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

GCA ADVISORS, LLC,

Plaintiff,

-against-

ONION, INC., and UNIVISION COMMUNICATIONS INC.,

Defendants.

Index No. 653989/2018

Hon. Saliann Scarpulla

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT UNIVISION COMMUNICATIONS INC.'S MOTION TO DISMISS

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Defendant Univision Communications Inc. ("Univision"), by its attorneys Shapiro Arato Bach LLP, respectfully submits this memorandum of law in support of its motion to dismiss, pursuant to CPLR § 3211(a)(7), the single cause of action for tortious interference with contract that Plaintiff GCA Advisors, LLC ("GCA") asserts against Univision.

PRELIMINARY STATEMENT

This lawsuit concerns GCA's attempt to profit from a corporate transaction in which it played no part. GCA is an investment bank and financial advisor. In 2013, GCA entered into an agreement (the "Agreement") with Univision's Co-Defendant Onion, Inc. ("Onion") to act as Onion's financial advisor in connection with a possible corporate transaction. No such transaction materialized in 2013, or in 2014, or even into 2015. As a result, in April 2015, Onion properly terminated its relationship with GCA. Nine months later, Onion sold a 40.5% minority interest in Onion to Univision. GCA was not involved in that transaction, and GCA did not assist Onion with that transaction. Nevertheless, GCA now seeks to obtain an undeserved fee from Univision in connection with that transaction under the misguided theory that Univision "caused" Onion to breach the Agreement by not paying GCA the fee.

GCA's claim for tortious interference against Univision should be dismissed for two independent reasons. First, in its Complaint, GCA alleges that Univision purchased a controlling financial interest in Onion. That factual allegation forecloses GCA's tortious interference claim as a matter of law, because even if Univision had engaged in any supposed interference (and it did not), a stakeholder with such a financial interest in a company is justified in interfering with that company's contracts, and that justification bars the interference claim asserted here. Second, the interference claim fails because GCA does not allege that Univision was the "but-for" cause of Onion's alleged breach, a requisite element of GCA's

claim.

ALLEGATIONS OF THE COMPLAINT

In October 2013, Onion wished to explore effectuating a corporate transaction. (Complaint, dated Aug. 10, 2018 ("Compl.") ¶ 6). Onion, accordingly, hired GCA, pursuant to the Agreement, "to act as The Onion's financial advisor in connection with [that] possible 'Transaction.'" (*Id*.).

The Agreement provides for Onion to "pay a 'Transaction Fee' to GCA for its advisory services, including a Base Fee of $2,000,000," if a qualifying "Transaction," constituting certain types of "change of control" transactions, is "consummated" within a prescribed time period. (*Id*. ¶¶ 6, 8).

Onion terminated the Agreement on or about April 4, 2015. (*Id*. ¶ 9). Nine months later, Univision acquired a minority interest in Onion, equal to 40.5% of Onion's outstanding stock, along with an annual call right for the remaining equity interests. (*Id*.) GCA contends that Univision "purchased a controlling interest in The Onion" as a result of Univision's acquisition of this minority stake. (*Id*. ¶ 21).

GCA asserts two causes of action in this case stemming from the transaction. GCA asserts one cause of action against Onion for breach of contract for failing to pay GCA the Transaction Fee. In this cause of action, GCA seeks payment of a Transaction Fee under the Agreement of at least $2,000,000. (*Id*. ¶ 18). GCA seeks this payment even though GCA does not allege that it provided any services to Onion in connection with the sale, and GCA thus tacitly concedes that it had nothing to do with the transaction. (*Id*. ¶¶ 1-23).[1]

[1] We understand that Onion will demonstrate at the appropriate point in this action that GCA's breach of contract claim fails as a matter of law because GCA was not the procuring cause of the transaction. *See Morpheus Capital Advisors LLC v. UBS AG*, 23 N.Y.3d 528, 534-37

GCA asserts a second cause of action against Univision for tortious interference with contract. GCA alleges in this cause of action that Univision caused Onion's breach. (*Id*. ¶¶ 19-23). Most of GCA's allegations regarding this claim are nothing more than unsupported legal conclusions[2] or parrot the elements of a tortious interference claim.[3] GCA alleges just two purported "facts" in support of this cause of action—that Univision (1) allegedly knew of the Agreement when it purchased its minority interest in Onion and (2) purportedly "enter[ed] into an agreement to pay the Transaction Fee [allegedly] due Plaintiff to a third party." (*Id*. ¶¶ 21-22). GCA fails to allege (either with cognizable facts or as even an improper legal conclusion) that Univision was the "but for" cause of Onion's alleged breach.

