SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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| JPS PARTNERS in its own right, and derivatively in the right of BINN and PARTNERS, LLC, Plaintiffs, | ) | |
| -against- | ) | |
| MORETON BINN, an individual, | ) | Case No.: 650430/2012 E |
| GUGGENHEIM SECURITIES, LLC, MISTRAL EQUITY PARTNERS, MISTRAL CAPITAL MANAGEMENT, LLC, and LILAC VENTURES MASTERFUND, Ltd. | ) | |
| Defendants, and | ) | AMENDED COMPLAINT |
| BINN and PARTNERS LLC, | ) | |
| Nominal Defendant. | ) | |

Plaintiff JPS Partners, in its own right, and derivatively in the right of Binn and Partners, LLC, by its attorney Felicello Law P.C., brings this Amended Complaint against Moreton Binn, an individual; Binn and Partners LLC, nominally; Guggenheim Securities, LLC; Mistral Equity Partners; Mistral Capital Management, LLC; and Lilac Ventures Masterfund, Ltd. Except where indicated as to its own actions and conduct, JPS Partners alleges the following upon information and belief:

## NATURE OF THE CASE

1. In 2005, JPS Partners invested in Binn and Partners, LLC, which was in the business of operating spas under the brand name "XpresSpa" at airport terminals

throughout the world through subsidiaries. Moreton Binn, one of the founders of the Company, served as its sole manager.

2. JPS Partners understood that their investment was not liquid and they were prepared to maintain their position in the spa business for the long term.

3. JPS Partners first received notice from Mr. Binn at the beginning of February 2012 that he had negotiated to transfer the entire spa business to a new Delaware limited liability company controlled by Mistral Equity Partners and that Mistral would be contributing cash to the new company (the "Transaction"). In exchange for this capital contribution, Mistral Equity Partners would also be gaining a controlling interest in the assets of the spa business. Binn and Partners, LLC would become a nominal parent shell company of the new entity. The undisclosed but direct consequence of the Transaction is that the interest in Binn and Partners, LLC owned by JPS Partners would likely be wiped out.

4. In early February 2012, when JPS Partners requested additional information about the Transaction, Mr. Binn refused to provide it. Instead, by mid-February he rushed through a vote on the Transaction, which was perfunctory in any case because of his controlling ownership interest of Binn and Company, LLC.

5. In addition to providing timely, written notice of their dissent to the Transaction, JPS Partners brought the initial complaint in this action and an order to show cause seeking a temporary restraining order and preliminary injunction to prevent the Transaction from closing. This Court denied the order to show cause on the

basis that "there is no showing of irreparable harm that Damages cannot compensate for, and the balance of the equities favors the defendant." At the time of the initial complaint, JPS Partners sought to stop the disputed Transaction from closing. Now that the Transaction has occurred, JPS Partners, through this Amended Complaint, seeks damages and equitable relief for the harm caused by the Defendants.

## PARTIES

6. Plaintiff JPS Partners is an unincorporated association formed as a business venture between brothers Jonathan and Peter Sobel. JPS Partners is located in Suffolk County, New York. JPS Partners is a member of Binn and Partners, LLC, holding a minority interest of 1.93%.

7. Defendant Moreton Binn is an individual residing in New York County, New York. Mr. Binn is the sole manager of Binn and Partners, LLC. Marisol Binn is the wife of Moreton Binn. She is not a party to this lawsuit.

8. Nominal Defendant Binn and Partners, LLC is a New York limited liability company with its principal place of business located at 3 East 54th St., 9th Floor, New York, NY 10022. Prior to the Transaction, Binn and Partners, LLC held a controlling interest in various subsidiaries branded as XpresSpa, which together operate 36 spas in airports throughout the world. (See http://www.xpresspa.com/spas-a/204.htm). XpresSpa also offers spa products for sale via a website (www.xpresspa.com). After the close of the Transaction, Binn

and Partners' ownership interest in the XpresSpa business has been effectively reduced to a worthless, non-controlling interest.

9. Defendant Guggenheim Securities, LLC ("Guggenheim") is a Delaware limited liability company, headquartered in New York and Chicago. It is located in New York County at 135 East 57th Street, New York, NY, 10022. Alan D. Schwartz, the former CEO of The Bear Stearns Companies, is the Executive Chairman of Guggenheim Partners LLC. Guggenheim Partners LLC is the parent company of Guggenheim. Mr. Schwartz is also a member of Binn and Partners, LLC.

10. Defendant Mistral Equity Partners is a partnership with its principal place of business at 650 Fifth Avenue, 31st Floor, New York, NY, 10019. Mistral Equity Partners is a private equity firm. William P. Phoenix is the Managing Director of Mistral Equity Partners. The Schottenstein Family of Companies ("SFC") is a "strategic partner" of Mistral Equity Partners.

11. Defendant Mistral Capital Management, LLC, is a Delaware limited liability company, with its principal place of business at 650 Fifth Avenue, 31st Floor, New York, NY, 10019. Mistral Equity Partners and Mistral Capital Management, LLC have acted as alter egos in this transaction. Together, they will be referred to as "Mistral" throughout this Amended Complaint.

12. Defendant Lilac Ventures Masterfund, Ltd ("Lilac Ventures") is an investment fund, registered in Bermuda, with its principal place of business in New York County, New York. Lilac Advisors, LLC serves as the investment manager to

Lilac Ventures. Bruce T. Bernstein is an officer of Lilac Advisors and is responsible for the portfolio decisions of Lilac Ventures. Lilac Ventures, controlled by Mr. Bernstein, is a member of Binn and Partners, LLC.

## JURISDICTION & VENUE

13. This Court has jurisdiction over this action pursuant to CPLR § 301 because all of the parties maintain their principal place of business in New York. In addition, as to Defendants Mr. Binn, Binn and Partners, LLC, and Lilac Ventures, the Third Amended and Restated Operating Agreement, dated June 16, 2008 (the "Operating Agreement") provides that New York state courts have jurisdiction over any matter relating to it directly or indirectly.

14. Venue is proper because the defendants reside in New York County, NY and for the additional reason that the wrongful conduct occurred in New York County, NY.

## FACTUAL BACKGROUND

**Binn and Partners, LLC is controlled by Moreton Binn.**

15. In 2003, Moreton and Marisol Binn started the XpresSpa business.

16. In 2005, JPS Partners invested $520,013 in Binn and Partners, LLC, then the parent company for XpressSpa. For their investment, JPS Partners received 26 Class B Units and 13 Class A Units. At the time of their investment, their share represented 2.52% of the Company. Following a new round of funding in 2007,

their interest decreased to 1.95%. Since then, their interest has been further decreased to 1.93%.

17. Both before and after the Transaction, Moreton and Marisol Binn together control over 55% of Binn and Partners, LLC.

**The members of Binn and Partners agreed to allow Mr. Binn to act as sole manager of the Company in accordance with an Operating Agreement that set specific guidelines for how the Company should be run.**

18. Binn and Partners, LLC operates pursuant to the Third Amended and Restated Operating Agreement, dated June 16, 2008. A copy of the Operating Agreement is attached as Exhibit A.

19. Section 4.01 of the Operating Agreement names Moreton Binn as the sole Manager for the Company. Mr. Binn is also the Chairman/Chief Executive Office of the Company. Marisol Binn is the President of the Company. Section 4.04 of the Operating Agreement.

20. As stated in the Operating Agreement, "the primary purpose and scope of the Company and its subsidiaries shall be to engage in spa services, predominantly at large, high-traffic airport locations, but possibly also in smaller or lower-traffic airport locations through a franchise program that the Company intends to pursue and develop." Section 1.06 of the Operating Agreement.

21. The Operating Agreement provides that "[o]n or before April 15th of each year" the Company "shall mail" to each member an "annual audited financial statement." Section 2.03 of the Operating Agreement.

22. Section 2.05 of the Operating Agreement provides that if a lender is willing to accept equity in lieu of cash interest, the equity interest "would consist of Class B Units at a dollar rate per Class B Unit equal to the last major sale of Class B Units, which is presently $40,000."

23. Section 2.07 of the Operating Agreement provides each member with a right of inspection to inspect the books and records of the Company upon reasonable notice.

24. As of the date of the Operating Agreement, the Company had authorized 2,000 units, 1,360 of which were classified as Class A Units and 640 of which were classified as Class B Units. Section 3.04 of the Operating Agreement.

25. Section 3.08 of the Operating Agreement states that "no Member shall be required to make any additional capital contribution."

26. Section 4.10 of the Operating Agreement provides: "Commencing in 2010, the Company will use reasonable efforts to create liquidity (i.e. enabling the Members to sell their Units) . . ."

27. Section 6.03(b) of the Operating Agreement provides: "The Company, at the sole discretion of the Manager, will use reasonable efforts to distribute to the Class B Members: 9i) in May 2010, 15% of the Company's accumulated Profits (less accumulated Losses) from inception through December 31, 2009; and (ii) in each year thereafter, 20% of the Company's accumulated Profits (less accumulated Losses) to the Class B Members, until the Full Return is achieved."

