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

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

SHAPIRO ARATO BACH LLP
Cynthia S. Arato
500 Fifth Avenue, 40th Floor
New York, NY 10110
Telephone: (212) 257-4880
Facsimile: (212) 202-6417

Counsel for Defendant Univision Communications Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. GCA RELIES ON AN ERRONEOUS PLEADING STANDARD 1

II. GCA FAILS TO STATE A CLAIM FOR TORTIOUS INTERFERENCE 2

A. Univision's Economic Interest Bars GCA's Tortious Interference Claim 2

B. GCA's Claim Fails Because It Does Not Allege That Univision Was The But-For Cause Of The Alleged Breach 5

C. This Court Should Deny Leave To Replead 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases **Page(s)**

Advanced Global Tech., LLC v. Sirius Satellite Radio, Inc.,
44 A.D.3d 317 (1st Dep't 2007) 1

Carlyle, LLC v. Quik Park 1633 Garage LLC,
160 A.D.3d 476 (1st Dep't 2018) 6

Due Pesci Inc. v. Threads for Thought, LLC,
35 Misc.3d 1202(A) (N.Y. Sup. Ct. 2012) 1, 4

Felsen v. Sol Cafe Mfg. Corp.,
24 N.Y.2d 682 (1969) 2, 4

Foster v. Churchill,
87 N.Y.2d 744 (1996) 4

Gulf Ins. Co. v. Mian Contracting, Inc.,
6 Misc. 3d 1016(A) (N.Y. Sup. Ct. 2004) 4

Hirsh v. Food Res., Inc.,
24 A.D.3d 293 (1st Dep't 2005) 3

Koret, Inc. v. Christian Dior, S.A.,
161 A.D.2d 156 (1st Dep't 1990) 3

Leon v. Martinez,
84 N.Y.2d 83 (1994) 2

Levine v. Yokell,
258 A.D.2d 296 (1st Dep't 1999) 3

Morrison v. Frank,
81 N.Y.S.2d 743 (N.Y. Sup. Ct. 1948) 3

MTI/The Image Group, Inc. v. Fox Studios E. Inc.,
262 A.D.2d 20 (1st Dep't 1999) 3

Nicosia v. Bd. of Managers of Weber House Condo.,
77 A.D.3d 455 (1st Dep't 2010) 5

Norte & Co. v. New York & Harlem R.R. Co.,
222 A.D.2d 357 (1st Dep't 1995) 6

Record Club of Am., Inc. v. United Artists Records, Inc.,
611 F. Supp. 211 (S.D.N.Y. 1985) 3

White Plains Coat & Apron Co. v. Cintas Corp.,
8 N.Y.3d 422 (2007) 2

Statutes

CPLR § 3211(a) 1, 2

Defendant Univision Communications Inc. ("Univision"), by its attorneys Shapiro Arato Bach LLP, respectfully submits this reply memorandum of law in further 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.

ARGUMENT

I. GCA RELIES ON AN ERRONEOUS PLEADING STANDARD

GCA relies on an erroneous pleading standard to contend that Univision "fails to state a defense of economic interest" and "has not alleged—much less conclusively established—that it interfered with the contract between GCA and The Onion based upon its economic interest in The Onion." (Pl. Br. 1).

GCA improperly seeks to impose a non-existent burden upon Univision. Univision moves to dismiss GCA's interference claim under CPLR § 3211(a)(7). That section of the CPLR governs motions to dismiss based on a plaintiff's "failure to state a cause of action." CPLR § 3211(a)(7). Accordingly, Univision has no burden under that section to "allege," or to proffer evidence "conclusively establish[ing]," its economic justification defense. To the contrary, this Court can and should grant Univision's motion to dismiss because the allegations in GCA's Complaint foreclose GCA's claim. *Advanced Global Tech., LLC v. Sirius Satellite Radio, Inc.*, 44 A.D.3d 317, 318 (1st Dep't 2007) ("The motion court correctly held pursuant to CPLR 3211(a)(7)" that the complaint's "allegations, on their face, show" defendant's "economic interest" defense). GCA's cited case, *Due Pesci Inc. v. Threads for Thought, LLC*, 35 Misc.3d 1202(A) (N.Y. Sup. Ct. 2012) is in accord. *Id*. at *7 (to assert a viable interference claim, the "*[p]laintiff* must . . . allege that [the defendant] procured [the] breach . . . without justification") (emphasis added)).

Univision also has no obligation to submit any evidence "conclusively establish[ing]" its economic justification defense. (Pl. Br. 1-2). That standard applies to a motion to dismiss based on documentary evidence brought under CPLR § 3211(a)(1), and not a motion to dismiss for failure to state a claim brought under CPLR § 3211(a)(7). *See*, *e.g.*, *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994) (*cited* by GCA and holding that "[u]nder CPLR 3211(a)(1) a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims").

