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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DANIEL DYMTROW, Plaintiff, v. TAYLOR SWIFT, SCOTT SWIFT, SCOTT BORCHETTA, BIG MACHINE RECORDS, LLC, and ANDREA SWIFT, Defendants.	)	Civil Action No. 07 CV 11277 (RJS)

REPLY MEMORANDUM OF LAW OF DEFENDANTS TAYLOR SWIFT, SCOTT SWIFT AND ANDREA SWIFT IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT

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This Reply Memorandum of Law is respectfully submitted on behalf of Defendants Taylor Swift, Scott Swift and Andrea Swift ("Defendants") in support of their motion, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss Plaintiff's Amended Complaint.

PRELIMINARY STATEMENT

Nobody forced Plaintiff Daniel Dymtrow to enter into a management agreement with Taylor Swift. He did so voluntarily. He also did so fully aware that she was fourteen years old at the time and that the contract could be voided should she later elect to disaffirm it. New York law and public policy dictate that in order to obtain judicial approval of a minor's entertainment contract and a guarantee against disaffirmance, an "adult party must pay a price."[1] The price is that such contracts must be both fair and reasonable. Because of its open-ended duration, the EPMA was neither fair nor reasonable and thus would not have been approved by the Court

Such a circumstance illustrates well the illogical nature of Plaintiff's position: permitting claims such as Plaintiff's to proceed would create a disincentive to seeking judicial approval if a manager could simply draft a contract inimical to the minor's interests, avoid judicial scrutiny, and nevertheless still recover. Such a result gives the manager the advantage in bargaining power that courts have sought to avoid by allowing minors the absolute right to disaffirm their contracts. Accordingly, Plaintiff should not be permitted to benefit from his strategic decision to avoid judicial scrutiny of an unreasonable contract by now seeking payment under the terms of the EPMA.

As set forth herein and in the Swift Defendants' moving Memorandum of Law, Plaintiff's Amended Complaint should be dismissed.

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[1] *Prinze v. Jonas*, 38 N.Y.2d 570, 575-76, 345 N.E.2d 295, 381 N.Y.S.2d 824 (N.Y. 1976).

ARGUMENT

I. Plaintiff Has Failed To Demonstrate Any Basis Upon Which To Sustain His Claim For Unjust Enrichment

Despite the multitude of allegations in the Amended Complaint detailing the litany of services Plaintiff allegedly performed for Taylor, Plaintiff now clarifies (appropriately so) in his opposition brief that he is not seeking to recover compensation for any such services. Nevertheless, Plaintiff hinges his argument for recovery under a restitution theory on the equally unsound basis that he is owed commissions on contracts he allegedly "arranged" for Taylor before she disaffirmed the EPMA.

In support, Plaintiff rests largely on the inapposite case of *Scott Eden Management v. Kavovit*, 149 Misc.2d 262, 563 N.Y.S.2d 1001 (Sup. Ct. Westchester Co. 1990). Under the unique facts of that case, a management company was simply seeking the *continued* payment of commissions it had rightfully earned and had been receiving all along pursuant to the contract prior to the minor's disaffirmance. While the *Scott Eden* Court noted that it knew of no case that raised the question "whether disaffirmance may void the *contractual obligation to pay agent's commissions* without any concomitant exchange being made" (149 Misc. 2d at 265, 563 N.Y.S. 2d at 1003 (emphasis added)), it nevertheless reasoned that in light of the unique facts before it, the management company was already "entitled to [its] percentage fee." *Id.* at 266, 563 N.Y.S. 2d at 1003. Thus, the Court held that the minor "must continue to pay to plaintiffs all commissions to which plaintiff *would be entitled under their contract*, as they become due." *Id.* at 267, 563 N.Y.S. 2d at 1004 (emphasis added). Importantly, the disaffirmance in *Scott Eden* occurred only one week before the manager's contract would have expired under its own terms and after the manager had been collecting the commissions in issue for over one year. *Id.* at 263-64, 563 N.Y.S. 2d at 1001-02.

