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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Dancesport Videos LLC, an Arizona
limited liability company,

10 Plaintiff,

11 v.

12 James Kunitz, husband, et al.,

13 Defendants.
14

No. CV11-1850 PHX DGC

ORDER

15 Plaintiff Dancesport Videos LLC (“DSV”) filed a first amended and supplemental
16 complaint against Defendants James and Jaana Kunitz and Digital Video Creations, Inc.
17 (“Digital”) on March 3, 2012. Doc. 44. Defendants filed a first amended and
18 supplemented counterclaim (“the counterclaim”) against DSV and twelve Third Party
19 Defendants. Doc. 58. Third Party Defendants Russ Clark, Trustee of the Russ S. Clark
20 Revocable Living Trust; Rosalyn DeBeve, Trustee of the Rosalyn O. DeBeve Revocable
21 Living Trust; KC Limited Company LLC; Hunter Lisle; Carey Mason; Mark Theiss;
22 Rene Roberts; EJ Forever, Emmanuel Pierre Antoine, and Jasmin Dadlani, Co-Trustees
23 of the Jepa Revocable Living Trust, (collectively “Third Party Defendants”) filed
24 separate motions to dismiss the counterclaim pursuant to Rule 12(b)(2) and 12(b)(6).
25 Docs. 73, 75, 77, 79, 81, 83, 97, and 104. The same Third Party Defendants filed a joint
26 motion to dismiss the counterclaim on statute of limitations grounds. Doc. 114.
27 Defendant and Counter-Claimant Digital filed separate oppositions to the motions to
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1 dismiss on Rule 12(b)(6), 12(b)(2), and statute of limitations grounds (Docs. 115, 118,
2 131), and the Third Party Defendants filed joint replies. Docs. 140, 141, 142. Third
3 Party Defendants Robert and Julia Powers filed a separate motion to dismiss Defendants'
4 tortious interference counterclaim pursuant to Rule 12(b)(6). Doc. 108. Digital filed an
5 opposition to this motion (Doc. 122), and the Powerses filed a reply. Doc. 132. All of
6 the pending motions have been fully briefed. For the reasons set forth below, the Court
7 will deny each of the motions.¹

8 **I. Background.**

9 DSV is an Arizona-based limited liability company in the business of developing
10 aerobic exercise, dance, and fitness media and instructor training programs and licenses.
11 Doc. 44, ¶¶ 1, 16. Defendants James and Jaana Kunitz are original members of DSV and
12 owners and members of Digital, which was granted a minor membership in DSV when
13 DSV was organized on June 6, 2005. *Id.*, ¶¶ 13-15.

14 DSV's original members agreed that Bob and Julia Powers, both world class
15 rhythm dancers, would raise the initial capital and bring in investors, and James and
16 Jaana Kunitz, also world-class rhythm dancers, would handle video production and
17 marketing. *Id.*, ¶¶ 18-19. On July 12, 2005, DSV's original members entered into an
18 Operating Agreement governing their relationships and contributions. *Id.*, ¶ 20.
19 Subsequently, Digital and B&J Rhythm, Inc., a company owned by Bob and Julia
20 Powers, became the managing members of DSV. *Id.*, ¶ 25.

21 The parties present differing accounts of ensuing events. Plaintiff claim that DSV
22 successfully marketed and sold aerobic dance exercise videos featuring Julia Powers and
23 Defendant Jaana Kunitz under the Dance and Core Rhythms Trademarks and that
24 Defendants began to produce a competing product known as "Extreme Cardio Dance"
25 featuring only Jaana Kunitz and using the 3 Core Movements developed by DSV. *Id.*, ¶¶

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27 ¹ The requests for oral argument are denied because the issues have been fully
28 briefed and oral argument will not aid the Court's decision. *See* Fed. R. Civ. P. 78(b);
Partridge v. Reich, 141 F.3d 920, 926 (9th Cir. 1998).

