IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 09-6917
	)	
AMERICAN CAPITAL, LTD., d/b/a American Capital Strategies, Ltd., a Delaware corporation	)	
	)	
Defendant.	)	

AMERICAN CAPITAL'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and for the reasons set forth fully in the supporting memorandum filed contemporaneously herewith, Defendant American Capital, Ltd. ("American Capital"), respectfully moves this Court to grant it summary judgment on Plaintiff James Nation's single-count Complaint for Tortious Interference With a Contract. Pursuant to Local Rule 56.1(a), this motion is accompanied by: (1) exhibits (including depositions, interrogatory answers and documents as contemplated by Federal Rule of Civil Procedure 56(c)); (2) a supporting memorandum of law; and (3) a statement of material facts as to which there is no genuine issue and which entitle American Capital to judgment as a matter of law.

Dated: January 18, 2011

Respectfully submitted,

AMERICAN CAPITAL, LTD.

By: s/ Alan W. Nicgorski
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AMERICAN CAPITAL'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, Defendant American Capital, Ltd. ("American Capital") respectfully submits this Memorandum in Support of its Motion for Summary Judgment.

INTRODUCTION

Plaintiff James Nation ("Nation") filed a single-count Complaint for Tortious Interference With a Contract (the "Complaint") against American Capital. Specifically, Nation alleges that he entered into a Separation and Severance Agreement and General Release (the "agreement") with his former employer, The Spring Air Company ("Spring Air"), and that Spring Air breached the agreement by failing to pay Nation the full amount due under the agreement. Nation further alleges that American Capital – who Nation asserts was Spring Air's "main financial resource and main creditor" – tortiously interfered with the agreement by instructing Spring Air to stop paying Nation under the severance agreement. As discussed below, Nation's claim fails because Nation cannot show that American Capital directed Spring Air to stop the severance payments, and, even if it had, such conduct would have been privileged and Nation cannot show that such privilege was waived due to unjustified or malicious conduct. Additionally, if this Court were to find a genuine dispute of fact exists as to the merits of Nation's tortious interference claim, it should grant summary judgment to American Capital on its affirmative defense of "set off," that Nation's 2008 earnings from the time period after the severance payments ceased must be offset from any damages to which Nation would otherwise be entitled.

Therefore, this Court should conclude that Nation's tortious interference claim fails as a matter of law and grant American Capital's motion for summary judgment; or, *at the minimum*, this Court should grant American Capital summary judgment on its set-off defense and hold that

Nation's 2008 earnings from Serta constitute mitigation of damages and must therefore be deducted from the remaining amount owed to him by Spring Air under the agreement.

FACTS

I. Nation Departs Spring Air After the "Roll-up."

Nation became the President and CEO of Spring Air in or around October 1995. At the time, Spring Air was run like a "co-op." Spring Air owned the brand name and licensed it to various independently owned mattress manufacturers across the country. Spring Air also provided marketing, merchandising, and product development support to the licensees.

In June 2007, HIG Capital ("HIG") – an investment firm who had acquired certain of the licensees in prior years – purchased Spring Air and most of the remaining licensees. HIG planned to "roll-up" these previously independent companies into a unified business under common ownership.[1] (American Capital's Local Rule 56.1 Statement of Undisputed Material Facts ("ACSUMF") ¶ 20.) American Capital provided financing to HIG for this transaction, acquired a minority equity interest in Spring Air, and had one seat on Spring Air's seven-member Board of Directors. (ACSUMF ¶ 21.) Initially, American Capital's seat on the Spring Air Board was held by Bowen Diehl ("Diehl"). (ACSUMF ¶ 21.)

