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Attorneys for Defendants Direct Capital Corporation, Christian Caruso, George Wade and Darren Anthony

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 08-2638-RMB-JS

Return Date: September 2, 2008

MARLIN LEASING CORPORATION,

ORAL ARGUMENT REQUESTED

Plaintiff,

v.

DIRECT CAPITAL CORP., CHRISTIAN
CARUSO, GEORGE WADE, and DARREN
ANTHONY,

Defendants.

NOTICE OF MOTION TO DISMISS

TO: Darren H. Goldstein, Esq.

Flaster Greenberg, P.C.

Commerce Center, 1810 Chapel Avenue West

Cherry Hill, NJ 08002-4609

COUNSEL:

PLEASE TAKE NOTICE that on Tuesday, September 2, 2008, at 9:00 a.m., or as soon thereafter as counsel may be heard, Defendants, by their counsel, Tompkins, McGuire, Wachenfeld & Barry, shall move before the United States District Court, at the United States Courthouse in Camden, New Jersey, pursuant to Fed.R.Civ.P. 12(b)(2), for an Order dismissing the Complaint as to defendants, Christian Caruso, George Wade and Darren Anthony.

PLEASE TAKE FURTHER NOTICE that in support of the within motion, Defendants shall rely upon the Affidavits and Brief submitted herewith. A proposed form of Order has also been submitted.

PLEASE TAKE FURTHER NOTICE that Defendants respectfully request oral argument pursuant to L.Civ.R. 7.1(b)(4), if timely opposition is received.

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Attorneys for Defendants Direct Capital
Corporation, Christian Caruso, George Wade
and Darren Anthony

By: /s/ Harry McEnroe
Harry D. McEnroe, Esq.

DATED: July 31, 2008

CERTIFICATION OF SERVICE

I, Jared P. DuVoisin, being of full age, hereby certify as follows:

1. I am an attorney at law, licensed to practice before this Court and am an associate with the firm of Tompkins, McGuire, Wachenfeld & Barry, LLP.

2. On this date, I caused to be electronically filed with the Clerk of the United States District Court for the District of New Jersey the following motion papers on behalf of Defendants: (1) Notice of Motion To Dismiss with Certification of Service; (2) Brief; (3) Supporting Affidavits; and (4) Proposed Order.

3. Also on this date, a courtesy copy of the above-referenced motion papers were served via Regular Mail upon the Honorable Renee Marie Bumb, United States District Judge.

4. I further certify that on this date I caused copies of the above-referenced motion papers to be served upon all counsel of record in the manner indicated:

Via Lawyers Service & Electronic Filing

Darren H. Goldstein, Esq.
Flaster Greenberg, P.C.
Commerce Center, 1810 Chapel Avenue West
Cherry Hill, NJ 08002-4609

I certify that the foregoing statements made by me are true. I am aware that if any of these statements are willfully false, I am subject to punishment.

/s/ Jared DuVoisin

Jared P. DuVoisin

DATED: July 31, 2008

Harry D. McEnroe, Esq.

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DIRECT CAPITAL CORP., CHRISTIAN
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ANTHONY,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Introduction

Marlin Leasing Corporation ("Marlin") and Direct Capital Corporation ("Direct") are competitors in the business of equipment lease financing. Marlin and Direct have numerous employees responsible for attempting to further the interests of the businesses. The Individual Defendants previously worked for Marlin, but now work for Direct Capital Corporation.

As the Individual Defendants understand the claim of Marlin, they are accused of violating employment agreements with Marlin, a code of ethics promulgated by Marlin, breach of contract, breach of the covenants of good faith and fair dealing, tortious interference with Marlin's customer relationships, tortious interference with Marlin's relationships with certain co-defendants, unfair competition, civil conspiracy, misappropriation of confidential information, computer related offenses, and, as to Mr. Wade, breach of a duty of loyalty to Marlin. However, none of the Individual Defendants have sufficient "minimum contacts" to enable this Court to exercise personal jurisdiction over any of them. None of the Individual Defendants have ever worked in New Jersey or ever lived in New Jersey. None of the Individual Defendants own property in New Jersey. The Individual Defendants have not in any way engendered a belief that any of them were subjecting themselves to this Court's jurisdiction. Accordingly, this

Court lacks personal jurisdiction over the Individual Defendants and each individually requests that the Court dismiss Marlin's action as to each of them.