28. Article VII of the Operating Agreement describes the events that will cause the Company to be dissolved. Specifically, Section 8.01(b) provides that the Company "shall . . . be dissolved upon the occurrence . . . [of] [t]he Transfer of substantially all of the assets of the Company."

**Prior to February 2012, Mr. Binn continuously held out XpresSpa as a viable business, in no danger of failing to meet budgeted obligations.**

29. Moreton Binn organized the XpresSpa business so that each separate XpresSpa spa is a separate corporate entity. Prior to the Transaction, these corporate entities were wholly owned subsidiaries of Binn and Partners, LLC. The location of Binn and Partners, LLC is advertised as XpresSpa World Headquarters. *See* << http://www.xpresspa.com/about-a/165.htm, last visited July 26, 2012>>, a printout of which is attached as Exhibit B.

30. Although the separate subsidiary spas were generally profitable, Binn and Partners, LLC operated at a loss because of excessive corporate headquarters overhead. For example:

- Mr. Binn caused the Company to enter into lease agreements with another entity that he owns and to pay rent for corporate apartments totaling $3,357 in 2004, $8,536 in 2005, $8,222 in 2006, $50,591 in 2007, $84,300 in 2008, $73,815 in 2009, $20,000 in 2010, and $20,000 in 2011.

- For the eight year period 2004-2011, on total spa revenues of almost $100 million, Mr. Binn incurred $49.61 million of Selling, General and Administrative Expenses ("SG&A"), including indirect store costs and

corporate overhead. Out of these non-direct expenses, Mr. Binn engendered the following general and administrative corporate headquarters expenses: (All numbers have been rounded.)

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| Accounting Fees | $1,719,000 |
| Bank charges (non-interest) | $597,000 |
| Legal Fees | $1,841,000 |
| Management Fees (non-spa) and a miscellaneous expense | $366,000 |
| Travel and Entertainment Expenses | $3,234,000 |
| Telephone Expense | $1,304,000 |
| Office Expenses | $1,173,000 |
| Office Salaries | $10,147,000 |
| Payroll Tax | $1,060,000 |
| Outside Office Help Expense | $696,000 |
| Administrative Employee Benefits | $1,176,000 |
| Administrative Employee Expenses | $1,051,000 |
| Payroll Processing | $473,000 |
| Office Rent | $2,213,000 |
| **TOTAL OF THE ABOVE SELECT, NON-DIRECT GENERAL AND ADMINISTRATIVE EXPENSES:** | **($27,049,287)** |
| **OTHER NON-DIRECT SG&A EXPENSES:** | **($22,560,000)** |

- Over this same eight-year period (2004-2011), direct spa expense totaled about $73 million. Thus, excluding the above select excessive non-direct general and administrative expenses incurred at the corporate level, the spas generated a net profit of over $4 million.

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| 2004-2011 Spa Revenue: | $99,770,000 |
| 2004-2011 Direct Spa Expense: | ($73,080,000) |
| 2004-2011 Other Indirect/SG&A Expenses: | ($22,560,000) |
| **Spa Revenues Less Direct Spa and Other Indirect/SG&A Expenses,** **FOR A NET PROFIT OF:** | **$4,130,000** |

- But because of Mr. Binn's excessive spending at the corporate level, Binn and Partners, LLC has never shown a profit and has in fact lost roughly $23 million over the eight-year period 2004-2011:

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| **Actual 2004-2011 Net Loss:** | **($22,910,000)**<br>+ a $300,000 reduction in 2011 retained earnings to reflect an error from 2008-2011 |

31. Despite annual losses due to excessive corporate level spending, Mr. Binn continued to aggressively grow the spa business, spending almost $27 million on new spa investment for the same eight year period:

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| **2004-2011 Cash required for investment (i.e., to build spas):** | **($26,958,000)** |

32. The total capital raised from investors over the life of the Company was just over $19 million. Thus, over 2.5 times the Company's entire investment capital was spent on SG&A expenses.

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| **Total Capital Raised From Investors Over the Life of the Company:** | **$19,110,000** |

33. The financial statement for the year ended 2011 showed the most excessive annual spending at the corporate headquarters level to date.

34. Rather than cut the excessive corporate spending, Mr. Binn chose to fund his excessive corporate level expenses with credit. In August 2008, he obtained a three-year $15 million credit facility for the Company with Bank of America. The terms of the credit facility required Mr. Binn to personally guarantee all loan payments and provided the bank with a security interest in the assets of Binn and Partners, LLC. As of August 2011, the Company had borrowed $13.66 million at a low interest rate of 4 ¼% per annum.

35. In addition, in 2008, Mr. Binn provided a loan of $2 million to the Company and Lilac Ventures (i.e. Bruce Bernstein) loaned the company $1 million. The interest rate for these notes was 10% per annum. Mr. Binn and Lilac Ventures received Class B units in lieu of interest. As additional consideration for the loans, Mr. Binn and Mr. Bernstein also received put options to sell Class B units to the Company at $55,000 each. Mr. Binn received put options for about 19.72 units and Mr. Bernstein received put options for about 10.15 units. The put options were set to expire on February 29, 2012 and were exercised on the same day that the Transaction closed, i.e., February 23, 2012.

36. Mr. Binn was continually optimistic about the Company's performance and its relationship with Bank of America.

37. In a memorandum to members dated July 16, 2010 ("July 2010 Memo"), provided as follow up to a "Board Conference Call" held on July 14, 2010, Mr. Binn unequivocally states that it is not the right time to be looking for liquidity because the Company would soon be profitable. He states, "[M]anagement recommends that, at this time, we not consider the sale of any shares, whether publically or privately. **We should sit back for the next few years** and reap the rewards and benefits. We invested a lot of money and time to get where we are today. To give up all that potential up-side would not be wise."(emphasis added) A copy of the July 2010 Memo is attached as Exhibit C.

38. The cover letter for the 2010 audited financial statement, dated February 24, 2011, (the "February 2011 Letter") notes that although the $15 million credit line

would mature on August 15, 2011, management will meet with the bank before the maturity date to renegotiate the line of credit. The letter reassures, "We sincerely believe, at this stage of XpresSpa's growth, BofA is pleased with the results we obtained. They have the vision to foresee our future and have shown a great deal of interest in XpresSpa's growth." A copy of the February 24, 2011 letter is attached as Exhibit D.

39. The February 2011 Letter also states, "[I]t is Management's intention to find a partial liquidity solution using 2013 anticipated results as the basis for Fair Value."

40. On June 16, 2011, Marisol and Moreton Binn sent a memorandum (the "June 2011 Memo") to all of the Unitholders of Binn and Partners, LLC that noted that although 2011 started off slow due to a particularly harsh winter, sales had increased every month since February 2011 through mid-June 2011. A copy of the June 2011 Memo is attached as Exhibit E.

41. The June 2011 Memo goes on to state:

> **As you already know, XpresSpa is an exciting business with an incredible, almost non-competitive concept in the United States, at airports. The business continues to grow, floorlessly, year over year.**

42. The June 2011 Memo was sent after Mr. Binn confirmed with Bank of America that it would not be granting additional credit and Mr. Binn would need to continue to guarantee the loan in order for the credit facility to remain open

because the Company had not achieved financial targets for terminating the guarantee. The June 2011 Memo did not mention the Bank of America credit facility or the fact that it would be discontinued absent Mr. Binn's continued guarantee.

43. The June 2011 Memo gave no indication of any problem with the Company's ability to meet expenses as budgeted by management.

**Mr. Binn failed to disclose potential class action litigation against the company.**

44. Unbeknown to JPS Partners until recently, on July 29, 2010, seven spa technicians filed a potential class action lawsuit against a number of the Company's subsidiaries, Mr. Binn, Sydelle Elkind (Mr. Binn's administrative assistant), and Matthew Podell (in-house, general counsel to the Company), alleging violations of the Fair Labor Standards Act and the New York Labor Law (the "Class Action Lawsuit").

45. The Class Action Lawsuit was not disclosed on the Company's 2010 or 2011 audited financial statements.

46. The Class Action Lawsuit is ongoing and an Amended Complaint has been filed.

47. Mr. Binn has never disclosed the Class Action Lawsuit to JPS Partners.

**Mr. Binn limited his exposure to the Bank of America loan in September 2011.**

48. During the spring of 2011, Mr. Binn met with Bank of America to renegotiate the $15 million credit facility.

49. JPS Partners did not attend the meeting with Bank of America and never received a report of its outcome.

50. Apparently, following that meeting, Mr. Binn began to take action to limit his personal debt exposure and increase his own liquidity.

51. After the upbeat June 2011 Memo, Mr. Binn next sent a memorandum (the "September 2011 Memo") to the members of Binn and Partners, LLC regarding the company's bank loan. The September 2011 Memo details that Bank of America is only willing to extend the maturity of the current credit facility if one or more of the Company's members agrees to continue to guarantee the current $13.666 million owed to the bank. Further, the guarantee provided must include a covenant that the guarantors will maintain liquidity of $5 million, $2.5 million of which is to be pledged to the bank. Given that the annual interest payment was about $600,000 and that the bank held a security interest in the assets of Binn and Partners, LLC, the bank held a very secure loan. A copy of the September 19, 2011 memo is attached as Exhibit F.