Here, unlike the facts in *Scott Eden*, there exists no allegation in the Amended Complaint that Plaintiff had been receiving commissions "on income from performance contracts already obtained" by Plaintiff. 149 Misc. 2d at 263, 563 N.Y.S.2d at 1001 (*see, e.g.*, Am. Compl., ¶¶ 102-103). By contrast, in *Scott Eden*, the management company was simply seeking the continued payment of commissions it had rightfully earned and had been receiving all along.

Moreover, taken to its logical conclusion, the application of the Westchester Supreme Court's decision in *Scott Eden* to the present facts as alleged by Plaintiff would require that the only way a minor may disaffirm a wholly executory personal services contract is to perform on it. This would render the right of disaffirmance wholly illusory. If the consideration to be restored is simply that which the minor agreed to provide in the contract, the purpose behind New York's strong public policy of affording minors the right to disaffirm would be severely undermined. The right to repudiate a contract "'is based on the incapacity of the infant to contract . . . .'" *See In re Ferguson's Guardianship*, 41 N.Y.S.2d 862, 864 (Surr. Ct., Westchester Co. 1943) (quoting *Green v. Green*, 69 N.Y. 553, 556 (1877)). Since "infants are not endowed with sufficient business acumen and sagacity in their dealings . . . persons transacting business with them, particularly with knowledge of this incapacity, do so at their own peril." *Id.* To provide a recovery to a plaintiff who refuses to obtain judicial scrutiny of a subsequently disaffirmed personal services contract, particularly one such as the EPMA that is contrary to statute and public policy due to its unlimited duration, is to require a minor to fulfill her obligations to the manager as though she had not disaffirmed at all. *See Farnum v. O'Neill*, 141 Misc. 555, 556, 252 N.Y.S. 900, 903 (Mun. Ct., N.Y. Co., 1931).

The *Farnum* case, *supra*, is consistent with the foregoing and stands in sharp contrast to *Scott Eden*. There, a manager attempted to recover commissions purportedly due to him under a personal services contract with a performer who was a minor at the time of the making of the contract and who sought to disaffirm the contract shortly after reaching majority. The Court distinguished the contract at issue as "not a single transaction, like the purchase and sale of some commodity or property, but an agreement primarily and essentially covering the right to the personal services of the infant defendant and looking entirely to the future for performance." *Id.*, 141 Misc. at 556, 252 N.Y.S. at 903. The Court also noted that the contract provided for the "continued right to share in [the defendant's] earnings . . . ." *Id.* Such a contract, the Court reasoned, "binds and obligates the defendant to the exclusive control of the plaintiff for several years" absent a right to disaffirm, and accordingly the Court dismissed the manager's complaint on the grounds of the defendant's infancy. *Id.*

Critically, the *Farnum* Court held that the defendant had the right to disaffirm *despite payment of commissions to the manager* since the contractual services rendered by the manager to the defendant resulting in such commissions took place prior to the defendant becoming of age. 141 Misc. at 557, 252 N.Y.S. at 903. Similarly, here, even taking the allegations in the Amended Complaint as true, any services rendered by Plaintiff to Taylor are not commissionable given Taylor's infancy and Plaintiff's failure to obtain judicial approval of the contract.[2]

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[2] In a puzzling argument, Plaintiff asserts that the Swift Defendants have not moved to dismiss Plaintiff's First Cause of Action as against Scott and Andrea Swift, but only as it relates to Taylor. *See* Plaintiff's Memorandum of Law in Opposition, filed May 11, 2009 (hereinafter "P. Opp.") at 19. First, the Swift Defendants' moving brief nowhere limits their motion to dismiss Plaintiff's deficient restitution claims to Taylor alone. *See* Swift Defendants' Moving Brief, dated March 20, 2009 (hereinafter "Swift Defendants' Br.") at 5-9. Second, while Plaintiff asserts in his opposition brief that he has sufficiently pled that *Taylor's parents* have profited unjustly (P. Opp. at 21), the assertion is nonsensical given that, by Plaintiff's own admission, his restitution claim relates to "contracts he [allegedly] arranged *for Taylor*." P. Opp. at 11 (emphasis added). Thus, not surprisingly, Plaintiff's assertion of a purported

(...continued)

Finally, because the term of the EPMA extended for an indeterminate duration, it would not have comported with the time limitations in § 35.03(2)(d) and thus could not have been judicially approved.[3] This open-ended duration contemplated by the EPMA is unreasonable and not in Taylor's best interests. Accordingly, it would be entirely inequitable to permit a restitution claim to be sustained in this situation. Such relief would provide an incentive for a manager to draft contracts that omit those provisions aimed at protecting the infant's interest and then avoid seeking judicial approval on the theory that the manager has nothing to lose since he will still recover under the contract if the infant chooses to disaffirm. Such a result is antithetical to the New York public policy interest in protecting infants in their contractual relationships.

