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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)

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

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This memorandum of law is respectfully submitted on behalf of Defendants Taylor Swift and her parents, Scott Swift and Andrea Swift (the "Swift Defendants") in support of their motion, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the Amended Complaint of Plaintiff Daniel Dymtrow, dated December 22, 2008, in its entirety, for failure to state a claim upon which relief may be granted.

PRELIMINARY STATEMENT

When she was fourteen years old, singer and songwriter Taylor Swift ("Taylor") signed a management contract with Plaintiff Daniel Dymtrow. Plaintiff assured Taylor and her parents, Scott and Andrea, that if they ever became unhappy with him, they could walk away with no hard feelings. Shortly thereafter, the Swift Defendants became unhappy with Plaintiff and accordingly, when Taylor was fifteen years old, and consistent with her undisputed legal right, she disaffirmed her contract with Plaintiff. The Swift Defendants terminated their relationship with Plaintiff because, among other things, Plaintiff displayed an astounding lack of understanding of the country music industry, he alienated the very people essential to the advancement of Taylor's career, he rarely visited Nashville, the center of country music and where the Swifts lived, he had no business plan, and he managed to obtain only one deal – a photo shoot worth $10,000 – during the time he managed Taylor. In addition, Plaintiff displayed a surprising lack of professionalism by gossiping behind the backs of other artists and the Swift Defendants did not want a manager for Taylor who might similarly betray her confidences.

Now, years after Taylor legally disaffirmed the contract, she has become an international star and out from the woodwork comes Plaintiff with a package of deficient claims in a transparent effort to avoid the risk that he assumed years ago by failing to obtain judicial approval of his contract with Taylor. Plaintiff has even gone so far as to allege tort claims

against Taylor's parents, ignoring the inviolable right that parents have to advise their child. This effort to improperly extract unearned monies from Taylor and her parents fails. Plaintiff cannot so easily avoid the consequences of his failure to obtain court approval or ignore the ramifications of Taylor's disaffirmance.

Indeed, Plaintiff fully understood the risk of entering into a contract with a fourteen year old girl. Thus, Plaintiff included a provision in the agreement that required Taylor's cooperation with any effort to obtain judicial approval[1] so that, pursuant to New York's specific statutory mechanism, he could attempt to restrict her right to disaffirm.[2] The legislature designed this procedure in order to "provide a degree of certainty for parties contracting with infants in the entertainment industry so that the validity of such contracts would not be rendered doubtful" and so that an adult could "obtain assurance of a binding contract before expenditures are made in reliance on the contract."[3] Proceeding with judicial approval of minors' contracts is thus standard in the entertainment industry. Yet Plaintiff chose not to do so and instead opted to assume the risk that Taylor might disaffirm since he wanted to avoid judicial scrutiny that would have protected Taylor from the improvident contract that extended for an indeterminate duration.

In an end run around clear New York law, Plaintiff sets forth claims for (1) unjust enrichment and other quasi-contract theories, (2) breach of contract, (3) promissory estoppel and estoppel in pais, (4) tortious interference and (5) breach of implied covenant of good faith and

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[1] *See* Amended Complaint, Exhibit A at ¶12(c). Plaintiff's Amended Complaint is attached to the declaration of Howard H. Weller, dated March 20, 2009, which declaration accompanies the moving papers.

[2] *See New York Arts and Cultural Affairs Law* § 35.03

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

fair dealing. As all of these claims are legally deficient, the Swift Defendants request that the Court dismiss the Amended Complaint in its entirety against each of them.

STATEMENT OF FACTS

For the purposes of this motion only, Defendants assume the truth of the facts alleged in the Amended Complaint. The Amended Complaint alleges that Plaintiff is a music industry personal manager (Am. Compl., ¶ 14) who entered into an exclusive personal management agreement with Taylor (the "EPMA"). (Am. Compl., ¶ 4). Taylor was thirteen years old when Plaintiff orally agreed to manage her. (Am. Compl., ¶ 2). The EPMA was signed on or about April 5, 2004 when Taylor was fourteen, and made effective as of March 25, 2003. (Am. Compl., ¶ 22). The EPMA, which is attached to the Amended Complaint as Exhibit A states, "[t]his agreement has been entered into in the State of New York, and the validity, interpretation, and legal affect [sic] of this agreement 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., Ex. A, p. 5) (emphasis added). Taylor's parents signed an agreement purporting to guarantee the performance by Taylor of all of her obligations and services detailed in the EPMA. (Am. Compl., Ex. B).