LEGAL STANDARD

On a motion to dismiss for failure to state a cause of action under CPLR § 3211(a)(7), a court must "determine whether the facts as alleged" fit within a "cognizable legal theory." *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141 (2017) (citations and quotations omitted). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim…" *Id*. Although the Court should liberally construe the pleadings and sustain the Complaint if its factual allegations manifest a cognizable cause of

(2014); *Alta Capital Partners Int'l LLC v. Parsons Capital LLC*, 155 A.D.3d 493, 493-94 (1st Dep't 2017); *accord Thomas P. Reilly & Co. v. Rockefeller Ctr. Mgmt. Corp.*, 223 A.D.2d 477, 477 (1st Dep't 1996). We also understand that Onion will demonstrate that the transaction was not a qualifying transaction under the Agreement.

[2] *See*, *e.g.*, Compl. ¶ 20 (alleging that the Agreement is a binding agreement); *id*. at ¶ 22 (alleging that the Agreement was breached).

[3] *See*, *e.g.*, Compl. ¶ 14 (alleging that Univision "intentionally prevented the payment of the Transaction Fee under the Agreement"); *id*. at ¶ 22 (alleging that Univision "knowingly and intentionally caused Defendant The Onion to breach its contractual obligations under the Agreement")

action, "allegations" that are "vague and conclusory" "fail[] to sufficiently" plead a claim for "tortious interference." *Carlyle, LLC v. Quik Park 1633 Garage LLC*, 160 A.D.3d 476, 477 (1st Dep't 2018); *accord Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dep't 2006).

ARGUMENT

I. GCA'S CAUSE OF ACTION FOR TORTIOUS INTERFERENCE FAILS TO STATE A CLAIM

GCA's claim that Univision tortiously interfered with the Agreement fails as a matter of law for two independent reasons. First, GCA alleges that Univision has a substantial, indeed, controlling financial interest in Onion. (Compl. ¶ 21). This allegation demonstrates that Univision has a justification defense to GCA's tortious interference claim, since New York law allows stakeholders like Univision to protect its interests even if that protection amounts to interfering with a contract. GCA, moreover, has not alleged (and cannot allege) that Univision acted with malice or used unlawful means to induce the alleged breach, as GCA must to overcome Univision's defense. Second, GCA has failed to allege that Univision is the "but for" cause of the alleged breach.

A. GCA's Allegation That Univision Has A Substantial And/Or Controlling Interest In Onion Provides Univision With A Justification Defense

GCA alleges in its tortious interference claim that Univision "purchased a controlling interest in The Onion in January 2016." (*Id*.). That allegation forecloses GCA's interference claim as a matter of law, since a stakeholder with a financial interest in a company is permitted to interfere with that company's contracts. Accordingly, even if Univision had engaged in the kind of actions alleged by GCA, Univision would have been legally justified in doing so and would not be subject to suit. The Court of Appeals recognized this justification almost fifty years ago in *Felsen v. Sol Cafe Mfg. Corp.*:

> [A] person who has a financial interest, as a stockholder, in the business of another is privileged to interfere with a contract which that other person or business had with a third person if his purpose is to protect his own interest and if he does not employ improper means.

24 N.Y.2d 682, 687 (1969). In that case, the Court held that the plaintiff had not established a *prima facie* case of tortious interference where the plaintiff could not show that the defendant shareholder was motivated by any malice toward the plaintiff or had employed illegal means. *Id*. The Court held that, in these circumstances, the defendant's motion to dismiss should have been granted. *Id*.; *see also Morrison v. Frank*, 81 N.Y.S.2d 743, 744 (N.Y. Sup. Ct. 1948) (cited with approval by *Felson*, 24 N.Y.2d at 687) (granting motion to dismiss interference claim because "[t]he averment that defendant's acts were motivated solely by an intent to benefit himself negatives the allegation of malice" and plaintiff failed sufficiently to allege any improper means).