52. The September 2011 Memo does not indicate any problem with the Company's ability to meet expenses as budgeted by management but goes on to explain that Mr. Binn and Marisol Binn have "reluctantly" agreed to continue to guarantee the loan that they had guaranteed since 2008. (Indeed, Mr. Binn had personally guaranteed Company loans since 2004.) This time, however, Lilac Ventures (i.e. Mr. Bernstein) agreed to guarantee 50% of the outstanding obligation.

53. As consideration for his prior agreement to serve as guarantor, Mr. Binn was awarded 43.75 B units, valued at $1.75 million. Under the renewed facility, Lilac Ventures and the Binns were each awarded 17.083 Class B units (valued at $40,000 per unit) and 13.666 Class A units, for a total of about 61 Units. Thus, under the renewed facility, Mr. Binn had cut his guarantee in half, but was awarded almost 31 Units for doing so.

54. The September 2011 Memo invites other members to participate in the guarantee obligation and to be compensated on the same terms as Lilac Ventures. But the September 2011 Memo warns that "Any substitution or additions to the existing guarantors would require Bank consent. The financial statement of each proposed guarantor will be submitted to Bank of American [sic] for review and approval."

55. The September 2011 Memo requires that any members who would like to participate in the guarantee option call or email Mr. Binn "on or before, Thursday the 22nd," just 3 days after the date of the memo.

56. Prior to February 2012, JPS Partners was not notified of the supposed urgent capital needs of Binn and Partners, LLC.

**JPS Partners is first told of the supposed urgent capital needs of Binn and Partners, LLC in the first week of February 2012.**

57. Unbeknown to JPS Partners and other minority members of the Company, except apparently Alan Schwartz and Mr. Bernstein, Mr. Binn was engaged in putting together a transaction that would relieve Lilac Ventures (i.e. Bernstein) and Mr. Binn of their guarantee, despite the consideration they had received, just a few

months earlier, for their guarantee in the form of Class A and B Units. Further, the Transaction would allow Lilac Ventures (i.e., Mr. Bernstein), Mr. Binn, and Mr. Schwartz (indirectly, through his interest in Guggenheim) to receive significant cash payments at the close of the Transaction, but cause significant harm to the other members of Binn and Partners, LLC.

58. On December 26, 2011, Mistral and Binn and Partners LLP, with the assistance of Guggenheim (likely at the direction of Alan Schwartz) executed a document titled "Summary of Principal Terms" (the "Term Sheet")[1], which sets forth the egregious terms of the Transaction at issue:

    a. In exchange for their $23.8 million investment, Mistral receives an immediate $1.8 million fee and $23.8 million worth of 10.336% cumulative preferred stock ("B interests"), which is really an 11.18% dividend yield on a $22 million investment. In four years, Mistral can convert the B interests into 42% of the common equity of the newly formed XpresSpa Holdings LLC (referred to in the Term Sheet as "FinCo" or "FinCo, LLC"), plus receive a conversion fee of $6.4 million. In addition, Mistral receives an annual monitoring fee of $250,000 (i.e. $1 million for the four years before Mistral can convert their interest and sell

[1] The "Summary of Principal Terms," dated December 25, 2011, signed December 26, 2011, and first provided to JPS Partners at the beginning of February 2011, refers to the new Delaware limited liability company that is to be created as "FinCo, LLC" or "FinCo." It is the understanding of JPS Partners that "FinCo" was used as a placeholder and that the legal name of the newly-created entity is XpresSpa Holdings, LLC.

the Company), unspecified salary for its management duties, a 50% bonus based on target cash flow, equity kickers for additional equity, and the right to appoint 3 out of 6 board members. The new board has the right to amend the terms of any equity security.

b. In four years, instead of converting the B interests, Mistral can simply offer the Company for sale at a price that it designates. If Mistral receives an offer that equals 90% of the designated sale price, Mistral can accept the offer and, because of a liquidation preference, would receive the first $23.8 million. This is in addition to four years of dividends, which will total $12 million at that point, a $1 million monitoring fee, and a lucrative management compensation package. If Mistral converts in four years, it still maintains the right to offer the Company for sale at its designated price along with its liquidation preference.

A copy of the Term Sheet is attached as Exhibit G.

59. The Term Sheet does not mention the engagement of Guggenheim or any fees to be paid to Guggenheim for its services.

60. JPS Partners did not receive a copy of the Term sheet, or any other corporate communications after the September 2011 Memo, until the first week of February 2012 when JPS Partners received a letter from Mr. Binn dated January 30, 2012 (the "January 30 2012 Letter"), alerting them that "Binn and Partners, LLC is about to undergo an exciting Transaction." The letter details that Mistral "has

proposed to invest approximately $23 million in our company in exchange for a 42% minority interest." A copy of the January 30 2012 letter is attached as Exhibit H.

61. A copy of the FinCo Term Sheet was appended to the January 2012 Letter.

62. The January 30 2012 Letter explains that the funds will be used to reduce bank debt and to continue to grow the brand. It specifically states, "**No funds are being used to make distributions.**" (emphasis added)

63. The letter requests that JPS Partners sign the enclosed Unanimous Written Consent document (the "February Consent") no later than Friday, February 3, 2012.

64. The February Consent describes the Transaction as follows:

WHEREAS, the Company holds a controlling interest in the subsidiaries . . . through which the company operates its XpresSpa business (the "Business");

WHEREAS, the Class B Members and the Company desire to enter into a recapitalization transaction (the "Transaction") pursuant to which Mistral Capital Management, LLC, or any of its affiliates or assignees (collectively, "Mistral"), will purchase an equity interest in the Business as follows:

(i) first the Company will **contribute its entire interest in the Subsidiaries to XpresSpa Holdings, LLC** ("Holdings"), a newly formed Delaware

limited liability company, which is initially a wholly owned subsidiary of the Company; then

(ii) Mistral will purchase an equity interest in Holdings.

(emphasis added)

65. The January 30 2012 Letter does not mention Guggenheim.

66. The January 30 2012 Letter falsely describes the Transaction as a "recapitalization transaction." In a "recapitalization," a company restructures its debt and equity, often with the aim of stabilizing the capital structure. Thus, it would be a recapitalization of Binn and Partners, LLC if it were merely replacing the debt it owed to Bank of America by giving equity to Mistral in exchange for an investment in Binn and Partners, LLC. Instead, after Mr. Binn transferred the assets of Binn and Partners, LLC to XpresSpa Holdings, LLC, Binn and Partners, LLC underwent a **decapitalization** and XpresSpa Holdings, LLC was capitalized with money from Mistral and with the assets formerly under the control of Binn and Partners, LLC. Mr. Binn, together, with Lilac Ventures, Mistral, and Guggenheim looted the assets of Binn and Partners, LLC and replaced a low cost funding source (Bank of America credit facility at 4 ¼% interest) with a very high cost of capital from Mistral. In the fog of the Transaction, Mr. Binn was able to significantly reduce his personal bank guarantee risk and take a cash disbursement of $ 1.084 million for the sale of B Units to the Company. Lilac Ventures was able to eliminate its bank guarantee and receive a cash disbursement of $308,000

for the sale of B Units to the Company, plus a $50,000 fee. Mr. Binn and Lilac Ventures also refinanced their existing loans to the Company at higher rates; in the case of Lilac, escalating to 30% compounded monthly. Guggenheim received a fee of $1.5 million, more than five times Mr. Schwartz's whole investment in Binn and Partners, LLC.

67. JPS Partners immediately rejected the proposed Transaction by a letter dated and emailed on February 2, 2012 and offered to sell their minority interest back to the Company.

68. Having not received any response to their rejection and offer, on February 6, 2012, JPS Partners again sent an email to Mr. Binn requesting a response.

69. On February 8, 2012, still having not received a response from Mr. Binn, JPS Partners sent a copy of the February 2nd email to William P. Phoenix at Mistral Equity Partners.

70. On February 9, 2012, Mr. Binn finally sent a letter response to JPS Partners, rejecting their interpretation of the Transaction and their offer to sell their interest back to the Company.

71. The next day, Mr. Binn sent a "Notice of Special Meeting of Members" to all the members of Binn and Partners, LLC. A copy of the notice is attached as Exhibit I.

72. The notice alerted the members that a special meeting would be held on Tuesday, February 14, at 11:30 a.m. "to consider and take action upon a proposal to enter into a Capital Raise transaction."

73. On Saturday, February 11, 2012, Mr. Binn sent JPS Partners an email again attempting to justify the Transaction and suggesting that a phone call on February 13th "might be advantageous." The email attaches the February 10th notice.

