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

MORETON BINN, individual, and MARISOL F, LLC, a limited liability company	:	Index No.: _____
Plaintiffs,	:	**SUMMONS**
- against -	:	
MUCHNICK, GOLIEB & GOLIEB, P.C., a professional corporation, JOHN GOLIEB, an individual, DLA PIPER LLP (US), a limited liability partnership, and SYDNEY BURKE, an individual,	:	
Defendants.	:	

To the above-named Defendants:

You are hereby summoned to serve upon Plaintiffs' attorney an answer to the complaint in this action within twenty days after the service of this summons, exclusive of the day of service (or within thirty days after the service is complete if this summons is not personally delivered to you within the State of New York). In case of your failure to answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of venue is the place of business of all Defendants.

Dated: New York, New York
September 11, 2017

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

MORETON BINN, individual, and MARISOL F, LLC, a limited liability company	:	Index No.: _____
Plaintiffs,	:	**COMPLAINT**
- against -	:	
MUCHNICK, GOLIEB & GOLIEB, P.C., a professional corporation, JOHN GOLIEB, an individual, DLA PIPER LLP (US), a limited liability partnership, and SYDNEY BURKE, an individual,	:	
Defendants.	:	

Plaintiffs Moreton Binn and Marisol F, LLC (together, the "Plaintiffs"), by and through their undersigned attorneys as and for their Complaint against defendants Muchnick, Golieb & Golieb, P.C. ("MGG") and John Golieb (collectively, MGG and Mr. Golieb are referred to as the "Golieb Defendants") and against defendants DLA Piper LLP (US) ("DLA") and Sydney Burke (collectively, DLA and Mr. Burke are referred to as the "DLA Defendants"), (collectively, the Golieb Defendants and the DLA Defendants are referred to as the "Defendants"), allege the following upon information and belief:

NATURE OF THE ACTION

1. This is an action to recover money damages resulting from legal malpractice by the Defendants.

2. Moreton and Marisol Binn, husband and wife, invented the concept of a wellness spa at the airport, where passengers are often required to spend substantial amounts of time waiting for flights.

3. Moreton and Marisol Binn engaged the Golieb Defendants to incorporate their new business. The Golieb Defendants formed Marisol F, LLC and Binn and Partners, LLC (initially known as Binn & Partners LLC). Marisol F, LLC, wholly owned by Marisol Binn, and Moreton Binn were the initial investors in Binn and Partners, LLC ("Binn and Partners"), the corporate entity that created the XpresSpa brand.

4. Binn and Partners signed its first airport lease in or about 2003 and opened its first XpresSpa location at JFK Airport in 2004. The Golieb Defendants represented Binn and Partners and Plaintiffs during the negotiation of the lease and additional legal work related to the opening of the initial location.

5. The concept proved a success and Moreton and Marisol Binn soon began to expand the concept to other terminals and other airports. Initially, Plaintiffs were the only members of Binn and Partners, but subsequently Plaintiffs sought capital from friends and associates so that they could expand the business.

6. As additional investors were added to Binn and Partners, the Golieb Defendants continued to represent Plaintiffs, as well as Binn and Partners. The Golieb Defendants never presented Plaintiffs or Binn and Partners with an engagement letter or conflict waiver concerning any legal advice given concerning the operation of the XpresSpa business. Nor did the Golieb Defendants ever explain to the Plaintiffs that they might have a conflict in simultaneously representing the interests of the individuals and their related corporate entities.

7. By the end of 2011, the XpresSpa business needed additional capital to fund its planned expansion. Binn and Partners retained Guggenheim Partners to assist them in locating prospective investors. Golieb worked closely with Guggenheim Partners to ensure the accuracy of the information in the presentation book that they prepared. Relying on Golieb's advice, Moreton

Binn, as Chairman of the Board and C.E.O. of Binn and Partners, agreed to an investment from Mistral Equity Partners, and its related affiliates (collectively referred here as "Mistral").

8. The operating agreement in place at the time of the proposed investment from Mistral provided for a dissolution of Binn and Partners if there was a transfer of substantially all the assets of the limited liability company. Despite this provision in the operating agreement, the transaction proposed by Mistral required Binn and Partners to transfer substantially all the assets of Binn and Partners, i.e. the XpresSpa business, to a new corporate entity, XpresSpa Holdings LLC, and for Mistral to invest directly in the newly-created entity. The Golieb Defendants advised Plaintiffs to agree to the transaction as proposed by Mistral and its counsel.

9. One of the members of Binn and Partners—JPS Partners—did, in fact, object to the transaction as proposed by Mistral. Instead of advising Plaintiffs to settle the dispute with JPS Partners or to change the nature of the transaction, the Golieb Defendants continued to advise Plaintiffs to move forward with the transaction as proposed by Mistral. As detailed below, the structure of Mistral's investment led to the dissolution of Binn and Partners, LLC, and eliminated the Binns' majority interest in the XpresSpa brand and their majority position on the board of directors (the "Mistral Transaction").

10. Without providing Plaintiffs with sufficient details about the proposed transaction or providing Plaintiffs with viable alternatives to maintaining majority ownership and control of the company they founded, the Golieb Defendants advised the Plaintiffs to agree to the Mistral Transaction. Subsequent to the Mistral Transaction, the XpresSpa business was wholly owned by XpresSpa Holdings, LLC ("XpresSpa Holdings") and the Plaintiffs were reduced to minority interest holders and minority members on the Board of Directors.

11. Through the years since Mistral's takeover of majority ownership of the

company, as XpresSpa Holdings needed additional capital to operate and expand, the Golieb Defendants advised the Plaintiffs to participate in the additional capital contributions on the terms proposed by Mistral.