A short time later, in August 2007, Nation separated from Spring Air under the terms of the severance and non-compete agreement. (ACSUMF ¶¶ 6, 22.) The agreement provided that Nation was to receive a total of $1,243,140 in severance pay over a period of fifteen (15) months. (ACSUMF ¶ 7.) In exchange for this pay, Nation, among other things, agreed that he would not

[1] The parent corporation for this new unified business was Consolidated Bedding, Inc. ("CBI"). However, the operational and day-to-day business continued to be operated under the auspices of The Spring Air Company. Thus, for simplicity's sake, we shall continue to refer to the business at issue as "Spring Air" throughout this brief.

provide any services to any Spring Air competitor (including Serta) through December 31, 2008. (ACSUMF ¶ 8.)

II. Spring Air's Financial Struggles and American Capital's Efforts to Save the Company.

Shortly after the roll-up, it became clear that Spring Air was strapped for cash and would be in need of additional cash soon. In January 2008, Spring Air had advised American Capital (at that time, its secured senior lender) that it was "facing an urgent liquidity crisis and require[d] additional financing in order to successfully carry out its business plan, satisfy its obligations to creditors, and remain an on-going concern." (ACSUMF ¶ 23.) By that time, Spring Air was in default under its financing agreements with American Capital. (ACSUMF ¶ 24.) In light of these circumstances, American Capital urged Spring Air's Board of Directors and its majority owner, HIG, to put additional funds into Spring Air. (ACSUMF ¶ 25.) Eventually, American Capital and HIG each agreed to put $11 million dollars (for a total of $22 million) into Spring Air. (ACSUMF ¶ 25.) This new funding closed in early February 2008. (ACSUMF ¶ 25.) As a result of this transaction, American Capital increased its minority ownership in Spring Air and also obtained two additional seats (for a total of three out of seven) on the Board of Directors. (ACSUMF ¶ 26.) At this time, Diehl left the Spring Air Board of Directors, and Michael Michienzi ("Michienzi"), Craig Moore ("Moore"), and Bill Byers ("Byers") were appointed to the three American Capital seats. (ACSUMF ¶ 27.)

Despite this funding, Spring Air continued to burn through its available cash at an alarming rate, and it was clear that another significant cash infusion would be necessary for Spring Air to achieve a turnaround. (ACSUMF ¶ 28.) In April 2008, as they negotiated the terms of a larger cash infusion, HIG and American Capital each provided an additional $1.5 million to Spring Air to maintain operations. (ACSUMF ¶ 28.) Although HIG would not invest

any more in the struggling company beyond this temporary infusion, in June 2008, American Capital provided an additional $15 million in funding to Spring Air. (ACSUMF ¶ 29.) As part of this transaction, American Capital became the majority equity holder in Spring Air and gained an additional board seat thereby giving it a majority of the seats (four of seven) on Spring Air's Board of Directors. (ACSUMF ¶ 29.) Around that time, Diehl re-joined the Spring Air Board as the fourth American Capital member; and Michienzi became the Chairman. (ACSUMF ¶ 30.) Additionally, Spring Air hired a new Chief Financial Advisor ("CFO"), Steve Cumbow ("Cumbow"), who had a reputation for turning around failing companies.[2] (ACSUMF ¶ 31.) Cumbow later assumed the role and responsibilities of Chief Operating Officer ("COO"). (ACSUMF ¶ 32.)

III. Spring Air Suspends Severance Payments to Nation and Others in August 2008 in Order to Preserve Cash for Essential Operations.

Despite American Capital's continued investment in and support of Spring Air, it continued to struggle financially. (ACSUMF ¶¶ 33-36.) In August 2008, Spring Air was in "awful" financial condition, and was not able to pay many of its vendors on a timely basis, or in some cases, at all. (ACSUMF ¶ 35.) In fact, at least by mid-2008, Spring Air's biggest supplier, Leggett & Platt – who supplied mattress springs – had serious concerns about Spring Air's continuing viability as a going concern. (ACSUMF ¶ 34.)