Procedural History

1. On April 16, 2008, Marlin Leasing Corporation ("Marlin") initiated an action in the Superior Court of New Jersey Chancery Division, Burlington County (Docket No. BUR-C-000052-08) against Direct Capital Corporation, Mr. Christian Caruso, Mr. George Wade, and Mr. Darren Anthony.

2. On May 29, 2008, the Defendants removed the case to this Court. Mr. Caruso, Mr. Wade and Mr. Anthony (the "Individual Defendants") now move to dismiss the claims against them because, as set forth more fully in the accompanying Memorandum of Law which is incorporated herein by reference, this Court does not have personal jurisdiction over any of them.

Factual Background

A. Mr. George Wade

Mr. Wade started with Marlin in September of 2004. Mr. Wade worked in Marlin's Chicago, Illinois office. He was trained in Philadelphia and never traveled to New Jersey pursuant to his job responsibilities, except for one meeting approximately two and a half years into the job. Mr. Wade owns no property in New Jersey, has never resided in New Jersey and, since his departure from Marlin, has not called on any of the

same customers that he called on while he was with Marlin. See Affidavit of Mr. Wade.

Additionally, Marlin does not allege that Mr. Wade executed any type of non-competition, non-solicitation or nondisclosure agreement while he was at Marlin. Accordingly, such an agreement could not even arguably constitute the basis for establishing personal jurisdiction over Mr. Wade through any type of exclusive forum selection clause. Mr. Wade only signed a Code of Ethics Disclosure Statement that contained no forum selection clause.

Marlin also alleges that Mr. Wade forwarded one or more proprietary documents of Marlin to Direct Capital. Even assuming *arguendo* that such assertions are true, for purposes of this Motion, the alleged acts would have taken place entirely within the State of Illinois as Mr. Wade was situated in Marlin's Chicago office at the time and the alleged recipient at Direct Capital was also situated in Chicago at Direct Capital's Chicago office at the time. Id.

Additionally, Mr. Wade has only closed four deals since joining Direct Capital. The customers were not ones that he worked with while with Marlin and they are not a New Jersey customers. Id.

B. Mr. Darren Anthony

Mr. Anthony received an offer letter from Marlin on or

about October 17, 2003 and accepted the offer approximately ten days later on October 27, 2003 when he began work in Marlin's Atlanta, Georgia office. Mr. Anthony began working as an account executive, which is an entry level sales person at Marlin. Eventually, Mr Anthony became a senior account executive and, later, a director of business development for Marlin's Atlanta branch overseeing approximately 20 people. Mr. Anthony has never resided in New Jersey, was not trained by Marlin in New Jersey, did not execute any employment contract in New Jersey and owns no property in New Jersey. See the Affidavit of Mr. Anthony.

Mr. Anthony has not closed a single deal on behalf of Direct Capital since leaving Marlin. Accordingly, it would have been impossible for him to have misappropriated any of Marlin's customers. Id.

Mr. Anthony's only contacts with New Jersey would have been possibly making sales calls and/or closing deals in New Jersey while with Marlin. All such calls would have initiated from Georgia and all such calls would have been done for the benefit of Marlin and not for Mr. Anthony personally. Mr. Anthony is not even certain how many, if any, deals he closed for Marlin's New Jersey customers while he was with Marlin, but it is respectfully suggested that Marlin would have access to such information. Id.

In any event, none of Mr. Anthony's post-departure activities would indicate in any way that Mr. Anthony has purposely availed himself of New Jersey or that he has in any way engendered a belief that he was subjecting himself to this Court's jurisdiction.

C. Mr. Christian Caruso

Mr. Caruso started with Marlin in November of 2003. He was hired in Chicago, he worked in Chicago, he was trained in Chicago and he executed whichever employment agreements he executed in Chicago. Mr. Caruso's official start date is, upon information and belief, January 4, 2004. Over the course of his employment, he started as an account executive and later became a director of business development in July of 2006. He resigned in late October of 2007. See Affidavit of Mr. Caruso.