12. In connection with at least one of the capital raises, the Golieb Defendants represented to the Plaintiffs that the capital raise proposed by Mistral would be structured as a loan from the Plaintiffs to the XpresSpa business. The Golieb Defendants failed to explain to the Plaintiffs that they were in fact purchasing preferred shares that were convertible into equity. This equity lost much of its value before Plaintiffs could liquidate it.

13. After managing the company for about 4 years, in and around April 2016, Mistral recommended that XpresSpa Holdings enter into an agreement whereby it would be acquired by Form Holdings Corp., a public company ("FH").

14. In August 2016, the Board of Directors of XpresSpa Holdings agreed to be acquired by FH. Again, the Golieb Defendants failed to advise the Plaintiffs of the conflicts that arose from the terms proposed by Mistral.

15. The merger agreement provided that all legacy members, including Moreton Binn and Marisol F, LLC, would be given preferred shares. However, the merger agreement provided to a Mistral corporate vehicle, Mistral XH Representative, LLC ("Mistral XH"), full authority to act as the agent for all the XpresSpa legacy members– including Moreton Binn and Marisol F, LLC. Further, the Mistral XH vehicle that held full proxy power, and which was controlled by Mistral, would be represented by DLA, the firm that had represented and continued to represent Mistral in all aspects of its relationship with XpresSpa and the FH acquisition. The Golieb Defendants failed to advise the Plaintiffs of the irreconcilable conflicts of interest inherent in DLA's proposed representation, failed to advise Plaintiffs that the preferred shares that they

would receive as consideration for the merger would be unregistered stock held in escrow for up to 18 months and that the Mistral XH vehicle, represented by DLA, would have full authority to renegotiate the terms and value of the preferred shares and the corporate liabilities charged against them in connection with the merger. In addition, the Golieb Defendants failed to challenge the valuation provided to the company for the member units held by the Plaintiffs and other minority unitholders. In short, the Golieb Defendants repeatedly failed to protect Plaintiffs' interests, causing them to suffer significant damages including losing the vast majority of their investment in the XpresSpa business.

16. Following the board's vote to enter into the merger agreement, DLA undertook to represent Mistral XH in its capacity as agent for Plaintiffs and other legacy members. DLA did so by attending board and shareholder meetings concerning matters within the scope of the agent's responsibilities and entering into discussions with FH concerning those matters. As a result of DLA's discussions with FH concerning these matters, Mistral XH and DLA consented to amendments to the merger agreement and other actions impacting the rights of Plaintiffs and the other legacy members and the value of the preferred shares granted to them as consideration for the merger.

17. In undertaking to represent Mistral XH, which purports to serve as an agent for the Plaintiffs and the other legacy members of XpresSpa Holdings, DLA stands in a relationship of privity with Plaintiffs.

18. Despite DLA's undertaking to represent the agent to the legacy members, DLA failed to advise Plaintiffs of the irreconcilable conflicts of simultaneous representation of the Plaintiffs, Mistral, and other clients of DLA. DLA failed to obtain the written consent of Plaintiffs to proceed with the relationship despite the existence of such conflicts.

19. These conflicts of interest led DLA to take action on behalf of Plaintiffs and otherwise to provide Plaintiffs with advice that was counter to their interests, all of which has caused Plaintiffs substantial damages.

PARTIES

20. Plaintiff Moreton Binn is an individual residing in Fairfield County, Connecticut.

21. Plaintiff Marisol F, LLC is a limited liability company organized and existing under the laws of the State of New York. The principal offices of Marisol F, LLC are located at c/o Ahn Law Group LLC, 85 Broad Street, 16th Floor, New York, NY 10004. Marisol Binn is the sole member of Marisol F, LLC.

22. Upon information and belief, Defendant John Golieb is an attorney duly admitted to practice law in the State of New York, who resides in New York, with an actual place of business at 200 Park Avenue, Suite 1700, New York, New York, 10003.

23. At all relevant times, Golieb held himself out as an attorney who was experienced in, and capable of providing competent legal representation in, corporate matters.

24. Upon information and belief, Defendant Muchnick, Golieb & Golieb, P.C. ("MGG") is a professional corporation organized and existing under the laws of the state of New York, with a place of business at 200 Park Avenue, Suite 1700, New York, New York, 10003.

25. At all relevant times, MGG held itself out as a law firm which was experienced in, and capable of providing competent legal representation in, corporate matters.

26. Upon information and belief, Golieb is a shareholder of and named partner at MGG.

27. Upon information and belief, Defendant DLA is one of several legal entities that

operates as an international law firm known as "DLA Piper." Upon information and belief, defendant DLA is the member of "DLA Piper" that operates as a law firm in the United States, including in the State of New York. Upon information and belief, defendant DLA is a limited liability partnership organized and existing under the laws of the State of Maryland and authorized to conduct business in the State of New York. Upon information and belief, defendant DLA's principal executive office is located at 1251 Avenue of the Americas, New York, NY 10020-1104.

28. At all relevant times DLA held itself out as a law firm experienced in corporate and other legal matters.

29. Upon information and belief, Defendant Sydney Burke, Esq. is an individual licensed to practice law in the State of New York, a partner of defendant DLA, and has an actual place of business located at 1251 Avenue of the Americas, New York, NY 10020-1104.

30. At all relevant times Burke held himself out as an attorney experienced in corporate and other legal matters.

JURISDICTION AND VENUE

31. Personal jurisdiction over Defendants is proper here pursuant to New York CPLR §§ 301 because all the defendants maintain their principal place of business in New York. In addition, the causes of action set forth below arise primarily from conduct that occurred in New York.

32. Venue is proper in New York County pursuant to *inter alia* CPLR §§ 503, 509.

FACTUAL BACKGROUND

The Golieb Defendants' Representation of the Plaintiffs

33. Beginning on or about April 1995 and continuing through 2016, the Golieb Defendants were retained by Plaintiffs to act as their attorney, both in matters in which the Plaintiffs participated together and in separate transactions for one or more of the Plaintiffs.