Plaintiff alleges that on or about March 7, 2005, Plaintiff began "coordinating [the] terms" of a prospective record contract on behalf of Taylor with a newly formed record label. (Am. Compl., ¶ 38). Plaintiff claims he "explored and pursued talent agency opportunities" for Taylor "before the EPMA was disaffirmed." (Am. Compl., ¶ 46). On or about August 1, 2005, Taylor, through her lawyer, sent a letter "disaffirming the EPMA" (Am. Compl., ¶ 43) as was her legal right. (Am. Compl., ¶¶ 90, 147). Given Taylor's absolute right to disaffirm an agreement she made as a minor, her parents' absolute right to advise her to do so and the lack of any legally

relevant allegations that could overcome these absolute rights, the Amended Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

ARGUMENT

I. PLAINTIFF'S AMENDED COMPLAINT MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

A. Standard for 12(b)(6) Dismissal

Dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) is appropriate if "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief." *Carell v. The Shubert Organization, Inc.*, 104 F. Supp. 2d 236, 246 (S.D.N.Y. 2000). While a court must accept the factual allegations of the complaint as true, it is "by no means under a concomitant obligation to accept unsupported inferences or 'sweeping legal conclusions cast in the form of factual allegations.'" *Troni v. Banca Popolare Di Milano*, No. 89 Civ. 3299,1990 WL 165684, at *2 (S.D.N.Y. Oct. 26, 1990) (citations omitted). "'[L]iberal construction of pleadings should not be permitted to override completely the rights of defendants.'" *Id.* (citations omitted); *see also Leeds v. Meltz,* 85 F.3d 51, 53 (2d Cir. 1996) ("bald assertions and conclusions of law will not suffice" will not suffice to defeat a 12(b)(6) motion); *Everfresh Beverages, Inc. v. Charterhouse Group International, Inc. et al.*, 238 B.R. 558, 571 (S.D.N.Y. 1999) (noting the that the pleading standard is a liberal one but warning that "even liberal construction has its limits").

Thus, a pleading "must at least set forth sufficient information for the court to determine whether some recognized legal theory exists on which relief" can be found. 2 James Wm. Moore *et al., Moore's Federal Practice* ¶ 12.34[1][b] (3d ed. 2002). Moreover, it is the legal sufficiency of the complaint, "not the weight of any evidence offered in support of the action" that is to be

assessed. *Spadafor v. Reale*, No. 98 Civ. 4589, 2001 WL 1020359, at *1 (S.D.N.Y. Sept. 5, 2001). Accordingly, it is a plaintiff's "obligation to provide the 'grounds' of his 'entitlement to relief' [and this] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65 (2007) (citation omitted). Rather, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." 550 U.S. at 570, 127 S. Ct. at 1974. [put

B. Plaintiff's Claim for Unjust Enrichment and Other Quasi-Contract Theories Must Be Dismissed

Plaintiff pleads unjust enrichment and other quasi-contract theories in an attempt to circumvent Taylor's absolute right to disaffirm a contract.[4] However, as the New York Court of Appeals long ago stated, the right of a minor to rescind a contract does not depend on her ability to restore alleged consideration or otherwise make restitution of that which is not capable of being returned. *Casey v. Kastel*, 237 N.Y. 305, 314, 142 N.E. 671, 674 (1924). It is only where the minor still has the consideration, and it is tangible and capable of measurement, that the other party may have an entitlement thereto. *Id.*, 237 N.Y. at 315; *Icovino v. Haymes*, 191 Misc. 311, 312-13, 77 N.Y.S.2d 316, 318 (N.Y. Mun. Ct. Richmond Co. 1948). As stated by the Court in *In re Ferguson's Guardianship*, 41 N.Y.S.2d 862, 864 (Surr. Ct., Westchester Co. 1943), "[w]here