Mr. Caruso now works for Direct Capital. During his time with Direct Capital, Mr. Caruso has not closed any deal with any client that he worked on while he was with Marlin. Id. Mr. Caruso owns no property in New Jersey, has never resided in New Jersey, and has done nothing to engender a belief that he was subjecting himself to this Court's jurisdiction. Id.

Mr. Caruso believes he has scrupulously avoided communicating with any customers with whom he closed deals while he was at Marlin. Id.

Mr. Caruso has been accused of soliciting Marlin employees

since he left Marlin and became a Direct Capital employee. However, such a claim is not actionable under any contractual theory because none of the written agreements between Marlin and Mr. Caruso contain a non-solicitation covenant. Additionally, Marlin has failed to allege that any of the alleged solicitation of Marlin employees took place with respect to any New Jersey employees of Marlin. Presumably, that is because no such solicitations ever occurred in New Jersey.

With respect to the document or documents that Mr. Wade allegedly requested from a Marlin employee, any such request would have been made entirely within the State of Illinois, and would have no connection with the State of New Jersey. Furthermore, the form that Marlin alleges that Mr. Caruso requested and received appears to be a form that is sent out over 100 times a day by Marlin to prospective customers and, accordingly, is a document generally available to any who seek it. Id. Accordingly, such a document could not rise to the level of a trade secret. Last, the contract clause that Mr. Caruso was interested in receiving was clause that was not utilized by Direct Capital in any respect. Id.

In the interest of full disclosure, Mr. Caruso was also in possession of a rate sheet that expired in January of 2006. Rate sheets expire at least every quarter, and, therefore, such a rate sheet was of no value and was not utilized by Mr. Caruso

while at Direct Capital. Id. The only other document that Mr. Caruso believes he has that relates to Marlin is a telecommunication equipment rate sheet. Again, this document was not utilized by Mr. Caruso or Direct Capital, because Direct Capital does not participate in any such program. Id.

In any event, Mr. Caruso did not obtain any such documents from New Jersey.

Argument

A. Standard of Review.

The Plaintiff has the burden of proving facts sufficient to establish the Court's personal jurisdiction over each of the Individual Defendants by a preponderance of the evidence. See Ameripay, LLC v. Ameripay Payroll, Ltd., 334 F.Supp.2d 629, 632 (D.N.J. 2004). Although Plaintiff's allegations in its complaint and contested factual issues are construed in its favor, the Plaintiff must go beyond the pleadings and offer affirmative proof of the facts relating to personal jurisdiction with respect to each of the Individual Defendants. See Id. at 633. The Plaintiff may not rely on unsupported allegations in the pleadings to make its showing of personal jurisdiction. See Victory Int'l (USA) Inc. v. Perry Ellis Int'l, Inc., Civil Action No. 07-0375, 2008 WL 65177, at *6 (D.N.J. Jan. 2, 2008).

Marlin has made broad, conclusory allegations regarding each of the Individual Defendants in its Complaint but does not

provide affirmative proof of facts establishing this Court's jurisdiction over any of the Individual Defendants. Therefore, Marlin has failed to meet its burden of showing this Court's personal jurisdiction over Mr. Wade, Mr. Anthony, or Mr. Caruso and each is entitled to dismissal of Marlin's claims.

B. The New Jersey District Court Does Not Have Either General Or Specific Personal Jurisdiction Over Any Of The Individual Defendants.

In order for a court to exercise personal jurisdiction over a nonresident defendant, jurisdiction must be authorized under the state's long-arm statute, and federal due process requirements must also be satisfied. Dent v. Cunningham, 786 F.2d 173, 175 (3d Cir. 1986). Courts construe New Jersey's long-arm statute as permitting the exercise of jurisdiction to the extent permissible under the federal due process clause. Ameripay, 334 F.Supp.2d at 632 n.4. Accordingly, the primary analysis herein relates to due process. See Rodi v. Southern New England School of Law, 255 F.Supp.2d 346, 348-49 (D.N.J. 2003). Pursuant to the federal due process clause, "a court may exercise personal jurisdiction over a nonresident defendant if the defendant has certain minimum contacts ... such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." A.S.T., LLC v. Pallenberg, Civ. No. 07-795, 2007 WL 1827188, at *2 (D.N.J. June 25, 2007)

(quotation marks omitted) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

Jurisdiction can either be general, where the defendant has continuous and systematic contacts with the forum state, or specific, where the cause of action is based on the defendant's form-based minimum contacts. Ameripay, 334 F.Supp.2d at 633. In this case, New Jersey does not have either general or specific jurisdiction over any of the Individual Defendants; therefore, the action against each should be dismissed.