34. On or about September 21, 2000, Moreton and Marisol Binn retained the Golieb Defendants to assist them in registering Binn & Partners, LLC (later known as Binn and Partners LLC). Subsequently, the Binns decided to use this entity for their proposed airport spa business. The spa business was operated under the brand name "XpresSpa." At the beginning, the business was funded personally by Moreton and Marisol Binn. Later, Moreton and Marisol raised additional funds for the business from friends and associates.

35. Defendant John Golieb held himself out as Plaintiffs' personal attorney during this period and Plaintiffs relied on Golieb's advice in all matters relating to the JPS Settlement and their business interests at XpresSpa, in addition to various other legal matters for which they turned to Golieb for advice.

36. From time to time Golieb also held himself out as the attorney for Binn and Partners. At the very beginning of the XpresSpa business, Golieb attended the first meeting with Moreton Binn at JFK Airport to discuss the first spa lease and negotiated the first lease for Binn & Partner LLC's first XpresSpa location at JFK Terminal One.

37. By the end of 2011, the XpresSpa business needed an infusion of additional capital to increase its number of storefronts and Plaintiffs sought outside investment. Binn and Partners retained Guggenheim Partners to assist them in locating prospective investors. Golieb worked closely with Guggenheim Partners to ensure the accuracy of the information in the presentation book that they prepared. Relying on Golieb's advice, Moreton Binn, as Chairman of the Board and C.E.O. of Binn and Partners, agreed to an investment from Mistral.

38. Binn and Partners was sued by one of its investors, JPS Partners, when the company informed its members of the proposed transaction with Mistral. Golieb advised Binn Partners, and Plaintiffs, to litigate the claim made by JPS Partners. Golieb failed to advise

Plaintiffs that the JPS Partners may have a valid claim and that a quick settlement would be beneficial for Plaintiffs and the company. Instead, the company (referred to throughout as "XpresSpa") endured a two year plus litigation, settling with JPS Partners in the summer of 2014.

39. Golieb failed to advise Plaintiffs and Binn and Partners that the JPS Partners raised legitimate claims and that Binn and Partners and Plaintiffs should bargain for a better deal with Mistral.

40. After the investment from Mistral, Golieb continued to advise Plaintiffs. XpresSpa's in-house attorney, Matthew Podell, regularly sent documents relating to Moreton Binn and Marisol F, LLC, to Golieb for his review and input. The Plaintiffs believed and understood that Golieb was reviewing all legal documents that he received from XpresSpa to be sure that the documents comported with the legal interests of the Plaintiffs. This belief was misplaced, and Golieb often acted as a rubber stamp on documents prepared by XpresSpa's outside counsel.

41. Instead of actively working to protect the interests of his clients, Plaintiffs, Golieb sat idly by and allowed their legal rights, and financial interests, to be taken away from them.

The JPS Settlement & Mistral's Takeover of the Company

42. As discussed above in paragraph 38, in February 2012, JPS Partners, one of the original investors in the XpresSpa business, sued Binn and Partners to halt the transfer of "substantially all of the assets" of the company to a new entity, XpresSpa Holdings, LLC, which would be receiving an investment from Mistral. Subsequently, the lawsuit was enlarged to include Moreton Binn, Guggenheim Securities, LLC, Mistral Equity Partners, Mistral Capital Management, LLC, and Lilac Ventures Masterfund, Ltd. as co-defendants (the "JPS Litigation").

43. In or about June 2014, the parties to the JPS Litigation reached a settlement agreement (the "JPS Settlement"). At the time that settlement was reached, the causes of action

alleged against Guggenheim Securities, the Mistral entities, and Lilac Ventures were noticed for appeal. All the defendants were included in the global JPS Settlement.

44. The Golieb Defendants represented the Plaintiffs' personal interests in connection with the JPS Settlement.

45. In order to fund the JPS Settlement, the Mistral Spa Holdings, LLC, an investor in the spa business and, upon information and belief, an entity related to the Mistral entities who were defendants in the JPS Litigation, orchestrated a reorganization and recapitalization of XpresSpa Holdings, LLC in 2014 that caused Plaintiffs to give up their majority ownership interest in the spa business and majority membership on the board of directors of the company. Upon information and belief, Golieb was aware of, and helped to orchestrate this reorganization to the detriment of the Plaintiffs.

46. Upon information and belief, Guggenheim Securities, LLC, Mistral Equity Partners, Mistral Capital Management, LLC, and Lilac Ventures Masterfund, Ltd. were not charged with any costs of the settlement in the reorganization and recapitalization of XpresSpa Holdings, LLC, except to the extent that Lilac Ventures Masterfund, Ltd. participated as a legacy member of Binn and Partners, LLC.

47. Upon information and belief, at the time of the JPS Settlement, XpresSpa and Mistral, were both represented by DLA. Golieb never informed the Binns or Marisol F, LLC that DLA's simultaneous representation of both XpresSpa and Mistral represented a conflict of interests.

48. Golieb prepared a memo dated July 28, 2014 about the JPS Settlement ("JPS Settlement Closing Summary"). The JPS Settlement Closing Summary details, *inter alia*, that Plaintiffs' will be losing their membership majority in the XpresSpa business and their majority on

the Board of Directors. The JPS Settlement Closing Summary does not provide any advice for how Plaintiffs could avoid this result.

49. Upon information and belief, Golieb never advised Plaintiffs prior to drafting the JPS Settlement Closing Summary that they would be giving up their majority ownership interest and majority board membership in agreeing to the terms set forth by Mistral.

50. Upon information and belief, prior to the closing of the JPS Settlement, Golieb never explained to Plaintiffs specifically that the amount of the JPS Settlement and related costs totaling $2.2 million (the "JPS Amount") were defined by XpresSpa as funding an obligation of Binn and Partners and were treated as a distribution from XpresSpa to the members of Binn and Partners.