74. On the morning of Monday, February 13, 2012, Mr. Binn sent JPS an email noting that the special meeting has been reset for Thursday, February 16th at 10:30 am. That same day, JPS Partners sent to Mr. Binn and, separately, to Mr. Phoenix at Mistral, a detailed email explaining how the proposed Transaction negatively impacts the minority interest holders.

75. Mr. Binn responded to the email with a letter again suggesting a "direct conversation." In this letter, Mr. Binn proposes that Eric Rutkoske from Guggenheim participate on the call. **This is the first time, two days before the proposed vote on the Transaction, that JPS Partners was told that Guggenheim was involved in the Transaction.** As noted above, at ¶ 9, Alan Schwartz, a Member of Binn and Partners, LLC, is the Executive Chairman of Guggenheim.

76. JPS Partners asked that Mr. Binn send additional information about the Transaction before they would agree to participate in a "direct conversation." Their request for additional information was ignored.

77. On February 15, 2012, JPS Partners filed its initial complaint and sought a temporary restraining order and preliminary injunction by order to show cause to stop the meeting to vote on the Transaction. The Court denied this relief, noting

that there would be no benefit in stopping the vote because Mr. Binn held the majority interest.

78. At 5:30 pm that same day, while the parties were in court, Binn and Partners, LLC, circulated a summary of the so-called "recapitalization transaction" that it intended to close with Mistral on Friday, February 17, 2012 (the "February 15th Email"). Prior to this email, Mr. Binn had not revealed that the Company would have a problem paying 2012 expenses as budgeted. A copy of this email and its attachments are attached as Exhibit J.

79. As demonstrated above, *see* ¶¶ 30-31, if the Company is having a problem meeting its budgeted expenses, it is a problem that Mr. Binn created as a result of excessive spending at the corporate level. Rather than cut costs by first prioritizing those expenses most necessary and limiting expenses using spa revenues and profits as a guide, he chose to continue his exorbitant corporate spending by personally guaranteeing a loan to fund the activities of the corporate headquarters.

80. The February 15th Email is the first time that JPS Partners received a copy of the report prepared by Guggenheim detailing the Transaction (the "Guggenheim Report").

81. Mr. Binn's cover letter to the Guggenheim Report includes a number of ambiguous and dubious claims:

a. ***"Our bank facility with Bank of America is expired and will not be renewed even with the benefit of the guarantees in place today, unless we proceed with the Mistral transaction."***

- At the February 16th member meeting, Mr. Binn clarified this vague, dire sounding claim as meaning that "the Bank did not want to come back with another $15 million line [of credit." This is not surprising because the (1) Company had not met the targets necessary for the existing facility to be converted to an unguaranteed company loan and (2) the existing facility was depleted in three years mostly on corporate headquarters' expenses.

b. ***"Mezzanine loans from myself [Mr. Binn] and another unit holder [Lilac Ventures] have matured and cannot be repaid."***

- These two loans were rolled following the Transaction and could have been rolled independent of the Transaction.

c. ***"Put simply, we must close this transaction on time as the viability of this business is in jeopardy without the capital provided by this transaction."***

- Not closing the Transaction on February 17, 2012 would simply have forced Mr. Binn to cut and prioritize expenses.

*d.* ***"Guggenheim Securities conducted an extremely broad auction process, contacting more than 50 potential bidders of all types with an openness to exploring a wide variety of transaction structures."***

- No other "potential bidders" have ever been disclosed.

*e.* ***"[T]his is the best alternative available to us in light of the Company's needs and financial performance."***

- The XpresSpa business itself was (and likely remains) profitable. Mr. Binn could have cut budgeted expenses at the corporate level by prioritizing expenses according to relative importance, rather than transfer the controlling interest in the assets of Binn and Partners, LLC to Mistral in exchange for a cash contribution to XpresSpa Holdings, LLC, providing the means for all four defendants herein to receive substantial cash disbursements.

*f.* ***"Proceeds invested by Mistral will be used to repay debt."***

- The $9.4 million owed to Bank of America was repaid. But its repayment did not benefit the Company. The two loans from Mr. Binn and Lilac Ventures were refinanced to rates escalating to 30% compounded monthly. The first year's interest payment on the $4 million refinanced loans is about 64% greater than the interest on the $9.4 million bank debt and the disparity compounds each year thereafter.

g. ***"No unit holders will be selling any equity interests as part of this transaction, and Mistral was not willing or able to make proceeds available for that purpose."***

- Immediately following the close of the Transaction, both Mr. Binn and Lilac Ventures sold the Company B units for $55,000 per unit and were paid cash from the Mistral cash contribution. If the deal had not closed before February 29, 2012, Mr. Binn and Lilac Ventures could have still exercised their put options but they would not have been able to receive cash distributions for their Units.

h. ***"This deal was only made possible by the continued commitment and belief in this business by all of our stakeholders."***

- Because of Mr. Binn's majority interest in Binn and Partners, LLC, his vote of the units he controls was the only vote necessary to make the deal possible.

82. These claims exaggerate the problems the Company was having meeting its obligations. If the Company had defaulted on its loan payment to Bank of America because Mr. Binn chose to first pay corporate headquarters' expenses with spa profits in 2011 totaling about $7.25 million, then the Bank would have made the monthly payments of about $50,000 from the posted collateral. Mr. Binn acknowledged as much at the February 16th members teleconference. He stated, "So, obviously the first money that the bank would take would be our

pledged bond account which we now have at Bank of America." The business would have carried on. It was in no danger of entering bankruptcy.

83. The "Certain Disclosures and Other Considerations" statement at the beginning of the Guggenheim Report would be comical if Guggenheim were not receiving a fee of $1.5 million for providing so little and if the conflict of interest presented by Guggenheim's fee being contingent on the Transaction closing were not so apparent. Specifically, the report states:

- "Guggenheim Securities **expresses no view** as to the appropriate range of **Company values** now or in the future."
- "Gugggenheim Securities **is not providing any view or opinion** with respect to the **fairness of the Transaction**, and **nothing herein shall be deemed to be a recommendation** to the Company's Senior Management, Board or members with respect to the advisability of the Transaction."
- "Guggenheim Securities does not provide tax, regulatory, legal, accounting or actuarial advice . . ."
- "Guggenheim Securities has acted as a **financial advisor** to the Company in connection with the Transaction and will receive a customary fee for such services, **which is contingent on the successful consummation of the Transaction**." [emphasis added]

84. The Guggenheim Report significantly mischaracterizes the financial health of Binn and Partners, LLC. For instance:

- Page 2 states that the Company has "underperformed financially" because the 2011 $27.3 million in revenue, **an increase of 16%** from 2010, the same increase as in 2010 from 2009, was below the Company's overly rosy forecast of $30 million. In fact, in a February 24, 2011 "financial summary," Mr. Binn cites the 2010 increase in gross revenue as a "great year" compared to 2009.

- It also mischaracterizes an **increase in same store sales** of .5% in October and 3.4% in November as having "deteriorated."

- The report also states that "Disappointing top-line performance and increased expenses led to materially reduced EBITDA," supported by the fact that EBITDA was only 50% of an overly rosy forecast. In fact, EBITDA was only $300,000 less than the prior year, and was depressed as a result of the extraordinary 2011 expenses at the corporate level including those expenses incurred from this Transaction. (During the February 16, 2012 members teleconference, Mr. Binn acknowledged that the fees relating to the Transaction include "legal and accounting bills, which have been running to the moon.")

85. The Guggenheim Report includes a sources and uses of funds statement. A careful analysis of the report shows how the Transaction effectively wipes out the

investment capital of the minority members and solely benefits Mr. Binn, Lilac Ventures, Guggenheim, and Mistral. Specifically:

- The entire XpresSpa business has been transferred to a new Delaware Limited Liability Company, which is an "Event of Dissolution" of the Company under the terms of the Operating Agreement. *See* Section 8.01(b) of the Operating Agreement.

- Guggenheim Securities receives a fee of $1.5 million at Transaction close.

- Mr. Binn and Lilac Ventures (i.e. Mr. Bernstein) are able to be paid immediately from the sale of B units to the Company at $55,000 per unit, netting $1.084 million and $308,000, respectively. These payments to Mr. Binn and Lilac Ventures are improper cash disbursements, which were only possible as a result of the Transaction. If the Transaction had not closed, Mr. Binn and Lilac Ventures could still have exercised their put options, but they would have received obligations from the company instead of cash. Although Mr. Binn repeatedly promised that no disbursements for payments for the sale of units would be made to members as a result of the Transaction, the payments made to Mr. Binn and Lilac Ventures were disbursements clearly in violation of these promises.

- In addition, Mr. Binn is repaid $224,000 on his $2 million corporate loan and $300,000, plus about $4,000 interest, on another bridge loan he made in January 2012.

- Mr. Binn's loan, which is now valued at $1.776 million, was refinanced to 12% (compounded monthly) from 10% interest per annum. In four years, he can convert this into 3% of total common equity in the newly created Delaware entity. In addition, he now receives an unspecified salary, bonuses, and equity kickers.