II. Plaintiff Has Failed To Demonstrate Any Basis Upon Which To Sustain His Claim For Breach of Contract

In an attempt to steer the Court's attention away from Plaintiff's failure to obtain judicial approval of the EPMA, Plaintiff argues that the Swift Defendants have "manipulate[d]" subsection 2 of New York General Obligations Law §3-107 governing parental guarantees of unapproved entertainment contracts with minors. *See* P. Opp. at 27. To the contrary, the plain wording of the statute voids guarantees of unapproved contracts where the infant refused to perform services "*permitted by the contract to be performed*" in New York. § 3-107(2) (emphasis added). Tellingly, Plaintiff completely fails to offer an explanation as to why this

(...continued)
benefit to Taylor's parents is contrary to the very allegations cited by Plaintiff for support. *See* P. Opp. at 19-20 citing to the Amended Complaint at various paragraphs, each of which relates to services allegedly performed by Plaintiff on *Taylor's behalf*. *See, e.g.*, ¶ 3 (Plaintiff "devoted . . . time towards planning Taylor's career"); ¶ 27 (Plaintiff "focused his efforts on Taylor's behalf"); and ¶ 28 (Plaintiff "was able to secure many opportunities for Taylor").

[3] The EPMA would only have come to an end "upon the expiration of the 'Second Album Cycle'" but there is no date certain set forth in the EPMA as to when the "Second Album Cycle" is reached. See Am. Compl., Exhibit A, p.1. This directly contravenes Section 35.03(2)(d)'s mandate that no contract shall be approved if its terms extends beyond 3 years (or 7 years if the infant is represented by experienced counsel).

unambiguous statutory language does not apply here. Taylor was certainly permitted by the EPMA to perform services in New York, as there is no restriction in the EPMA precluding her from performing in New York or requiring her to perform services exclusively in another geographic location. Indeed, because of the nature of her performing career, the EPMA surely anticipated that Taylor would perform her services worldwide, including most certainly in New York. This is explicitly supported by the very first paragraph of the EPMA which states: "Territory: *The World.*" *See* Am. Compl., Exhibit A, p.1, para. 1 (emphasis added).[4]

Recognizing the infirmity of his position, Plaintiff instead states that "one need not even engage in a review" of the statutory language of § 3-107(2) because the applicability of that section "altogether is suspect." *See* P. Opp. at 27. Plaintiff's creative theory is that § 3-107 does not apply since it is only applicable to infants' contracts which "the supreme court or surrogate's court has jurisdiction to approve as provided in" Section 35.03 of New York Arts and Cultural Affairs Law. However, Section 35.03 clearly does provide jurisdiction to approve the EPMA. That statute provides for judicial approval of contracts with infant performers whose services "are to be performed or rendered" in New York. Here, Taylor's services were "to be performed or rendered" in New York and Plaintiff's arguments to the contrary directly conflict with Plaintiff's own allegations in the Amended Complaint as well as with the explicit terms of the EPMA.[5]

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[4] Of course, to the extent that Taylor had any obligations to remit payment to Plaintiff pursuant to the EPMA, such payment was to be made to Plaintiff in New York, where he resided.

[5] It is noteworthy that even Plaintiff is not convinced of § 3-107's inapplicability, as he can only posit that the applicability of § 3-107 is "suspect" or questionable. This lack of definitiveness betrays the weakness of Plaintiff's position. Indeed, Plaintiff offers no reason why the plain language of § 35.03 does not apply to the EPMA, simply stating that the statute's "scenarios are [not] implicated here." *See* P. Opp. at 28.