1 17-62. Plaintiff alleges that under Digital’s management, DSV was paying significant
2 amounts in expenses to third-party vendors and in compensation to Digital, but
3 distributing minimal profits to DSV members. *Id.*, ¶ 63. Plaintiff alleges that a majority
4 of members voted on September 13, 2009 to freeze DSV accounts and suspend Digital
5 from serving as the management company, that Bob Powers notified Digital via email on
6 September 14, 2009 that they had voted to take control of DSV’s checking account, and
7 that James Kunitz determined on September 17, 2009 that the Management Agreement
8 was terminated. *Id.*, ¶ 65. Thereafter, Plaintiff alleges, James Kunitz repeatedly made
9 unlawful assignments of the Dance and Core Rhythms Trademarks (“the Trademarks”) to
10 Digital, used the Trademarks in association with Digital’s competing products,
11 misdirected website traffic from DSV to Digital, and falsely represented to DSV’s
12 marketing company and its affiliates that DSV was out of business. *Id.*, ¶¶ 68-126.
13 Plaintiff’s first amended and supplemental complaint makes thirteen claims for relief
14 based on these allegations. *Id.*, ¶¶ 127-219.

15 Defendants allege in their counterclaim that during the time that Digital served as
16 the management company for DSV, Robert Powers falsely represented to James Kunitz
17 that Powers had obtained approval from all DSV investors to spend money on a side
18 venture that involved certifying dance instructors around the country to teach Core
19 Rhythms in fitness classes. Doc. 58, ¶¶ 25-26. Defendants allege that this venture was
20 unsuccessful, resulting in a loss of \$425,000 to \$450,000, and that James Kunitz solicited
21 the vote of all DSV members to cut Powers’ salary and to prevent him from spending any
22 more money on this business. *Id.*, ¶¶ 27-30. Defendants allege that the members
23 requested one month to consider Kunitz’ proposal and that during this time Robert and
24 Julia Powers approached each member and persuaded them to vote to remove Digital
25 from management of DSV and to retain B&J Rhythms as sole manager in exchange for
26 receiving a monthly salary for serving on a board of directors despite the fact that the
27 members had no involvement in the day to day operations of DSV or expertise in running
28 the business. *Id.*, ¶ 32. Defendants allege that these and subsequent actions by the

1 Powerses and Third Party Defendants effectively left DSV as a non-functioning entity.
2 *Id.*, ¶¶ 33-36. These allegations are the basis of Defendants’ counterclaims for breach of
3 fiduciary duty against the Third Party Defendants, tortious interference against Robert
4 Powers, and misappropriation of likeness against DSV. *Id.*, ¶¶ 37-48.

5 **II. Rule 12(b)(6) Legal Standard.**

6 When analyzing a complaint for failure to state a claim to relief under Rule
7 12(b)(6), the well-pled factual allegations are taken as true and construed in the light
8 most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th
9 Cir. 2009). Legal conclusions couched as factual allegations are not entitled to the
10 assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and therefore are
11 insufficient to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec.*
12 *Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010). To avoid a Rule 12(b)(6) dismissal, the
13 complaint must plead enough facts to state a claim to relief that is plausible on its face.
14 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This plausibility standard “is not
15 akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a
16 defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at
17 556). “[W]here the well-pleaded facts do not permit the court to infer more than the mere
18 possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the
19 pleader is entitled to relief.’” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

20 **III. Third Party Defendants’ Motions to Dismiss Breach of Fiduciary Duty Claim.**

21 **A. Failure to State a Claim.**

22 The Third Party Defendants argue that Arizona law precludes holding a member
23 liable for the obligations and liabilities of a company solely on the basis of being a
24 member, and that Counter-Claimants are, in essence, seeking to hold them liable merely
25 for being members exercising their legitimate member rights when they cast votes to
26 terminate Digital’s Management Agreement. Doc. 77 at 8-9. Third Party Defendants
27 also argue that Counter-Claimants fail to allege facts showing that they, as minority
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1 interest holders in DSV, had a fiduciary duty to the Kunitzes or Digital. *Id.* at 10-12.²

2 Third Party Defendants' first argument is unpersuasive. The counterclaim does
3 not seek to hold them liable simply for being members who exercised their rights to vote
4 – in this case, to revoke Digital's Management Agreement. *See* Doc. 77 at 9. Rather,
5 Counter-Claimants allege that, once voted onto DSV's board of directors, Third Party
6 Defendants took actions solely for their own benefit and to the detriment of DSV,
7 including distributing all of DSV's revenues to themselves as a "salary expense" and
8 thereby depriving Digital of its rightful distributions. Doc. 58, ¶32. Counter-Claimants
9 further allege that Third Party Defendants, while collecting monthly salaries, failed to
10 perform the duties incumbent upon directors – such as paying vendors and creditors and
11 promoting the company – effectively letting the company fail while distributing its
12 remaining proceeds to themselves. *Id.*, ¶¶ 34, 36. These alleged actions go beyond
13 exercising ordinary member rights.