- Mr. Bernstein loaned an additional $1 million at 20% interest, compounded monthly, and also refinanced his initial $1 million loan and accrued interest of $250,000 to a 20% rate, all $2.25 million escalating to 30% compound interest for years 5 through 8. He also received 86 Class A Units, in addition to the 10 he received for making the initial loan, a fee of $50,000, a $44,000 cash interest payment, a senior claim to other Binn and Partners, LLC equity holders and reimbursement of legal expenses for the Transaction.

- $9.5 million of the low 4 ¼% interest rate Bank of America loan is repaid, completely relieving Lilac Ventures of its guarantee liability and significantly reducing the guarantee exposure of the Binns.

- Immediately after the deal, the Company can re-borrow from Bank of America up to $5 million, increasing to $10 million on January 1, 2013.

Thus, it appears that the main motivation for paying down the bank debt was to change the character of the debt from guaranteed by Mr. Binn and Lilac Ventures to unguaranteed. It did not provide any economic benefit to Binn and Partners, LLC.

- The Guggenheim Report does not provide any specific information about how the Mistral funds are to be used for the business, other than to say that after paying the bank, the deal fees, and distributions to Mr. Binn and Lilac Ventures, the cash remaining is available to fund 2012 budgeted expenses.

*See* Excel Spreadsheet explaining the detrimental net effect of the Transaction to Binn and Partners, LLC and its unitholders, attached as Exhibit K.

**February 16, 2012 Telephonic Meeting**

86. On February 16, 2012, the members of Binn and Partners, LLC met by phone to discuss the Transaction and vote.

87. During the call, JPS Partners again expressed their concerns about the deal and voted against it. They also offered to sell their interest to any of the other members. Perhaps as part of an effort to lull JPS Partners into going along with the Transaction and not raise the suspicions of the other minority interest holders, Alan Schwartz expressed that he might be interested in purchasing the shares. When JPS Partners followed up with him over a two week period following the meeting, Mr. Schwartz informed them, through Eric Rutkoske, that he was

speaking on behalf of a friend who had expressed interest in buying shares but was not currently in a position to do so.

88. Mr. Binn assured the members that they would receive a letter describing the financial health of the new entity "at least once every two months."

89. Three other members abstained from the vote. The Binns, Mr. Schwartz, and Mr. Bernstein (for Lilac Ventures) all voted in favor of the Transaction and Mr. Binn voted yes by proxy for 2 of the 3 remaining unit holders. Given Mr. Binn's majority interest, the vote was perfunctory in any case.

90. No other members have made an offer to JPS Partners for their interest in Binn and Partners, LLC.

**Until the Court issued an Order in July 2012, JPS Partners had been improperly frozen out of access to all information about their investment since the Transaction closed.**

91. Despite making repeated requests throughout May and June 2012, until the Court ordered its production in July 2012, JPS Partners had not received the 2011 audited financial statement, which, according to the Company's auditor, were signed in February 2012, and were due to be sent to the members on April 15, 2012, in accordance with the Operating Agreement. Further, JPS Partners have not received any bimonthly letters, as promised by Mr. Binn during the February 16th meeting.

92. Through their counsel, JPS Partners attempted to exercise their right to inspect the books and records of the Company, as provided by the Operating Agreement.

Despite providing reasonable notice by letter on Friday, June 22, 2012 for a proposed inspection on Tuesday, June 26, 2012, JPS Partners was denied their right to inspect the Company's books and records. The Court has since ordered the Company to allow the inspection requested by JPS Partners.

93. JPS Partners is currently stuck in an investment that is significantly different from the investment that they agreed to in 2005 and again in 2008, when the applicable Operating Agreement was signed.

94. Following the February 2012 Transaction, rather than have an opportunity to participate in the future profitable sale of the Company, JPS Partners now owns 1.93% of a shell Company which no longer holds the assets of XpresSpa and is only a non-controlling nominal parent of its former business. Further, the investment terms have been changed to provide the newly-created controlling entity with the right to sell the business for a price that will entitle this new entity to 100% of the sale proceeds. Mistral does not intend to operate the spa business for the benefit of the minority unit-holders of Binn and Partners, LLC. Rather, as stated by Mr. Binn during the member teleconference on February 16, 2012, Mistral's "goal is in the next four years, let's say, '12, '13, '14 and '15, is to in essence, get out, liquidate, everybody cut up whatever money's in the pot."

**A PRE-ACTION DEMAND WOULD HAVE BEEN BE FUTILE**

95. Plaintiffs should be excused from the requirement that they make a pre-action demand on Binn and Partners, LLC before bringing this derivative action because such a demand would have been futile.

96. Mr. Binn is the sole Manager of Binn and Partners, LLC. Under the terms of the Operating Agreement, as Manager, Mr. Binn "shall be responsible for the overall management and control of the business and affairs of the Company. . . [He] shall have the right to enter into and execute all contracts, documents and other agreements on behalf of the Company and shall thereby fully bind the Company." Section 4.01 of the Operating Agreement.

97. Further, the Operating Agreement specifies that "[n]o act shall be taken, sum expended, decision made or obligation incurred by the Company, or by any Member or Members on behalf of the Company, with respect to any matter within the scope of the Company's business or otherwise, unless the decision to do so has been approved by the Manger." *Id.*

98. The Operating Agreement requires that the company have a Members Committee, consisting of five members, but no specific tasks are delegated to this committee. Further, Mr. Binn, as the sole Manager, is entitled "cast an additional and deciding vote, on any vote that is deadlocked." Section 4.08 of the Operating Agreement.

99. Pursuant to the Operating Agreement, the following five events may only occur with the approval of the holders in excess of fifty percent (50%) of the outstanding Units:

    a. With respect to any Class B Units hereafter authorized, the sale of such Class B Units at a price less than $40,000 per Class B Unit, but only with the additional approval of a majority of the Members Committee;

b. Borrowing amounts in excess of the amount of capital invested in the Company or irrevocably committed to be invested in the Company through a Letter of Credit or such other instrument acceptable to the Manager;

c. Making loans to Members or employees other than in the ordinary course of the Company's business;

d. Selling the Company to or merging the Company with any other Person, except a sale of all or substantially all of the Units pursuant to Section 7.05(a) or (b) shall not be deemed a sale or merger of the Company; or

e. Converting the Company to a "C Corporation" (by merger or otherwise) for the purpose of effecting an initial public offering (IPO) or becoming a reporting company under the Securities Exchange Act of 1934, as amended.

100. Mr. Binn and his wife Marisol Binn, control more than 55% of Binn and Partners, LLC.

101. In addition, Lilac Ventures (controlled by Mr. Bernstein) and Alan Schwartz (who is the Executive Chairman of Guggenheim's parent company) are also members of Binn and Partners, LLC with voting rights.

102. This Amended Complaint challenges the conduct of Mr. Binn, Lilac Ventures, and Guggenheim, in addition to the conduct of Mistral.

103. The disinterested members of Binn and Partners, LLC do not have any authority to act on behalf of the Company, without Mr. Binn's approval.

104. The management of Binn and Partners, LLC, i.e. Mr. Binn, would not have voted in favor of pursuing this litigation.

105. The details of the Transaction, including the consequence that after four years the value of the minority unit holders interest would be zero was not

adequately communicated to the disinterested members prior to the Transaction's close.

106. As detailed above, the Transaction was an egregious oppression of the interest of the minority unit holders, for the benefit of Mr. Binn, Lilac Ventures, and, indirectly, Mr. Schwartz. The design and approval of the Transaction could not have been a product of sound business judgment.

107. Demand on Binn and Partners, LLC would have been futile.

# CAUSES OF ACTION

**First Cause of Action (Derivative)**
**(Dissolution of Binn & Partners LLC pursuant to the Operating Agreement)**

108. Plaintiff hereby restates and realleges Paragraphs 1 through 107.

109. Pursuant to NY Limited Liability Company Section 7.01(a), "A limited liability **company is dissolved** and its affairs **shall be wound up** upon . . . (2) the happening of **events specified in the operating agreement** . . ." (emphasis added)

110. Under the terms of the Operating Agreement, the Transaction was an "event of dissolution."

111. Specifically, Section 8.01 of the Operating Agreement states "Events of Dissolution. The Company **shall** . . . **be dissolved** upon the occurrence . . . [of] (b) [t]he **Transfer of substantially all of the assets** of the Company." (emphasis added)

112. According to the Company's 2011 Audited Financial Statement, on February 23, 2012, Binn and Partners, LLC contributed all of its assets and liabilities, excluding $100,000 and the loan note to Lilac Ventures, into XpresSpa Holdings, LLC, a newly-formed Delaware Limited Liability Company. Thus, the entire business of XpresSpa, which constitutes "substantially all of the assets" of Binn and Partners, LLC, has been transferred to a foreign LLC.

113. Accordingly, Binn and Partners, LLC should be dissolved pursuant to the terms of the Operating Agreement.

114. The Operating Agreement does not include any exceptions for transfers to wholly-owned subsidiaries. A transfer to any other entity is an "event of dissolution."