First, Plaintiff asserts in the Amended Complaint that "a substantial part of the events giving rise to Mr. Dymtrow's claims occurred in this judicial district." Am. Compl., ¶ 8. This is supported by the fact that, as a New York resident, any obligations under the EPMA to pay Plaintiff were to be performed in New York. *See, e.g., Concesionaria DHM, S.A. v. International Finance Corporation*, 307 F. Supp. 2d 553, 560 (S.D.N.Y. 2004) (New York was "clearly the contractually designated place where performance by the defendants was due and where performance by both parties had occurred" where agreement called for payments to be made in New York); *Irrigation Tech. Leasing Assocs., Inc. v. Superior Farming Co.*, 1991 WL 274479 at *2 (S.D.N.Y. Dec. 10, 1991) (defendant was under a duty to make payments in New York and thus "had continuing obligation to perform in New York"). In addition, Plaintiff alleges that Taylor met with record executives in New York and showcased her talent to music industry professionals in New York. *See* Am. Compl., ¶¶ 27, 29(b)(c).

Second, the EPMA contains a choice of law provision that states that it "shall be governed by the laws of the State of New York applicable to contracts entered into *and performed entirely within* the State of New York." Am. Compl., Exhibit A, p. 5, para. 12 (emphasis added). Plaintiff states that this provision of the EPMA "does not bolster" the Swift Defendants' argument that Taylor's services were to be performed in New, but again fails to indicate why. The choice of law language in the EPMA, however, is directly on point. In this regard, the case of *Don King Productions, Inc. v. Douglas*, 742 F. Supp. 741 (S.D.N.Y. 1990) is instructive.

In that case, as with the EPMA, the parties designated that a boxing promoter agreement was to be performed in New York for choice of law purposes. After suit for breach of the agreement was initiated, the defendant boxer sought to have the New York Court apply Nevada

law. The Court noted, however, that the contract did not specifically call for *performance* in Nevada or in any particular state, given that it was anticipated that the defendant's boxing matches would be held all over the world. 742 F. Supp. at 757. Thus, the Court reasoned that because there was no credible means of "centering" the dispute by reference to the expected locations for bout performances, there was no basis to look beyond the parties' contractual designation of New York law. *Id.* Since the designated place of performance had a substantial relationship to New York (New York was the residence of one of the contracting parties, the state where some contractual negotiations occurred, and the state where some obligations under the contract arose), the enforceability of the agreement could only be determined by New York law. *Id.* at 756-758.

Similarly here, given the nature of the music industry, the EPMA called for performance, literally, all over the world. *See* Am. Compl., Exhibit A, p.1, para. 1. Nevertheless, the parties agreed that services would be performed entirely within New York for choice of law purposes. Accordingly, given the inability to center performance of Taylor's potential career in any other state, and given that the EPMA had a substantial relationship with New York (Plaintiff concedes that it was negotiated and agreed to in New York, signed by him in New York and payment was to be made to him in New York),[6] New York courts clearly would have been required to respect New York as the place of performance and therefore would have had jurisdiction to approve the EPMA under § 35.03.[7]

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[6] See Am. Compl., ¶ 8.

[7] Plaintiff argues that because the subsequent contracts that he allegedly arranged for Taylor had no explicit connection to New York, New York courts would not have had jurisdiction to approve the EPMA. However, the issue is whether the EPMA itself could have been judicially approved. It would be nonsensical for a court to consider hypothetical locations for potential contracts that might be entered into pursuant to the EPMA as a basis for considering whether it had jurisdiction to approve the EPMA under §35.03.

III. Plaintiff Has Failed To Demonstrate Any Basis Upon Which To Sustain His Claims For Promissory Estoppel and Estoppel in Pais