1. The Federal Court for the District of New Jersey Cannot Exercise General Jurisdiction Over the Individual Defendants Because None Of Them Have Systematic and Continuous Contact with the State Of New Jersey.

General jurisdiction requires that each of the Individual Defendants have continuous and systematic contact with the forum state. See id. As set forth above, none of the Individual Defendants have such continuous and systematic contacts with New Jersey. None of them have resided in New Jersey or been employed in New Jersey. See Affidavits of Mr. Wade, Mr. Anthony and Mr. Caruso. The only New Jersey contacts any of the Individual Defendants may have had would have been sporadic phone calls made while working with Marlin or Direct Capital which may have resulted in at most, a few deals in the State of New Jersey. These limited contacts alone with the State of New Jersey are not enough to allow the Court to exercise general

jurisdiction over any of the Individual Defendants.

2. Marlin Cannot Establish This Court's Specific Jurisdiction Over Any of the Individual Defendants Because it Cannot Meet Even One Prong of the Three-Prong Test Required to Establish Specific Jurisdiction.

The exercise of specific personal jurisdiction meets with the requirement of due process only when all three prongs of the following test are satisfied: 1) the cause of action arises out of the contacts with the forum state; 2) the defendant purposefully avails himself of the protection of the forum state's laws; and 3) it would not "violate traditional notions of fair play and substantial justice" to require the defendant to defend the suit in the forum state. See In re. Royal Dutch/Shell Transport Securities Litigation, 380 F.Supp.2d 509, 549 (D.N.J. 2005). As Marlin cannot meet any of these three prongs, it cannot establish that this Court has personal jurisdiction over any, much less all, of the Individual Defendants.

a. Marlin Cannot Show That This Claim Arises From the Individual Defendants' Contacts with New Jersey.

Marlin cannot meet the first prong of the test, that Mr. Caruso's, Mr. Anthony's or Mr. Wade's contacts with New Jersey relate to the cause of action. Mr. Anthony works in Atlanta, Georgia currently and he did so when he was with Marlin. Mr. Wade and Mr. Caruso worked in Marlin's Chicago, Illinois office

and continue to work in Chicago, Illinois. All of the allegations in the Complaint relate to conduct that took place outside of the State of New Jersey and therefore cannot form the basis for specific *in personam* jurisdiction over any of the Individual Defendants. Working for a company that happens to be headquartered in New Jersey is insufficient to establish the requisite jurisdictional link. Otherwise, if Marlin happened to be headquartered in Honolulu, these Individual Defendants could presumably be forced to fly to Hawaii to defend this action. Without affirmative proof that each of the individuals' contacts with New Jersey relate to the cause of action, Marlin fails to satisfy this prong of the specific personal jurisdiction analysis.

b. None of the Individual Defendants Purposefully Availed Himself of the Protection of New Jersey's Laws.

Under the second factor of the specific jurisdiction test, each of the Individual Defendants must have purposefully availed himself of the benefits and protection of New Jersey's laws. See In re. Royal Dutch, 380 F.Supp.2d at 549. This inquiry is not only about whether the Individual Defendants' contacts might have caused injury in New Jersey, but whether those contacts should have given each Defendant notice that he should have reasonably anticipated being hailed into court in New Jersey. See id. at 551. Further, where such contacts are not voluntary

or are "random, fortuitous or attenuated", they do not confer personal jurisdiction. See Harleysville Ins. Co. of N.J. v. Clark, Civil Action No. 05-5566, 2006 WL 2135834, at *4 (D.N.J. July 27, 2006) (quotation marks and citation omitted).

c. It would be unreasonable and unfair to subject the Individual Defendants to defend this action in New Jersey.