51. Golieb never asked Plaintiffs if they would prefer to fund the JPS Settlement directly and avoid losing majority ownership and board control of XpresSpa.

52. Certain expenses were included as part of the JPS Settlement amount, which were charged against Binn and Partners, and which may have included attorneys' fees for counsel provided to the other defendants in the JPS Litigation, including the Mistral entities. Upon information and belief, Golieb never sought clarification from Mistral or its counsel why these costs should be borne by Binn and Partners.

53. As part of the reorganization and recapitalization of XpresSpa, Mistral Spa Holdings LLC invested $1,281,068 and the Binn and Partners' members who participated invested the balance of $918,932. XpresSpa then issued 4,400,000 shares in consideration for the $2.2 million. It was this issuance and investment that gave Mistral majority ownership of XpresSpa. Plaintiffs did not play any role in the negotiation of this transaction and believed that their interests were represented by Golieb. But, upon information and belief, Golieb failed to negotiate on their

behalf and agreed to the transaction as presented by Mistral and its counsel, DLA, who also served as counsel to XpresSpa.

54. The Golieb Defendants failed to advise Plaintiffs that they could contribute additional funds to the settlement and avoid losing control of the company that they founded.

55. Golieb advised Plaintiffs to agree to the closing of the JPS Settlement and the reorganization orchestrated by Mistral. Upon information and belief, the settlement funds were paid to JPS Partners prior to the finalization of the documentation of the transaction.

56. Upon information and belief, contemporaneously with the JPS Settlement, Golieb advised Plaintiffs to execute signature pages to allow the JPS Settlement to proceed. The final documentation of the Mistral Transaction was not provided to Plaintiffs, or the other minority shareholders, until 2015.

57. Golieb did prepare a memorandum describing the JPS Settlement but the intended audience and date of preparation of the memorandum are both unclear. There is no stated recipient for the memorandum. It is dated July 28, 2014 but it references an amendment dated December 31, 2014, which makes it unlikely that the memorandum was prepared prior to December 31, 2014. Thus, it is more likely that the memorandum was prepared after the JPS Settlement closed and the stated reorganization had occurred. The memorandum was then dated as of July 28, 2014. Plaintiffs do not know why the document may have been backdated.

Golieb Defendants' Failure to Advise Plaintiffs That They Were Acquiring Equity Not Debt

58. On or about January 8, 2015, DLA circulated a draft Membership Interest Purchase Agreement (the "MIPA") to Golieb as well as to the general counsel at XpresSpa and William Phoenix, who is a managing director. Upon information and belief, the purpose of the new MIPA was to raise additional capital from the investors in XpresSpa.

59. Upon receiving the MIPA on January 8, 2015, Golieb stated "I am happy to review this but I am not sure who we are representing. Am I accurate in assuming that DLA Piper is representing XpresSpa Holdings and Mistral? In that case, subject to Moreton and Marisol's approval, we would be representing the Binns only. Please advise Other members should be advised that they need to retain their own counsel."

60. Golieb never told Plaintiffs that DLA had a conflict of interest in representing both XpresSpa and Mistral in a matter where Mistral had interests that differed from the interests of the minority members of XpresSpa.

61. Golieb never informed Plaintiffs that one of the DLA attorneys had a direct equity interest in Mistral, further conflicting any advice given that may favor Mistral over the minority interest holders.

62. At the time, Marisol F, LLC held an anti-dilution right that should have protected it from being diluted from an issuance of additional membership interests. In addition, the Golieb Defendants had advised Marisol F, LLC not to invest additional funds in the company, but did not advise Plaintiffs to refuse to participate in the January 2015 capital raise, which he described as a loan to the company.

63. As part of the January 2015 capital raise, on or about January 13, 2015, Marisol F, LLC agreed to lend $262,500 and Moreton Binn agreed to lend $630,500 to XpresSpa Holdings LLC.

64. Plaintiffs were notified that they were receiving a position as a holder of a "P-3 interest." Based on the advice they received from the Golieb Defendants, Plaintiffs understood P-3 to represent debt. A January 20, 2015 letter sent by Andrew Heyer, then-C.E.O. of Mistral Spa Holdings, LLC, to all XpresSpa members explains that the "recent financing was structured similar

to the P-3 unites that Mistral owned in the past." On an "Ownership Register" prepared on or about July 8, 2015 by XpresSpa management, Plaintiffs' P-3 interests are listed as loans that would need to be repaid.

65. The Golieb Defendants did not explain to Plaintiffs at the time that Plaintiffs had made a further investment in the company and had received equity, not a debt that would need to be repaid. Plaintiffs would not have agreed to the transaction if they understood that it was additional equity in the company that they no longer controlled.

66. The Golieb Defendants did not explain to Plaintiffs that DLA took the position that it represented both Mistral and XpresSpa, but not Plaintiffs or any other members of XpresSpa. The Golieb Defendants did not explain to Plaintiffs that DLA had a potentially non-waivable conflict of interest in representing the majority shareholder of XpresSpa and the XpresSpa company, but not the minority members of XpresSpa.

67. The Golieb Defendants did not express any concern to Plaintiffs that DLA's fees for preparing the documentation for the capital raise were to be paid by XpresSpa.

68. The Golieb Defendants did not inform Plaintiffs that XpresSpa's agreement to pay for the minority members' legal fees, including the Golieb Defendants' fees, up to a cap of $10,000, may have influenced the amount of time the Golieb Defendants devoted to reviewing and negotiating the transaction.

Continued Marginalization of Moreton & Marisol Binn

69. Throughout 2015 and 2016, Moreton and Marisol Binn continued to be marginalized at XpresSpa. Andrew Heyer and William Phoenix managed the business on a day to day basis and effectively made all strategic decisions for the company because, as representatives of Mistral, they controlled the majority vote of the board.