1. Promissory Estoppel

Plaintiff has not cited a single case that calls into question the well-settled New York law requiring unconscionable injury as a result of the alleged reliance in the context of a claim for promissory estoppel. *See Ionosphere Clubs, Inc. v. Ins. Co. of the State of Pennsylvania*, 85 F.3d 992, 999 (2d Cir. 1996); *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 301 (2d Cir. 1996); *Spier v. Southgate Owners Corp.*, 39 A.D.3d 277, 278, 833 N.Y.S.2d 459, 460 (1st Dep't 2007); *Prichard v. 164 Ludlow Corp.*, 14 Misc. 3d 1202(A), 831 N.Y.S.2d 362, 2006 WL 3626306 at *10 (Sup. Ct. N.Y. Co., 2006); *30 Broad, LLC v. Lawrence*, 12 Misc.3d 1179(A), 824 N.Y.S.2d 767, 2006 WL 1882410 at * 3 (Sup. Ct. N.Y. Co., 2006). In fact, in two of the cases Plaintiff cites for the proposition that only a prejudicial change in position is required, the courts are in fact outlining the necessary elements of a claim for equitable estoppel, not promissory estoppel. *See Airco Alloys v. Niagara Mohawk Power*, 76 A.D.2d 68, 81-82, 430 N.Y.S. 2d 179, 187 (4th Dept. 1980) and *BWA Corp. v. Alltrans Express U.S.A.*, 112 A.D.2d 850, 853, 493 N.Y.S. 2d 1, 3 (1st Dept. 1985).[8]

Plaintiff then states that "even if unconscionable injury were a required element, Dymtrow has sufficiently plead that element as well." *See* P. Opp. at 32. However, the

[8] Plaintiff cites to *Restatement (Second) of Contracts* § 90 and to *Lahr Constr. Corp. v. Kozel & Son, Inc.*, 168 Misc. 2d 759, 640 N.Y.S.2d 957 (Sup. Ct. Monroe Co. 1996) to support the proposition that promissory estoppel is not dependant upon the existence of a contract, but rather can exist solely based upon reliance upon a promise. Plaintiff completely fails to recognize, however, that *Lahr* questions whether promissory estoppel based upon detrimental reliance as Plaintiff alleges here and as set forth in § 90 of the *Restatement* is even applicable in New York. *Lahr* acknowledges that promissory estoppel has had only "tentative application" in New York and has not been adopted by the Court of Appeals. *Id.* 168 Misc. 2d at 762-63, 640 N.Y.S.2d at 959-60. Similarly, the Second Department has held that promissory estoppel based upon alleged reliance "has not been the law of New York, with narrow exceptions based on unusual circumstances" none of which are at issue in this case. *Swerdloff v. Mobil Oil Corp.*, 74 A.D.2d 258, 261, 427 N.Y.S.2d 266, 268 (2d Dep't 1980).

allegations that he cites to in the Amended Complaint[9] fail to qualify as unconscionable injury for two reasons. First, the loss of commissions or out of pocket expenditures do not rise to the level of unconscionable injury. *See, e.g.*, *Spier*, supra, 39 A.D.3d at 278, 833 N.Y.S.2d at 460 (out of pocket expenditures do not constitute unconscionable injury warranting application of promissory estoppel). Second, none of the allegations Plaintiff points to demonstrate that he suffered any "injury beyond that which flows naturally...from the non-performance of the unenforce[d] agreement", as is required by the Second Circuit's definition of "unconscionable injury." *Merex A.G. v. Fairchild Weston Systems*, 29 F.3d 821, 824-26 (2d Cir. 1994). The "substantial efforts" devoted to "building, managing and maintaining Taylor's career" were simply part and parcel of Plaintiff's obligations under the EPMA.

Similarly, Plaintiff has failed to rebut the assertion that his promissory estoppel claim is merely duplicative of his insufficiently pled breach of contract claim, as he has still not alleged "a legal duty extraneous to the guarantee nor has he alleged a promise outside the scope of the guarantee." *See* Swift Defendants' Br. at 16. Plaintiff merely states that "[t]he promises [Taylor's parents] made to Dymtrow were broader and encompassed more than what the EPMA provided for", but then proceeds to cite to allegations in the Amended Complaint that simply describe Taylor's parents' alleged obligations under the EPMA and the guarantee. *See, e.g.*, P. Opp. at 35. Because promissory estoppel is not the appropriate remedy in such circumstances, this claim must be dismissed.

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[9] Plaintiff references paragraphs 3, 25, 27, 29, 31-34, 47-49, 85 and 115 at page 32 of his opposition brief purportedly to support his statement that the Amended Complaint sufficiently pleads unconscionable injury. Not only do these allegations fail to support such an injury, but they also fail to demonstrate that Plaintiff suffered a prejudicial change in position. Each allegation simply relates to Plaintiff's claim that he devoted substantial time to Taylor's career – the very obligation that he undertook pursuant to the EPMA.