This Court has held that, "[f]or personal jurisdiction to comport with 'fair play and substantial justice,' it must be reasonable to require the defendant to defend the suit in the forum state." Victory Int'l (USA) Inc. v. Perry Ellis Int'l, Inc., Civil Action No. 07-0375, 2008 WL 65177, at *5 (D.N.J. Jan. 2, 2008). For the Individual Defendants, it would be unreasonable and unfair to litigate this matter in New Jersey. Such litigation could pose an undue hardship on the Individual Defendants. The Plaintiff, on the other hand, has corporate offices in Atlanta and Chicago, where the Individual Defendants work and live. Accordingly, it would pose far less of a hardship on the Plaintiff to litigate these claims where there is actually personal jurisdiction over the Individual Defendants.

Conclusion

Because the Plaintiff cannot satisfy any, much less all, of the three prong test to establish personal jurisdiction over the

Individual Defendants, the Court should dismiss this action as to the Individual Defendants.

Respectfully submitted,

/s/ Harry McEnroe

Harry D. McEnroe, Esq.

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Attorneys for Defendants Direct Capital Corporation, Christian Caruso, George Wade and Darren Anthony

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MARLIN LEASING CORPORATION,

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DIRECT CAPITAL CORP., CHRISTIAN
CARUSO, GEORGE WADE, and DARREN
ANTHONY,

Defendants.

ORDER

THIS MATTER having been opened to the Court by Tompkins, McGuire, Wachenfeld & Barry, LLP on behalf of defendants, Direct Capital Corporation, Christian Caruso, George Wade and Darren Anthony, on motion to dismiss brought pursuant to Fed.R.Civ.P.

12(b)(2), and the Court having read the moving papers and all opposition thereto, and good cause having been shown;

IT IS on this _____ day of September 2008;

ORDERED, that defendants, Direct Capital Corporation, Christian Caruso, George Wade and Darren Anthony's motion to dismiss is hereby granted; and it is

FURTHER ORDERED, that the Complaint is hereby dismissed in its entirety with prejudice as to defendants, Christian Caruso, George Wade and Darren Anthony; and it is

FURTHER ORDERED, that Tompkins, McGuire, Wachenfeld & Barry shall serve a true and complete copy of this Order upon all counsel of record within __ days of receipt.

Honorable Renee Marie Bumb, U.S.D.J.

Harry D. McEnroe, Esq.

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Defendants.

AFFIDAVIT OF DARREN ANTHONY

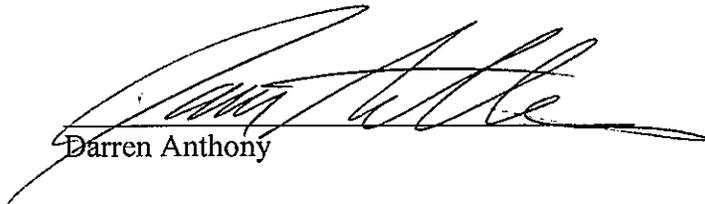
I, Darren Anthony, under oath, hereby depose and say as follows:

1. I currently reside at 62370 Deerwoods Trail, Alpharetta, Georgia 30005.
2. I received an offer letter from Marlin on or about October 17, 2003, and I accepted the offer approximately ten days later. I then began work in Marlin's Atlanta, Georgia office as an account executive.
3. Account executives are entry-level sales people at Marlin.
4. I eventually became a senior accountant executive in and later I became a director of business development for Marlin's Atlanta branch overseeing approximately twenty people.
5. I have never resided in New Jersey.
6. When I started at Marlin, I was trained in Atlanta, Georgia.
7. I did not execute any employment contract in New Jersey.
8. I own no property in New Jersey.
9. Since leaving Marlin, I have not called on any of the vendors that I had called on while I was working for Marlin.

Marlin, they would have been initiated from Georgia and would have been done for the benefit of Marlin.

11. It would create an undue burden and hardship for me to travel to New Jersey to defend this litigation.

This ends my affidavit testimony.


Darren Anthony

STATE OF GEORGIA
COUNTY OF FULTON

Subscribed, sworn to and acknowledged before me this 30th day of
July, 2008.


Justice of the Peace/Notary Public

My Commission Expires: July 13, 2010

Harry D. McEnroe, Esq.

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v.

DIRECT CAPITAL CORP., CHRISTIAN
CARUSO, GEORGE WADE, and DARREN
ANTHONY,

Defendants.

