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IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

THE CANOPY GROUP, INC., a Utah corporation, and RAYMOND J. NOORDA and LEWENA NOORDA, as Trustees of the NOORDA FAMILY TRUST,

Plaintiffs,

vs.

RALPH J. YARRO III, an individual, DARCY G. MOTT, an individual, and BRENT D. CHRISTENSEN, an individual,

Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO PLEAD AS COMPULSORY COUNTERCLAIM

Civil No. 050400245

Honorable Anthony W. Schofield, Div. 8

Pursuant to Rule 13(a) of the Utah Rules of Civil Procedure, defendants Ralph J. Yarro III ("Mr. Yarro"), Darcy G. Mott ("Mr. Mott") and Brent D. Christensen ("Mr. Christensen") (collectively the "Yarro Plaintiffs") hereby respectfully submit this Memorandum In Support Of Defendants' Motion To Dismiss For Failure To Plead As Compulsory Counterclaim.

STATEMENT OF FACTS

A. Original Lawsuit

On January 20, 2005, the Yarro Plaintiffs filed a Complaint in the Fourth Judicial District Court, Utah County, State of Utah (Case No. 050400205) (referred to hereafter as the "Original Lawsuit"), seeking damages against, among others, the Noorda Family Trust ("the Trust"), Raymond J. Noorda ("Mr. Noorda") and Lewena Noorda ("Mrs. Noorda"). Counsel for the Trust, Mr. and Mrs. Noorda and The Canopy Group, Inc. ("Canopy") accepted service of the Original Lawsuit Complaint on January 21, 2005, on behalf of the Trust and Mr. and Mrs. Noorda. Canopy was permitted to intervene in the Original Lawsuit at the time the Yarro Plaintiffs sought to obtain a temporary restraining order to reinstate the status quo. The Original Lawsuit Complaint incorporates documents and agreements referred to in the Complaint as the "Canopy 2000 Recapitalization Plan," including: (1) Canopy's Amended and Restated Articles of Incorporation, attached to Original Lawsuit Complaint at Tab 1; (2) Canopy's 2000 Stock Option Plan, attached to Original Lawsuit Complaint at Tab 2; and (3) Shareholder Agreement, attached to Original Lawsuit Complaint at Tab 3. A copy of the Original Lawsuit Complaint is attached hereto as Exhibit A.[1]

The claims asserted in the Original Lawsuit, including without limitation the claims for breach of contract, are grounded in the Canopy 2000 Recapitalization Plan and arise out of a

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[1]The Yarro Plaintiffs filed an Amended Complaint on February 9, 2005. The Amended Complaint did not materially change the allegations in the Original Lawsuit Complaint.

Canopy Board Meeting on December 17, 2004, at which Mrs. Noorda proposed and read a resolution that purportedly: (1) granted her and Mr. Noorda sufficient additional voting share options to give themselves control of Canopy; (2) terminated the Yarro Plaintiffs for cause (without detailing what they had allegedly done wrong); and (3) appointed William Mustard as the President and Chief Executive Officer of Canopy. *See* Original Lawsuit Compl. ¶ 69. The Original Lawsuit Complaint alleges, among other things, that the Yarro Plaintiffs have suffered irreparable harm as a result of the purported actions taken on December 17, 2004 and thereafter, which actions constitute breaches of the Canopy 2000 Recapitalization Plan. The Yarro Plaintiffs seek damages for, among other things, the deprivation of their right to manage Canopy, as well as the deprivation of certain compensation, bonuses and benefits.

B. Second Lawsuit

On January 24, 2005, after having accepted service of the Original Lawsuit, Mr. and Mrs. Noorda as trustees for the Trust, as well as Canopy (collectively the "Noorda Parties") filed a Complaint in the Fourth Judicial District Court, Utah County, State of Utah (Case No. 050400245) (the "Second Lawsuit" or the "instant case") against the Yarro Plaintiffs.

