.” (Doc. 17 ¶ 5.) Arnett alleges that Holdings infringed his copyright in “Remember Me” by reproducing and distributing the song “Remember When” in North Carolina. (Doc. 17 ¶¶ 8, 32.)

Although Holdings is qualified to do business in North Carolina, Holdings is not incorporated in North Carolina, nor does Holdings have its principal place of business in North Carolina. Holdings is a Delaware corporation that conducts business through its principal place of business in New York. (Doc. 8-1 ¶ 3.)

Further, Holdings has never reproduced or distributed “Remember When” in North Carolina or anywhere else. (Doc. 8-1 ¶ 6.) Holdings is a parent company of, and investor in, certain music-publishing and recorded-music companies. (Doc. 8-1 ¶ 5.) Holdings has never been involved in the actions set forth in the First Amended Complaint. (*See* Doc. 8-1 ¶¶ 5-6.)

Additionally, Arnett attempts to establish specific jurisdiction by alleging that SME is a partnership that distributed “Remember When” in North Carolina, and that Holdings is a partner of SME.<sup>1</sup> (Doc. 17 ¶ 6.) Arnett claims that “as a matter of basic principles of agency,” all of

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<sup>1</sup> SME is an entity registered in and subject to Delaware law. (Barger Decl. ¶ 3, Ex. A.) On a motion to dismiss, a court may take judicial notice of publicly available records of secretaries of state. *See Sanders v. Countrywide Home Loans, Inc.*, 2009 WL 929093, at \*4 n.2 (W.D.N.C. Apr. 2, 2009) (“The court may take judicial notice of such public records maintained by the State of North Carolina without converting a motion to dismiss into one for summary judgment.”); *In re Mid Atl. Retail Grp., Inc.*, 2008 WL 2491627, at \*2 (Bankr. M.D.N.C. June 18, 2008) (taking judicial notice of North Carolina Secretary of State website).

SME's contacts with North Carolina are necessarily attributable to all of SME's partners, including Holdings. (Doc. 17 ¶ 5.)

## **MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

### **STANDARD OF REVIEW**

In ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), courts must accept as true the allegations made in the operative complaint and construe the allegations in the plaintiff's favor. *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994).

The complaint's allegations, however, "must be enough to raise a right to relief above the speculative level." *Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62, 71 (4th Cir. 2016) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

A complaint will not survive a motion to dismiss unless it contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Andon, LLC v. City of Newport News, Va.*, 813 F.3d 510, 513–14 (4th Cir. 2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Talismanic assertions lacking factual support are insufficient to satisfy the pleading standard set by *Twombly* and *Iqbal*." *Calvary Christian Ctr. v. City of Fredericksburg, Va.*, 832 F. Supp. 2d 635, 642 (E.D. Va. 2011)

### **ARGUMENT**

#### **I. Arnett has failed sufficiently to allege access.**

To establish a claim for copyright infringement, "a plaintiff must prove that it owned a valid copyright and that the defendant copied the original elements of that copyright." *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 537 (4th Cir. 2015) (quotation omitted).

In the absence of direct evidence of copying, the plaintiff in a copyright action must allege the defendant had access to the work at issue. *See id.* at 537-38; *Towler v. Sayles*, 76 F.3d 579, 582 (4th Cir. 1996). The plaintiff “must show that [the defendant] had an opportunity to view or to copy her work . . . . A mere possibility that such an opportunity could have arisen will not suffice. Rather, it must be reasonably possible that the paths of the infringer and the infringed work crossed.” *Towler*, 76 F.3d at 582 (quotations omitted).