II. GCA FAILS TO STATE A CLAIM FOR TORTIOUS INTERFERENCE

A. Univision's Economic Interest Bars GCA's Tortious Interference Claim

GCA concedes that a stakeholder with a financial interest in a company is justified in interfering with that company's contracts under the "economic justification" or "economic interest" defense. (Pl. Br. 3). GCA nevertheless contends that Univision cannot avail itself of this defense on this motion to dismiss because (1) the defense "exists only where the interferer acts in the economic interests of the contracting party, not for the interferer's own personal interest" (*id*.); and (2) the Complaint alleges that Univision acted in its own personal interest when it "caused" Onion to breach a payment obligation to GCA (*id*. 3-4).

Contrary to GCA's contentions, a parent company or controlling shareholder, by definition, always possesses a financial stake in the business of the company that it wholly or majority owns. Accordingly, unless it acts with improper means or with malice, such company or shareholder is privileged to interfere with the contracts of the company that it owns, including to protect its own financial interest. *See*, *e.g.*, *Felsen v. Sol Cafe Mfg. Corp.*, 24 N.Y.2d 682, 687 (1969) (as the "sole stockholder of" the allegedly breaching party the defendant "had an existing economic interest in the affairs" of the party); *White Plains Coat &*

Apron Co. v. Cintas Corp., 8 N.Y.3d 422, 426 (2007) (the "economic interest" defense has applied "where defendants were significant stockholders in the breaching parties' business" and "where defendant and the breaching party had a parent-subsidiary relationship"); *Hirsh v. Food Res., Inc*., 24 A.D.3d 293, 296-97 (1st Dep't 2005) (interference claim against majority shareholder was "deficient" because "as holder of 83 1/3% of Food Resources' shares, [shareholder] was also acting as an owner with an economic interest"); *MTI/The Image Grp., Inc. v. Fox Studios E. Inc.*, 262 A.D.2d 20, 23-24 (1st Dep't 1999) (fact that "all the named [defendants] are affiliated with [the allegedly breaching party], either as parent or sister companies" gave defendants "an economic interest" in the allegedly breaching party sufficient to support a defense of economic justification); *Koret, Inc. v. Christian Dior, S.A.*, 161 A.D.2d 156, 157 (1st Dep't 1990) (parent may "interfere with the contract of its subsidiary in order to protect its economic interests"); *Record Club of Am., Inc. v. United Artists Records, Inc.*, 611 F. Supp. 211, 217 (S.D.N.Y. 1985) ("Under New York law, one who has a financial interest in the business of another is privileged to interfere with a contract between the other and a third party *if* his purpose is to protect his own interests and if he does not employ improper means.").

For this reason, courts regularly dismiss claims for tortious interference, like GCA's claim here, brought against a parent/shareholder who is not alleged to have acted with malice or engaged in improper means. *See*, *e.g*., *Hirsh*, 24 A.D.3d at 296-97; *MTI/The Image Grp.*, 262 A.D.2d at 23-24; *Levine v. Yokell*, 258 A.D.2d 296, 296 (1st Dep't 1999) (affirming dismissal of interference claim on a motion to dismiss where pleading failed to demonstrate that defendant acted "without economic justification"); *Morrison v. Frank*, 81 N.Y.S.2d 743, 744 (N.Y. Sup. Ct. 1948) (dismissing interference claim on a motion to dismiss where allegations in plaintiff's

complaint established defendant's economic justification defense) (*cited with approval by Felsen*, 24 N.Y.2d at 687)).

GCA disregards these authorities and relies instead on a single non-precedential case—*Due Pesci.* But even *Due Pesci* supports the dismissal of GCA's interference claim. *Due Pesci* states that the economic interest privilege applies where a company "interfere[es] with [an affiliate's] Agreement in order to protect *its* economic interest." 35 Misc.3d 1202(A), at *8 (emphasis added); *see also id*. (defendant failed to demonstrate, on a motion to dismiss based on documentary evidence, that "it believed it was in *its* economic interest to interfere with the Agreement") (emphasis added).[1] In addition, while *Due Pesci* observes that the defense applies where a company interferes to protect its affiliate's financial health, *Due Pesci* recognizes that "[]*other* economic interest[s]" can also suffice. *Id*. (emphasis added).[2]

Second, even if the economic justification defense contains a requirement that an alleged interferer must act in the economic interest of the breaching party, that element is met here because, as alleged by GCA, Univision's supposed interference would have been in Onion's economic interest. Assuming Univision "caused" Onion not to pay GCA the disputed $2 million fee that GCA claims is due, that would have left Onion with an additional $2 million dollars in its cash reserves that it otherwise would have paid to GCA. GCA concludes without