14 The argument that Third Party Defendants' did not owe a fiduciary duty to
15 Counter-Claimants because they are merely minority members of an LLC and had no
16 position of superiority over the Kunitzes or Digital is also unpersuasive. Counter-
17 Claimants cite to Arizona case law for the proposition that directors of a corporation owe
18 a fiduciary duty to the owners of the company (Doc. 115 at 7), and to fundamental
19 principles of agency law holding that managers of an LLC owe a fiduciary duty to the
20 company and its members. *Id.*, citing Restatement (Second) of Agency § 387. Counter-
21 Claimants have alleged not only that the named Third Party Defendants are members of
22 DSV, but that, as of August 24, 2009, they became part of a board of directors. Doc. 58,
23 ¶¶ 11-18. Although Counter-Claimants allege that DSV is an Arizona limited liability
24 company and not a corporation, they allege actions taken by Third Party Defendants in
25 their role as directors that plausibly gave them "superiority of position" over the Kunitzes

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27 ² Because Third Party Defendants make substantially identical arguments, unless
28 otherwise noted, the Court will cite specifically to the arguments put forth by K.C.
Limited Company, LLC as representative of the arguments of all Third Party Defendants.

1 and Digital as non-managing members and thereby placed Counter-Claimants in a role of
2 “peculiar reliance” upon them for the ongoing viability of the company. *See Standard*
3 *Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 335 (Ariz. Ct. App. 1997) (citing the
4 grounds for a fiduciary relationship).

5 Third Party Defendants’ citation to case-law from other jurisdictions (Doc. 140
6 at 7) does not lead to a contrary conclusion. These cases stand for the proposition that
7 minority members of an LLC do not owe a fiduciary duty to other members when they
8 are neither managers nor controlling members. *See, e.g., Coventry Real Estate Advisors,*
9 *L.L.C. v. Developers Diversified Realty Corp.*, 84 A. D. 3d. 583, 584 (N.Y. 2011) (stating
10 that under Delaware law, fiduciary duties are imposed, “‘only on managers and those
11 designated as controlling members of an LLC,’ and not on non-managing minority
12 members such as DDR.”) (internal citation omitted). None of the cases cited, however,
13 contains the facts presented here – allegations that Third Party Defendants took actions
14 not simply as minority members, but as directors of the company, funneling money to
15 themselves and depriving Digital of its rightful disbursements.

16 Third Party Defendants dispute that there was a board of directors as might be
17 found in a corporation, but this factual dispute cannot be resolved at the pleading stage
18 where the Court is required to take all well-pled allegations in the complaint as true and
19 to construe the complaint in the light most favorable to the non-moving party. *Cousins v.*
20 *Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Under the facts alleged, Counter-
21 Claimants have made a plausible claim that a fiduciary relationship existed between the
22 named Third Party Defendants and Counter-Claimants from the time the Third Party
23 Defendants allegedly became directors, and that the Third Party Defendants breached
24 their fiduciary duties when they engaged in actions solely for their own financial benefit
25 to the loss of DSV.

26 Third Party Defendants argue for the first time in their reply that the only action
27 available to Counter-Claimants under Arizona law is a derivative action on behalf of
28 DSV, and that their individual action should therefore be dismissed. Doc. 140 at 9-12.

1 The Court will not consider arguments made for the first time in a reply brief. *See, e.g.,*
2 *Delgadillo v. Woodford*, 527 F.3d 919, 930 n. 4 (9th Cir.2008); *Marlyn Nutraceuticals,*
3 *Inc. v. Improvita Health Products*, 663 F.Supp.2d 841, 848 (D. Ariz. 2009). The Court
4 will deny Third Party Defendants’ motion to dismiss on the basis of failure to state a
5 claim.