70. Marisol Binn, upon the advice of the Golieb Defendants, resigned from the Board of Directors of XpresSpa Holdings LLC effective January 2016. Her seat on the board remained unfilled until on or about July 21, 2016. when it was filled by Ned Hentz. Moreton Binn remained on the board until the merger with FH.

Malpractice Concerning the Acquisition of XpresSpa Holdings LLC by Form Holdings Corp.

71. During the spring of 2016, XpresSpa was again seeking additional capital to fund continued growth of the company.

72. Bruce Bernstein, the controlling principal of Rockmore Investment Master Fund Ltd., one of the investors in and a major creditor of XpresSpa Holdings LLC, was named to the board of directors for Vringo, Inc. (now known as Form Holdings Corp., *i.e.* FH) in February 2016.

73. In or about March 2016, Plaintiffs first learned that the board of XpresSpa was considering a transaction that would allow the company to be acquired by FH. Plaintiffs played no role in the negotiation of the merger and acquisition by FH.

74. Upon information and belief, all the documents relating to the acquisition were prepared by DLA and counsel for FH.

75. As of August 7, 2016, DLA was still circulating draft merger documents to the members of XpresSpa, including a draft merger agreement. The Merger Agreement described the legacy shareholders of XpresSpa as XpresSpa "Unitholders" and provided that certain liabilities concerning prior business of XpresSpa would be subject to an Escrow Agreement. In exchange for the cancellation of their shares of XpresSpa, the Unitholders would receive common stock in FH, series D convertible preferred shares of FH, and five-year warrants to purchase common stock of FH. Preferred shares with a specified initial liquidation preference value would be held in escrow as security against such liabilities.

76. Plaintiffs understood that the Golieb Defendants were reviewing the various merger documents to protect their interests. The Golieb Defendants never advised Plaintiffs to withhold their vote in favor of the merger.

77. The Merger Agreement further provides that Mistral is entitled to appoint one of its investment vehicles as the representative of all the XpresSpa Unitholders.

78. Specifically, section 8.1 of the Merger Agreement provides: "Unitholders' Representative. By executing this Agreement, a Joinder Agreement or by accepting any consideration payable hereunder, each Company Unitholder shall have irrevocably authorized, appointed and empowered Mistral XH Representative, LLC (together with any subsequent or successor representative, the "Unitholders' Representative") to be the exclusive proxy, representative, agent and attorney-in fact of each of the Company Unitholders, with full power of substitution, to make all decisions and determinations and to act and execute, deliver and receive all documents, instruments and consents on behalf of the Company Unitholders, at any time, in connection with, and that may be deemed by the Unitholders' Representative to be necessary or appropriate to accomplish the intent and implement the provisions of, this Agreement, and to facilitate the consummation of the transactions contemplated hereby. By executing this Agreement, the Unitholders' Representative accepts such appointment, authority and power and authorization to act as Unitholders' Representative as attorney-in-fact and agent on behalf of the Company Unitholders in accordance with the terms of this Agreement and any applicable ancillary documents. Without limiting the generality of the foregoing, the Unitholders' Representative shall have the power to take any of the following actions on behalf of the Company Unitholders: (i) to give and receive notices, communications and consents under this Agreement, the Escrow Agreement and the other documents, instruments and agreements contemplated hereby; (ii) to receive and facilitate

distribution of payments pursuant to this Agreement and the Escrow Agreement (including any unused balance of the Indemnity Escrow Fund and/or the Consents Escrow Fund); (iii) to waive, modify or amend any provision of this Agreement, the Escrow Agreement or the other documents, instruments and agreements contemplated hereby; (iv) to assert any claim or institute any Action; (v) to investigate, defend, contest or litigate any Action initiated by any Person against the Unitholders' Representative or a Company Unitholder under this Agreement and the Escrow Agreement, as the Unitholders' Representative, in its sole discretion, may deem necessary or desirable; (vi) [reserved]; (vii) to negotiate, enter into settlements and compromises of, resolve and comply with orders of courts and awards of arbitrators or other third party intermediaries with respect to any disputes arising under this Agreement and the Escrow Agreement, as the Unitholders' Representative, in its sole discretion, may deem necessary or desirable; (viii) to negotiate and enter into settlements with respect to any indemnification claims arising under this Agreement and the Escrow Agreement, as the Unitholders' Representative, in its sole discretion, may deem necessary or desirable; (ix) to agree to any offsets or other additions or subtractions of amounts to be paid under this Agreement and the Escrow Agreement as the Unitholders' Representative, in its sole discretion, may deem necessary or desirable; (x) to make, execute, acknowledge and deliver all such other agreements, guarantees, orders, receipts, endorsements, notices, requests, instructions, certificates, assignments, letters and other writings, (xi) make, or assist Parent with making, any filings in connection with this Agreement and the transactions contemplated hereby, (xii) to refrain from enforcing any right of the Company Unitholders arising out of or under or in any manner relating to this Agreement; provided, however, that no such failure to act on the part of the Unitholders' Representative, except as otherwise provided in this Agreement, shall be deemed a waiver of any such right or interest by the Unitholders' Representative or by the Company

Unitholders unless such waiver is in a writing signed by the waiving party or by the Unitholders' Representative, and (xiii) engage, at the Company Unitholders' expense, attorneys, accountants, financial and other advisors, paying agents and other persons necessary or appropriate in the judgment of the Unitholders' Representative for the accomplishment of the foregoing or in connection with any matter arising under this Agreement, and, in general, to do any and all things and to take any and all action that the Unitholders' Representative, in its sole and absolute discretion, may consider necessary or proper or convenient in connection with or to carry out the activities described in this Agreement. Unitholders' Representative shall have the right to withhold any amounts otherwise payable to the Company Unitholders in accordance with this Agreement as it deems necessary or appropriate in order to cover costs, fees and expenses that it may reasonably incur in connection with discharging its duties hereunder."