In a case alleging infringement of a musical composition, a plaintiff can allege access either through (1) specific facts plausibly evidencing widespread dissemination or (2) a specific chain of events plausibly linking plaintiff’s work and the defendant’s access. *See Loomis v. Cornish*, 836 F.3d 991, 995 (9th Cir. 2016) (affirming grant of summary judgment for failure to allege access sufficiently); *see also Jones v. Blige*, 558 F.3d 485, 491 (6th Cir. 2009) (affirming summary judgment in favor of defendants because “access may not be inferred through mere speculation or conjecture” (quotation omitted)).<sup>2</sup>

Arnett has failed sufficiently to allege access. Merely reciting the talismanic and conclusory statement that a work has been “widely disseminated,” without any specific allegations, is insufficient to establish access as a matter of law. Moreover, Arnett has failed, as required by the Fourth Circuit, to allege a specific chain of events linking Arnett’s work to Jackson, either directly or through a third-party intermediary with a sufficiently close relationship.

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<sup>2</sup> Although in *Loomis* and *Jones* the court ruled on motions for summary judgment, these legal principles apply with equal force to a motion to dismiss when a plaintiff fails to allege facts which, even if supported by competent evidence, do not establish the defendant had a “reasonably possible” opportunity to access the work.

**A. Merely alleging “widespread dissemination,” without any specific factual allegations, is insufficient to establish access.**

Arnett has failed to allege access, as a matter of law, by making only the conclusory statement that “Remember Me” has been “widely disseminated” through “audio performances posted on the Internet” and “sales of recordings.” (Doc. 17 ¶ 18.)

Merely posting a work on the internet is insufficient to establish access through widespread dissemination. *See Building Graphics, Inc. v. Lennar Corp.*, 708 F.3d 573, 577 (4th Cir. 2013) (affirming district court’s finding that “[t]he fact that the plans were available online also was not enough to prove access”); *Fisher v. United Feature Syndicate, Inc.*, 203 F.3d 834, at \*4 (10th Cir. 2000) (Table) (affirming dismissal of complaint for failure sufficiently to allege access); *Building Graphics, Inc. v Lennar Corp.*, 866 F. Supp. 2d 530, 541 (W.D.N.C. 2011) (“[W]ithout more, the Court will not infer merely from the availability of a sizable body of information—in this case, the whole of the Internet—a reasonable probability of access to the specific, copyrighted work embedded within.”); *see also Art Attacks Ink, LLC v. MGA Entm’t Inc.*, 581 F.3d 1138, 1145 (9th Cir. 2009) (holding that while the internet can “reach a wide and diverse audience,” merely posting a work on the internet “is not sufficient to demonstrate wide dissemination”); *O’Keefe v. Ogilvy & Mather Worldwide, Inc.*, 590 F. Supp. 2d 500, 515 (S.D.N.Y. 2008) (“[T]he mere fact that O’Keefe’s work was posted on the internet prior to the creation of defendants’ work is insufficient by itself to demonstrate wide dissemination.”)

In the absence of facts establishing a very large quantity of sales, selling recordings is also not sufficient to establish access through widespread dissemination. *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003) (“We note that *They Mystery Magician* only sold approximately 17,000 copies between 1986 and 1999; therefore, the video cannot be considered widely disseminated.”); *Jason v. Fonda*, 526 F. Supp. 774, 776 (C.D. Cal. 1981), *adopted and*

*aff'd*, 698 F.2d 966 (9th Cir. 1982) (holding the availability of “200 and 700 copies . . . through various Southern California bookstores” was insufficient to establish widespread dissemination).

To establish widespread distribution, therefore, a plaintiff must allege specific facts—above and beyond a conclusory statement about posting a work on the internet or selling some recordings—in order to sufficiently allege access. Rather than allege such specific facts, Arnett merely states, without any supporting factual allegations, that his work was “widely disseminated.” (Doc. 17 ¶ 18.) Under *Twombly* and *Iqbal*, however, “[t]alismanic assertions lacking factual support are insufficient” to survive a motion to dismiss. See *Calvary Christian Ctr.*, 832 F. Supp. 2d at 642. The “doors of discovery” do not unlock for a plaintiff “armed with nothing more than conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

Arnett has failed to allege specific facts sufficient to state a plausible claim that his work was widely disseminated through his personal website and record sales. See *Andon, LLC*, 813 F.3d at 513–14. He has therefore failed to state a claim upon which relief may be granted.

