

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
DANIEL DYM TROW, :
 : No. 07 Civ. 11277 (RJS)
 :
 Plaintiff, :
 :
 v. :
 :
 TAYLOR SWIFT, SCOTT SWIFT, SCOTT :
 BORCHETTA, BIG MACHINE RECORDS, :
 LLC, and ANDREA SWIFT, :
 :
 Defendants. :
-----X

**REPLY MEMORANDUM OF LAW IN
FURTHER SUPPORT OF MOTION TO DISMISS
THE AMENDED COMPLAINT AGAINST DEFENDANTS
SCOTT BORCHETTA AND BIG MACHINE RECORDS, LLC**

JONATHAN D. DAVIS, P.C.
99 Park Avenue
Suite 1600
New York, New York 10016
(212) 687-5464
Attorneys for Defendants
Scott Borchetta and Big Machine Records, LLC

TABLE OF CONTENTS

Preliminary Statement.....1

ARGUMENT2

THE AMENDED COMPLAINT SHOULD BE DISMISSED2

 A. Plaintiff Has Failed To State A Claim For Unjust Enrichment2

 B. Plaintiff Failed To Allege Tortious
 Interference With Prospective Economic Gain.....3

CONCLUSION.....7

Preliminary Statement

This reply memorandum of law is respectfully submitted on behalf of Defendants Borchetta and BMR in further support of their motion, pursuant to Rule 12(b)(6), Fed. R. Civ. P., for an order dismissing the Amended Complaint for failure to state a claim upon which relief can be granted.¹

Plaintiff does not challenge the legal bases of Defendants Borchetta's and BMR's motion to dismiss. Instead, Plaintiff claims that he has satisfactorily alleged that he conferred a benefit on Mr. Borchetta and BMR sufficient to support an unjust enrichment claim. However, the Amended Complaint merely alleges that Plaintiff had meetings and negotiations with Mr. Borchetta, but he was not acting on Mr. Borchetta's or BMR's behalf. The mere fact that Mr. Borchetta and/or BMR may have ultimately benefited from these contacts is insufficient to support a claim for unjust enrichment against them as a matter of law.

Plaintiff also claims that he alleged each of the elements of his tortious interference claims, but he has not alleged any facts to support his conclusory allegations that Mr. Borchetta or BMR acted with intent to harm him or employed "wrongful means." Indeed, he does not even allege that Mr. Borchetta or BMR acted solely for the purpose of harming Plaintiff, as is required for a tortious interference claim based on contracts terminable at will or for prospective business gain.

All of the claims asserted against Mr. Borchetta and BMR are legally insufficient and must be dismissed.

¹ This reply memorandum adopts the defined terms in Defendants' moving papers to dismiss the Amended Complaint.

ARGUMENT

THE AMENDED COMPLAINT SHOULD BE DISMISSED

A. Plaintiff Has Failed To State A Claim For Unjust Enrichment

Plaintiff cites to several paragraphs in his Amended Complaint alleging he had meetings with Mr. Borchetta regarding Ms. Swift's career.² Plaintiff's Memo at 21, *citing* Davis Decl., Ex. A at ¶¶33-36, 38, 47, 62. As the cited paragraphs demonstrate, there is no allegation in the Amended Complaint that Mr. Borchetta or BMR requested any services from Plaintiff. Indeed, Plaintiff confirms that his meetings with Mr. Borchetta were "services . . . intended to primarily benefit Taylor . . ." Plaintiff's Memo at 21.

Plaintiff alleges that Mr. Borchetta encouraged Plaintiff to remain in contact with him and to coordinate the best contract terms for Ms. Taylor and that Mr. Borchetta and BMR "**appreciated his efforts on behalf of Taylor** and that they would continue to support him and **his efforts to maximize Taylor's potential and manage her career.**" *Id.* at 22, *citing* Davis Decl., Ex. A at ¶53 (emphasis added). These allegations further underscore that Plaintiff was acting on behalf of Plaintiff, and not Mr. Borchetta or BMR.