In light of these dire circumstances, Spring Air's management team (including CFO/COO Cumbow and CEO Bob Hellyer) was constantly making decisions about what expenses to pay and which to defer in order to preserve the cash it had access to as long as possible and to go

[2] For approximately five months prior to joining Spring Air, Cumbow had been employed as a Vice President in American Capital's operations group. When Cumbow learned that Spring Air was looking for a CFO, he applied for that position and, when hired, resigned his employment with American Capital. (ACSUMF ¶37.)

towards a turnaround. (ACSUMF ¶ 39.) In other words, Spring Air's top priority was to keep the critical parts of the company going so that it could make and sell mattresses. (ACSUMF ¶ 40.) During this time period, Spring Air was constantly deferring payments to and re-negotiating terms with its suppliers. (ACSUMF ¶ 41.) As part of this effort to preserve cash for on-going operations, on August 22, 2008, the Spring Air management team decided to suspend severance payments to Nation and three other executives. (ACSUMF ¶¶ 10-12, 40.) At that point, Nation had been paid $836,153.28.[3] (ACSUMF ¶ 9.) Nation immediately contacted Serta about employment, and on September 15, 2008, Nation began working as the President of Business Development for Serta, Spring Air's direct competitor and a company specifically prohibited in Nation's severance and non-compete agreement. (ACSUMF ¶¶ 13-15.) Nation earned $106,384.64 in salary from Serta during the remainder of 2008. (ACSUMF ¶¶ 15-16.)

IV. Spring Air Files for Bankruptcy.

Despite American Capital's continued monetary and operational assistance, Spring Air was eventually forced to file for Chapter 7 bankruptcy in May 2009. (ACSUMF ¶ 42.) While American Capital's substantial investment and financing allowed Spring Air to survive and meet many of its obligations (including the $836,153.28 in payments to Nation) during 2008 and early 2009, Spring Air was never able to stabilize its cash flow issues, and American Capital ultimately lost millions of dollars due to Spring Air's failure. (ACSUMF ¶¶ 42-43.)

ARGUMENT

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a) (*see* cmts. to 2010 Amendments ("Subdivision (a) carries forward the summary-

[3] On December 11, 2008, Nation filed an arbitration demand against Spring Air with the American Arbitration Association seeking the $406,980.72 in remaining severance payments.

judgment standard expressed in former subdivision (c)")); *see also Davis v. Jewish Vocational Serv.*, No. 07C4735, 2010 WL 1172537, at *3 (N.D. Ill. Mar. 17, 2010). The existence of "merely a scintilla of evidence in support of the nonmoving party's position is insufficient." *Bus. Systs. Eng'g, Inc. v. Int'l Bus. Machs. Corp.*, 520 F. Supp. 2d 1012, 1014 (N.D. Ill. 2007). Instead, a genuine issue of fact requiring a trial exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Davis*, 2010 WL 1172537, at *3. Moreover, because it is *Nation* who bears the burden of proof here, American Capital need only show that there is an absence of evidence to support one or more of the elements Nation is required to prove in order to prevail on its motion for summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Here, American Capital is entitled to summary judgment because there is a complete lack of record evidence to support at least two of the elements Nation must prove to succeed on his claim for tortious interference with contract. *First*, Nation fails to meet his burden on *the* crucial element of his tortious interference claim, as there is absolutely no evidence in the record that *American Capital* instructed or otherwise induced Spring Air to breach its contract with Nation. *Second*, even if American Capital had instructed Spring Air not to pay Nation (and it did not), such action was not wrongful, but was privileged under Illinois law as American Capital's interest – as Spring Air's majority equity holder and primary lender – in the continued financial viability of Spring Air was equal or greater to Nation's interest in continuing to receive payments under the agreement; and Nation can point to no evidence that such an action by American Capital, if it had occurred, was malicious or unjustified.

Finally, although the Court need not reach this issue if it grants American Capital summary judgment on either of the two previous arguments, American Capital is also entitled to

summary judgment on its "set-off" defense as Nation's 2008 earnings ($106,384.64) from Serta constitute mitigation of damages and must therefore be deducted from the remaining amount owed to him by Spring Air under the agreement.