6 **B. Statute of Limitations.**

7 Third Party Defendants argue that Counter-Claimants did not file their breach of
8 fiduciary duty claim within the applicable two-year statute of limitations. “[T]he statute
9 of limitations defense . . . may be raised by a motion to dismiss . . . [i]f the running of the
10 statute is apparent on the face of the complaint.” *Jablon v. Dean Witter & Co.*, 614 F.2d
11 677, 682 (9th Cir. 1980) (citing *Graham v. Taubman*, 610 F.2d 821 (9th Cir. 1979)).
12 Even if the relevant dates in the complaint are beyond the statutory period, however, the
13 “complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can
14 prove no set of facts that would establish the timeliness of the claim.” *Hernandez v. City*
15 *of El Monte*, 138 F.3d 393, 402 (9th Cir. 1998) (quoting *Supermail Cargo, Inc. v. United*
16 *States*, 68 F.3d 1204, 1206 (9th Cir. 1995); *see Cervantes v. City of San Diego*, 5 F.3d
17 1273, 1275 (9th Cir. 1993). Indeed, “[d]ismissal on statute of limitations grounds can be
18 granted pursuant to Fed. R. Civ. P. 12(b)(6) ‘only if the assertions of the complaint, read
19 with the required liberality, would not permit the plaintiff to prove that the statute was
20 tolled.’” *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) (citing *Vaughan v.*
21 *Grijalva*, 927 F.2d 476, 478 (9th Cir. 1991) (quoting *Jablon*, 614 F.2d at 682)); *see*
22 *Pisciotta v. Teledyne Indus., Inc.*, 91 F.3d 1326, 1331 (9th Cir. 1996). “‘Because the
23 applicability of the equitable tolling doctrine often depends on matters outside the
24 pleadings, it is not generally amenable to resolution on a Rule 12(b)(6) motion.’”
25 *Hernandez*, 138 F.3d at 402 (quoting *Supermail Cargo*, 68 F.3d at 1206); *see Federal*
26 *Civil Procedure Before Trial* § 9:194, at 9-48, §9:214.1, at 9-57.

27 Third Party Defendants assert that Counter-Claimant’s breach of fiduciary duty
28 claim is subject to the two-year statute of limitations found in A.R.S. 12-542(3) for tort

1 claims involving injury to property. Doc. 114 at 7. They argue that the bases for this
2 claim, as stated in the counterclaim, are the votes taken on September 21, 2009 to
3 terminate DSV's Management Agreement with Digital, and on October 8, 2009 to oust
4 James and Jaana Kunitz from membership. Doc. 114 at 9; *see* Doc. 58, ¶¶ 19-20.
5 Counter-Claimants filed their first counterclaim on December 23, 2011, followed by a
6 corrected counterclaim on January 12, 2012 (Doc. 33), and the instant counterclaim on
7 May 31, 2012 (Doc. 58), all more than two years after these votes. Third Party
8 Defendants argue that it is apparent on the face of the counterclaim that the statute of
9 limitations had expired and Counter-Claimants allege no facts from which to conclude
10 that the statute was tolled. Doc. 114 at 9.

11 Counter-Claimants do not dispute that their claim is subject to a two-year
12 limitations period. They argue, however, that their reference to the October 8, 2009
13 ouster alleged in Plaintiff's complaint does not establish when the ouster actually took
14 place and that, as set forth in the attached affidavit of James Kunitz, they did not actually
15 learn of the ouster or their loss of interest in DSV until DSV provided them notice on
16 March 26, 2011. Doc. 131 at 3-4. Counter-Claimants further argue that they alleged
17 ongoing violations of Third Party Defendants' fiduciary duties, such as failing to pay
18 vendors and creditors, distributing income only to themselves and not DSV, and
19 effectively winding down the business, for which Counter-Claimants argue they were
20 unable to provide precise dates because they were shut out of the business. *Id.* at 4-6.
21 Counter-Claimants argue that the discovery rule applies and the statute of limitations was
22 tolled until they received written notice of Third Party Defendants' actions in March
23 2011 because, apart from this notice, they were not aware of what was actually happening
24 inside the company or when the alleged breaches of fiduciary duty occurred. *Id.* at 7.

25 The date Counter-Claimants became aware of actions alleged in the counterclaim
26 constitutes a factual issue that cannot be resolved at the pleading stage. Because it does
27 not appear beyond doubt that Counter-Claimants can prove no set of facts that would
28 establish the timeliness of their claim, the Court will deny Third Party Defendants'

1 motion to dismiss on statute of limitations grounds.