AFFIDAVIT OF CHRISTIAN CARUSO

I, Christian Caruso, under oath, hereby depose and say as follows:

1. I currently reside at 2009 West Walton Street, Chicago, Illinois 60622.
2. I started working for Marlin in November of 2003.
3. I was hired in Chicago, Illinois, was trained in Chicago and executed my employment agreement in Chicago.
4. I believe that my official start date was January 4, 2004.
5. Over the course of my employment, I started as an account executive, which is an entry-level position, and later became a director of business development in July of 2006.
6. I resigned in late October of 2007.
7. I now work for Direct Capital Corporation. I have not closed any deal with any client that I worked with while I worked with Marlin.
8. I own no property in New Jersey.
9. I have never resided in New Jersey.
10. Since joining Direct Capital, I have done my best to scrupulously avoid communicating with any customers with whom I closed deals with while I was at Marlin.

11. I have been accused of soliciting Marlin employees since I left Marlin and became a Direct Capital employee. I am not aware of any nonsolicitation covenant contained in any document that I executed in favor of Marlin. To the extent that I attempted any solicitation of Marlin employees, no such solicitation actions ever occurred in New Jersey and did not involve any New Jersey employees.

12. With respect to the document or documents that Marlin alleges that I requested from a Marlin employee, any such request would have been made entirely in the State of Illinois and had no connection with the State of New Jersey.

13. The form that Marlin alleges that I requested is a form that is sent out over one hundred times a day from Marlin employees to prospective customers and is a document that is generally available to anyone who desires it.

14. With respect to the contract clause that I am alleged to have requested a copy of, that clause was never utilized by Direct Capital in any respect and such a request, even if made, had nothing to do with New Jersey.

15. The rate sheet of Marlin's that I was in possession of expired in January of 2006. Rate sheets expire at least every quarter and this rate sheet was of no value and was not utilized by me since I joined Direct Capital in 2007. I also had a telecommunication rate sheet that was not utilized by me or Direct Capital in any respect because Direct Capital does not participate in any such program. Again, these rate sheets had nothing to do with New Jersey.

16. It would create an undue burden and a hardship for me to travel to New Jersey to defend this litigation.

This ends my affidavit testimony.

Christian Caruso

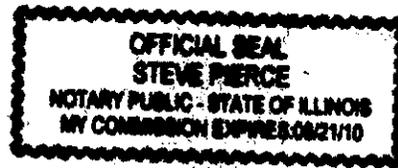


STATE OF
COUNTY OF

Subscribed, sworn to and acknowledged before me this 30th day of
July, 2008.

Steve Pierce
Justice of the Peace/Notary Public

My Commission Expires:



Harry D. McEnroe, Esq.

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ANTHONY,

Defendants.

AFFIDAVIT OF GEORGE WADE

I, George Wade, under oath, hereby depose and say as follows:

1. I currently reside at 3900 North Pine Grove Street, Number 508, Chicago, Illinois 60613.

2. I began work with Marlin in September 2004 in Marlin's Chicago, Illinois office. I was trained in Philadelphia and I never traveled to New Jersey for my job responsibilities, except for one meeting approximately two and a half years into the job.

3. I own no property in New Jersey.

4. I have never resided in New Jersey.

5. Since my departure from Marlin, I have not called on any of the same customers that I had called on while I was with Marlin.

6. I do not recall executing a non-competition, non-solicitation or disclosure agreement in favor of Marlin. The document that Marlin alleges that I executed was a code of ethics disclosure statement. That statement contained no forum selection clause.

7. Marlin alleges that I forwarded one or more proprietary documents to Direct Capital. My understanding is that the court must accept such assertions as true for purposes of the Motion to Dismiss. However, even assuming that I forwarded or received Marlin documents,

and even assuming that the said documents were proprietary, all such actions would have taken place in Illinois and had nothing to do with New Jersey.

8. I have only closed four deals since joining Direct Capital. They were not customers that I worked with while with Marlin and the customers were not New Jersey customers.

9. It would create an undue hardship for me if I had to travel to New Jersey to defend this litigation.

This ends my affidavit testimony.



George Wade

STATE OF
COUNTY OF

Subscribed, sworn to and acknowledged before me this 30th day of
July, 2008.



Justice of the Peace/Notary Public

My Commission Expires:

