UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STARWOOD HOTELS & RESORTS WORLDWIDE, INC.,

Plaintiff,

- against -

HILTON HOTELS CORPORATION N/K/A HILTON WORLDWIDE, ROSS KLEIN AND AMAR LALVANI,

Defendants.

No. 09-cv-3862 (SCR) (ECF Case)

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS

Of Counsel: Aaron H. Marks, Esq.
Leonard A. Feiwus, Esq
Emilie B. Cooper, Esq.
Kasowitz, Benson, Torres & Friedman LLP
1633 Broadway
New York, New York 10019
Phone: (212) 506-1700
Fax: (212) 506-1800

Attorneys for Defendant Hilton Hotels Corporation n/k/a/ Hilton Worldwide

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

RULES AND STATUTES

Defendants Hilton Hotels Corporation, n/k/a Hilton Worldwide ("Hilton"), Ross Klein ("Klein") and Amar Lalvani ("Lalvani," and collectively with Hilton and Klein, "Defendants") respectfully submit this reply memorandum of law in further support of their motion to dismiss the eleventh cause of action of the Amended Complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"), and to dismiss the entire action for lack of subject matter jurisdiction pursuant to FRCP 12(b)(1).[1]

PRELIMINARY STATEMENT

Starwood has failed to establish that this Court has subject matter jurisdiction based on either federal question or diversity of the parties. Accordingly, this action should be dismissed.

Starwood's eleventh cause of action pursuant to the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (the "CFAA"), is not sustainable. Contrary to Starwood's view, Congress did not, in enacting the CFAA, intend to federalize every state law employment or trade secret dispute involving the taking or copying of electronic files by departing employees. Rather, the CFAA was intended to prevent and punish unauthorized access to computers (*i.e.*, hacking) that causes actual damage to the system or data, not merely the downloading or copying of files. The prevailing authority confirms this common sense view, by holding that employees who are authorized to access their employer's computer systems are not subject to a CFAA claim based on allegations of disloyal intent or misuse of electronic information.

Starwood simply ignores the weight of this authority, including two recent federal district court cases directly on point within the Second Circuit.[2] Instead, Starwood relies on a handful of cases applying a minority view, none of which have been followed in this Circuit. Starwood's

---

[1] Defendants' Memorandum of Law in Support of Their Motion to Dismiss, dated February 26, 2010, is cited herein as "Mem." Plaintiff Starwood Hotels and Resorts Worldwide, Inc.'s ("Starwood") Memorandum of Law in Opposition to Defendants' Motion to Dismiss, dated March 12, 2010, is cited herein as "Opp."

[2] *See* Mem. at 12-13, and herein at 5-6.

overbroad interpretation of the CFAA is contrary to the plain meaning and legislative intent of the statute, and the numerous court decisions that have decided the issue. Similarly, in cavalier fashion, Starwood contends that the CFAA's "damage or loss" requirement may be satisfied by its asserted business losses, even though this view has been expressly rejected by the Second Circuit and a prior decision of this Court.[3] Accordingly, Starwood's CFAA claim again fails because, pursuant to the correct Second Circuit standard, Starwood cannot demonstrate that it suffered any "damage or loss" caused by computer inoperability or data impairment.

Complete diversity of citizenship does not exist, as both Starwood and Lalvani were citizens of New York at the time Starwood filed this lawsuit. Lalvani established his domicile in New York when he purchased his family home and moved there in October 2006. Although Lalvani temporarily relocated to California to work for Hilton, he never intended to remain there indefinitely, as Hilton had informed him, prior to his move, that it was soon relocating its headquarters out of state. The undisputed facts reflect Lalvani's intent to maintain New York as his domicile: Lalvani never sold his family home in New York but rather rented it furnished for a six month term; he maintained significant business, financial, and personal ties with New York; and he communicated to Hilton, in a survey taken *mere days* before the filing of this lawsuit, that his "permanent address" was his home in New York.

Starwood's reliance on Lalvani's registration to vote and his driver's license in California are insufficient to demonstrate that he changed his domicile from New York to California. Contrary to Starwood's contention, Lalvani never indicated (nor swore) that he was a citizen or domiciliary of California when he registered to vote – in fact, the California voting registration instructions require only that one be a "resident" of California. Similarly, Lalvani's mail-in renewal of his California driver's license while living in Brussels and before returning to New

[3] *See* Mem. at 17-19.

York in 2006 provides no support for an intention to remain in California indefinitely. Starwood cannot satisfy its burden of proof, by clear and convincing evidence, that Lalvani changed his domicile to California at the time this lawsuit was commenced.