I. American Capital Did Not Induce Spring Air to Suspend Nation's Severance Payments.

To prevail on his claims under Illinois law (which the parties agree applies here), Nation must prove: "(1) a valid contract existed; (2) defendant knew the contract existed; (3) defendant intentionally and maliciously induced the breach of contract; (4) the breach of contract was caused by defendant's wrongful conduct; and (5) plaintiff suffered damage as a result." *Bus. Systs. Eng'g, Inc.*, 520 F. Supp. 2d at 1020-21 (*citing Fitzpatrick v. Catholic Bishop of Chicago*, 916 F.2d 1254, 1256 (7th Cir. 1990); *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 675-76 (Ill.1989)). It is the *sine qua non* of Nation's tortious interference claim that he prove that American Capital actually **interfered** with his contract with Spring Air. *See, e.g., HPI Health Care Servs., Inc.*, 545 N.E.2d at 675-76. Thus, to survive summary judgment, Nation must be able to point to sufficient evidence to allow a reasonable juror to conclude that Spring Air breached the agreement with Nation because American Capital instructed or induced Spring Air to stop making severance payments to Nation. However, ***not a single shred of evidence*** exists to support such an argument, and as a result, American Capital should be granted summary judgment. (ACSUMF ¶¶ 10-12, 40.)

As an initial matter, there is no evidence that American Capital or the American Capital employees serving on Spring Air's Board of Directors instructed or induced Spring Air to stop making payments to Nation. Indeed, the four American Capital members of Spring Air's Board of Directors (Michienzi, Moore, Diehl and Byers) unequivocally testified that, at the time the decision was made to suspend Nation's severance payments, neither they nor the Board was

involved in making that decision but rather, that the decision was made by Spring Air management. (ACSUMF ¶¶ 12, 40.) There is no evidence to contrary.

In his Complaint, Nation asserts that Spring Air CFO/COO Steve Cumbow was an agent of American Capital and that Cumbow's participation in the decision to suspend Nation's severance payments therefore equates to tortious interference by American Capital. Nation is wrong. First, it is undisputed that, at the time Spring Air suspended Nation's severance payments, Cumbow was an officer (CFO/COO) and employee of Spring Air and *not* an employee of American Capital. (ACSUMF ¶ 37.) It "is well established that employees and officers of a corporation are the corporation's agents," *Alpha Sch. Bus Co., Inc. v. Wagner*, 910 N.E.2d 1134, 1150 (Ill. App. Ct. 2009) (citing RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006)), and therefore at the time the severance decision was made, Cumbow was an agent of Spring Air, not American Capital. Moreover, Nation can point to no evidence to show that Cumbow was otherwise somehow an "agent" of American Capital at the time the severance decision was made by Spring Air. (ACSUMF ¶¶ 31-32, 37, 40.)

Therefore, no genuine dispute of fact exists: Cumbow was an officer, employee and agent of Spring Air – *and not of American Capital* – at the time he participated in the decision to suspend Nation's severance payments. (ACSUMF ¶ 37.) Cumbow's participation in that decision therefore cannot constitute interference by American Capital with Nation's contractual rights. Thus, because there was no interference by American Capital, the Court should grant American Capital's motion for summary judgment.

II. Even If American Capital Had Induced Spring Air to Suspend Payments to Nation (and It Did Not), Such Actions Would Have Been Privileged, and There Is No Evidence that American Capital Acted Maliciously or Unjustifiably.

Even assuming *arguendo* that Nation could point to some evidence that American Capital interfered with his contract with Spring Air, which he cannot, such interference would be privileged because American Capital would have been acting to protect its interest as the majority shareholder and primary creditor of Spring Air in the financial viability of Spring Air. (ACSUMF ¶¶ 23, 38, 40, 42.) Under such circumstances, it is *Nation's* burden to prove that American Capital's alleged conduct was unjustified and malicious, and he cannot do so. Therefore, this Court should grant American Capital summary judgment on this ground as well.

A. If American Capital Had Induced Spring Air to Stop Paying Nation, Such Interference Would Have Been Privileged Under Illinois Law.