The Second Lawsuit Complaint contains extensive quotations from the very same documents and agreements that are an integral part of the Original Lawsuit, and asserts that the Yarro Plaintiffs have breached the various agreements and/or that said agreements are null and void. *See, e.g.,* Second Lawsuit Compl. ¶¶ 26-38, 54-57, 59-61, 105-123, and p. 29 ¶¶ B, E. In

the Second Lawsuit Complaint, the Noorda Parties cite and/or quote provisions of Canopy's Amended and Restated Articles of Incorporation in paragraphs 27, 28 and 29; cite and/or quote provisions of Canopy's 2000 Stock Option Plan in paragraphs 30, 31, 32, 33, 54, 55, 56, 57, 58, 59, 60, 61, 106, 107, 108, 109, 110, and 111; and cite and/or quote provisions of the Shareholder Agreement in paragraphs 36, 37, 38, 113, 114, 116, 118, 119, 120, 121, 122, and 123. The Second Lawsuit Complaint offers no explanation or attempted justification for filing a new action rather than pleading the claims as counterclaims to the Original Lawsuit.

ARGUMENT

I. RULE 13(A) REQUIRES DEFENDANTS TO BRING CLAIMS ARISING OUT OF THE SAME TRANSACTION OR OCCURRENCES AS COMPULSORY COUNTERCLAIMS.

The Noorda Parties should be required to make their claims in the Original Lawsuit in accordance with Rule 13(a) of the Utah Rules of Civil Procedure. Rule 13(a) provides:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Utah R. Civ. P. 13(a). Thus, under Rule 13(a), a claim must be brought as a compulsory counterclaim if it arises from the "same transaction" as a claim in the original lawsuit. *Mark VII Financial Consultants v. Smedley*, 792 P.2d 130, 132-33 (Utah Ct. App. 1990). Claims that rely upon the same underlying agreements or claim breaches of the same agreements and involve the

same parties as the original claims arise from the "same transactions." *See Romar Dev. Co. v. Gulf View Mgt. Corp.*, 644 So.2d 462, 468 (Ala. 1994) ("Where the claim and the counterclaim allege respective breaches of the same contract, the counterclaim is compulsory."); *Mathis v. Bill De La Garza & Assocs.*, 778 S.W.2d 105 (Tx. Ct. App. 1989) (finding that where one party claimed breach of contract, and the other party alleged breach of the same contract, "the counterclaim was a compulsory one."); *cf. King v. Barron*, 770 P.2d 975, 977 (Utah 1988) (in reviewing a severance of claims, the Court quoted the following with approval "The test for determining whether the two causes of action arose out of the same transaction or occurrence is the logical relationship test" (citation omitted)); *Massey v. Board of Trustees*, 2004 UT App 27, ¶ 12, 86 P.3d 120 (in analyzing a claim preclusion issue, stating that claims brought in two separate suits were "unquestionably part of the **same transaction**" because "they are related in time, space, origin and motivation, and form a convenient trial unit that any defendant could expect to be brought in one suit." (emphasis added)).

The purpose of Rule 13(a) "is to ensure that all relevant claims arising out of a given transaction are litigated in the same action." *Raile Family Trust v. Promax Dev. Corp.*, 2001 UT 40, ¶ 12, 24 P.3d 980.

II. THE CLAIMS ASSERTED IN THE SECOND LAWSUIT ARE COMPULSORY COUNTERCLAIMS TO THE ORIGINAL LAWSUIT.

A. The Claims Are Against Opposing Parties.

To constitute a compulsory counterclaim, the claim must be asserted against "any opposing party." Utah R. Civ. P. 13(a). This element is satisfied because the same persons and entities are parties to the Original Lawsuit and the Second Lawsuit. In the Original Lawsuit, Mr. Yarro, Mr. Mott and Mr. Christensen are plaintiffs and the Noorda Family Trust, Mr. and Mrs. Noorda, and Canopy, as well as others, are defendants. In the Second Lawsuit, Mr. Yarro, Mr. Mott and Mr. Christensen are named as defendants, and Mr. and Mrs. Noorda as trustees of the Noorda Family Trust and Canopy are plaintiffs.