2. Estoppel in Pais

Plaintiff's equitable estoppel claim is similarly deficient, as Plaintiff has not alleged that he changed his position to his substantial detriment. The only allegation to support this assertion is contained in paragraph 114 of the Amended Complaint and that allegation simply notes that Plaintiff allegedly expended "substantial efforts over nearly two-and-one-half years in building, managing, and maintaining Taylor's career and success." As discussed in the Swift Defendants' Moving Brief at page 17, any such efforts were undertaken pursuant to Plaintiff's obligations under the EPMA. Critically, even if these expectations were unfulfilled, they do not suffice for a change in position, prejudicial or otherwise. *Mendez v. Reynolds*, 248 A.D.2d 62, 66, 681 N.Y.S.2d 494, 497 (1st Dep't 1998).

IV. Plaintiff Has Failed To Demonstrate Any Basis Upon Which To Sustain His Claim For Tortious Interference

There may not exist a more absolute right under the law than that of a parent to advise his or her child. Yet Plaintiff grossly minimizes this right and interferes with this most sacrosanct of relationships by his wholly misguided and obtrusive assertion that a jury should "determine whether Taylor's parent's conduct impaired the health or the well-being of Taylor." *See* P. Opp. at 40. Plaintiff's inflammatory allegations and his mock crusade for children's rights have no place in this action.

In a desperate attempt to involve the Court in an area that the courts have explicitly and rightfully refused to enter, Plaintiff alleges that his tortious interference claim against Taylor's parents is actionable because their conduct went beyond advice and constituted "unlawful threats and misrepresentations made by Taylor's parents to get Taylor to disaffirm the contract with Dymtrow." *See* P. Opp. at 38. The so-called "threats," however, amount merely to claims that Scott Swift allegedly told his daughter that he would cease funding her music career if she did

not disaffirm the EPMA and that Taylor would have to "choose between [her] father and [Mr. Dymtrow]." Am. Compl. ¶¶ 55, 67. Even assuming the truth of these outlandish allegations, they are not actionable. This position is clearly articulated in *Lee v. Silver*, in which the Court made no distinction between "threats and misrepresentations" and "advice" in stating the absolute rule that a parent cannot be found liable for inducing an infant to disaffirm a contract. The Court unambiguously held:

> The wrongful act is malicious when done without legal or social justification. I do not believe that the rule should include advice given by a parent to an infant child to disaffirm a contract. Public policy dictates that parents should have an absolute right to advise their infant children with regard to all matters; that such a right should be exercised freely and should not subject the parent to any inquiry as to motive. Such an unrestricted right is one most calculated to promote the best interests of the family relationship.

Lee v. Silver, 262 A.D. 149, 151 (1st Dept. 1941) (emphasis added).

Plaintiff tries to distinguish *Lee* on the basis that Taylor's parents signed a guarantee, but this is nonsensical: the existence of a guarantee has no bearing on a parent's absolute right to urge a child to disaffirm a contract. Plaintiff also tries to contort *Cohen v. Brunswick Record Corp.*, 31 Misc. 2d 525, 526, 221 N.Y.S. 2d 893, 894 (Sup. Ct. N.Y. Co. 1961) and *E.R. Squibb & Sons v. Ira J. Shapiro, Inc.*, 64 N.Y.S.2d 368, 369-70 (Sup. Ct. N.Y. Co. 1945) into cases that support his position but this too is unavailing. While *Cohen* mentions that a third party individual may be held liable for inducing an infant to disaffirm a contract if fraud or misrepresentations were involved, the conduct of a parent was not at issue, and the Court still refused to find the defendant liable despite allegations that he had "wrongfully, maliciously and for the purpose of harming the plaintiff...induced" the infant to disaffirm her contract. *Cohen*, 31 Misc. 2d at 526. Similarly, in *E.R. Squibb & Sons* the Court refused to impose liability on a non-parent individual for procuring an infant's disaffirmance of a contract noting that motives

are immaterial. *E.R. Squibb & Sons*, 64 N.Y.S.2d at 370. Based on the foregoing, Plaintiff's conclusory allegations of the "threats and misrepresentations" utilized to induce Taylor's disaffirmance would not even suffice to impose liability on a non-parent third party, let alone on Taylor's parents in light of the unequivocal New York public policy asserted in *Lee*.

