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 RESPONSE
IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Court should deny Plaintiff Jim Nation's ("Nation") Motion for Summary Judgment,[1] and should grant American Capital, Ltd.'s ("American Capital") Motion for Summary Judgment.[2] Nation has not met – and cannot meet – his burden of proving a claim for tortious interference with contract because he has no evidence to show that American Capital caused Spring Air to breach its agreement with Nation. Even if such evidence existed, there is no evidence that the alleged interference was unjustified, malicious, wrongful, or inconsistent with the business privilege held by American Capital and Spring Air's Board of Directors. Additionally, Nation has not produced competent evidence to support the amount of damages he is claiming.

ARGUMENT

[1] Plaintiff's Motion for Summary Judgment is filed with this Court as Document Number 54.

[2] American Capital's Motion for Summary Judgment, Memorandum in Support of its Motion for Summary Judgment ("Summ. J. Memo") and Local Rule 56.1 Statement of Undisputed Material Facts ("ACSUMF") are filed with this Court under Document Numbers 56, 57, and 65, respectively.

To prevail on his claim for tortious interference with a contract, Nation must prove: (1) a valid contract existed; (2) American Capital knew the contract existed; (3) American Capital intentionally and maliciously induced the breach of contract; (4) the breach of contract was caused by American Capital's wrongful conduct; and (5) Nation suffered damage as a result. *Bus. Systs. Eng'g, Inc. v. Int'l Bus. Machs. Corp.*, 520 F. Supp. 2d 1012, 1020-21 (N.D. Ill. 2007) (*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). Further, because American Capital had a privilege to interfere with Spring Air's contract with Nation in order to protect its interest in Spring Air's continued financial viability, Nation must prove 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. *See HPI Health Care Servs., Inc.*, 545 N.E.2d at 678.

Nation fails to meet his burden of proof in at least three respects. *First,* Nation fails to produce any competent evidence that *American Capital* induced Spring Air's breach and ignores the substantial record to the contrary. Nation fails to identify any action actually taken by American Capital, and does not offer a single argument or authority for his conclusory assertions that Michienzi's alleged actions – as chairman of Spring Air's board of directors – should be imputed to American Capital. Further, Nation does not offer any argument that American Capital's actions (if there were any) *caused* Spring Air's breach, at a time when Spring Air was cutting costs broadly to address cash flow issues. *Second,* there is no evidence that American Capital's alleged conduct was unjustified or malicious, and, in fact, Nation admits that American Capital's alleged actions were motivated by its desire to protect its investment in Spring Air and not any desire to harm Nation. Under well established and controlling Illinois Supreme Court

authority (that Nation ignores), Nation's admission establishes that American Capital's alleged interference with his agreement with Spring Air was privileged and, thus, American Capital cannot be liable for tortious interference with a contract. *Id.* at 676-77. *Third*, Nation's claim that he is entitled to $406,980.72 in damages ignores the undisputed fact that he mitigated his damages by earning $106,384.64 from Serta in 2008. Thus, Nation can recover no more than $300,596.28 even if he were to prevail on his claim against American Capital.

For the reasons set forth more fully below and in American Capital's Summary Judgment Memo, the Court should grant American Capital's motion and deny Nation's motion.

I. Nation Cannot Prove That American Capital Induced Spring Air's Breach.

Contrary to the allegations in his Complaint, Nation's sole assertion of actual inducement now is that "it was American Capital through Michael Michienzi that made the decision to stop [Plaintiff's] severance payments under Spring Air's Agreement with [Plaintiff]." (Pl.'s Mot. for Summ. J. at 5.) Plaintiff relies solely on the affidavit of Robert Hellyer to support this proposition, which is insufficient for several reasons. First, Hellyer's affidavit does not set forth sufficient foundational facts to support its conclusory assertions. Hellyer does not provide any information to establish how he knows that Michienzi made any specific decision with respect to Nation, merely averring that Michienzi made "any and all" decisions regarding Nation. (Hellyer Aff. ¶ 6, Ex. 17 to Pl.'s Local Rule 56.1 Statement of Undisputed Facts.)[3] As such, it is not sufficient to support Plaintiff's motion for summary judgment, nor is it sufficient to defeat American Capital's. *See, e.g., Thomas v. Christ Hosp. & Med. Center*, 328 F.3d 890, 894 (7th Cir. 2003) ("it is clear that conclusory assertions, unsupported by specific facts made in affidavits opposing a motion for summary judgment, are not sufficient to defeat a motion for

[3] Plaintiff's Rule 56.1 Statement is on file with the Court as Document Number 67.

summary judgment."). Furthermore, the record evidence demonstrates that *Spring Air management* decided to suspend payments to Plaintiff (and other former officers), as part of a larger cost-cutting effort to save Spring Air (ACSUMF ¶ 10), and that neither Michienzi nor any other Spring Air board member was involved in making the decision. (ACSUMF ¶ 12).[4]

Even if sufficient evidence existed to show that Michienzi made the decision to suspend payments to Plaintiff, there is no evidence to suggest that his decision was induced by – or should be attributed to – American Capital. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(2) (2006) ("Although a corporation's shareholders elect its directors … the directors are neither the shareholders' nor the corporation's agents …. [S]hareholders do not ordinarily have a right to control directors by giving binding instructions to them [and] … [i]n any event, directors' ability to bind the corporation is invested in the directors as a board, not in individual directors acting unilaterally."). Plaintiff calls Michienzi "entrenched" in Spring Air, and specifically identifies an email about a sizeable cost-cutting plan in which Michienzi refers to himself and Spring Air as "we." (Pl.'s Mot. for Summ. J. at 5.) Yet Michienzi was the chairman of Spring Air's board of directors, and directors – by definition – are charged with making decisions for the companies they direct. Plaintiff has no evidence, facts or authority to argue that Michienzi had the ability to suspend Spring Air's payments to Plaintiff or that his alleged decision to do so was made in any other capacity than as a director of Spring Air. There is no evidence that American Capital exerted pressure or influenced Michienzi in any way with respect to Plaintiff's payments, and no

[4] At a minimum, the deposition testimony of Spring Air's board members establishes a factual dispute on this point. However, as discussed herein, this fact dispute does not impede American Capital's Motion for Summary Judgment because, even if Nation's assertion were true, he cannot show that Michienzi's actions are attributable to American Capital, nor can he show that such actions were unjustified or malicious.

basis to attribute Michienzi's alleged actions as Spring Air chairman to American Capital.[5] Further, there is no evidence or argument offered that American Capital's alleged actions actually *caused* the breach. Given Spring Air's poor cash flow and broad cost-cutting initiatives, there is ample evidence of Spring Air's independent cause to suspend payments to former executives. *See, e.g., Byker v. Sequent Computer Sys., Inc.*, No. 96 C 2297, 1997 WL 639045, at *13 (N.D. Ill. Oct. 1, 1997) ("there is nothing to corroborate the naked allegations of [plaintiff's] complaint … [which] rests only on … [a] vague and speculative allegation"); *Echo, Inc. v. Timberland Machines & Irrigation, Inc.*, Nos. 08 C 7123, 09 C 2673, 2011 WL 148396, at *5 (N.D. Ill. Jan. 18, 2011); *see also* ACSUMF ¶¶ 10-12, 23-24, 28, 33-36, 39-42.

II. Even if This Court Finds That American Capital Induced the Breach of Nation's Agreement, Nation's Motion Still Fails.

A. Nation cannot prove that American Capital's alleged interference was unjustified, malicious, or wrongful.

Even if this Court should find that American Capital, and not Spring Air's directors or officers, caused the breach of Nation's agreement, Nation's motion still fails because he cannot prove that American Capital's alleged inducement was unjustified, malicious, or wrongful. Nation acknowledges that he must prove *inter alia* that American Capital's alleged interference with his contract with Spring Air was unjustified, malicious and wrongful, (Pl.'s Mot. For Summ. J. at 5-6.), yet he provides *no evidence* to support his conclusory assertions that American Capital's alleged actions were malicious, "without justification" or wrongful. *See, e.g., HPI Health Care Servs., Inc.*, 545 N.E.2d at 676-77; *Swager v. Couri*, 359 N.E.2d 921, 927 (Ill. 1979); *Stevenson v. ITT Harper, Inc.*, 366 N.E.2d 561, 571-72 (Ill. App. Ct. 1977); *MGD, Inc. v.*

[5] Moreover, even accepting Plaintiff's view that Michienzi made the decision to suspend payments to Plaintiff, it would not overcome the privilege granted to directors to exercise their business judgment in making decisions on behalf of their corporations. See *infra* at II(B), pp. 6-9.