B. The Claims In The Instant Case Arise Out Of The Same Transactions That Are The Subject Matter Of The Original Lawsuit.

The claims asserted in the instant case arise out of the same transactions and occurrences that are the subject matter of the Original Complaint. In the Original Complaint, the Yarro Plaintiffs allege that the Noorda Parties breached the Canopy 2000 Recapitalization Plan, and in particular, the Canopy 2000 Stock Option Plan and the Shareholder Agreement. In the instant case, the Noorda Parties allege that the Yarro Plaintiffs breached those same agreements by the actions taken in their capacity as board member, officers, and/or employees of Canopy. Not only do the Noorda Parties allege breaches of those agreements, they also seek the Court to find that the agreements attached to and incorporated in the Original Complaint are null and void. Thus,

there can be no question that the claims asserted by the Noorda Parties in the instant case are compulsory counterclaims to the Original Lawsuit. *See Romar*, 644 So.2d at 468 ("Where the claim and the counterclaim allege respective breaches of the same contract, the counterclaim is compulsory.").

Furthermore, at issue in both the Original Lawsuit and the Second Lawsuit is who should serve as directors of Canopy. In the Original Lawsuit, the Yarro Plaintiffs assert that Mr. Yarro should continue to serve as a director of Canopy and that Mr. and Mrs. Noorda should be removed as directors of Canopy, that certain actions purportedly taken by Mr. and Mrs. Noorda on December 17, 2004 are *void ab initio* and that subsequent related actions must be rescinded. In the instant case, the Noorda Parties assert that Mr. Yarro should be removed as a director of Canopy, and that certain actions taken by the Yarro Plaintiffs, in their capacity as board member, officers, and/or employees of Canopy are void and should be rescinded. The claims in the Original Lawsuit certainly have a "logical relationship" with the claims in the instant case, and are "related in time, space, origin and motivation, and form a convenient trial unit that any defendant could expect to be brought in one suit." *King*, 770 P.2d at 977; *Massey*, 2004 UT App 27 at ¶ 12. Therefore, the claims in the instant action arise out of the same subject matter as the claims in the Original Lawsuit. Accordingly, the Noorda Parties must bring those claims, if at all, as compulsory counterclaims to the Original Lawsuit.

C. The Court Has Jurisdiction Over All Parties In The Instant Action.

The final element that is considered in determining whether a claim must be brought as a compulsory counterclaim is whether the adjudication of the claim requires "the presence of third parties of whom the court cannot acquire jurisdiction." In this case, both the Original Lawsuit and the Second Lawsuit were filed in the same court, and assigned to the same judge. There are no third parties necessary to the adjudication of the claims in the Second Lawsuit over which this court cannot acquire jurisdiction. Accordingly, the claims of the Second Lawsuit must be brought as compulsory counterclaims to the Original Lawsuit.

CONCLUSION

The claims made in the instant case arise from the same transactions and occurrences that are the subject matter of the Original Complaint, and are brought against opposing parties. Because the Noorda Parties brought their claims in this action, in violation of Rule 13(a), the Yarro Plaintiffs are entitled to dismissal of the instant action. Accordingly, the Court should grant the motion to dismiss, and the Noorda Parties should be ordered to bring their claims, if any, as compulsory counterclaims to the Original Complaint.

DATED this 14th day of February, 2005.

SNOW, CHRISTENSEN & MARTINEAU

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CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law offices of Snow, Christensen & Martineau, attorneys for defendants, and that a true and correct copy of the **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO PLEAD AS COMPULSORY COUNTERCLAIM** (Case No. 050400205, Fourth Judicial District Court, Utah County, for the State of Utah) was served on the following, by mailing, postage prepaid, this 14th day of February, 2005:

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