2 **C. Personal Jurisdiction.**

3 With the exceptions of KC Limited Company, LLC, which identifies itself as an
4 Arizona limited liability company (Doc. 77 at 3), and Rosalyn DeBeve, who the
5 counterclaim identifies as residing in Phoenix, Arizona (Doc 58, ¶ 18), the Third Party
6 Defendants all argue that the counterclaim against them should be dismissed for lack of
7 personal jurisdiction. *See, e.g.*, Doc. 73 at 9-15. Counter-Claimants argue in response
8 that the Court has specific personal jurisdiction. Doc. 118 at 3.

9 Plaintiff bears the burden of establishing personal jurisdiction. *See, e.g. Zigler v.*
10 *Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995). Because the Court is resolving
11 the motion to dismiss without holding an evidentiary hearing, Plaintiff “need make only a
12 prima facie showing of jurisdictional facts to withstand the motion.” *Ballard v. Savage*,
13 65 F.3d 1495, 1498 (9th Cir. 1995). That is, Plaintiff “need only demonstrate facts that if
14 true would support jurisdiction over [Defendants].” *Ballard*, 65 F.3d at 1498; *see*
15 *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1085 (9th Cir. 2000)
16 (“Where . . . the district court does not hold an evidentiary hearing but rather decides the
17 jurisdictional issue on the basis of the pleadings and supporting declarations, we will
18 presume that the facts set forth therein can be proven.”). Disputed facts must be decided
19 in Plaintiff’s favor. *See Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001).

20 Because there is no federal statute that governs personal jurisdiction in this case,
21 Arizona’s long-arm rules apply. *See Terracom v. Valley Nat’l Bank*, 49 F.3d 555, 559
22 (9th Cir. 1995). Arizona Rule of Civil Procedure 4.2(a) “provides for personal
23 jurisdiction co-extensive with the limits of federal due process.” *Doe v. Am. Nat’l Red*
24 *Cross*, 112 F.3d 1048, 1050 (9th Cir. 1997) (citing *Batton v. Tenn. Farmers Mut. Ins.*
25 *Co.*, 736 P.2d 2, 4 (Ariz. 1987)). Federal due process requires that a defendant have
26 sufficient minimum contacts with the forum state so that the exercise of personal
27 jurisdiction will not offend traditional notions of fair play and substantial justice. *See*
28 *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

1 The Ninth Circuit applies a three-part test for specific jurisdiction. Such
2 jurisdiction exists if (1) the defendant purposefully availed himself of the privileges of
3 conducting activities in the forum, thereby invoking the benefits and protections of its
4 laws, (2) the claim arises out of the defendant’s forum-related activities, and (3) the
5 exercise of jurisdiction is reasonable. *See, e.g., Bancroft & Masters, Inc. v. Augusta Nat’l*
6 *Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000); *Burger King Corp. v. Rudzewicz*, 471 U.S.
7 462, 472-76 (1985). The Court will address each of these three factors.

8 **1. Purposeful Availment.**

9 In cases arising out of contractual relationships, including those involving related
10 tort claims, the Ninth Circuit applies the “purposeful availment” test enunciated in
11 *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), which “requires that the defendant engage
12 in some form of affirmative conduct allowing or promoting the transaction of business
13 within the forum state. This focus on the defendant’s affirmative conduct is designed to
14 ensure that the defendant is not haled into court as the result of random, fortuitous, or
15 attenuated contacts.” *Gray & Co. v. Firstenberg Mach. Co.*, 913 F.2d 758, 760 (9th Cir.
16 1990) (citation omitted); *see Roth*, 942 F.2d 617, 621 (9th Cir. 1991) (applying
17 purposeful availment test in breach of contract action); *McGlinchy v. Shell Chem. Co.*,
18 845 F.2d 802, 817 (9th Cir. 1988). A defendant has engaged in affirmative conduct and
19 thereby “purposely availed himself of the benefits of a forum if he has deliberately
20 ‘engaged in significant activities within a State or has created ‘continuing obligations’
21 between himself and the residents of the forum.” *Gray*, 913 F.2d at 760 (quoting *Burger*
22 *King*, 471 U.S. at 475-76); *see Cybersell*, 130 F.3d at 417 (stating that “the ‘purposeful
23 availment’ requirement is satisfied if the defendant has taken deliberate action within the
24 forum state or if he has created continuing obligations to forum residents”) (citing
25 *Ballard*, 65 F.3d at 1498).