Lastly, the first, third and fourth causes of action, which all concern Klein's separation agreement, should be compelled to arbitration with respect to all Defendants. Starwood contends that these claims should be excluded from arbitration because they concern trade secrets. This argument is incorrect because Klein's separation agreement contains a broad arbitration clause with no such carve-out. Starwood also contends that Hilton and Lalvani cannot compel arbitration with respect to these claims because they are not signatories to Klein's separation agreement. Starwood ignores the law that nonsignatories may compel arbitration where, as here, the claims at issue are related and factually intertwined.

ARGUMENT

I.
STARWOOD FAILS TO STATE A CLAIM UNDER THE CFAA

Starwood contends that a departing employee may be subject to a CFAA claim if, using fully authorized electronic access, that employee reviews or copies electronic information for later use against the employer's interests. Courts have routinely rejected Starwood's position, and dismissed CFAA claims against departing employees who were authorized to access their employer's computer systems and the information at issue.[4] Starwood's construction is

[4] *See, e.g., LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1129 (9th Cir. 2009) (no CFAA violation where departing employee was authorized to access plaintiff's computers and obtain particular documents); *Jet One Group, Inc. v. Halcyon Jet Holdings, Inc.*, No. 08-CV-3980, 2009 WL 2524864, at *5-6 (E.D.N.Y. Aug. 14, 2009) (same); *Shamrock Foods Co. v. Gast*, 535 F. Supp. 2d 962, 962-63 (D. Ariz. 2008) (same); *Diamond Power Int'l, Inc. v. Davidson*, 540 F. Supp. 2d 1322, 1343 (N.D. Ga. 2007) (no CFAA claim where defendant was authorized to access computer system and "his level of authorized access included express permission (and password access) to obtain the specific information at issue); *Lockheed Martin Corp. v. Speed*, No. 6:05-CV-1580, 2006 WL 2683058, at *5-7 (M.D. Fla. Aug. 1, 2006) (no CFAA claim stated where departing employees were permitted electronic access as they "fit within the very group that Congress chose not to reach, *i.e.*, those with access authorization"); *see also US Bioservices Corp. v. Lugo*, 595 F. Supp. 2d 1189, 1192-95 (D. Kan. 2009); *Condux Int'l, Inc. v. Haugum*, No. 08-

inconsistent with the plain meaning of the statute and the legislative intent articulated by Congress. (Mem. at 8-13.) The CFAA "was not meant to cover the disloyal employee who walks off with confidential information." *Kluber Skahan & Assocs., Inc. v. Cordogan, Clark & Assoc., Inc.*, No. 08-cv-1529, 2009 WL 466812, at *8 (N.D. Ill. Feb. 25, 2009), *quoting Am. Family Mut. Ins. Co. v. Rickman*, 554 F. Supp. 2d 766, 771 (N.D. Ohio 2008) (dismissing CFAA claim against departing employee who misappropriated employer's confidential information).

Where, as here, the defendants were authorized to access the computer, documents or data in question, courts routinely find that the employee has not exceeded authorized access or committed a CFAA violation.[5] Contrary to Starwood's assertion, cases following the prevailing view do not find that company policies or employment agreements create CFAA liability for an otherwise authorized employee.[6] To do so would broaden the statute beyond its plain language and congressional intent.[7] It would also mean that every state law employment or trade secrets case involving electronic information would become a federal action, a result that does not

---

4824, 2008 WL 5244818, at *4-6 (D. Minn. Dec. 15, 2008); *B & B Microscopes v. Armogida*, 532 F. Supp. 2d 744, 758 (W.D. Penn. 2007); *Brett Senior & Assocs., P.C. v. Fitzgerald*, No. 06-1412, 2007 WL 2043377, at *2-4 (E.D. Pa. July 13, 2007); *Int'l Ass'n of Mach. & Aerospace Workers v. Werner-Masuda*, 390 F. Supp. 2d 479, 495-99 (D. Md. 2005) (dismissing CFAA claim against secretary of local union who had authority to access confidential membership information that she used for the benefit of a rival union).

[5] *See supra* note 4; Mem. at 9-10.

