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 REPLY
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

After two rounds of briefing and the exchange of Rule 56.1 Statements, it is plain that there is no genuine dispute of material fact and that American Capital is entitled to summary judgment for two reasons. *First*, Nation fails to produce any competent evidence that American Capital induced Spring Air's breach and ignores the substantial record to the contrary. *Second*, even if American Capital had induced Spring Air not to pay Nation (and it did not), such action was privileged under Illinois law, and Nation has failed to point to any contrary evidence.

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

In his Complaint, Nation alleges that Spring Air CFO Steve Cumbow made the decision to halt Nation's severance payments and that Cumbow was an agent of American Capital. (Compl. ¶ 8.) Nation now abandons that theory, and admits that Cumbow was a Spring Air executive at the relevant time. Instead, Nation now claims that it was Michael Michienzi, Spring Air's Chairman of the Board, who made not only the decision to stop Nation's payments but allegedly directed all aspects of Spring Air's business. As an initial matter, Nation's breathless assertions that "American Capital **WAS** Spring Air" and his speculation about American Capital's involvement in other decisions regarding Spring Air's financial affairs is simply not

relevant to his claim. This is not an *alter ego* case; it is a claim for tortious interference with contract by a third party. *See Knickman v. Midland Risk Servs.-Ill., Inc.*, 700 N.E.2d 458, 462 (4th Dist. 1998) (parent company that was "alter ego" of subsidiary could not be liable for inducing breach of a contract to which it was constructively a party). Thus, the only relevant issues are whether American Capital induced Spring Air to stop paying Nation and, if it did, whether American Capital was justified in doing so.

Nation's only "evidence" with respect to the relevant issues is the affidavit of Robert Hellyer. However**,** Hellyer's affidavit does not set forth sufficient foundational facts to support its conclusory assertions and thus is not sufficient to defeat American Capital's summary judgment. *See* Doc. 70, Def.'s Resp., at 3-5; *see also, e.g., Thomas v. Christ Hosp. & Med. Center*, 328 F.3d 890, 894 (7th Cir. 2003) (conclusory assertions in affidavits are not sufficient to defeat a motion for summary judgment.). Indeed, the record demonstrates that *Spring Air management* – not Michienzi or anyone else on the Spring Air Board - decided to suspend payments to Plaintiff (and other former officers), as part of a larger cost-cutting effort to save Spring Air. (Doc. 65, ACSUMF ¶¶ 10, 12.) Further, even if Hellyer's Affidavit had proper foundation, Nation's claim still fails because even if Michienzi made the decision to suspend payments to Nation, there is no evidence that Michienzi – the Chairman of Spring Air's Board of Directors – was induced to do so by American Capital. (*See* Doc. 70, Def.'s Resp., at 4-5 and authorities cited therein.)

II. American Capital had a Privilege to Interfere With Spring Air's Contracts and Nation Cannot Overcome that Privilege.

Under Illinois law, corporate board members, equity holders, primary creditors, and business advisors have a privilege to induce a breach of contract when they are exercising their reasonable business judgment in the interest of the corporation. *See HPI Health Care Servs.*,

Inc., v. Mt. Vernon Hospital, Inc., 545 N.E.2d 672, 676-77 (Ill.1989); *see also* Doc. 57, Def.'s SJ Mem. at 9-10 and cited authorities. Here, Plaintiff admits that, at the time Nation's payments were suspended, American Capital was both Spring Air's majority equity holder and largest creditor (Doc. 68, Pl.'s A. to ACSUMF ¶ 38), and that American Capital employees – including Michienzi – occupied 4 of the 7 available seats on Spring Air's board of directors. (Doc. 68, Pl.'s A. to ACSUMF ¶¶ 29-30.) Thus, American Capital and its employees serving on Spring Air's Board of Director's had an unequivocal interest in promoting Spring Air's success, giving rise to a privilege to interfere with Spring Air's contracts.