26 Counter-Claimants argue that the Third Party Defendants purposely availed
27 themselves of the privilege of conducting business in Arizona because the alleged
28 tortious conduct took place in Arizona while the Third Party Defendants were acting as a

1 board of directors of DSV, the Third Party Defendants had access to DSV’s Arizona bank
2 accounts, and the Operative Agreement and First Amendment that all of them signed
3 contains an Arizona choice-of-law provision. Doc. 118 at 13. In sum, Counter-
4 Claimants assert that through the ownership and operation of a business in Arizona, Third
5 Party Defendants purposely availed themselves of the privilege of conducting business in
6 the state. *Id.*

7 Taking the allegations in the counterclaim and pleadings as true, the Court finds
8 that Counter-Claimants have made a prima facie showing for personal jurisdiction. The
9 counterclaim alleges that DSV is an Arizona limited liability company that was
10 conducting business and maintaining its principle place of operations in Arizona. Doc.
11 58, ¶ 6. As previously discussed, the counterclaim also alleges that each of the named
12 Third Party Defendants took on the role of director on a board of directors and collected a
13 salary from DSV. Doc. 58, ¶ 32. The Declaration of James Kunitz asserts that the Third
14 Party Defendants took over day-to-day decisions for the company, including a decision to
15 suspend all media buys. Doc. 119, ¶ 9. Counter-Claimants list specific meetings
16 regarding the business operations of DSV in which it alleges each of the Third Party
17 Defendants participated. Doc. 118 at 8-9. Although Third Party Defendants argue that
18 they did not attend meetings in person (Doc. 141 at 6), physical presence in the forum
19 state is not required to show purposeful availment where Counter-Claimants have alleged
20 that participation in the meetings was in furtherance of directing the operations of the
21 Arizona-based company. Assuming at this stage that Counter-Claimants can prove the
22 facts set forth in their counterclaim and declaration, the actions alleged are sufficient to
23 show that Third Party Defendants purposely availed themselves of the privilege of doing
24 business in Arizona.

25 2. “Arising Out of.”

26 The Ninth Circuit has adopted a “but for” test for determining whether a cause of
27 action arises out of a defendant’s forum-related activities. *See Omeluk v. Langstein Slip*
28 *& Batbyggeri A/S*, 52 F.3d 267, 271 (9th Cir. 1995). The “arising out of” requirement is

1 met if, “but for” the contacts between the defendant and the forum state, the cause of
2 action would not have arisen. *See Terracom v. Valley Nat’l Bank*, 49 F.3d 555, 561 (9th
3 Cir. 1995). Here, the counterclaim of breach of fiduciary duty would not exist but for the
4 Third Party Defendants’ alleged actions as directors of DSV.

5 **3. Reasonableness.**

6 An unreasonable exercise of jurisdiction violates the Due Process Clause even if
7 the “purposeful availment” and “arising out of” requirements are satisfied. *See Int’l*
8 *Shoe*, 326 U.S. at 316; *Ziegler*, 64 F.3d at 474-75. A district court presumes, however,
9 that its exercise of jurisdiction over a defendant is reasonable if these two requirements
10 are met. *See Ballard*, 65 F.3d at 1500. The burden then shifts to the defendant to
11 “present a compelling case that the presence of some other considerations would render
12 jurisdiction unreasonable.” *Id.* (quoting *Burger King*, 471 U.S. at 477).

13 The Ninth Circuit considers seven factors to determine whether the exercise of
14 specific jurisdiction over a defendant is reasonable: (1) the extent of the defendant’s
15 purposeful interjection into the forum state, (2) the burden on the defendant of litigating
16 in the forum, (3) the extent of conflicts with the sovereignty of the defendant’s state,
17 (4) the forum state’s interest in adjudicating the dispute, (5) the most efficient judicial
18 resolution of the dispute, (6) the importance of the forum to the plaintiff’s interest in
19 convenient and effective relief, and (7) the existence of an alternative forum. *See Ziegler*,
20 64 F.3d at 475 (citing *Terracom*, 49 F.3d at 561); *World-Wide Volkswagen Corp. v.*
21 *Woodson*, 444 U.S. 286, 292 (1980) (listing several of the seven factors).