[6] *See, e.g., Bell Aerospace Servs., Inc. v. U.S. Aero Servs., Inc.*, No. 1:09cv141, 2010 U.S. Dist. LEXIS 19876, at *6-10 (M.D. Ala. Mar. 5, 2010) (dismissing CFAA claim even though employees were prohibited from taking or copying electronic files by confidentiality agreements); *Condux*, 2008 WL 5244818, at *4-6 (rejecting CFAA claim even though defendant was prohibited from misappropriating confidential business information for his own benefit by plaintiff's employee handbook); *Black & Decker (US), Inc. v. Smith*, 568 F. Supp. 2d 929, 936 (W.D. Tenn. 2008) (dismissing CFAA claim where complaint included claims that defendant breached confidentiality agreements); *Werner-Masuda*, 390 F. Supp. 2d at 498-99 ("to the extent that [defendant] may have breached the Registration Agreement by *using* the information obtained for purposes contrary to the policies established by the [union's] Constitution, it does not follow, as a matter of law, that she was not authorized to access the information, or that she did so in excess of her authorization in violation of the . . . CFAA"). In any event, Starwood fails to identify an actual, specific company policy, or a particular term in any confidentiality agreement, which limited or extinguished Klein or Lalvani's computer access.

[7] *See Brekka*, 581 F.3d at 1133 (the statute does not on its face proscribe unauthorized *use* of electronic information, only unauthorized *access*); *Gast*, 535 F. Supp. 2d at 965 (the "purpose of the CFAA 'was to create a cause of action against computer hackers (e.g., electronic trespassers)'"), *quoting Werner-Masuda*, 390 F. Supp. 2d at 495-96; *Diamond Power*, 540 F. Supp. at 1343.

comport with the stated purpose of the statute. *See, e.g.*, *US Bioservices*, 595 F. Supp. 2d at 1193 ("[a]n interpretation [of the CFAA] based on agency principles would inappropriately expand federal jurisdiction"); *Condux*, 2008 WL 5244818, at *6 (rejecting *International Airport Centers, L.L.C. v. Citrin*, 440 F.3d 418 (7th Cir. 2006), because it "would create a federal cause of action for an employer whenever an employee accesses information on the company computer with intentions of using the information in a manner adverse to the employer's interests or in violation of a duty of loyalty").

Starwood's opposition ignores all of this authority. Indeed, Starwood does not cite, let alone discuss, the two leading cases within the Second Circuit: *Jet One Group, Inc. v. Halcyon Jet Holdings, Inc.*, No. 08-CV-3980, 2009 WL 2524864 (E.D.N.Y. Aug. 14, 2009) and *Cenveo v. Rao*, 659 F. Supp. 2d 312 (D. Conn. 2009). Both cases dismissed CFAA claims on Rule 12(b)(6) motions where employees were authorized to access their employer's electronic information, but did so for improper purposes or use. *Jet One*, 2009 WL 2524864, at *5-6 (rejecting "a CFAA claim based on [the employee] *misusing* and *misappropriating* information that he was freely given access to"); *Cenveo*, 659 F. Supp. 2d at 314-16 (dismissing CFAA claim where the employee had downloaded and e-mailed electronic information from his employer's computer system because the employee was authorized to access the "highly sensitive, confidential information" at issue).

In *Jet One*, the court dismissed the CFAA claim because the defendant was employed and authorized to access the electronic data, even though his express intent at the time of access was to misappropriate information. *Jet One*, 2009 WL 2524864, at *5-6. In so doing, *Jet One* recognized that a minority of courts have interpreted the CFAA's authorization element differently, but held that broadening the statute to include an employee's misuse or

misappropriation of electronic information would "grossly expand the statute's reach" beyond its plain meaning or congressional intent. *Id.* at *6 (collecting cases, and declining to follow *Citrin*, *EF Cultural* and *Calyon*).

While Starwood states that the Second Circuit has accepted the broad interpretation of the CFAA articulated in *Citrin* (Opp. at 11 n.5), Judge Seybert in *Jet One* expressly reasoned that it has not. *Jet One*, 2009 WL 2524864, at *6, *discussing Nexans Wires S.A. v. Sark-USA, Inc.*, 166 F. App'x 559, 562-563 (2d Cir. 2006) ("the Second Circuit has implicitly adopted the narrow view" of the CFAA in *Nexans Wires*). In addition to ignoring the thorough analysis of *Jet One*, Starwood relies on the cursory language of Judge Owen's memorandum decision in *Calyon v. Mizuho Secs. USA, Inc.*, No. 07 Civ. 2241, 2007 WL 2618658, at *1 (S.D.N.Y. Sept. 5, 2007). (Opp. at 11.) However, *Calyon* recognized a split of legal authority on the issue of authorization, and refused to decide which interpretation to adopt, finding instead a sufficient factual basis for the claim in that case to survive a Rule 12(b)(6) motion. 2007 WL 2618658, at *1.