As set forth in Defendants Borchetta's and BMR's moving memorandum, the mere fact that a party may have benefited from Plaintiff's services does not state a claim for unjust enrichment. Here, the services were performed for another party, Ms. Swift, from whom Plaintiff expected compensation. Borchetta Defendants' Memo at 13-14.

² "Plaintiff's Memo" refers to Plaintiff Daniel Dymtrow's Memorandum Of Law In Opposition To The Swift Defendants' And The Big Machine Defendants' Motions To Dismiss The Amended Complaint For Failure To State A Claim. "Borchetta Defendants' Memo" refers to the Memorandum Of Law In Support Of Motion To Dismiss The Amended Complaint Against Defendants Scott Borchetta And Big Machine Records, LLC.

Plaintiff does not dispute this legal principle or Defendants Borchetta's and BMR's authorities. In addition to the cases previously cited, *see Lakeville Pace Mechanical, Inc. v. Elmar Realty Corp.*, 276 A.D.2d 673, 676, 714 N.Y.S.2d 338, 342 (2d Dep't 2000) and *Outrigger Const. Co., Inc. v. Bank Leumi Trust Co. of New York*, 240 A.D.2d 382, 384, 658 N.Y.S.2d 394, 396 (2d Dep't 1997).

Plaintiff allegedly performed his services pursuant to his contract with Ms. Swift. The fact that that contract was voidable because of Ms. Swift's infancy does not mean that Plaintiff can now turn to Mr. Borchetta or BMR as an alternate source of compensation where Plaintiff never had a contract with them, performed no services for them, and expected, and continues to expect, to be compensated by Ms. Swift only.

The Sixth Cause Of Action in the Amended Complaint for unjust enrichment against Defendants Borchetta and BMR must be dismissed.

**B. Plaintiff Failed To Allege Tortious
Interference With Prospective Economic Gain**

Plaintiff argues that his tortious interference claim against Mr. Borchetta and BMR with respect to the Management Agreement is based on prospective economic gain, not on a breach of an existing contract, and that the claim is thus subject to the pleading requirement that Plaintiff allege that Defendants employed "wrongful means" or acted solely with intent to harm Plaintiff. Plaintiff's Memo at 42. As previously set forth, the same pleading requirement applies if the Management Agreement is considered an at will contract voidable at the election of Ms. Swift. Borchetta Defendants' Memo at 5-12.

With respect to the alleged interference by Mr. Borchetta and BMR with the Parents' Guarantee, Plaintiff asserts that the guarantee is a valid contract upon which a tortious interference contract claim may be asserted. Aside from the fact that Plaintiff's

argument erroneously assumes the validity of the Parents' Guarantee, ignoring the dictates of the New York General Obligations Law §3-107 and the authorities holding that an agreement in violation of a statute cannot be the basis of a tortious interference claim (*see* Borchetta Defendants' Memo at 8-9), Plaintiff admits that his claims against Ms. Swift's parents also "sound in tortious interference with *prospective economic gain*, and not in interference with a contract. . . ." Plaintiff's Memo at 38, 41 (emphasis in original). Because Plaintiff's claims against the parents are based on *prospective economic gain*, and thus subject to *Guard-Life's* pleading requirement that Defendants must have employed wrongful means or acted solely with intent to harm him, Plaintiff's claim against Mr. Borchetta and BMR for inducing the loss of a prospective economic opportunity is likewise subject to the same analysis.