115. If the transfer of assets from Binn and Partners, LLC to XpresSpa Holdings LLC has rendered Binn and Partners, LLC unable to meet its financial obligations (i.e. the $2.25 million loan note to Lilac Ventures) in the case of dissolution, those transfers should be voided.

116. Pursuant to New York Limited Liability Company Law, Section 703, the Court should appoint a receiver or liquidating trustee to oversee the winding up and dissolution of Binn and Partners, LLC.

**Second Cause of Action (Derivative)**
**(In the alternative, Judicial Dissolution of Binn & Partners LLC)**

117. Plaintiff hereby restates and realleges Paragraphs 1 through 117.

118. The New York Limited Liability Company Law, Section 702 provides:

> On application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.

119. According to the Operating Agreement, the "primary purpose and scope of the Company and its subsidiaries shall be to engage in spa services, predominantly at large, high-traffic airport locations . . ."

120. Because the entire XpresSpa business has been transferred to XpresSpa Holdings LLC, a foreign limited liability company, it is not "reasonably practicable" for Binn and Partners, LLC "to carry on the business in conformity with the articles of organization or operating agreement."

121. Further, the Transaction at issue was an act of minority oppression.

122. Mr. Binn, Lilac Ventures, Mistral, and Guggenheim all benefited from the Transaction at the direct expense of JPS Partners and the remaining minority unit holders.

123. As demonstrated above, it is very likely that JPS Partners' interest will be worthless after four years, when Mistral has the right to sell the XpresSpa business.

124. JPS Partners reasonably expected that their investment in XpreSpa would increase or decrease in line with the investment of Mr. Binn. JPS Partners did not expect that Mr. Binn, who owed them a fiduciary duty, would breach his duty to them and put his own interest ahead of the interest of Binn and Partners, LLC and its minority interest holders.

125. The expectations of JPS Partners were reasonable under the circumstances and were central to their decision to join Binn and Partners, LLC.

126. Because their interests have been oppressed, Binn and Partners, LLC cannot continue to carry on business in conformity with the operating agreement. It should be dissolved.

**Third Cause of Action (Derivative)**
**(Breach of Fiduciary Duty Against Moreton Binn,**
**as Manager of Binn & Partners LLC)**

127. Plaintiff hereby restates and realleges Paragraphs 1 through 126 above.

128. Mr. Binn, as the sole Manager of Binn and Partners, LLC, owed a fiduciary duty to Binn and Partners, LLC, to use his utmost abilities to conduct the business in a fair, just, and equitable manner and to act in furtherance of the best interests of the Company and not solely in his own interests or in the interests of select members.

129. As Manager of the Company, Mr. Binn was given the "right to enter into and execute all contracts, documents and other agreements on behalf of the

Company and shall thereby fully bind the Company." *See* Operating Agreement, Section 4.01.

130. Further, the Operating Agreement provides that "[n]o act shall be taken, sum expended, decision made or obligation incurred by the Company, or by any Member or Members on behalf of the Company, with respect to any matter within the scope of the Company's business or otherwise, unless the decision to do so has been approved by the Manager." *See id.*

131. By transferring the assets out of the Company to Mistral and leaving Binn and Partners, LLC as an empty shell, Mr. Binn breached the fiduciary duty that he owed to the Company by negotiating and entering into a Transaction that put his own financial interest ahead of the interest of the Company. The Transaction gave the controlling interest in the assets of Binn and Partners, LLC to a newly created Mistral-controlled entity (XpresSpa Holdings, LLC) that in four years has the right in its sole discretion to sell the XpresSpa business at a price that entitles XpresSpa Holdings, LLC to all of the sale proceeds, earns XpresSpa Holdings, LLC a huge financial profit, but yet leaves the existing members of Binn and Partners, LLC with zero.

132. The Transaction was not a recapitalization of Binn and Partners, LLC. Instead, Mistral capitalized a new Mistral-controlled entity (XpresSpa Holdings, LLC) to which Binn improperly, and in violation of his fiduciary duty, transferred all of the assets of Binn and Partners, LLC (i.e., Mistral contributed cash to

XpresSpa Holdings, LLC and not to Binn and Partners, LLC) and then all four defendants took significant cash distributions from XpresSpa Holdings, LLC.

133. Further, the Transaction provides Mistral with no incentive to increase the value of the Company beyond a level that earns Mistral a huge return on its short-term investment but provides little benefit to the minority interest holders of Binn and Partners, LLC. For example, Mistral receives essentially the same pay-out whether the Company is eventually sold at $50 million or $75 million. Yet, if the sale is for $50 million, the interest of JPS Partners will be zero.

134. Moreover, in direct neglect of his duty to act with utmost good faith and fair dealing towards Binn and Partners, LLC, Mr. Binn,, along with Mistral, Lilac Ventures (i.e., Mr. Bernstein) and Guggenheim (through Mr. Schwartz), created a Transaction that not only relieved him of most of his personal bank guarantee and provided the means by which all Defendants took significant cash disbursements from XpresSpa Holdings, LLC, but also allows Mr. Binn and Lilac Ventures to recoup their respective investments and to profit via dividends, fees, compensation, interest, sales of units and high rate loan repayments regardless of whether other Binn and Partners, LLC members receive any return on their investments. *See* Excel Spreadsheet detailing how the cash contributed by Mistral has not, and will not, inure to the benefit of the members of Binn and Partners, LLC, attached as Exhibit L.

135. Mr. Binn's actions, with the assistance of Mistral, Lilac Ventures, and Guggenheim, converted a company with a controlling interest in its business into

an empty shell that is now a non-controlling nominal parent of a newly-created, Mistral-controlled entity, which has every incentive and right to sell the business in four years for a price that entitles it to all of the sale proceeds.

136. If the Company was having a problem meeting its budgeted expenses, it is a problem that Mr. Binn created as a result of excessive spending at the corporate level. Because the XpresSpa business itself is profitable, Mr. Binn could have cut budgeted expenses at the corporate level by prioritizing expenses according to relative importance and eliminating less critical expenses. Years of spa profits have been reduced to substantial losses by the profligate spending on corporate level expenses only made possible by Mr. Binn's agreement to personally guarantee a loan facility to fund these expenses; a guarantee which has now been reduced by the Transaction but to the complete detriment of the members of Binn and Partners, LLC.

137. Thus, Mr. Binn owes damages to the Company for breaching his fiduciary duty.

**Fourth Cause of Action (Direct)**
**(Breach of Fiduciary Duty Against Moreton Binn,**
**as Manager of Binn & Partners LLC)**

138. Plaintiff hereby restates and realleges Paragraphs 1 through 137 above.

139. Mr. Binn, as the sole Manager of Binn and Partners, LLC, owed a fiduciary duty to all of the members of Binn and Partners, LLC, including JPS Partners, to use his utmost abilities to conduct the business in a fair, just, and

equitable manner and to act without oppressing the interests of the minority unit holders.

140. As Manager of the Company, Mr. Binn was given the "right to enter into and execute all contracts, documents and other agreements on behalf of the Company and shall thereby fully bind the Company." *See* Operating Agreement, Section 4.01.

141. Further, the Operating Agreement provides that "[n]o act shall be taken, sum expended, decision made or obligation incurred by the Company, or by any Member or Members on behalf of the Company, with respect to any matter within the scope of the Company's business or otherwise, unless the decision to do so has been approved by the Manager." *See id.*

142. As detailed above, Mr. Binn breached the fiduciary duty that he owed to the minority unit holders of the Company by negotiating and entering into a Transaction that put his own financial interests ahead of the interests of the Company and the minority shareholders. Mr. Binn engaged in oppression of the interests of the minority unit holders. The Transaction created the possibility and highly probable outcome that in four years the business will be sold at a price that could yield substantial profits for Mistral, Mr. Binn, and Lilac Ventures yet simultaneously wipe out the minority unitholders of Binn and Partners, LLC. (It is likely that Mr. Schwartz has been compensated for his loss by the upfront $1.5 million fee paid to Guggenheim.)

143. In direct neglect of his duty to act with utmost good faith and fair dealing towards all of the members of Binn and Partners, LLC, Mr. Binn, along with Mistral, Lilac Ventures (i.e., Mr. Bernstein) and Guggenheim (through Mr. Schwartz), created a Transaction that not only relieved him of most of his personal bank guarantee and provided the means by which all Defendants took significant cash disbursements from XpresSpa Holdings, LLC, but also allows Mr. Binn and Lilac Ventures to recoup their respective investments and to profit via dividends, fees, compensation, interest, sales of units and high rate loan repayments regardless of whether other Binn and Partners, LLC members receive any return on their investments. *See* Exhibit L.

144. Mr. Binn's actions, with the assistance of Mistral, Lilac Ventures, and Guggenheim, converted a company with a controlling interest in its business into an empty shell that is now a non-controlling nominal parent of a newly-created, Mistral-controlled entity, which has every incentive and right to sell the business in four years for a price that entitles it to all of the sale proceeds.