Dalen Trading Co., 596 N.E.2d 15, 18 (Ill. App. Ct. 1992); *Interlease Aviation v. Vanguard Airlines,* No. 02-4801, 2004 WL 1149397, at *9-10 (N.D. Ill. May 20, 2004). If American Capital is found to have interfered with Nation's contract, any alleged actions taken by American Capital regarding the suspension of Spring Air's payments to Nation were, in fact, justified and not wrongful or malicious. (*See* American Capital's Summ. J. Memo 9-14.) Nation has not come forward with any evidence – nor can he – to contradict such a finding.

B. American Capital's alleged actions related to Nation's contract were privileged, and Nation cannot overcome that privilege.

Nation entirely ignores well established Illinois law that even if American Capital interfered with Nation's contract with Spring Air, any actions taken to protect its legitimate interest in Spring Air's financial viability would have been privileged. To overcome the privilege, Nation must prove that American Capital's alleged interference was not related to its interest in protecting its investment in Spring Air, but was instead for the sole purpose of harming Nation. Nation cannot meet this burden, and thus his motion should be denied.

Specifically, Illinois law recognizes that "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). "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 …." *Id.* at 1053. Board members, equity holders, primary creditors, corporate officers and business advisors are all privileged to interfere with their corporations' contracts when, in the exercise of their reasonable business judgment, they conclude it is in the best interests of the corporation. *See, e.g., HPI Health Care Servs., Inc.*, 545 N.E.2d at 676-77 ("[T]his Court recognized a privilege for corporate officers and directors to use their business judgment and discretion on behalf of their corporations … 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*, 359 N.E.2d at 927 ("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*, 366 N.E.2d at 571-72 (a parent corporation's influence on its subsidiary's decision to discharge plaintiff was privileged because it "was motivated by reasonable business purposes and was the product of neither malice nor bad faith"); *MGD, Inc.*, 596 N.E.2d at 18 (corporate board member, officer and/or majority shareholder's actions were privileged where there was no allegation of misappropriated assets nor a desire to harm the plaintiff unrelated to the companies' interests); *Interlease Aviation*, 2004 WL 1149397, at *9-10 (creditor acting to protect its interest in debtor corporation was privileged).

Here, there is no dispute that, at the time payments to Nation were suspended, American Capital was both the majority equity holder in and a major creditor of Spring Air (ACSUMF ¶ 38), and Spring Air was struggling financially. (ACSUMF ¶¶ 23-24, 28, 33, 36, 41-42.) It is also undisputed that American Capital employees held four of the seven seats on Spring Air's Board of Directors at that time. (ACSUMF ¶ 29.) As such, it is undisputed that American Capital and its employees who held seats on Spring Air's Board of Directors had an interest in Spring Air's continued financial viability and were privileged to exercise their reasonable business judgment and interfere with Spring Air's contracts if they determined it was in Spring Air's best interests to do so.

To prevail in light of American Capital's privilege, Nation must prove 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" Plaintiff. *HPI Health Care*

Servs., Inc., 545 N.E.2d at 678; *see also Cashen v. Integrated Portfolio Mgmt.*, No. 08-CV-268, 2008 WL 4976210, at *4 (N.D. Ill. Nov. 20, 2008) (where defendant's conduct is 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) (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.").