Plaintiff has not met the pleading requirements for a claim based on prospective economic advantage, which were recently reaffirmed by the Court of Appeals for the Second Circuit in *Friedman v. Coldwater Creek, Inc.*, 2009 WL 932546 (2d Cir. April 8, 2009) at *1:

Under New York law, in order to make out a *prima facie* case for tortious interference with prospective economic advantage, a plaintiff must establish "(1) that [h]e had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair or improper means; and (4) the defendant's interference caused injury to the relationship," *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 400 (2d Cir. 2006). The New York Court of Appeals has explained that, "as a general rule, a defendant's conduct must amount to a crime or an independent tort" in order to amount to tortious interference with a prospective economic advantage. *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190 (2004). A defendant who has not committed a crime or independent tort or acted solely out of malice may nevertheless be liable

if he has employed “wrongful means.” “‘Wrongful’ means include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions,” *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183 (1980) (quoting and citing Restatement (Second) of Torts §768, Comment e; § 767, Comment c), and “‘extreme and unfair’ economic pressure.” *Carvel*, 3 N.Y.3d at 190.

See also Gurvey v. Cowan. Liebowitz & Latman, PC., 2009 WL 1117278 (S.D.N.Y. April 24, 2009) at *5.

Plaintiff makes the sweeping statement that his Amended Complaint alleges every element of a tortious interference claim with a string citation to 36 paragraphs of his pleading without any explanation how these paragraphs support his argument. Plaintiff’s Memo at 42. Plaintiff’s cited allegations merely include the entirely conclusory assertion that “Defendant Borchetta’s and Big Machine Records’ actions **were done to harm** Mr. Dymtrow and/or were done by dishonest or unfair means. Their actions were willful, malicious and/or fraudulent.” Davis Decl., Ex. A at ¶135 (emphasis added).

Plaintiff avoids alleging that Mr. Borchetta or BMR acted **solely** for the purpose of harming Plaintiff. Indeed, the Amended Complaint alleges that Mr. Borchetta and BMR acted to advance their own “economic advantage,” Davis Decl., Ex. A at 78, which the previously-cited authorities amply demonstrate precludes the opportunity for Plaintiff to contend that Defendants acted solely to inflict harm on him. Borchetta Defendants’ Memo at 11-12. *See also Hassan v. Deutsche Bank A.G.*, 515 F. Supp.2d 426, 430 (S.D.N.Y. 2007) (A motive of normal economic self-interest is *inconsistent* with a sole purpose of inflicting intentional harm); *Anesthesia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center*, 59 A.D.3d 473, 873 N.Y.S.2d 679, 684 (2d Dep’t 2009) (“If a defendant shows that the interference is intended, at least in part, to

advance its own interests, then it was not acting solely to harm the plaintiff.”); *Advanced Global Technology LLC v. Sirius Satellite Radio, Inc.*, 15 Misc. 3d 776, 782-83, 836 N.Y.S.2d 807 (Sup. Ct. N.Y. Co.), *aff’d*, 44 A.D.3d 317, 843 N.Y.S.2d 220 (1st Dep’t 2007).

Plaintiff has also failed to allege any facts demonstrating that Defendants Borchetta or BMR engaged in a “crime” or an “independent tort” or employed “wrongful means,” as is required to plead a tortious interference claim for any purported interference with Plaintiff’s ability to seek prospective economic gain from the Management Agreement or the Parents’ Guarantee. Borchetta Defendants’ Memo at 10-11. *See also Advanced Global Technology LLC, supra*, 15 Misc. 3d at 782 (allegation that defendant acted “without justification, entirely out of malice” and “not motivated by normal economic self-interest” was conclusory and belied by facts).

Having failed to plead the necessary elements of a tortious interference with contract or prospective business opportunities or gain, Plaintiff’s claims must be dismissed.

CONCLUSION

For all the foregoing reasons, Defendants Borchetta and BMR respectfully request that the Court dismiss the Amended Complaint for failure to state a claim, together with such other and further relief as the Court deems just and proper.

Dated: June 3, 2009
New York, New York

JONATHAN D. DAVIS, P.C.

A handwritten signature in black ink, appearing to read 'Jonathan D. Davis', is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

By:

Jonathan D. Davis (JD 5712)
99 Park Avenue
Suite 1600
New York, New York 10016
(212) 687-5464
Attorneys for Defendants Scott
Borchetta and Big Machine Records,
LLC