22 Each of the Third Party Defendants argues that the extent of his or her
23 involvement in Arizona was limited to the activities of a minority shareholder and that
24 this does not constitute purposeful interjection. *See, e.g.*, Doc. 73 at 12, 141-1, ¶¶ 6-8.
25 As noted above, however, Counter-Claimants assert that each Third Party Defendant
26 acted purposefully in receiving salaries and assuming direction of the business of DSV.
27 This factor weighs in favor of asserting personal jurisdiction.

28 Third Party Defendants’ argue that litigating in Arizona would be unfairly

1 burdensome because, as residents of other states, they would have to bear the expense of
2 travel for depositions and court appearances. Doc. 73 at 12-13.³ Although the Court is
3 mindful that litigating in an out-of-state forum is potentially more costly and more
4 burdensome than litigating in one's home state, Third Party Defendants have not
5 presented evidence that this would create an undue hardship such that it would be
6 unreasonable to hale them into this forum for Counter-Claimants' Arizona-based claims.

7 Third Party Defendants also argue that their inclusion in the litigation would
8 confuse the issues, leading to judicial inefficiency, because the core dispute is between
9 Counter-Claimants and DSV. Doc. 73 at 13. Because the Court has already determined
10 that Counter-Claimants have alleged sufficient facts to state a plausible claim against
11 each of the Third Party Defendants, this argument lacks merit. Judicial efficiency would
12 best be served by having the identical claim against all Third Party Defendants
13 adjudicated in the same forum.

14 On the whole, Third Party Defendants have failed to present a compelling case
15 that personal jurisdiction in Arizona would be unreasonable. The Court concludes that it
16 has specific personal jurisdiction over Third Party Defendants.

17 **IV. Robert and Julia Powers' Motion to Dismiss the Tortious Interference Claim.**

18 Counter-Claimants make a tortious interference claim against Robert Powers,
19 alleging that Powers wrongfully effectuated the termination of Digital's Management
20 Agreement with DSV, causing Digital to suffer financial harm. Doc. 58, ¶¶ 42-45.
21 Powers argues that the Court should dismiss this claim under Rule 12(b)(6) because it is
22 missing an essential element, namely, that an independent third party interfered with the
23 contract of two other parties. Doc. 108 at 2. Powers argues that, taking the allegation in
24 the counterclaim as fact, he and Julia Powers were officers and "control persons" of DSV
25 and, as such, he is not an independent third party who can be held liable for interfering
26 with DSV's contract. *Id.* at 3-4. Powers also argues that long-standing Arizona law

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28 ³ Unless otherwise noted, the Court will cite to the arguments put forth by Russ Clark as representative of the arguments of all Third Party Defendants.

1 holds that an officer of a company cannot be held liable for tortious interference with a
2 contract when termination of the contract results from business decisions made in the
3 course of his ordinary business duties. *Id.* at 4.

4 Under Arizona law, the elements of a claim of tortious interference with contract
5 are: (1) the existence of a valid contractual relationship or business expectancy;
6 (2) knowledge of the relationship or expectancy on the part of the interferer;
7 (3) intentional interference inducing or causing a breach or termination of the relationship
8 or expectancy; and (4) resultant damage to the party whose relationship or expectancy
9 has been disrupted. See *Antwerp Diamond Exch. of Am., Inc. v. Better Bus. Bur. of*
10 *Maricopa County, Inc.*, 637 P.2d 733, 740 (Ariz. 1981); see also Restatement (Second) of
11 Torts § 766 (1977). “In addition to proving the four elements stated in *Antwerp Diamond*
12 *Exchange*, the plaintiff bringing a tortious interference action must show that the
13 defendant acted improperly.” *Wagenseller v. Scottsdale Mem’l Hosp.*, 710 P.2d 1025,
14 1043 (Ariz. 1985).

15 Counter-Claimants argue that they have satisfied all the necessary pleading
16 requirements because they have alleged that they had a valid management contract with
17 DSV (Doc. 58, ¶ 23), Powers knew of this (*id.*), Powers intentionally interfered with the
18 contract, inducing breach (*id.*, ¶ 32), and the breach resulted in damages. *Id.*, ¶ 44.
19 Counter-Claimants further argue that Powers was, in fact, a third party to the contract
20 because the contract was between Digital and DSV and it was B&J Rhythms, not Powers,
21 that was the managing member of DSV. Doc. 122 at 7. Counter-Claimants further argue
22 that Powers’ actions were improper and therefore not within the scope of his employment
23 agreement. *Id.* at 7-10.