**B. Arnett has failed to allege to allege a specific, plausible chain of events linking Arnett’s work to Jackson, either directly or through a third-party intermediary.**

Arnett does not allege that he provided Jackson with a copy of Arnett’s work, so no allegation of direct access is set forth in the First Amended Complaint. (See Doc. 17 ¶¶ 12-27.) Arnett also has failed sufficiently to allege that Jackson had access to *Remember Me* through a third-party intermediary.

A plaintiff may establish access by alleging that the work was sent to or viewed by a “third party intermediary who has a *close relationship* with the infringer.” *Towler*, 76 F.3d at 583 (emphasis added).

One key feature in a close relationship is that the person must be “in a position to transmit it to the copier.” *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 944 (8th Cir. 1992) (cited by *Towler*, 76 F.3d at 583); *see also Feldman v. Twentieth Century Fox Film Corp.*, 723 F. Supp. 2d. 357, 365-66 (D. Mass. 2010) (dismissing complaint for failure to allege access where plaintiff merely alleged “a friend with contacts in Hollywood” disseminated the work to defendants). For example, an intermediary could be someone who was “a supervisor with responsibility for the defendant’s project, was part of the same work unit as the copier, or contributed creative ideas or material to the defendant’s work.” *Moore*, 972 F.2d at 944 (quotation omitted).

An “attenuated corporate connection” is not a sufficiently close relationship. *See Jones*, 558 F.3d at 493 (6th Cir. 2009) (concluding that “an attenuated corporate connection” does not create “a reasonable possibility of access). The plaintiff must allege specific facts showing that the “recipients worked closely with [the] alleged infringers.” *Moore v. Lightstorm Entm’t*, 992 F. Supp. 2d 543, 543 (D. Md. 2014). Accordingly, “the dealing between the intermediary and the alleged copier must involve some overlap in subject matter to permit an inference of access.” *See Towler*, 76 F.3d at 583 (quoting *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1358 (C.D. Cal. 1984)). There must be some plausible factual allegation that the intermediary and the alleged copier worked on the same projects during the time that the allegedly infringing work was created. *See id.* (finding no access where “a host of individuals connected with film production” allegedly received a copy of a screenplay).

Arnett’s attempts to allege access through a third-party intermediary are insufficient to “nudge [his] claims across the line from conceivable to plausible.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Arnett claims he submitted his work to “Tony Defries, who had a

business relationship with recording and publishing companies that also handled Mr. Jackson's works," and "T. Bone Burnett, whose work includes recording handled by Sony Music Entertainment and its labels with which Defendant Jackson was affiliated." (Doc. 17 ¶ 19.) Arnett is claiming that simply because two people at one time did some work with the same, large recording entity, there must have been access. But such a relationship amounts merely to an "attenuated corporate connection." *See Jones*, 558 F.3d at 493. Arnett does not allege that these recipients "worked closely with" Jackson in any capacity whatsoever. *See Moore*, 992 F. Supp. 2d at 543.

Arnett also claims he submitted his work to "Dan Huff, who was an acquaintance of Mr. Jackson." (Doc. 17 ¶ 19.) However, merely alleging that someone is an "acquaintance" does not establish a reasonable, plausible possibility of access. The third-party intermediary must be a person with a "close relationship" that worked on the same musical projects as the alleged infringer during the time period in question. *See Towler*, 76 F.3d at 583. If the rule were otherwise, simply naming any person the alleged infringer has ever met would somehow establish a plausible allegation of access.