Starwood further suggests that the Ninth Circuit decision in *LVRC Holdings v. Brekka* supports Plaintiff's argument. (Opp. at 8, *citing Brekka*, 581 F.3d at 1129, 1132-33, 1135). This is flatly wrong. In *Brekka*, the Ninth Circuit refused to find that the employee, Brekka, had acted "without authorization" or "in excess of authorized access" when he accessed his company's computer, and then emailed confidential electronic information to his personal account, against his employer's interests and in furtherance of his own competing business. 581 F.3d at 1133. The Ninth Circuit held that the employee's authorization to access documents on the company computer did not terminate or change when his mental state changed from loyal to disloyal employee. *Id.* Moreover, there was no CFAA violation after Brekka's departure from the

company because there was no evidence that Brekka himself accessed the company computer once he left. *Id.* at 1136-37.

Against the weight of the authority, Starwood relies almost exclusively on two inapposite cases and pretends as if there is no law to the contrary. (Opp. at 7-13, *citing EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577 (1st Cir. 2001); *United States v. John*, No. 08-10459, 2010 WL 432405 (5th Cir. Feb. 9, 2010)). Neither case is relevant nor controlling. *EF Cultural* involved a competitor's use of a sophisticated computer program to mine the plaintiff's website for pricing and other proprietary information. 274 F.3d at 578-80. Although one defendant was a former employee of the plaintiff, the case does not concern the former employee's authorization to access the employer's computer system. *Id.* at 581-84. Moreover, *EF Cultural* construes an earlier version of the CFAA statute and predates most of the cases that have considered the authorization issue. *John* is also irrelevant. *John* concerned the appellate review of a criminal conviction of a former bank employee who accessed customer accounts in furtherance of a scheme of fraud. Because the CFAA issue was not properly preserved before the trial court, the appellate court could reverse only "if there was a manifest miscarriage of justice." *John*, 2010 WL 432405, at *2. Under that standard, the Fifth Circuit found there was ample record evidence to support the jury's finding that John exceeded her authorization when she accessed electronic information in furtherance of the crime. *Id.* at *2-5.[8]

[8] Starwood's reliance on other cases is also misplaced because they (i) concern allegations, as in *Citrin*, where information was deleted or destroyed, *e.g., S.E. Mech. Servs., Inc. v. Brody*, 8:08-CV-1151-T-30EAJ, 2008 WL 4613046, at *8 (M.D. Fla. Oct. 15, 2008); (ii) involve a question of fact as to whether access was authorized, *see, e.g., Feinberg v. Eckelmeyer*, No. 2:09-cv-1536, 2009 WL 4906376, at *7 (E.D. Penn. Dec. 16, 2009); *Lasco Foods, Inc. v. Hall & Shaw Sales, Mktg., & Consulting, LLC*, No. 4:08CV01683, 2009 WL 3523986, at *4 (E.D. Mo. Oct. 26, 2009); *Global Policy Partners, LLC v. Yessin*, No. 1:09cv859, 2009 WL 4307459, at *4 (E.D. Va. Nov. 24, 2009); (iii) were decided in a Circuit that had adopted or advocated the broad breach of loyalty view advocated in *Citrin*, and were bound to follow that interpretation, *see, e.g., Dental Health Prods., Inc. v. Ringo*, No. 08-C-1039, 2009 WL 1076883, at *7 (E.D. Wis. Apr. 20, 2009); *Guest-Tek Interactive Entm't Inc. v. Pullen*, No. 09-11164, 2009 WL 3403129, at *3 (D. Mass. Oct. 19, 2009); *MPC Containment Sys., Ltd. v. Moreland*, No. 05 C 6973, 2008 WL 2875007, at *14 n.28 (N.D. Ill. July 23, 2008); or (iv) failed to conduct any substantive analysis,

Although Starwood suggests that its conclusory allegations are sufficient, they do not provide the necessary factual support for its claim. (Opp. at 14-15.) Starwood expressly admits that Klein and Lalvani were authorized to access Starwood's computers and any alleged confidential information. (*See* Am. Compl. ¶¶ 146-47: Klein and Lalvani "had access to the most confidential and competitively sensitive Starwood luxury and lifestyle brands information.")[9] Starwood's allegations that Klein and Lalvani e-mailed documents to their personal e-mail accounts likewise fail because Klein and Lalvani were permitted to access the documents at issue. *See Brekka*, 581 F.3d at 1134-35 (e-mailing sensitive documents that are accessed with permission, even for an improper purpose, does not satisfy the CFAA); *Gast*, 535 F. Supp. 2d at 968 (no CFAA claim where defendant e-mailed himself materials that he was authorized to access and view); *Cenveo*, 659 F. Supp. 2d at 317 (transmitting electronic information via e-mail is not accessing a computer under the CFAA).