24 In *Payne v. Pennzoil Corp.*, 672 P.2d 1322, 1327 (Ariz. Ct. App. 1983), the
25 Arizona Court of Appeals affirmed that for purposes of tortious interference, the contract
26 must be between the Plaintiff and a third party. The Appeals Court found that employees
27 “acting *for* the company . . . cannot be interfering with a contract *of* the company.” *Id.*
28 (emphasis in original). Counter-Claimants attempt to distinguish this and other cases

1 relied on by Powers because they pertain to motions for summary judgment for which the
2 liberal pleading standard at the motion to dismiss stage does not apply. Doc. 122 at 10.
3 But the fact that the Court must take as true the allegations in the complaint does not
4 change the legal standard for tortious interference under Arizona law. As Powers argues,
5 the allegations in the counterclaim clearly allege that “Powers was an officer of DSV and
6 was the control person of such entity.” Doc. 132 at 2, citing Doc. 58, ¶ 7. The
7 counterclaim also alleges that Powers promised that DSV would pay Third Party
8 Defendants a salary upon their votes to remove Digital from management – facts that,
9 taken as true, show that Powers was acting in a management capacity in the name of
10 DSV, and not as an independent third party. *See* Doc. 58, ¶ 32.

11 Powers can be still held liable for tortious interference with a contract between
12 Digital and DSV, however, where he is alleged to have acted improperly and not for the
13 benefit of the company. *Spratt v. N. Auto. Corp.*, 958 F. Supp. 456, 464 (D. Ariz. 1996)
14 (citing *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025 (Ariz.1985)); *see also*
15 *Bernstein v. Aetna Life & Cas.*, 843 F.2d 359, 367 (9th Cir. 1988) (finding on the basis of
16 *Wagenseller*, 710 P.2d at 1041-42, that a supervisor acting as agent for an employer
17 could be found liable for inducing a breach of the employer’s own contract where there
18 was an issue of fact that the supervisor acted improperly).

19 Powers argues that Counter-Claimants do not specifically allege that he acted
20 improperly to interfere with Digital’s management contract. Doc. 132 at 4-6. Powers’
21 argument appears to rest primarily on the absence of the word “improper” in the
22 counterclaim and the purported lack of an alleged causal link between Powers’ actions
23 and the decision of DSV members to terminate Digital’s management agreement. *Id.* at
24 4. The Court finds these points unpersuasive. The counterclaim alleges that Powers
25 offered to pay DSV’s members a salary to become members of a board of directors in
26 exchange for their votes to remove Digital from its management position. Doc. 58, ¶ 32.
27 It further alleges that he did this despite the fact that the members had no experience or
28 expertise in running the business and there was no legitimate business purpose for this

1 action. *Id.* The counterclaim goes on to allege that Powers acted in retaliation against
2 Digital for challenging his expenditures, and that he succeeded in “wrongfully
3 effectuating from the Board of Directors the termination of the management agreement
4 between Digital Video and DSV.” *Id.*, ¶¶ 43, 44. These allegations are sufficient to
5 allege improper conduct that was adverse to the interests of DSV and that was causally
6 linked to the termination of Digital’s management contract. The Court will deny the
7 Powers’ motion to dismiss the tortious interference claim.

8 **IT IS ORDERED:**

9 1. Third Party Defendants’ motions to dismiss the first amended and
10 supplemented counterclaim pursuant to Rule 12(b)(6) (Docs. 73, 75, 77, 79, 81, 83, 97,
11 and 104) is **denied**.

12 2. Third Party Defendants’ motions to dismiss the first amended and
13 supplemented counterclaim pursuant to Rule 12(b)(2) (Docs. 73, 79, 81, 83, 97, and 104)
14 is **denied**.

15 3. Robert and Julia Powers’ motion to dismiss Counter-Claimants’ tortious
16 interference counterclaim (Doc. 108) is **denied**.

17 Dated this 1st day of November, 2012.

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22 David G. Campbell
23 United States District Judge
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