Nation cannot meet this heightened burden. All of the evidence demonstrates that any financial decisions made by Spring Air's officers or directors were made to keep the company afloat, which is entirely consistent with the duty to act in the company's best interest. It is undisputed that Spring Air was in financial difficulty and had to make difficult decisions regarding which of the company's contractual creditors would be paid and when. (ACSUMF ¶¶ 23, 33-36, 39-42.) As early as January 2008 – well before payments to Plaintiff were suspended – 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 – while Plaintiff was still collecting checks – Spring Air was constantly deferring payments to vendors and re-negotiating terms with its suppliers. (ACSUMF ¶ 41.) Ultimately, the record plainly shows that decision to suspend payments to Plaintiff *and others* was part of a greater effort to conserve cash for essential on-going operations. (ACSUMF ¶ 40.) Nation can point to *no evidence* suggesting that the decision

to suspend his payments was "solely for the purpose of harming" him. *See HPI Health Care Servs., Inc.*, 545 N.E.2d at 678. Indeed, the record is crystal clear that the Spring Air was in financial distress and any decision to cease payments to Nation (regardless of who made that decision) was made with the company's financial viability in mind, and not with the intent to harm Nation. (ACSUMF ¶¶ 10-12, 39-42.) Thus, even if this Court concludes that American Capital induced Spring Air to breach its agreement with Plaintiff – whether it did so as the majority shareholder, primary creditor or director, the result is the same – American Capital's alleged decision was justified and privileged, and entirely consistent with American Capital's privilege to act in Spring Air's best interest. There is simply no evidence to the contrary.

Moreover, Nation affirmatively admits that American Capital's alleged decision to stop Nation's payments was part of an (ultimately unsuccessful) effort to save Spring Air:

> American Capital took over Spring Air's Board, took over Spring Air's offices and took over control of Spring Air's finances *as a result of some enormous loans* it made *in a risky attempt to keep Spring Air alive.* When American Capital discovered *it had invested heavily* in a dying company, *it did everything it could to save whatever of its investment was left*, which meant *cutting spending everywhere*, including Jim's severance Agreement. (Pl.'s Mot. for Summ. J. 7-8 (emphasis added)).

Nation therefore admits that his payments were suspended as part of an "attempt to keep Spring Air alive" and that his payments were not singled out, but spending was cut "everywhere." Put another way, American Capital's alleged decision was justified by its interest in Spring Air's financial viability and was not borne out of a desire to harm Nation unrelated to that interest. As a result, Plaintiff's Motion for Summary Judgment must be denied and the Court should award summary judgment to American Capital.

III. Plaintiff Did Not Fully Perform His Obligations Under the Agreement and His Claimed Damages Should be Reduced.

Even if this Court allows Plaintiff's tortious interference claim to proceed, it should nonetheless grant American Capital summary judgment on its set-off/mitigation defense. Plaintiff attempts to establish his damages by disingenuously asserting that he "fully performed his obligations under the Agreement and is still owed $406,980.72." (Pl.'s Mot. for Summ. J. 3.) He did not "fully perform"; rather, Nation mitigated his damages by working for Serta, a prohibited competitor under the agreement, almost immediately after Spring Air suspended Nation's payments. (ACSUMF ¶¶ 13-19.)

Illinois law is clear that compensatory damages in tort are "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* American Capital's Summ. J. Memo 14-15. Here, 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 – and *only because* – Spring Air suspended payments, Nation earned $106,384.64 working for Serta during 2008. (ACSUMF ¶¶ 13-16, 18.) Because Nation could not (and would not) have worked for Serta in 2008 but for Spring Air's alleged breach (ACSUMF ¶ 18), his Serta earnings constitute mitigation of his damages and must be set-off from the $406,980.72 otherwise due under agreement. Thus, Plaintiff may recover no more than $300,596.28 even if he were to prevail on his claim.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's Motion for Summary Judgment and enter summary judgment in favor of American Capital, and award it such other relief as this Court deems just and appropriate.

Dated: February 25, 2011

Respectfully submitted,

AMERICAN CAPITAL, LTD.

By: s/ Alan W. Nicgorski
One of Its Attorneys

Alan W. Nicgorski (#6243574)
Bradley D. Hergott (#6280208)
SCANDAGLIA & RYAN
55 E. Monroe Street, Suite 3440
Chicago, Illinois 60603
Telephone: (312) 580-2020
Facsimile: (312) 782-3806