Illinois law "recognizes that in many cases a third party may be privileged to purposefully bring about a breach of plaintiff's contract with another." *Certified Mech. Contractors, Inc. v. Wright & Co.*, 515 N.E.2d 1047, 1053 (Ill. App. Ct. 1987); *see also George A. Fuller Co., a Div. of Northrop Corp. v. Chicago Coll. of Osteopathic Med.*, 719 F.2d 1326, 1332 (7th Cir. 1983). "The third party is so 'privileged' when he is acting to protect a conflicting interest that is considered under the law to be of a value equal to or greater than the plaintiff's contractual rights . . . ." *Certified Mech.*, 515 N.E.2d at 1053; *see also George A. Fuller*, 719 F.2d at 1332. Illinois courts have recognized such a privilege for equity holders, members of boards of directors, primary creditors, and business advisors to use their business judgment on behalf of the corporation for which they work and to interfere with a corporation's contracts under certain circumstances. *See, e.g., HPI Health Care, Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 676 (Ill. 1989) (analogizing the hospital management company's role to that of corporate officers and directors of a corporation, and extending privilege to conduct in choosing

when, and to which creditors, payments should be made to satisfy hospitals' debts ("[a]s with corporate officers' and directors' duty to their shareholders … the duty owed by hospital management companies to their hospitals should take precedence over their duty to the hospitals' contract creditors")); *MGD, Inc. v. Dalen Trading Co.*, 596 N.E.2d 15, 18 (Ill. App. Ct. 1992) (extending privilege to corporate board member, officer and/or majority shareholder where there was no allegation of misappropriated assets nor a desire to harm the plaintiff unrelated to the companies' interests); *Certified Mech. Contractors*, 515 N.E.2d at 1053 (extending conditional privilege where acts inducing principal's breach are legal and not unreasonable under the circumstances, and there is no desire to harm the plaintiff unrelated to the principal's interests); *George A. Fuller*, 719 F.2d at 1333 (extending privilege to architect interfering with principal's contract ("Illinois law requires … [a plaintiff to] establish that the officers induced the breach to further their personal goals or to injure the other party to the contract, *and* acted contrary to the best interest of the corporation") (emphasis in original)); *Interlease Aviation v. Vanguard Airlines*, No. 02-4801, 2004 WL 1149397, at *9-10 (N.D. Ill. May 20, 2004) (extending privilege to creditor acting to protect its interest in debtor corporation).

Here, American Capital was both the majority equity holder and largest creditor of Spring Air at the time the decision to suspend Nation's severance payments was made. (ACSUMF ¶¶ 29, 38.) Under such circumstances, American Capital had a privilege to interfere with Spring Air's contracts in order to protect its interest in Spring Air's continued financial viability. *See MGD, Inc.*, 596 N.E.2d at 18; *Interlease Aviation*, 2004 WL 1149397, at *9-10. Illinois law has long recognized a privilege of corporate officers and directors to interfere in the corporation's contracts where, in the exercise of their reasonable business judgment, they conclude that such an action is in the best interests of the corporation. *See HPI Health Care Servs., Inc.*, 545 N.E.2d

at 677 ("[T]his Court recognized a privilege for corporate officers and directors to use their business judgment and discretion on behalf of their corporations. The existence of the privilege was based upon the recognition that the duty of corporate officers and directors to their corporations' shareholders outweighs any duty they might owe to the corporations' contract creditors.") (internal citations omitted); *Swager v. Couri*, 359 N.E.2d 921, 927 (Ill. 1979) ("corporate officers who in accordance with their business judgment and discretion interfere with their corporation's contractual relations lack the requisite 'malice' and therefore are not liable in tort."); *Stevenson v. ITT Harper, Inc.*, 366 N.E.2d 561, 571-72 (Ill. App. Ct. 1977) (holding that parent corporation's influence on subsidiary's decision to discharge plaintiff was privileged because it "was motivated by reasonable business purposes and was the product of neither malice or bad faith").