Starwood also has no claim against Hilton, as there are no allegations that Klein or Lalvani accessed a Starwood computer after they left Starwood, or after their Starwood authorization was terminated. *Brekka*, 581 F.3d at 1136-37 (no CFAA violation because there was no evidence that Brekka himself accessed the company computer after he separated from his employer). Nor are there any allegations that any Hilton personnel accessed a Starwood computer or directed Klein, Lalvani or anyone else to do so. *See ReMedPar, Inc. v. All Parts*

---

see, e.g., *Boxes of St. Louis Inc. v. Davolt*, No. 4:09CV922, 2010 WL 575757, at *3 (E.D. Mo. Feb. 12, 2010); *KEG Techs., Inc. v. Laimer*, 436 F. Supp. 2d 1364, 1380 (N.D. Ga. 2006); *Int'l Sec. Mgmt. Group, Inc. v. Sawyer*, No. 3:06CV0456, 2006 WL 1638537, at *20-21 (M.D. Tenn. June 6, 2006); *Personalized Brokerage Servs., LLC v. Lucius*, No. Civ. 05-1633, 2006 WL 208781, at *2 (D. Minn. Jan. 26, 2006).

[9] Starwood's CFAA claim "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 124 (2d Cir. 2008), *quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Thus, Starwood's naked allegation that Defendants acted "without authorization" is insufficient, as it is unsupported by the facts. (Opp. at 13-14, *citing* Am. Compl. ¶¶ 282-83, 286.)

Med., LLC, No. 3:09-cv-00807, 2010 WL 55303, at *6 (M.D. Tenn. Jan. 4, 2010); *Role Models Am., Inc. v. Jones*, 305 F. Supp. 2d 564, 568 (D. Md. 2004); *see* Mem. at 15-16.

Finally, Starwood contends that the CFAA's "damage or loss" requirement is met, even though it fails to allege that it suffered any computer inoperability or data impairment. (Opp. at 15-16.) Starwood suggests that "damage or loss" under the CFAA may be satisfied by its asserted business losses (*id.* at 16 n.9), even though this view has been expressly rejected by the Second Circuit and a prior decision of this Court. *Civic Ctr. Motors, Ltd. v. Mason St. Import Cars, Ltd.*, 387 F. Supp. 2d 378, 381 (S.D.N.Y. 2005) ("revenue lost because a defendant used unlawfully gained information to unfairly compete was not a type of 'loss' contemplated under the CFAA"), *citing Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F. Supp. 2d 468, 478 (S.D.N.Y 2004); *see* Mem. at 17-19. And Starwood's reliance on the conclusory allegation in the complaint (Opp. at 15, *citing* Am. Compl. ¶ 287), which simply parrots the requirement of the statute, is insufficient under *Nexans Wires* and *Twombly*. Accordingly, the CFAA claim also fails because, pursuant to the correct Second Circuit standard, Starwood cannot demonstrate that it suffered any "damage or loss" caused by computer inoperability or data impairment.

II.
COMPLETE DIVERSITY OF CITIZENSHIP DOES NOT EXIST BETWEEN STARWOOD AND ALL DEFENDANTS

A. Starwood Bears The Burden Of Proving, By Clear and Convincing Evidence, That Lalvani Changed His Domicile From New York To California In 2008

Starwood, as the party asserting subject matter jurisdiction, bears the burden of showing a factual basis for jurisdiction. *See Advani Enters., Inc. v. Underwriters at Lloyds*, 140 F.3d 157, 160 (2d Cir. 1998). In circumstances such as this, where Starwood must establish a *change* in Lalvani's domicile to sustain its claim of diversity, Starwood's burden to demonstrate that change is by "clear and convincing evidence." *See Palazzo v. Corio*, 232 F.3d 38, 42 (2d Cir.

2000). Starwood attempts to distort this standard, suggesting that it is Lalvani who bears the burden of proof because he was born and lived in California 35 years ago. This is incorrect.

Starwood's proposition that, throughout the past eleven years and numerous life-changing events (none of which were connected to California), Lalvani did not establish a new domicile in New York is wholly unsupported by the undisputed factual record. Specifically, it is undisputed that Lalvani departed California for New York in 1997, lived in New York, attended graduate school at Harvard, got married, lived in New York again, moved to Brussels, had a child, returned to New York in 2006 to accept a job offer of indefinite term based in the state, purchased a family home in New York, had another child in New York, and established numerous personal, business and financial ties to New York.[10] Therefore, because diversity jurisdiction is dependent upon a showing that Lalvani changed his domicile from New York to California prior to the initiation of this lawsuit, it is Starwood that must establish that change by "clear and convincing evidence." Starwood does not, and cannot, meet that burden.