[1] *Due Pesci*'s own citations are in accord. *Due Pesci* cites the Court of Appeals' seminal holding in *Felsen* that "defendants were privileged to interfere with the employment agreement to protect *their* economic interests." *Due Pesci*, 35 Misc.3d 1202(A), at *8 (*citing Felsen*, 24 N.Y.2d at 687-88) (emphasis added). *Due Pesci* also cites *Gulf Ins. Co. v. Mian Contracting, Inc*., 6 Misc. 3d 1016(A) (N.Y. Sup. Ct. 2004), where the court dismissed interference claims because they alleged only "that [the defendant's] actions were economically motivated." *Due Pesci*, 35 Misc.3d 1202(A), at *8-9 (citing *Gulf Ins. Co*., 6 Misc.3d 1016(A), at *2).

[2] Plaintiff's passing reference to *Foster v. Churchill*, 87 N.Y.2d 744 (1996) is also unavailing, as the Court there affirmed the dismissal of a tortious interference claim on the grounds that the alleged interferer had acted in the financial interests of the breaching party.

support that Univision supposedly "diverted" this fee from Onion's coffers to another vendor (Pl. Br. 3), but the Complaint does not suggest—let alone plead facts from which the Court may infer—that Onion had earmarked any money to pay GCA or that Onion had no additional funds to pay GCA after the so-called "diversion" took place. In other words, GCA has alleged no facts from which the Court can infer that Univision's supposed payment to a third party prevented Onion from also paying GCA. *Nicosia v. Bd. of Managers of Weber House Condo.*, 77 A.D.3d 455, 457 (1st Dep't 2010) (dismissing claim because plaintiff "ha[d] not pleaded the[] facts" necessary to support its claim and courts cannot "speculate and infer the facts for" plaintiff).

Finally, GCA contends in its opposition that Univision used Onion funds to pay a different financial advisor (The Raine Group) for its work on the transaction in dispute. (Dkt.22 ¶ 7 & Ex. B). Assuming that to be the case, such a payment would have been in Onion's economic interest as it would have been made for services that helped Univision and Onion effectuate a transaction that Onion sought.

For each of these reasons, the tortious interference claim fails.

B. GCA's Claim Fails Because It Does Not Allege That Univision Was The But-For Cause Of The Alleged Breach

GCA concedes in its opposition that its Complaint fails to allege the requisite element that Univision was the "but for" cause of Onion's alleged breach, which compels dismissal. (Pl. Br. 4). GCA's opposition does nothing to salvage that deficiency; it merely intones the "but for" phrase in its brief, which adds nothing to its deficient pleading. It is undisputed that GCA alleges in its Complaint only that Univision "diverted" its Transaction Fee to pay "a third party" and does not allege that Univision took any other actions. (Compl. ¶ 14). GCA tries to avoid the consequences of its pleading by stating in its opposition that "[b]ut for the fee being

diverted, GCA would have received it." (Pl. Br. 5). But GCA's mere reciting of the "but for" phrase adds nothing to its otherwise empty allegations. Indeed, GCA fails, in both its Complaint and its opposition, to allege or explain how Univision's supposed payment to a third party precluded Onion from using additional funds to also pay GCA. Accordingly, the "but for" contention that GCA now asserts in its opposition is based on precisely the type of "speculation," fueled by illogical leaps and "conclusory" assertions, which requires dismissal of the Complaint. *Carlyle, LLC v. Quik Park 1633 Garage LLC*, 160 A.D.3d 476, 477 (1st Dep't 2018) (internal quotations omitted).

C. This Court Should Deny Leave To Replead

This Court should deny GCA leave to replead. GCA vaguely alludes to additional "facts learned since GCA's Complaint was filed" (Pl. Br. 5), but GCA does not explain how these supposed "facts" remedy the Complaint's defects. As set forth above, these supposed new "facts" do not salvage GCA's claim, so "recasting the complaint would . . . be[] futile." *Norte & Co. v. New York & Harlem R.R. Co.*, 222 A.D.2d 357, 358 (1st Dep't 1995). For this reason, the Court should deny leave to replead. *Id*.

CONCLUSION

For the reasons set forth above and in the opening brief, the Court should dismiss GCA's claim for tortious interference against Univision pursuant to CPLR § 3211(a)(7).

Dated: New York, New York
April 12, 2019

SHAPIRO ARATO BACH LLP

By: /s/ Cynthia S. Arato
Cynthia S. Arato

500 Fifth Avenue, 40th Floor
New York, NY 10110
Telephone: (212) 257-4880
Facsimile: (212) 202-6417

Counsel for Defendant Univision Communications Inc.