Nation makes two unavailing arguments in support of his claim that American Capital does not have a privilege. *First,* relying on case law concerning the "competitor's privilege," Nation argues that American Capital does not have a privilege because it and Nation are not competitors. (Doc. 69, Pl.'s Resp., at 8.) However, the competitor's privilege – which is a defense to tortious interference with *prospective economic advantage* (not tortious interference with *contract*) – is not relevant here. American Capital is not asserting the "competitor's privilege," but is asserting the well-recognized privileged of owners, shareholders, creditors, board members, corporate officers and business advisors to interfere in the contracts of the corporations they serve. *See* Doc. 57, Def.'s SJ Mem. at 9-10 and cited authorities. *Second,* Nation argues – without support – that the privilege relied upon by American Capital does not extend to owners, shareholders, or creditors who have a majority or controlling ownership interest in the contracting corporation. Put simply, Nation is wrong. *See, e.g., MGD, Inc. v. Dalen Trading Co.*, 596 N.E.2d 15, 18 (Ill. App. Ct. 1992) (extending privilege to corporate board member, officer and majority shareholder). Here, just as in *MGD,* American Capital had a privilege to protect its interests in Spring Air's viability.

To overcome this privilege, Plaintiff admits that he must "plead and prove that the defendant's conduct was unjustified or malicious." (Doc. 69, Pl.'s Resp., at 9 (citing *HPI Health Care Servs., Inc.*, 545 N.E.2d at 677.)) In this context, it means that Plaintiff must have evidence to demonstrate that American Capital's 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. Nation cannot meet this standard. Indeed, even if the Court accepts Nation's arguments that American Capital, through Michienzi, controlled all of Spring Air's financial decisions, there is no evidence that American Capital ever acted in a manner unrelated to or inconsistent with the interest giving rise to its privilege. In fact, Nation admits that Spring Air was in financial distress throughout the time American Capital was involved with it, that Spring Air was constantly deferring payments to vendors and re-negotiating terms with suppliers, was never able to stabilize its cash flow issues, and finally filed for bankruptcy. (Doc. 68, Pl.'s A. to ACSUMF ¶¶ 23, 33, 41-42.) Moreover, Nation admits that American Capital's alleged decision to stop Nation's payments was part of an (ultimately unsuccessful) effort to save Spring Air. (Doc. No. 54, Pl.'s Mot. for SJ 7-8.) Thus, 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.[1]

[1] The decision to resume payments to other former officers, even if it were made by American Capital, is irrelevant to Nation's claim. Nation claims that American Capital wrongly induced a breach, and that the breach took place when his payments were first suspended. (Doc. 69, Pl.'s Resp., at 11.) The fact that payments were later resumed to other former officers – officers who were owed significantly less money, had not already gained employment with Spring Air's competitors and had not instituted litigation against Spring Air – is not relevant to Nation's claim. Further, Nation has no evidence regarding who made these decisions or for what reasons, as Hellyer resigned from Spring Air in early September 2008 and, therefore, has no personal knowledge of the process. (Doc. 55, Pl.'s 56.1 Stmt. ¶ 40; Hellyer Aff. ¶ 7.)

However, despite Plaintiff's admissions, he attempts to muddy the issues by incongruously and disingenuously trying to paint American Capital as a stingy creditor steering funds away from Nation for its own benefit, stating that "only American Capital would stand to gain from the excess funds, leaving Spring Air to face liability for a breach of contract." (Doc. 69, Pl.'s Resp., at 10.) This argument makes no sense, as Plaintiff admits that, first, there were no "excess funds"; second, despite Spring Air's financial distress and cash flow issues, *American Capital continued to invest at least $27.5 million in 2008*; and third, American Capital lost much more than Nation or any other creditor when Spring Air ultimately failed. (Pl.'s A. to ACSUMF ¶¶ 23-25, 28-29, 33-36, 41-43). Regardless of the spin Nation tries to place on any alleged actions taken by American Capital, acting to keep Spring Air financially viable surely is directly related to and consistent with Spring Air's best interests. There is no dispute that any financial decisions made were to keep Spring Air afloat for the benefit of all stockholders[2] and creditors, including creditors like Nation. Nation can produce no evidence that American Capital acted inconsistently with Spring Air's interests or solely for the purpose of harming Nation, and thus even if American Capital had induced Spring Air to suspend Nation's payments, it would have been privileged in doing so.[3]

CONCLUSION

For the reasons stated above and in American Capital's motion for summary judgment supporting materials and opposition to Plaintiff's motion for summary judgment, this Court should enter summary judgment in American Capital's favor.

[2] HIG remained a minority shareholder in Spring Air.

[3] In addition, American Capital moves for summary judgment on the ground that Nation's 2008 earnings at Serta were mitigation of damages and must, therefore, be deducted from his claimed damages. This issue has already been briefed extensively in American Capital's opening brief (Doc. 57, at 14-15) and response to Nation's summary judgment motion (Doc. 70, at 9-10).

Dated: March 4, 2011

Respectfully submitted,

AMERICAN CAPITAL, LTD.

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