79. By way of subsection (xiii) of the foregoing provision, Mistral was proposing to act as agent for all Unitholders, including the Plaintiffs. As such, DLA, in its role as attorneys for Mistral, would also be entering into a relationship of privity with Plaintiffs and other Unitholders.

80. The Golieb Defendants never explained to Plaintiffs that the Merger Agreement provided that Mistral would appoint and control a representative of all the XpresSpa Unitholders.

81. The Golieb Defendants never explained to Plaintiffs that as part of the merger transaction, Mistral would be making an investment in FH on or about August 8, 2016, on the same date that FH would be making an initial investment in XpresSpa. Thus, the capital to be used by FH for the merger came directly from Mistral. This is capital that Mistral could have invested directly in XpresSpa, but in choosing to invest the funds in FH, Mistral was able to take additional control away from the unitholders of XpresSpa such as Plaintiffs.

82. On or about August 8, 2016, the board of directors of XpresSpa discussed the

proposed transaction and voted to move forward with the merger and acquisition. Each of the directors elected by Mistral voted in favor of moving forward with the merger and acquisition.

Malpractice by DLA

83. Following the vote by the board of XpresSpa to enter into the merger agreement, Mistral purported to commence its role as the Unitholder Representative in discussions with FH. As attorneys to the Unitholder Representative, DLA undertook to represent the interests of all the Unitholders, in accordance with the terms of section 8.1 of the Merger Agreement. Thus, DLA undertook to represent the best interests of all Unitholders, including Plaintiffs.

84. DLA failed to advise the Unitholders of the fundamental conflict of interest arising from nature of the merger and its role as counsel to both Mistral and the Unitholder Representative. For example, in connection with the merger Mistral not only exchanged its interest in XpresSpa for shares of FH, but it also made a contemporaneous investment directly in FH. Thus, Mistral would retain substantially the same equity interest in FH regardless of the final amount of XpresSpa indemnification obligations. Further, the more the value of FH stock fell, the more stock granted to the Unitholders would be required to be placed in escrow to cover prior XpresSpa obligations.

85. The foregoing arrangement had the overall effect of making the Unitholders, including the Plaintiffs, personally liable for the obligations of XpresSpa while simultaneously transferring the ongoing business of XpresSpa to FH for no consideration. Mistral had a direct conflict of interest to the other Unitholders because by way of its direct equity interest in FH and, therefore, it was not on equal footing as other Unitholders.

86. Despite its obligations to consider the best interests of all Unitholders, DLA failed to act in the best interests of any Unitholder other than Mistral. For example, following the board

August 8, 2016 vote to enter into the Merger Agreement, XpresSpa entered into amendments to the agreement, including an amendment providing for a substantial increase in the amount of preferred shares held in escrow pursuant to the indemnification provision of the Merger Agreement. DLA failed to advise the Unitholders of the conflicting interests arising from the placement of further preferred shares at risk.

87. DLA also failed to adequately represent the interests of the Unitholders in connection with FH's operation of the business after the merger, including by failing to adequately represent the interests of the Unitholders in limiting the nature and extent of XpresSpa's indemnification obligations and other actions by the board and management of FH that led to a drastic fall in the value of FH stock.

Post-Merger Malpractice by Golieb

88. On or about October 28, 2016, almost three months after the proposed merger was announced, XpresSpa's in-house counsel, Matthew Podell, circulated documents for the minority interest members to sign in connection with the merger and with "retroactive preemptive rights" concerning their participation in prior fundraising efforts.

89. On or about October 31, 2016, Golieb sent Moreton and Marisol Binn an email in which he states that the documents are "significant," that he had taken a "(less than in depth) look at them," and that "counsel should be retained on behalf of all of the members."

90. Up until receiving that email, Plaintiffs were under the impression that Golieb had been reviewing all the merger documents with their interest in mind, including in the period prior to the board vote on the merger.

91. Plaintiffs and the other minority members of XpresSpa were forced to scramble to find competent representation. The majority and managing member of XpresSpa (Mistral) would

only agree to reimburse the minority members $25,000 to obtain counsel to perform the narrow scope of services of advising the minority members of their rights under the agreements.

92. Golieb, as counsel to Plaintiffs, did not attempt to negotiate with Mistral for a greater scope of services. Nor did the Golieb Defendants urge Plaintiffs to pay out of pocket for their own counsel to review and counsel them on the documents.

93. To the contrary, Golieb advised Plaintiffs to sign the documents and move forward with the transaction.

94. Golieb did not explain to Plaintiffs that Bruce Bernstein's participation on the Board of Directors of FH might create a conflict of interest.

95. Golieb did not raise any concerns with the Plaintiffs about DLA serving as counsel to both Mistral and XpresSpa.

96. In short, Golieb gave the Plaintiffs no assistance in preserving their rights to the company that they created. He never believed in the company, never believed in his clients, and was happy to ride on the coattails of DLA and collect a check for his services. He did not have the resources or skill to protect Plaintiffs' interests but he never told them that. Instead, he continued to lull them into believing that their rights were being protected.

97. In the end, the XpresSpa business was merged into Form Holdings with the shareholders of XpresSpa only receiving approximately 18% of the business for their approximately $43 million expected yearly annual revenue and FH shareholders receiving 82% of the business for their contribution of a business with total revenue for 2015 of less than $23 million and an operating loss over the past six months of over $14 million (compared to XpresSpa's operating loss of just over $3 million for the same period).