Finally, Arnett alleges his work was "accepted for review and consideration for inclusion on an album by Faith Hill, with whom Defendant Jackson performed during that time." (Doc. 17 ¶ 19.) As an initial matter, touring together does not constitute a close working relationship on the same subject matter, which in this case means writing songs together, rather than performing different songs on the same stage. *See Towler*, 76 F.3d at 583. Moreover, Arnett's allegation about Hill is false because the last time Jackson and Hill toured together was 1995—six years before Arnett allegedly authored "Remember Me." (Doebler Decl. ¶ 3.) Jackson requests the

Court to take judicial notice of this timeline because a plaintiff cannot invent objectively false facts in order to overcome a motion to dismiss. *See* Fed. R. Evid. 201(b).<sup>3</sup>

As a matter of law, Arnett has failed sufficiently to allege access through either widespread dissemination or through a third-party intermediary who has a close relationship with Jackson. Defendants therefore request that the Court dismiss Arnett's First Amended Complaint for failure to state a claim.

**II. The applicable statute of limitations bars all of Arnett's claims arising from alleged exploitations more than three years before suit was filed.**

The limitations period for bringing copyright infringement claims is three years after the claim accrues. *See* 17 U.S.C. § 507(b); *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 796 (4th Cir. 2001). A party cannot reach back and recover for alleged claims that accrued outside the limitations period based on acts of infringement that accrued within the limitations period. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 202 (4th Cir. 1997). Therefore, under the Copyright Act, an alleged infringement is actionable "within three years, and only three years," of its accrual. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014).

Arnett alleges Defendants infringed Arnett's copyright "at least by 2003" when Jackson "began to perform *Remember When*." (Doc. 17 ¶ 28.) Additionally, Arnett claims Defendants infringed the work in question "from the time of the earliest acts set forth" in the First Amended Complaint, which appears to be 2003. (Doc. 17 ¶ 29.)

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<sup>3</sup> Given that Arnett's allegation regarding Hill is indisputably false, Arnett is obligated to strike from his First Amended Complaint his allegation regarding Hill. *See* Fed. R. Civ. P. 11(b)(2).

Yet Arnett did not file this lawsuit until a decade later on October 27, 2016. (*See* Doc. 1.) As a result, the statute of limitations bars recovery for any alleged exploitations that occurred prior to October 27, 2013. *See* 17 U.S.C. § 507(b).

Because Arnett's claims are untimely, Defendants request that the Court dismiss all claims arising from alleged exploitations before October 27, 2013.

## **MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

### **STANDARD OF REVIEW**

The plaintiff asserting personal jurisdiction bears the burden of proving that such jurisdiction exists. *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 396 (4th Cir. 2003). If the district court addresses the question of personal jurisdiction on the basis of the papers alone, the plaintiff bears the burden of making a *prima facie* showing of a sufficient jurisdictional basis. *Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 276 (4th Cir. 2009). If the district court holds an evidentiary hearing, the plaintiff must establish personal jurisdiction by a preponderance of the evidence. *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 59-60 (4th Cir. 1993).

### **ARGUMENT**

Since North Carolina's long-arm statute extends to the limits of the Due Process Clause, a court sitting in North Carolina must determine whether the exercise of personal jurisdiction over a defendant comports with constitutional due process. *Christian Sci. Bd. of Dirs. of First Church of Christ, Scientist v. Nolan*, 259 F.3d 209, 215 (4th Cir. 2001); *see* N.C. Gen. Stat. § 1-75.4.

Personal jurisdiction can be either general or specific, depending upon the nature of the contacts that the defendant has with the forum state. *CFA Inst. of Chartered Fin. Analysts of*

*India*, 551 F.3d 285, 292 n.15 (4th Cir. 2009). As explained below, Holdings' contacts with North Carolina are insufficient to create either general or specific personal jurisdiction.

### **I. General Personal Jurisdiction.**

This Court lacks general jurisdiction over Holdings. See *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) (stating that it is “incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business” (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 411-12 (1984))).

In *Daimler AG v. Bauman*, the Supreme Court held that general jurisdiction exists only if a defendant's “affiliations with the State are so ‘continuous and systematic’ as to render [the defendant] *essentially at home in the forum State.*” 134 S. Ct. 746, 761 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)) (emphasis added).