Following *Felsen* and *Morrison*, New York courts have dismissed tortious interference claims at the pleading stage where the allegedly interfering defendant has an economic interest in the allegedly breaching party and the plaintiff fails to allege that the defendant possessed the requisite malice or used improper means. *See, e.g.*, *MTI/The Image Group, Inc. v. Fox Studios E. Inc.*, 262 A.D.2d 20, 23-24 (1st Dep't 1999) (affirming dismissal of interference claims where "all the named companies are affiliated with [the allegedly breaching party], either as parent or sister companies, and thus had an economic interest" and plaintiff "failed to demonstrate malice"); *Levine v. Yokell*, 258 A.D.2d 296, 296 (1st Dep't 1999) (affirming dismissal of tortious interference claim where "pleading does not contain the requisite allegation that defendant-respondent intentionally procured" a breach "without economic justification") (internal citations omitted); *see also WMW Mach. Co. v. Koerber AG*, 240 A.D.2d 400, 401 (1st Dep't 1997) (awarding summary judgment where "defendants, as either the parent or a

subsidiary of the Manufacturers, have an economic interest in the Manufacturers sufficient to support a defense of economic justification"; the imposition of liability therefore "requires a showing of either malice on the one hand, or fraudulent or illegal means on the other") (internal citations omitted); *Koret, Inc. v. Christian Dior, S.A.*, 161 A.D.2d 156, 157 (1st Dep't), *appeal denied*, 76 N.Y.2d 714 (1990) (vacating jury verdict that defendant tortiously interfered with contract of its wholly owned subsidiary because defendant "was no stranger" to the contract and "had a right to interfere with the contract of its subsidiary in order to protect its economic interests"); *cf. Canon Fin. Servs., Inc. v. Meyers Assocs*., LP, 139 A.D.3d 575, 576 (1st Dep't 2016) (claim "alleging tortious interference with contract … was correctly dismissed because [defendant] had its own economic interest in the agreement … and therefore was privileged to 'interfere' in the transaction at issue").

Here, GCA alleges that Univision has a controlling interest in Onion and that it purportedly caused Onion not to pay a fee to GCA, in favor of paying it to a third party (allegations that are, in any event, wrong). (Compl. ¶¶ 21-22). GCA does not allege that Univision acted with any malice towards GCA or employed improper means. GCA alleges only that Univision caused Onion not to pay GCA, a payment that necessarily would have depleted Onion's resources. Thus, under GCA's own theory and based on GCA's own allegations, Univision cannot have tortiously interfered with Onion's alleged obligations to GCA as a matter of law and that claim should be dismissed.

B. GCA's Tortious Interference Claim Fails Because GCA Fails To Allege That Univision Was The But-For Cause Of The Alleged Breach

GCA's tortious interference claim is also defective because GCA fails to allege the requisite element that Univision was the "but-for" cause of the alleged breach. *See, e.g.*, *Cantor Fitzgerald Assocs., L.P. v. Tradition N. Am., Inc.*, 299 A.D.2d 204, 204 (1st Dep't 2002) ("An

essential element of such a claim is that the breach of contract would not have occurred but for the activities of the defendant."); *see also PK Rest., LLC v. Lifshutz*, 138 A.D.3d 434, 438 (1st Dep't 2016) (dismissing interference claim because plaintiff failed to allege that defendants' actions were but-for cause of breach of contract with third party); *Pursuit Inv. Mgmt. LLC v. Alpha Beta Capital Partners, L.P.*, 127 A.D.3d 580, 581 (1st Dep't 2015) (same).

In fact, GCA has failed sufficiently to allege that Univision caused Onion to do anything, much less allege the requisite "but for" causation. GCA alleges that Univision "caused Defendant The Onion to breach its contractual obligations under the Agreement by entering into an agreement to pay the Transaction fee due Plaintiff GCA to a third party." (Compl. ¶ 22). GCA fails, however, to explain how Univision's purported agreement to pay a third party allegedly induced the Onion to not pay GCA. Indeed, GCA merely speculates that the first event could have led to the latter. GCA's claim fails for this reason as well. *See, e.g.*, *Carlyle*, 160 A.D.3d at 477 (dismissing claim where allegations of "but for" causation were "supported by mere speculation"); *Ferrandino & Son, Inc. v. Wheaton Builders, Inc., LLC*, 82 A.D.3d 1035, 1036 (2d Dep't 2011) (dismissing claim where plaintiff merely asserted, in conclusory manner and without support of relevant factual allegations, that defendant caused the breach, and failed to allege "but for" causation, because "to avoid dismissal of a tortious interference with contract claim a plaintiff must support his claim with more than mere speculation").

CONCLUSION

For the reasons set forth above, the Court should dismiss GCA's claim against Univision pursuant to CPLR § 3211(a)(7).

Dated: New York, New York
February 15, 2019

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