B. The Undisputed Facts Demonstrate That Lalvani Never Intended To Remain In California

The parties agree that a person's citizenship for diversity purposes is determined by his domicile, which is "presumed to continue" until superseded by a new domicile, *see Gutierrez v. Fox*, 141 F.3d 425, 427 (2d Cir. 1998), and that an individual only effects a change of domicile when he both resides in the new location and intends to remain there. *See Linardos v. Fortuna*, 157 F.3d 945, 948 (2d Cir. 1998). Courts must consider the "totality of the evidence," with no single factor dispositive to the analysis. *See Nat'l Artists Mgmt. Co. v. Weaving*, 769 F. Supp. 1224, 1228 (S.D.N.Y. 1991). In its opposition papers, Starwood does not dispute the following facts demonstrating Lalvani's lack of intent to remain in California:

[10] *See* Affidavit of Amar Lalvani in Support of Defendants' Motion to Dismiss, sworn to February 25, 2010 ("Lalvani Moving Aff.") ¶¶ 2-7.

- Prior to his temporary relocation, Lalvani was informed by the Hilton executive who recruited him that Hilton's headquarters would soon be moving out of California. Lalvani Moving Aff. ¶¶ 8-9. Lalvani's term sheet reflected that fact, stating that the headquarters were located in Beverly Hills "at this time" and providing a rental allowance for twelve months. *See* Lalvani Moving Aff., Ex. A; *see also Hakilla v. Consol. Edison Co. of N.Y.*, 745 F. Supp. 988, 990 (S.D.N.Y. 1990) (individuals who move to a state for a "short-term purpose," such as education, do not generally become domiciled there).

- Lalvani did not sell his family home in New York, but leased it furnished for a six month term, with valuable and easily-transportable items left behind.[11] *See* Lalvani Moving Aff. ¶¶ 9-10; *see also Kleiner v. Blum*, No. 03 Civ. 3846 (NRB), 2003 WL 22241210, at *1 (S.D.N.Y. Sept. 30, 2003) (party who resided in New York for three years but did not sell his Georgia home nor transfer his belongings remained a domiciliary of Georgia).

- While located temporarily in California, Lalvani maintained significant financial, business, and personal ties to New York, including an ownership stake in a New York business, membership in a New York social club, checking and savings accounts with a New York bank branch, and a brokerage account with a New York broker. *See* Lalvani Moving Aff. ¶¶ 11-13; *see also Brignoli v. Balch, Hardy & Scheinman, Inc.*, 696 F. Supp. 37, 41 (S.D.N.Y. 1988) (affiliations with social organizations and location of financial and business matters relevant to intent).

Moreover, nine days *before* this lawsuit was filed, Lalvani responded to an internal Hilton relocation survey that his "permanent address" was his family home in New York. *See* Lalvani Moving Aff., Ex. B. There is simply no better evidence of Lalvani's intent than that contemporaneous assertion. *See, e.g., Kenosha Unified Sch. Dist. v. Stifel Nicolaus & Co. Inc.*, 607 F. Supp. 2d 967, 972 (E.D. Wis. 2009) (party's contemporaneous designation of his primary address in one state supported finding of domicile there); *ConnectU LLC v. Zuckerberg*, 482 F. Supp. 2d 3, 28, 31-32 (D. Mass. 2007) (same), *rev'd on other grounds*, 522 F.3d 82 (1st Cir.

[11] Contrary to Starwood's assertion, the Lalvanis' decision not to sell their New York home had nothing to do with the real estate market, which was still stable in mid-2008, and everything to do with their intention to keep that address as their family's permanent home. *See* Reply Affidavit of Amar Lalvani in Further Support of Defendants' Motion to Dismiss, sworn to March 22, 2010 ("Lalvani Reply Aff.") ¶ 8. Moreover, although the Lalvanis were not required to make any representations to their building management concerning their intention to return, the Lalvanis informed their building management that they intended to return. *See* Lalvani Moving Aff. ¶ 13; Lalvani Reply Aff. ¶ 10. Finally, the Lalvanis wanted to, and did, find renters who would rent their apartment furnished. *See* Lalvani Reply Aff. ¶ 9.

2008); *Young v. Century House Historical Soc'y*, 117 F. Supp. 2d 277, 281 (N.D.N.Y. 2000) (same).