FIRST CAUSE OF ACTION

(Legal malpractice by the Golieb Defendants in connection with the advice given in 2014 concerning the reorganization and recapitalization of the XpresSpa business)

98. Plaintiffs repeat and reassert each allegation in paragraphs 1 through 97 as though fully set forth herein.

99. MGG is liable for the acts and omissions of Golieb as a partner of the firm because MGG failed to adequately monitor and supervise his work.

100. As detailed above, the Golieb Defendants failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession by failing to advise Plaintiffs that by agreeing to the transactions put forth by Mistral and its counsel, DLA, who was also counsel to XpresSpa, that Plaintiffs would be giving up their majority interest in the company and the majority of the Board of Directors.

101. As detailed above, the Golieb Defendants failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession by failing to advise Plaintiffs that they had other options available to settle the JPS Litigation that would not require them to give up majority interest in the company that they founded and control of the board. The Golieb Defendants failed to consider the Plaintiffs' net worth and their interest in preserving majority ownership of the company and majority control of the board.

102. As detailed above, the Golieb Defendants failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession by failing to negotiate with Mistral and its counsel on behalf of the Plaintiffs to reach a more favorable outcome for Plaintiffs.

103. The Golieb Defendants advised Plaintiffs to go along with the transaction and advised them that the company could not survive without Mistral's assistance.

104. Plaintiffs relied completely on the advice provided by the Golieb Defendants. Plaintiffs believed that the Golieb Defendants were looking out for their best interests.

105. The Golieb Defendants failed to inform Plaintiffs that DLA had a direct conflict in its dual representation of Mistral, which sought to take control of the company from Plaintiffs, and XpresSpa. As a result, Plaintiffs mistakenly believed that DLA was looking out for their interests as the then-majority owners of XpresSpa and relied on the advice of DLA to their detriment. Moreover, Plaintiffs believed that the Golieb Defendants were looking out for the Plaintiffs' interests but the Golieb Defendants merely acted as a rubber stamp for the decisions made by Mistral and DLA Piper.

106. The Golieb Defendants' abject failure to provide competent legal advice proximately and directly caused Plaintiffs to give majority ownership and majority control of the board of the company that they founded.

107. But for the Golieb Defendants' bad advice, Plaintiffs would not have agreed to give up control of XpresSpa. They would have found a way to fund the JPS Settlement that did not include giving up control of the company to Mistral. Plaintiffs have independent wealth and a net worth that far exceeds the amount of the settlement and could have funded the JPS Settlement without relying on funds from Mistral.

108. Plaintiffs have suffered damages a result in an amount to be calculated at trial, but in no case less than $500,000.

SECOND CAUSE OF ACTION

(Legal malpractice by the Golieb Defendants in connection with Plaintiffs' further investment)

109. Plaintiffs repeat and reassert each allegation in paragraphs 1 through 108 as

though fully set forth herein.

110. MGG is liable for the acts and omissions of Golieb as a partner of the firm because MGG failed to adequately monitor and supervise his work.

111. As detailed above, the Golieb Defendants failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession by failing to advise Plaintiffs that the P-3 transaction was not debt but was an investment for equity.

112. As detailed above, the Golieb Defendants failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession by failing to ensure that the P-3 transaction could not be converted into equity.

113. The Golieb Defendants' omissions proximately and directly caused Plaintiffs damages in that they did not have the priority position vis-à-vis the other equity holders and faced the increased the risk of its investment by becoming an equity holder.

114. Plaintiff's suffered calculable damages as proximate result of the Golieb Defendants' omissions because the equity they received in worth substantially less than the amount they were due under the loan.

THIRD CAUSE OF ACTION

(Legal malpractice by the Golieb Defendants in connection with advice given concerning the acquisition by Form Holdings Corp.)

115. Plaintiffs repeat and reassert each allegation in paragraphs 1 through 114 as though fully set forth herein.

116. MGG is liable for the acts and omissions of Golieb as a partner of the firm because MGG failed to adequately monitor and supervise his work.

117. As detailed above, the Golieb Defendants failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession by advising Plaintiffs to

agree to the acquisition put forth by Mistral and its counsel, DLA, who was also counsel to XpresSpa; and Bruce Bernstein, who is a principal at Rockmore Investment Master Fund Ltd and is a member of the Board of Directors of both FH. and XpresSpa; without insisting on further protections for their interests and without considering that the proposed acquisition was rife with legal and business conflict of interests.

118. The Golieb Defendants failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession by failing to advise Plaintiffs to seek additional counsel with the requisite skill to advise them concerning the proposed acquisition by Form Holdings until too late in the process, i.e. after the Board of Directors had already voted on the transaction and Plaintiffs had voted in favor of the transaction upon the advice of the Golieb Defendants.

119. The Golieb Defendants failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession by failing to advise Plaintiffs that the limited scope review of the transaction by Kramer Levin Naftelis & Frankel LLP was inadequate to protect the Plaintiffs' interests.

120. The Golieb Defendants failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession by failing to advise Plaintiffs that the proposed structure of the transaction and valuation of XpresSpa were unfair to Plaintiffs and sought to benefit Mistral and Rockmore Investment Master Fund Ltd. and their respective principals at the expense and to Plaintiffs' detriment.

121. The Golieb Defendants failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession by failing to advise Plaintiffs that they should seek to force Mistral to invest the approximately $1.7 million in XpresSpa directly instead of

using those funds to fund Form Holdings' acquisition of the company.

122. The Golieb Defendants failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession by failing to ensure that the valuation used to determine the Plaintiffs' financial investment was fair and reasonable.

123. The Golieb Defendants' omissions detailed above proximately and directly caused Plaintiffs to vote in favor of the acquisition of XpresSpa by FH, which led directly to the devaluation and dilution of their investment.