145. Mistral, in its sole discretion, has the ability to control the outcome of the minority unitholders' investment, but, as demonstrated above, because of Mistral's liquidation preference the interests of Mistral and the Binn and Partners, LLC's minority members are not aligned. Because the controlling interest no longer shares similarly in the investment outcome as the minority unitholders and because the controlling interest can designate a sale price at which its financial return is realistically maximized while the minority unitholders' units are

worthless, Mr. Binn's actions, with the assistance of Mistral, Lilac Ventures, and Guggenheim, have left JPS Partners facing the very likely consequence that the value of its stake in Binn and Partners, LLC will be completely wiped out after four years at the election of Mistral.

146. That JPS Partners would receive zero from the profitable sale of the Company's business 10 years after it invested was not within the contemplation of the parties at the time the Operating Agreement was executed.

147. If the Company was having a problem meeting its budgeted expenses, it is a problem that Mr. Binn created as a result of excessive spending at the corporate level. Because the XpresSpa business itself is profitable, Mr. Binn could have cut budgeted expenses at the corporate level by prioritizing expenses according to relative importance and eliminating less critical expenses. Years of spa profits have been reduced to substantial losses by the profligate spending on corporate level expenses only made possible by Mr. Binn's agreement to personally guarantee a loan facility to fund these expenses; a guarantee which has now been reduced by the Transaction but to the complete detriment of the members of Binn and Partners, LLC.

148. Thus, Mr. Binn owes damages to JPS Partners directly for breaching his fiduciary duty and oppressing their minority interest in Binn and Partners, LLC.

**Fifth Cause of Action (Derivative)**
**(Aiding and Abetting Mr. Binn's Breach of Fiduciary Duty against Guggenheim, Mistral, and Lilac Ventures)**

149. JPS Partners hereby restates and realleges Paragraphs 1 through 148.

150. Guggenheim, Mistral, and Lilac Ventures aided and abetted and facilitated Mr. Binn's breach of fiduciary duty owed to Binn and Partners, LLC.

151. Mr. Schwartz, a member of Binn and Partners, LLC, is the Executive Chairman of Guggenheim. Guggenheim acted as an "investment advisor" to Mr. Binn in connection with the Transaction at issue.

152. Mr. Binn has represented that Guggenheim "conducted an extremely broad auction process, contacting more than 50 potential bidders of all types with an openness [sic] to exploring a wide variety of Transaction structures."

153. Guggenheim knowingly participated in Mr. Binn's breach of the fiduciary duty he owed to Binn and Partners, LLC.

154. Guggenheim was aware of its role in the Transaction and accepted a fee of $1.5 million for its services, contingent on the Transaction occurring.

155. Guggenheim helped Mr. Binn to structure a Transaction that benefited Mr. Binn, Guggenheim, Mistral, and Lilac Ventures, and indirectly Mr. Schwartz and Mr. Bernstein, at the expense of Binn and Partners, LLC.

156. On February 8th and 13th, 2012, JPS Partners sent to Mr. Binn and separately to William Phoenix of Mistral detailed emails explaining how the

Transaction negatively impacts the minority unitholders of Binn and Partners, LLC. Thus, Mistral knowingly participated in Mr. Binn's breach of the fiduciary duty he owed to Binn and Partners, LLC.

157. Mistral was aware of the corporate structure of Binn and Partners, LLC. Mistral was aware that the Transaction was structured in a way that allows Mistral to sell the Company assets in four years for a price that entitles them to all of the sale proceeds and to receive during those four years substantial cash dividends, fees and compensation.

158. As detailed above, Mistral stands to earn an extraordinary return on its low risk investment during its relatively short term involvement with the Company.

159. Lilac Ventures knowingly participated in Mr. Binn's breach of the fiduciary duty he owed to Binn and Partners, LLC.

160. Lilac Ventures was an active participant in helping to close the Transaction and providing necessary backing for the deal. In exchange for its participation, as detailed above, Lilac Ventures was completely relieved from a substantial Company bank loan guarantee it had entered just a few months prior to the date the Transaction was signed, retained a substantial award of shares in the Company for the guarantee ostensibly contemplated to last for years, refinanced loans made to the Company to rates escalating to 30% compounded monthly with a senior claim to other members of Binn & Partners LLC and received immediate

cash distributions (a) from the sale of units to the Company at an all-time high $55,000 per unit and (b) for a $50,000 fee for its role in the Transaction.

161. During the February 16th members meeting attended by Mr. Schwartz of Guggenheim and Mr. Bernstein of Lilac Ventures, JPS Partners strongly objected to the Transaction and offered to make available the emails they previously sent to Mistral detailing their objections. Thus, Guggenheim, Mistral, and Lilac Ventures knowingly participated in Mr. Binn's breach of his fiduciary duty and thereby caused Binn and Partners, LLC significant damage.

162. Consequently, Guggenheim, Mistral, and Lilac Ventures aided and abetted and facilitated Mr. Binn's breach of his fiduciary duty and are jointly and severally liable for their misconduct and the harm they have caused to Binn and Partners, LLC.

**Sixth Cause of Action (Direct)**
**(Aiding and Abetting Mr. Binn's Breach of Fiduciary Duty against Guggenheim, Mistral, and Lilac Ventures)**

163. JPS Partners hereby restates and realleges Paragraphs 1 through 162.

164. Guggenheim, Mistral, and Lilac Ventures aided and abetted and facilitated Mr. Binn's breach of fiduciary duty owed to JPS Partners.

165. Mr. Schwartz, a member of Binn and Partners, LLC, is the Executive Chairman of Guggenheim. Guggenheim acted as an "investment advisor" to Mr. Binn in connection with the Transaction.

166. Mr. Binn has represented that Guggenheim "conducted an extremely broad auction process, contacting more than 50 potential bidders of all types with an openness [sic] to exploring a wide variety of transaction structures."

167. Guggenheim knowingly participated in Mr. Binn's breach of the fiduciary duty he owed to the minority unit holders of Binn and Partners, LLC.

168. Guggenheim was aware of its role in the Transaction and accepted a fee of $1.5 million for its services, contingent on the transaction occurring.

169. Guggenheim helped Mr. Binn to structure an oppressive Transaction that benefited Mr. Binn, Guggenheim, Mistral, and Lilac Ventures, and indirectly Mr. Schwartz and Mr. Bernstein, at the expense of the other minority unit holders of Binn and Partners, LLC.

170. On February 8th and 13th, 2012, JPS Partners sent to Mr. Binn and separately to William Phoenix of Mistral detailed emails explaining how the Transaction negatively impacts the minority unitholders of Binn and Partners, LLC. Thus, Mistral knowingly participated in Mr. Binn's breach of the fiduciary duty he owed to Binn and Partners, LLC and its minority unit holders.

171. Mistral was aware of the corporate structure of Binn and Partners, LLC and the presence of minority unit holders. Mistral was aware that the Transaction was structured in a way that allows Mistral to sell the Company assets in four years for a price that entitles them to all of the sale proceeds and to receive during those four years substantial cash dividends, fees and compensation, thus depriving

the long-term minority unit holders of their reasonable, expected return on their investment.

172. As detailed above, Mistral stands to earn an extraordinary return on its low risk investment during its relatively short-term involvement with the Company.

173. Lilac Ventures knowingly participated in Mr. Binn's breach of the fiduciary duty he owed to the minority unit holders of Binn and Partners, LLC. Mr. Bernstein is the controlling member of Lilac Ventures

174. Lilac Ventures was an active participant in helping to close the Transaction and providing necessary backing for the deal. In exchange for its participation, as detailed above, Lilac Ventures was completely relieved from a substantial Company bank loan guarantee it had entered just a few months prior to the date the Transaction was signed, retained a substantial award of shares in the Company for the guarantee ostensibly contemplated to last for years, refinanced loans made to the Company to rates escalating to 30% compounded monthly with a senior claim to other members of Binn & Partners LLC and received immediate cash distributions (a) from the sale of units to the Company at an all-time high $55,000 per unit and (b) for a $50,000 fee for its role in the Transaction.

175. During the February 16th members meeting attended by Mr. Schwartz of Guggenheim and Mr. Bernstein of Lilac Ventures, JPS Partners strongly objected to the Transaction and offered to make available the emails they previously sent to Mistral detailing their objections. Thus, Guggenheim, Mistral, and Lilac

Ventures knowingly participated in Mr. Binn's breach of his fiduciary duty and thereby caused JPS Partners, significant damage.

176. Mistral, Guggenheim, and Lilac Ventures knowingly participated in a Transaction that gave Mistral sole discretion to control the outcome of the minority unitholders' investment, but because of Mistral's liquidation preference Mistral's investment interest is not aligned with the investment interest of the minority unitholders of Binn and Partners, LLC. Because the controlling interest no longer shares similarly in the investment outcome as the minority unitholders and because the controlling interest can designate a sale price at which its financial return is realistically maximized while the minority unitholders' units are worthless, the actions of Mistral, Lilac Ventures, and Guggenheim aiding and abetting Mr. Binn's actions, have left JPS Partners facing the very likely consequence that the value of its stake in Binn and Partners, LLC will be completely wiped out after four years at the election of Mistral.