Only a limited set of affiliations with a forum will render a defendant amenable to general jurisdiction. *Id.* at 760. For a corporation, the “paradigm” fora for the exercise of general jurisdiction are “the place of incorporation and principal place of business.” *Id.* General jurisdiction does not exist simply because of “the magnitude of the defendant's in-state contacts.” *Id.* at 762 n.20. A court must appraise the defendant's activities “in their entirety, nationwide and worldwide.” *Id.*

Holdings is not at home in North Carolina and therefore not subject to general jurisdiction in North Carolina. Holdings is incorporated in Delaware, not North Carolina, and Holdings has its principal place of business in New York, not North Carolina. (Doc. 8-1 ¶ 3.)

North Carolina is not a “paradigm” forum for the exercise of general jurisdiction over Holdings. *See Daimler*, 134 S. Ct. at 760. Holdings cannot fairly be said to be “at home” in North Carolina. *Id.* at 761 (quoting *Goodyear*, 564 U.S. at 929).

## **II. Specific Personal Jurisdiction**

This Court also lacks specific personal jurisdiction over Holdings. The Fourth Circuit has established a three-part test to determine whether the exercise of specific jurisdiction complies with due process:

[W]e consider (1) the extent to which the defendant “purposefully availed” itself of the privilege of conducting activities in the State; (2) whether the plaintiff’s claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally “reasonable.”

*ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002) (alterations omitted). The plaintiff must establish all three elements, and the absence of any one element is fatal to the plaintiff’s assertion of specific jurisdiction. *See id.*

In conducting this analysis, a “parent-subsidiary relationship” is “insufficient to justify the existence of personal jurisdiction” over the defendant. *Mylan*, 2 F.3d at 63. “When a subsidiary of a foreign corporation is carrying on business in a particular jurisdiction, the parent company is not automatically subject to jurisdiction in that state because of the presumption of corporate separateness.” Wright & Miller, *Federal Practice and Procedure* § 1069.4 (3d ed. 2014).

Upholding the principle of corporate separateness, Arnett’s claims do not “arise out of” the activities of Holdings in North Carolina. Thus, the Court need not reach the first or third elements of the specific jurisdiction analysis.

Arnett’s copyright-infringement claims arise out of the alleged distribution and reproduction of “Remember When” in North Carolina. (Doc. 17 ¶¶ 7, 27.) Holdings, however,

does not itself distribute or reproduce any sound recordings, nor has it ever distributed or reproduced the song “Remember When” in North Carolina or anywhere else. (Doc. 8-1 ¶ 6.) While Holdings is a parent company of, and investor in, certain music-publishing and recorded-music companies, Holdings has never been involved in the actions set forth in the First Amended Complaint. (See Doc. 8-1 ¶¶ 5-6.) Thus, Arnett’s claims do not “arise out of” the activities of Holdings in North Carolina.

To bypass the fact that Holdings’ activities are unrelated to the copyright claims at issue, Arnett attempts to establish specific jurisdiction through a partnership theory. Arnett alleges that SME distributes “Remember When” in North Carolina, SME is a partnership, and that Holdings is a general partner of SME. (Doc. 17 ¶ 6.) Arnett claims that “as a matter of basic principles of agency,” SME’s contacts with North Carolina are necessarily attributable to all of SME’s general partners, including Holdings. (Doc. 17 ¶ 5.)