Starwood largely ignores the facts outlined above, arguing instead that Lalvani's California driver's license and voter registration prove that he was a California domiciliary because the California's Elections and Vehicle Codes provide that "residence" equates to "domicile." But those code provisions are not controlling on the issue of domicile for federal diversity purposes. As the Fifth Circuit has stated, the "determination of one's State Citizenship for diversity purposes is controlled by federal law, not by the law of any State." *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974) (emphasis added). In *Brown v. Mutual of N.Y. Life Ins. Co.*, the court rejected the argument that defendant's possession of a Tennessee driver's license was "indicative of a Tennessee domicile" and ruled instead that state citizenship for diversity purposes should be determined by "where that person intends to make his home, not merely where she resides or where she works, factors which might bear on her decision as to where to secure a driver's license." *Brown*, 213 F. Supp. 2d 667, 675 n.3 (S.D. Miss. 2002), *citing Mas v. Perry*, 489 F.2d at 1399.

Likewise, registering to vote in a national election does not establish state citizenship for purposes of determining diversity. *See Las Vistas Villas, S.A. v. Petersen*, 778 F. Supp. 1202, 1205 (M.D. Fla. 1991) ("[M]eeting the residency requirement for purposes of voting in a U.S. presidential election is not congruent with satisfying the domicile requirement for diversity jurisdiction."). Indeed, "many trial courts have found domicile, and therefore an intention to remain indefinitely, in a place other than where the party voted." *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir. 1972) (citing cases); *see also Brophy v. Hicks*, 839 F. Supp. 948, 952 (D. Conn. 1993) (parties registered to vote in Connecticut were domiciled in New York).

Here, Lalvani received a renewed California driver's license while living in Brussels and *prior to* his permanent move to New York in October 2006. Lalvani Reply Aff. ¶ 7. The fact that Lalvani did not obtain a New York license after October 2006 evidences nothing more than the fact that he does not own a car. *See* Lalvani Moving Aff. ¶ 15. Considering the facts outlined in Lalvani's moving papers, his possession of a California driver's license is unpersuasive.[12] *See Hamilton v. Accu-Tek*, 13 F. Supp. 2d 366, 370-71 (E.D.N.Y. 1998) (possession of driver's license not probative of state citizenship in light of counter veiling evidence); *Cielicki v. Presbyterian-Univ. Hosp.*, 383 F. Supp. 445, 449 (D.C. Pa. 1974) (same).

It is also undisputed that Lalvani registered to vote in California in 2008. Lalvani's decision to do so is not a relevant indicator of any alleged intent to remain in the state as he has no demonstrated voting practices, and recalls voting only in the 1992 and 2008 presidential elections. *See Boston Safe Deposit & Trust Co. v. Morse*, 779 F. Supp. 347, 349 (S.D.N.Y. 1991) (voter registration not compelling evidence of change in domicile absent showing of existing voting practices); *Everett v. L. Paul Brief*, No. 82 Civ. 3153 (JFK), 1985 WL 3563, at *3 (S.D.N.Y. Nov. 1, 1985) (same). Lalvani's decision to register in California related to the historic November 2008 presidential election and not any non-presidential races or issues local to either New York or California. *See* Lalvani Moving Aff. ¶ 17; Lalvani Reply Aff. ¶ 4. Lalvani determined that it was more convenient to register to vote in California (which he did by mail), and ultimately to vote via mail-in ballot, than to travel to New York to vote or to apply for, and submit, an absentee ballot in New York. *See* Lalvani Reply Aff. ¶ 4. When he registered to vote

[12] Mrs. Lalvani's California driver's license is of even less relevance. While Starwood argues that Mrs. Lalvani had the option of using her Belgian driver's license, she would attest that a Los Angeles Police Department officer, issuing her a ticket on October 6, 2008, directed that she obtain a *California* driver's license in order to drive a vehicle leased in California. Accordingly, Mrs. Lalvani believed that she was required to obtain a California driver's license in order to drive while temporarily living there. *See, e.g.*, *Thomas v. Farmer*, 148 F. Supp. 2d 593, 596 (D. Md. 2001) (suspension of party's license in one state prior to the issuance of a new license in another state "d[id] not suggest perfect voluntary choice among states" as it related to domicile).

in California, Lalvani swore – as the application form requires – that he met the eligibility requirements of California. Neither the application form nor the California instructions for the form make any mention of the term "domicile."[13] Gilman Dec., Exs. E & L. Instead, the California instructions state that "[t]o register in California you must: … be a *resident* of California . . . .." *Id.*, Ex. L (emphasis added).

In sum, Lalvani temporarily relocated to California for employment purposes with full knowledge that his new company would soon be moving out of the state. Lalvani had no intention of remaining there, maintaining both his family home and his other ties to New York.

III.
CLAIMS RELATING TO KLEIN'S SEPARATION AGREEMENT SHOULD BE ARBITRATED

In opposing Defendants' motion to compel arbitration, Starwood makes two arguments: (1) Starwood has "carved out" claims relating to misappropriated trade secrets from its agreement to arbitrate with Klein; and (2) Hilton and Lalvani cannot compel Starwood to arbitrate because they are nonsignatories to Klein's separation agreement. Both of these contentions are legally and factually wrong.