Plaintiff primarily relies on *Griston v. Stousland* (186 Misc. 201, 203, 60 N.Y.S. 2d 118, 120 (1st Dept. 1946)), but this discussion by Plaintiff at pages 39-40 of his opposition brief is puzzling in that *Griston* had nothing to do with tortious interference or with an infant's disaffirmance of a contract. Accordingly, it is patently misleading for Plaintiff to suggest that this case is analogous to the allegations in the Amended Complaint. *See* P. Opp. at 39. *Griston* concerned whether an infant's attorney could seek to hold her father liable for her attorney's fees where the infant discharged an attorney initially selected by the father and retained another without the father's approval. The Court's analysis of this issue turned on whether the father's choice of attorney was "arbitrary to the point of impairing the health or the well-being of his offspring." 186 Misc. at 203. If the father's actions were found to be such, then the infant would be justified in seeking her own counsel and her father would be liable for the attorney's fees. *Id.*, 186 Misc. at 203-04.[10]

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[10] Plaintiff confusingly asserts that his claims against Taylor's parents "sound in tortious interference with prospective economic gain, and not interference with a contract." *See* P. Opp. at 38. But each allegation referenced by Plaintiff in support of his deficient claim relates to alleged interference with Taylor's performance *under the EPMA*, not with a prospective third party contract. *See* Am. Compl., ¶¶ 119-127. In any event, in order to support a claim of tortious interference with prospective economic advantage, the claimant must not only allege a "specific prospective relationship", but must "proffer specific proof of prospective contracts that would have been executed but for the defendant's unwarranted interference." *Imtrac Industries, Inc. v. Glassexport Company Ltd.*, 1996 WL 39294, *10 (S.D.N.Y. 1996) (emphasis added). In the "absence of such evidentiary support, the claim must fail." *Id.* Nowhere in his Amended Complaint or opposition brief does Plaintiff offer specific proof of such prospective contracts or evidence that any such contracts would have been executed but for alleged interference by the Defendants. In any event, the alleged misrepresentations asserted in the Amended Complaint do not even come close to rising to the level necessary to sustain a claim for tortious interference with prospective economic advantage. *See Friedman v. Coldwater Creek, Inc.*, 2009 WL 932546 (2d Cir. 2009).

V. Plaintiff Has Failed To Demonstrate Any Basis Upon Which To Sustain His Claim For Breach of Implied Covenant of Good Faith and Fair Dealing

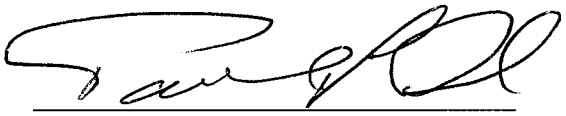
Plaintiff concedes that the duties of good faith and fair dealing do not imply obligations inconsistent with the other terms of the contractual relationship (P. Opp. 43), but insists that in signing the guarantee, Taylor's parents impliedly promised to refrain from "threatening, encouraging, and/or inducing Taylor's refusal to work with Mr. Dymtrow and her disaffirmation of the EPMA." (Am. Compl. ¶ 152). First, as set forth in the Swift Defendants' Moving Brief at pages 21-22, because the underlying guarantee executed by Taylor's parents is unenforceable, no covenant of good faith and fair dealing can be implied. Second, despite the fact that Plaintiff asserts that it was "whim or caprice" that drove Taylor's parents to advise Taylor to disaffirm the EPMA, a parent has an absolute right to advise a child concerning a contract. Any implication that there exists an obligation preventing a parent from exercising this right would be completely inconsistent with an iron-clad rule that has been consistently reaffirmed by New York courts.

CONCLUSION

For the reasons set forth herein and in the Swift Defendants' Moving Brief, Plaintiff's Amended Complaint should be dismissed, with prejudice, against Defendants Taylor Swift, Scott Swift, and Andrea Swift in its entirety together with such other and further relief that the Court deems just and proper.

DATED: June 3, 2009
New York, New York

Respectfully submitted,
MITCHELL SILBERBERG & KNUPP LLP

By: 

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