177. Thus, Guggenheim, Mistral, and Lilac Ventures aided and abetted Mr. Binn's breach of his fiduciary duty and are jointly and severally liable for their misconduct and the harm they have caused to JPS Partners and the other minority interest holders.

**Seventh Cause of Action (Derivative)**
**(Corporate Diversion Against Moreton Binn, as Manager of Binn &Partners, LLC)**

178. JPS Partners hereby restates and realleges Paragraphs 1 through 177.

179. Mr. Binn, as sole manager of Binn and Partners, LLC, entered into a Transaction with Mistral that improperly diverted corporate assets from the Company to his bank account.

180. The Transaction was very profitable for Mistral. Mr. Binn effectively gave Mistral the Company's business in exchange for an immediate reduction in a large Company loan that he had personally guaranteed. Further, the Transaction provided the means by which Mistral, Mr. Binn, Lilac Ventures, and Mr. Schwartz (via Guggenheim) could distribute to themselves now and in the future fees, interest, dividends, compensation, loan repayments, and cash from unit sales.

181. Mr. Binn acted in bad faith. He was motivated by a desire to limit his own debt exposure and to enrich those who assisted him in consummating the Transaction. He did not consider the best interests of the Company or the members of the Company not directly involved in the Transaction.

182. If he had been acting in the Company's best interest, rather than solely in his own interest, Mr. Binn would not have substituted a 4 ¼% bank loan that he had personally guaranteed with new unguaranteed loans from Lilac Ventures that include interest rates escalating to 30% compounded monthly. Nor would he have transferred the assets of the Company to a new Mistral-controlled entity and grant

Mistral the right to sell, at a price that Mistral designates, all of those assets in four years for an amount equal to more than its investment before any proceeds are distributed to members of Binn & Partners LLC and to receive dividends yielding more than 11% during the four years in addition to substantial fees and compensation to be determined by Mistral and Binn in exchange for cash used to make distributions to himself and Lilac Ventures, to pay exorbitant fees to Guggenheim, Mistral and Lilac Ventures, to pay substantial compensation to himself and Mistral (as determined by himself and Mistral) and to substantially reduce the balance of the loan that he personally guaranteed.

183. Acting for his own benefit, Mr. Binn entered into a Transaction designed to significantly reduce a large loan that he personally guaranteed and begin a four year process in which he could recoup his total investment in the Company at the expense of the Company's other members.

184. On February 23, 2012 or shortly thereafter, Mr. Binn and Lilac Ventures were improperly disbursed cash from the sale of B Units to the Company at $55,000 per unit, netting $1.084 million and $308,000 respectively. These cash payments were only possible as a result of the Transaction.

185. In a January 30, 2012 letter to JPS Partners, Mr. Binn stated, "No funds from Mistral are being used to make distributions." *See* Exhibit H.

186. In a February 9, 2012 letter to JPS Partners, Mr. Binn stated "None of the Capital being raised will be used for distributions, only debt reduction, growing

the business and continuing to build new Airport XpresSpa locations." *See* February 9, 2012 letter from Mr. Binn to JPS Partners, attached as Exhibit M.

187. In a February 11, 2012 email to JPS Partners, Mr. Binn stated "No money will be used for Unit Holder distributions." *See* February 11, 2012 email from Mr. Binn to JPS Partners, attached as Exhibit N.

188. In a February 15, 2012 letter sent by email to all members, Mr. Binn stated, "No unit holders will be selling any equity interests as part of this transaction, and Mistral was not willing or able to make proceeds available for that purpose." *See* Exhibit J.

189. Although Mr. Binn repeatedly promised that no disbursements for payments for the sale of units would be made to members as a result of the Transaction, the payments to Mr. Binn and to Lilac Ventures were disbursements clearly in violation of these representations and the Operating Agreement.

190. Notwithstanding that the units sold were previously issued in lieu of interest and the exercise of put options obligated the Company to purchase these units, it was improper to settle those obligations as part of the Transaction.

191. Mr. Binn should be required to return to the Company the cash disbursement that he caused to be made to himself because it was an improper corporate diversion.

192. Further, the additional cash disbursements that Mr. Binn caused to be made to Lilac Ventures and Guggenheim as part of the Transaction should also be returned to the Company as improper corporate diversions.

**Eighth Cause of Action (Direct)**
**(Breach of Contract Against Mr. Binn – Section 4.10 of the Operating Agreement)**

193. JPS Partners hereby restates and realleges Paragraphs 1 through 192.

194. Binn and Partners, LLC is managed in accordance with the Operating Agreement, which is a contract between all of the investors in the Company. JPS Partners, as a member of the Company, is a party to the Operating Agreement. Mr. Binn, as the sole manager, founder, and member of the Company, is also a party to the Operating Agreement.

195. Section 4.10 of the Operating Agreements provides that, "Commencing in 2010, the Company will use reasonable efforts to create liquidity (i.e. enabling the Members to sell their Units)."

196. Mr. Binn made no reasonable efforts to create liquidity for all of the Members of Binn and Partners, LLC. Instead, he looked for an exit for his own interests and for a way to create liquidity for select Members.

197. Instead of creating liquidity, Mr. Binn by transferring the entire business of XpresSpa to a new, Mistral-controlled Delaware Limited Liability Company, which has the right to sell the company coupled with a liquidation preference to Mistra,l has made it unlikely that the minority unit holders will ever be able to sell

units because Mistral can designate a sale price at which its financial return is realistically maximized while the minority unit holders' units are worthless.

198. In agreeing to enter into the Transaction that violated Section 4.10 of the Operating Agreement, Mr. Binn breached the Operating Agreement.

199. JPS Partners is entitled to damages for Mr. Binn's breach.

**Ninth Cause of Action (Derivative)**
**(Request for Equitable Accounting)**

200. JPS Partners hereby restates and realleges Paragraphs 1 through 199.

201. Given the myriad breaches of fiduciary duty, the corporate looting, and egregious spending at the corporate headquarters' level, JPS Partners is concerned about the accuracy of the accounting information it has received from Mr. Binn.

202. Thus, JPS Partners requests that the Court order an equitable accounting so that JPS Partners can determine if the funds of Binn and Partners, LLC have been properly accounted for and whether there have been other instances of breach of fiduciary duty and corporate diversion not detailed above.

**PRAYER FOR RELIEF**

WHEREFORE, JPS Partners seeks judgment against the Defendants as follows:

1. On the First Cause of Action, (1) an order of dissolution of Binn and Partners, LLC pursuant to the Operating Agreement and N.Y. Limited Liability Company Sections 701(a)(2) and 703 , and (2) the appointment of a receiver or liquidating

trustee to unwind the business and recover any assets improperly conveyed to XpresSpa Holdings LLC in breach of the fiduciary duties owed to Binn and Partners, LLC;

2. On the Second Cause of Action, an order of dissolution of Binn and Partners, LLC pursuant to N.Y. Limited Liability Company Law Section 702 and the appointment of a receiver or liquidating trustee to unwind the business and recover any assets improperly conveyed to XpresSpa Holdings LLC in breach of the fiduciary duty owed to JPS Partners and the other minority interest holders of Binn and Partners, LLC;

3. On the Third Cause of Action, judgment against Mr. Binn in an amount no less than $2.145 million or, in the alternative, a judgment declaring the Transaction void, returning the XpreSpa business assets to Binn and Partners, LLC and replacing Mr. Binn as the sole manager of the Company;

4. On the Fourth Cause of Action, judgment against Mr. Binn in an amount no less than $2.145 million or, in the alternative, a judgment declaring the Transaction void, returning the XpreSpa business assets to Binn and Partners, LLC and replacing Mr. Binn as the sole manager of the Company;

5. On the Fifth Cause of Action, judgment against Guggenheim, Mistral, and Lilac Ventures, jointly and severally, in an amount no less than $2.145 million or, in the alternative, a judgment declaring the Transaction void, returning the XpreSpa

business assets to Binn and Partners, LLC and replacing Mr. Binn as the sole manager of the Company;

6. On the Sixth Cause of Action, judgment against Guggenheim, Mistral, and Lilac Ventures, jointly and severally, in an amount no less than $2.145 million or, in the alternative, a judgment declaring the Transaction void, returning the XpresSpa business assets to Binn and Partners, LLC and replacing Mr. Binn as the sole manager of the Company;

7. On the Seventh Cause of Action, an order voiding the disbursement of corporate assets to Mr. Binn, Lilac Ventures, and Guggenheim in connection with the Transaction and requiring that the funds provided to Mr. Binn, Lilac Ventures, and Guggenheim be returned to the Company;

8. On the Eighth Cause of Action, judgment in an amount no less than $2.145 million;

9. On the Ninth Cause of Action, an order for an equitable accounting;

10. All reasonable costs, including attorney's fees and expenses, related to this action;

11. Punitive damages;

12. Pre- and post-judgment interest; and

13. For such other and further relief as this Court deems just and proper.

DATED: New York, New York
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