124. Moreover, the Golieb Defendants' omissions continue to proximately and directly cause Plaintiffs' harm because the delegation of authority to a Mistral vehicle, as detailed above, has allowed FH to continue to devalue the preferred shares of legacy XpresSpa members, further harming Plaintiffs' financial interests.

125. Plaintiffs have suffered calculable damages as a direct and proximate result of the Golieb Defendants' acts and omissions, in an amount to be calculated at trial.

FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty Against the Golieb Defendants)

126. Plaintiffs repeat and reassert each allegation in paragraphs 1 through 125 as though fully set forth herein.

127. MGG is liable for the acts and omissions of Golieb as a partner of the firm because MGG failed to adequately monitor and supervise his work.

128. As their legal counsel, the Golieb Defendants owed the Plaintiffs the fiduciary duty of undivided loyalty and the fiduciary duty of care.

129. The Golieb Defendants breached the fiduciary duties that they owed to the Plaintiffs by failing to advise them of the potential conflicts of simultaneous representation of the

Plaintiffs and, at times over the years, of Binn and Partners. The Golieb Defendants also failed to advise the Plaintiffs of the potential conflict caused by XpresSpa's agreement to pay certain, capped, legal fees owed to the Golieb Defendants. These conflicts of interest led the Golieb Defendants to provide Plaintiffs with advice that was counter to Plaintiffs' interests.

130. In addition, the Golieb Defendants breached the fiduciary duties that they owed to Plaintiffs by lulling Plaintiffs into believing that the Golieb Defendants were providing effective legal assistance when, instead, since February 2012, the Golieb Defendants were merely rubber-stamping the work performed by DLA.

131. The Golieb Defendants' breach of their fiduciary duties directly and proximately caused Plaintiffs to agree to corporate restructurings, as described above, that were against their interest by relying on the advice provided by the Golieb Defendants, which Plaintiffs did not know was merely passing along what was proposed by DLA.

132. As a result of the Golieb Defendants' breach of their fiduciary duties owed to them, Plaintiffs entered into transactions and agreements counter to their interest, losing majority interest in the company that they founded and losing majority control of the board of directors.

133. The Golieb Defendants' breach of their fiduciary duties directly and proximately caused Plaintiffs damages in an amount to be determined in detail at trial.

134. The Golieb Defendants have not earned the fees that they have been paid for representing Plaintiffs, at least since February 2012, because during the period from February 2012 through December 2016, the Golieb Defendants were in breach of the fiduciary duties that they owed their clients, and thus, have engaged in misconduct that supports a discharge for cause. As such, all fees paid by Plaintiffs since February 2012 must be forfeited.

FIFTH CAUSE OF ACTION
(Legal Malpractice against DLA and Sydney Burke, Esq.)

135. Plaintiffs repeat and reassert each allegation in paragraphs 1 through 134 as though fully set forth herein.

136. During the period August 8, 2016 through the present, the DLA Defendants undertook to act as attorneys for Plaintiffs by and through their agent.

137. As attorneys for Plaintiffs, by and through their agent, the DLA Defendants owed Plaintiffs a duty of care.

138. The DLA Defendants breached their duty of care to Plaintiffs by negligently failing to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession by *inter alia* advising the Unitholder Representative to agree to amendments to the Merger Agreement that were against their interests and failing to represent the best interests of Unitholders other than Mistral in the operation of FH following the merger.

139. As a direct and proximate cause of the DLA Defendants' failure to act in accordance with the standard of care necessitated by their position as attorneys, Plaintiffs have suffered actual and ascertainable damages as a result of the DLA Defendants' malpractice.

140. DLA is liable for Mr. Burke's breach of fiduciary duty because it failed to adequately monitor and supervise his work.

SIXTH CAUSE OF ACTION
(Breach of Fiduciary Duty against DLA and Sydney Burke, Esq.)

141. Plaintiffs repeat and reassert each allegation in paragraphs 1 through 140 as though fully set forth herein.

142. As attorneys for Plaintiffs, the DLA Defendants owed to Plaintiffs a fiduciary duty of undivided loyalty.

143. The DLA Defendants breached their duty of undivided loyalty.

144. As a result of DLA's undisclosed and financial relationship with FH, the DLA Defendants' loyalties to Plaintiffs were divided.

145. Further, as a result of payments from FH and Mistral to the DLA Defendants of legal and other amounts, the DLA Defendants' loyalty to Plaintiffs was divided.

146. Because of the DLA Defendants' divided loyalties, they failed to provide to Plaintiffs the advice necessitated by their position as attorneys for Plaintiffs.

147. As a direct and proximate cause of the DLA Defendants' failure to act in accordance with the standard of care necessitated by his position as attorneys for Plaintiffs, Plaintiffs have suffered actual and ascertainable damages as a result of Defendants malpractice.

148. DLA is liable for Mr. Burke's breach of fiduciary duty because it failed to adequately monitor and supervise his work.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, and in favor of Plaintiffs as follows:

(a) on the First Cause of Action, judgment in an amount to be determined at trial but in no event less than $500,000;

(b) on the Second Cause of Action, judgment in an amount to be determined at trial but in no event less than $500,000;

(c) on the Third Cause of Action, judgment in an amount to be determined at trial but in no event less than $500,000;

(d) on the Fourth Cause of Action, judgment in an amount to be determined at trial but in no event less than $500,000;

(e) on the Fifth Cause of Action, judgment in an amount to be determined at trial but in no event less than $500,000;

(f) on the Sixth Cause of Action, judgment in an amount to be determined at trial but in no event less than $500,000;

(g) all reasonable costs, including attorney's fees and expenses, related to this action;

(h) punitive damages;

(i) pre- and post-judgment interest; and

(j) such other and further relief as this Court deems just and proper.

JURY DEMAND

Plaintiffs hereby demand a trial by jury as to all claims so triable.

Dated: New York, New York
September 11, 2017

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