Arnett has the law backwards. Under Delaware law,<sup>4</sup> a partner “is an agent of the partnership for the purpose of its business”, but the partnership is not the corresponding agent of each partner. 6 Del. Code Ann. § 15-301(1); *see also* N.C. Gen. Stat. § 59-39(a) (same). Furthermore, a Delaware partnership “is a separate legal entity which is an entity distinct from its partners.” 6 Del. Code Ann. § 15-201(a). Accordingly, the minimum contacts of the partner must be evaluated separately from the partnership, and the partnership’s contacts cannot be attributed to the partner. *See, e.g., RCI Contractors & Eng’rs, Inc. v. Joe Rainero Tile Co.*, 666 F. Supp. 2d 621, 623 (W.D. Va. 2009) (“The plaintiff argues that jurisdiction over Kaiser Industries is proper in this case solely because it is the partner in the Kaiser Products partnership

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<sup>4</sup> SME and Holdings are entities registered in and subject to Delaware law. *See Park v. Am. Circuit Breaker Corp.*, 2008 WL 4596234, at \*6 (M.D.N.C. Oct. 14, 2008) (applying Delaware law to Delaware partnership).

that has subjected itself to personal jurisdiction in Virginia. . . . I find this argument to be without merit.”); *Marriott PLP Corp. v. Tuschman*, 904 F. Supp. 461, 466 (D. Md. 1995) (“Tuschman’s status as a limited partner in CHLP . . . does not in and of itself confer personal jurisdiction over Tuschman in this Court.”); *Sher v. Johnson*, 911 F.2d 1357, 1366 (9th Cir. 1990) (holding that the court could exercise personal jurisdiction over the partnership, but no such jurisdiction existed over the partnership’s individual partners).

The Supreme Court’s decision in *Rush v. Savchuk*, 444 U.S. 320 (1980) mandates this result. In *Rush*, the Minnesota court attempted to exercise personal jurisdiction over the defendant on the basis that his insurance carrier, which was obligated to indemnify the defendant from liability, had sufficient jurisdictional contacts in Minnesota. *Id.* at 325. The Supreme Court reversed, holding that the aggregation of parties’ jurisdictional contacts is “plainly unconstitutional” because a court must evaluate the individual acts of *each* defendant, not the acts of related defendants. *Id.* at 332.

Since a Delaware partnership is a distinct entity that is not the agent of a partner, Arnett’s allegations show only that SME and Holdings may be related defendants. *See* 6 Del. Code Ann. §§ 15-201(a) & 15-301(1); *RCI Contractors*, 666 F. Supp. 2d at 623; *Marriott*, 904 F. Supp. at 466; *Sher*, 911 F.2d at 1366. *Rush* forbids the aggregation of SME’s alleged contacts in order to haul Holdings into court.<sup>5</sup>

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<sup>5</sup> To the extent the courts in *Walker v. White*, 609 F. Supp. 2d 529, 537 (W.D.N.C. 2009) and *Avanti Hearth Prodducts, LLC v. Janifast, Inc.*, 2010 WL 3081371, at \*4 (W.D.N.C. Aug. 6, 2010) reached a different result, they are inconsistent with binding Supreme Court precedent. *See Rush*, 444 U.S. at 332. Moreover, *Walker* and *Avanti* are distinguishable because they relied exclusively on a case applying New York state law to a New York partnership. *See Afloat in France, Inc. v. Bancroft Cruises Ltd.*, 2003 WL 22400213, at \*5 (S.D.N.Y. Oct. 21, 2003). By contrast, SME is a Delaware partnership governed by the Delaware Revised Uniform Partnership Act. (*See* Barger Decl. ¶ 3, Ex. A.)

Holdings is not subject to general jurisdiction in North Carolina; Arnett's actions do not "arise out of" Holdings' own actions; and Arnett's partnership theory is foreclosed by Supreme Court precedent and the Delaware Revised Uniform Partnership Act. Holdings therefore is not subject to specific personal jurisdiction in this forum.

### **CONCLUSION**

For the foregoing reasons, Jackson and Holdings request that the Court dismiss Arnett's First Amended Complaint for failing sufficiently to allege access and for raising untimely claims. Further, Holdings alternatively requests that the Court dismiss Arnett's claims against it for lack of personal jurisdiction.

This the 9<sup>th</sup> day of January, 2017.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing has been served upon the following via the Court's ECF system on this 9th day of January, 2017.

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