Here, although Nation cannot point to any evidence that the decision to suspend Nation's severance payments was made either by American Capital's employees on Spring Air's Board of Directors or that Spring Air CFO Steve Cumbow was an agent of American Capital, even if he could, the decision to suspend severance payments was privileged. Indeed, the record evidence is undisputed that Spring Air was in financial difficulty and its management had to make tough decisions regarding which of the company's contractual creditors were to be paid and not paid. (ACSUMF ¶¶ 23, 33-36, 39-42.) As early as January 2008, Spring Air was "facing an urgent liquidity crisis and require[d] additional financing in order to successfully carry out its business plan, satisfy its obligations to creditors, and remain an on-going concern." (ACSUMF ¶ 23.) By mid- to late-2008, Spring Air was constantly deferring payments to vendors and re-negotiating terms with its suppliers. (ACSUMF ¶ 41.) Thus, whether the Court analyzes the decision to suspend Nation's severance payments as that of a majority shareholder, primary creditor,

director, or officer, the result is the same – American Capital's alleged decision was privileged, and Nation simply cannot prove facts sufficient to allow a reasonable juror to conclude that the decision was unjustified or malicious.

B. *There is No Evidence that the Decision to Suspend Severance Payments to Nation was Unjustified or Malicious.*

In light of the privilege that applies to American Capital's alleged conduct, Nation faces the "heightened requirement" of overcoming that privilege by proving that American Capital's purported conduct was unjustified or malicious, and there are simply no facts in the record on which Nation could possibly meet that burden. *HPI Health Care Servs., Inc.*, 545 N.E.2d at 676. Specifically, Nation cannot prove – as he must – that American Capital's purported conduct was "totally unrelated to or even antagonistic to the interest which gives rise to [the] privilege," or "solely for the purpose of harming" Nation. *Id.* at 678; *see also Cashen v. Intergrated Portfolio Mgmt.*, No. 08-CV-268, 2008 WL 4976210, at *4 (N.D. Ill. Nov. 20, 2008) (holding that where defendant's conduct was privileged, "Illinois courts have placed on the plaintiff the added burden of proving lack of justification – rather than requiring the defendant to prove that his actions were justified."); *Citylink Group, Ltd. v. Hyatt Corp.,* 729 N.E.2d 869, 877 (Ill. App. Ct. 2000) (holding that, to overcome privilege, plaintiffs must "prove that a defendant acted in its own interests and contrary to the interests of its principal, or engaged in conduct totally unrelated or antagonistic to the interest giving rise to the privilege"); *MGD, Inc.*, 596 N.E.2d at 18 ("Actual malice is a positive desire or intent to injure another, and in the context of a charge of tortious interference with a contractual relationship, the plaintiff must show that the desire to harm was unrelated to the interests of the corporation."). Given American Capital's obvious financial interest in Spring Air as its primary equity holder (ACSUMF ¶ 38), Nation would have to show that American Capital induced Spring Air to act against its own financial interests (and, thereby,

against American Capital's financial interests as well) by breaching Nation's severance and non-compete agreement solely for the purpose of harming Nation. *See HPI Health Care,* 545 N.E.2d at 678; *MGD, Inc.*, 596 N.E.2d at 18. The notion is preposterous and there is not one scintilla of evidence to support it. (ACSUMF ¶¶ 11, 40.)

To the contrary, there is no dispute that Spring Air was in financial distress throughout the time of American Capital was involved with that company – including at the time the decision was made to suspend payments to Mr. Nation. (ACSUMF ¶¶ 33-36, 39-42.) The testimony of a Spring Air employee (Liz Ohlig), a Spring Air supplier (Perry Davis of Leggett & Platt), and the members of Spring Air's Board of Directors (Michienzi, Diehl, Byers and Moore) is all in agreement on this point. (ACSUMF ¶¶ 33-36.) Moreover, it cannot be reasonably be disputed that the decision to suspend severance payments to Nation *and others* was part of the Spring Air management team's efforts to conserve cash for essential on-going operations necessary to manufacture and sell mattresses. (ACSUMF ¶ 40.) As Mike Michienzi (the Chairman of Spring Air's Board of Directors) testified: "the company was continually running out of cash . . . Steve Cumbow's [Spring Air's CFO] charge was to keep critical parts of the company going as long as he could so that he could make beds, have cash come in, and improve the cash situation." (ACSUMF ¶ 40.) Thus, the decision to suspend severance payments to Nation, as well as other non-essential payments, was plainly made to protect the financial viability of Spring Air by preserving cash. (ACSUMF ¶¶ 33-36, 39-42.) Thus, even if American Capital participated in that decision (and it did not), that decision was consistent with Spring Air's interest and consistent with the privilege.