First, Klein's separation agreement contains no exception or carve-out for trade secrets or any other dispute. Although the earlier non-solicitation agreement relied upon by Starwood arguably excludes trade secret claims from its arbitration provisions, Klein's separation agreement does not. Rather, Klein's separation agreement contains a broad arbitration clause that applies to "[a]ny controversy, dispute or claim arising out of or related to this Agreement"

[13] The California instructions do not direct the registrant to the California Elections Code or elsewhere for the definition of "resident." At the time Lalvani registered to vote in California, he believed that he was eligible to vote in California based upon his having temporarily relocated there. He did not read the California Elections Code cited in Starwood's papers, *see* Gilman Dec., Ex. M, nor did he believe he was representing himself to be a California domiciliary. *See* Lalvani Reply Aff. ¶ 5.

without exception. (Am. Compl. Ex. 3, ¶ 11.)[14] Even Starwood has availed itself of Klein's separation agreement to compel related claims and issues to arbitration. (*See* Am. Compl. Exs. 5-6.) Starwood's reliance on the arbitration provision in Klein's non-solicitation agreement is neither relevant nor controlling.

Second, with respect to Hilton and Lalvani, Starwood ignores that nonsignatories to an arbitration agreement may compel arbitration precisely in circumstances such as this. *See JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177 (2d Cir. 2004) ("a non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate a dispute where . . . the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed."), *quoting Choctow Generation Ltd. P'ship v. Am. Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2001) (internal quotations omitted); *see also Ross v. Am. Express Co.*, 547 F.3d 137, 144 (2d Cir. 2008) (same, where there is a relationship and "intertwined factual issues" between the parties). That standard is satisfied here, because Klein and Lalvani are alleged to have been recruited by Hilton, and then induced by Hilton to breach their agreements with Starwood, including specifically Klein's separation agreement at issue. (*See* Am. Compl. ¶¶ 162, 166, 177, 179.) Starwood offers no legal authority to the contrary.

Starwood's first, third and fourth causes of action should be arbitrated. Starwood's first cause of action expressly alleges breach of Klein's separation agreement. (Am. Compl. ¶ 224.) Starwood's third and fourth causes of action allege tortious interference with, and fraudulent inducement of, Klein's separation agreement. (Am. Compl. ¶¶ 235-236, 245, 249.) Accordingly, those claims must be compelled to arbitration according to the express terms of the arbitration clause in Klein's separation agreement. Starwood offers no reason otherwise.

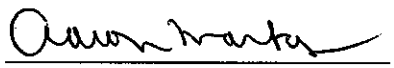
---

[14] *See Interstate Brands Corp., v. Bakery Drivers & Bakery Goods Vending Machs.*, 96 CV 4454, 1998 U.S. Dist. LEXIS 21596, at *14 (E.D.N.Y. Jan. 20, 1998) ("It is well settled that where claims are to be excluded from arbitration, it must be clearly and unambiguously stated in the agreement.") (citing cases).

CONCLUSION

For the foregoing reasons, and those set forth in their moving papers, Defendants Hilton, Klein and Lalvani respectfully request that the Court grant their motion to dismiss in its entirety.

Dated: March 22, 2010

By: 

Aaron H. Marks, Esq. (amarks@kasowitz.com)
Leonard A. Feiwus, Esq. (lfeiwus@kasowitz.com)
Emilie B. Cooper, Esq. (ecooper@kasowitz.com)

Kasowitz, Benson, Torres & Friedman LLP
1633 Broadway
New York, New York 10019
Phone: (212) 506-1700
Fax: (212) 506-1800
Attorneys for Defendant Hilton Hotels Corporation n/k/a/ Hilton Worldwide

Jeffrey I. Carton, Esq.
Meiselman, Denlea, Packman, Carton & Eberz P.C.
1311 Mamaroneck Avenue
White Plains, New York 10605
Phone: (914) 517-5000
Fax: (914) 517-5055

Ronald J. Nessim, Esq.
Paul S. Chan, Esq.
Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg, P.C.
1875 Century Park East, 23rd Floor
Los Angeles, California 90067
Phone: (310) 201-2100
Fax: (310) 201-2110
Attorneys for Defendant Ross Klein

Christopher J. Morvillo, Esq.
Edward M. Spiro, Esq.
Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C.
565 Fifth Avenue
New York, New York 10017
Phone: (212) 856-9600
Fax: (212) 856-9494
Attorneys for Defendant Amar Lalvani