There is also no evidence that the decision to suspend Nation's payments was motivated by ill will or malice toward Mr. Nation. (ACSUMF ¶¶ 10-11, 40.) Mr. Nation admitted this at

his deposition. (ACSUMF ¶ 11.) The lack of malice or ill will is further demonstrated by the fact that Mr. Nation was not singled out, but rather severance payments to others also were suspended, not to mention the fact payments to vendors were being deferred and re-negotiated during this time as well. (ACSUMF ¶ 10.)

III. Nation's Claimed Damages Resulting from the Breach Should be Reduced by the Amount He Earned Working for Serta, Spring Air's Competitor.

Even if this Court allows Nation's tortious interference claim to go to trial (and it should not), it should nonetheless grant American Capital summary judgment on its set-off/mitigation defense. Specifically, it is undisputed that: (1) Nation's agreement with Spring Air prohibited him from working for Serta through December 31, 2008 (ACSUMF ¶ 8); (2) at the time Spring Air suspended payments to Nation, $406,980.72 in payments remained to be made (ACSUMF ¶ 17); (3) after Spring Air suspended payments, Nation went to work for Serta and earned $106,384.64 in salary during the remainder of 2008 (ACSUMF ¶¶ 13-16); and (4) if Spring Air continued to make payments, Nation could not have and *would not have* worked for Serta during 2008. Nonetheless, Nation maintains that he is entitled to recover from American Capital the full amount remaining under his contract with Spring Air while also retaining the $106,384.44 he earned from Serta. Again, Nation is wrong.

It is well-established under Illinois law that the purpose of awarding compensatory damages in tort "is to make the injured party whole and restore him to the position he was in before the loss, but not to enable him to make a profit or windfall on the transaction." *Harris v. Peters*, 653 N.E.2d 1274, 1275 (Ill. App. Ct. 1995); *see also Ill. Sch. Dist. Agency v. Pac. Ins. Co., Ltd.*, 571 F.3d 611, 617 (7th Cir. 2009) (quoting *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1146 (7th Cir. 1985)); *Stevenson*, 366 N.E.2d at 571-72 (applying doctrine of "avoidable consequences" or mitigation in context of claim of tortious interferences with

employment agreement to reduce damages by amount of plaintiff's earnings form subsequent employment). The law "aims to put an injured plaintiff in the *same* financial position that it would have been in if the defendant had not breached its duty." *Ill. Sch. Dist.*, 571 F.3d at 617; *see also Harris*, 653 N.E.2d at 1275.

Here, allowing Nation to obtain the full benefit of the severance agreement and also retain his 2008 earnings from Serta would place him in a markedly *better* position than he would have been in had there been no alleged breach of the severance agreement. The law does not countenance such a windfall. Instead, because Nation would not have gone to work for Serta in 2008 if Spring Air had not stopped paying him, the $106,384.44 he was able to earn from Serta due to Spring Air's alleged breach constitutes mitigation of his damages and must be deducted from the $406,980.72 in remaining payments under his agreement with Spring Air. Thus, Nation can recover no more than $300,596.28 even if he were to prevail on his tortious interference claim against American Capital.

CONCLUSION

For the foregoing reasons, this Court should grant American Capital's motion for summary judgment, enter judgment in its favor and against Nation, and award it such other relief as this Court deems appropriate.

Dated: January 18, 2011

Respectfully submitted,

AMERICAN CAPITAL, LTD.

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