[4] Plaintiff shoehorns multiple and undefined causes of action into his purported "first cause of action," creating the unworkable task of determining which allegations Plaintiff intends to support which causes of action. To state a claim for unjust enrichment, Plaintiff must allege that Defendants were enriched at his expense and that it is against equity and good conscience to permit them to retain such enrichment. *Swits v. New York Systems Exchange Inc.*, 281 A.D.2d 833, 835, 722 N.Y.S.2d 300, 302 (3d Dep't 2001). To state a claim for quantum meruit, Plaintiff must plead (1) the performance of services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services. *Soumayah v. Minnelli*, 41 A.D.3d 390, 391, 839 N.Y.S.2d 79, 81 (1st Dep't 2007).

an infant avoids a contract, his duty is limited to returning the property or proceeds *then in his possession.*" (emphasis added). This is because:

> [t]he right to repudiate is based upon the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and when the avails of the property are improvidently spent or lost by speculation or otherwise during minority, the infant should not be held responsible for an inability to restore them. . . . The right to rescind is a legal right established for the protection of the infant, and to make it dependant on performing an impossibility . . . would tend to impair the right and withdraw the protection.

In re Ferguson's Guardianship, 41 N.Y.S.2d at 864 (quoting *Green v. Green*, 69 N.Y. 553, 556 (1877)).

Critically, where the alleged benefit received by the infant is intangible and incapable of measurement, the rule with respect to consideration that has been lost or squandered by the infant applies:

> If an infant who has lost or squandered the consideration received under a contract may, nevertheless, recover upon disaffirmance without a tender, surely, one who has received intangible benefit which, by reason of its very nature, cannot be returned should be in no worse position.

Icovino, 191 Misc. at 313, 77 N.Y.S.2d at 318. In *Icovino*, a minor paid defendant to arrange for voice lessons and after receiving several lessons, the minor disaffirmed the contract and sought to recover the payment made to the defendant. The Court held that the minor was entitled to recover the amount paid and declined to permit the adult defendant a deduction for expenses incurred in arranging the voice lessons. In so holding, the Court noted that even assuming the instruction to the minor was beneficial, such a benefit cannot be returned because it cannot be measured. *Icovino*, 191 Misc. at 312-13, 77 N.Y.S.2d at 318. The Court stated:

> Obviously, [the minor] cannot return or surrender the knowledge, if any, acquired by her as a result of the instruction . . . . I know of

> no authority which would permit the Court to measure or calculate the presumed benefit by the yardstick of [the adult's] loss in performing [his] part of the contract. *Nor is there any rule of which I am aware that requires, as a condition of disaffirmance, that [the adult] be made whole for loss sustained in performance. The law is to the contrary.*

Icovino, 191 Misc. at 313, 77 N.Y.S.2d at 318 (emphasis added).

Consistent with the foregoing New York case law, here, the litany of "services" purportedly performed by Plaintiff for which he now (nearly four years after disaffirmance) seeks compensation[5] are not properly the subject of recovery under a theory of unjust enrichment. Taylor in fact did not receive any benefit from Plaintiff's purported services, but even assuming that Plaintiff's services were beneficial, that which Taylor received was intangible and is incapable of being returned. Plaintiff cannot, therefore, recover the value of, for example, helping Taylor sharpen her talent and skills (Am. Compl., at ¶ 3), or working to create a unique image (Am. Compl., at ¶ 25), or arranging for consultants to help Taylor improve her singing and stage performance and encouraging Taylor to write her own songs (Am. Compl., at ¶ 27), or generally "further[ing] the career and reputation of Taylor" and advising her and

[5] For example, Plaintiff states that he (i) "devoted a significant amount of time towards planning [Taylor's] career, helping to sharpen her talent and skills, exposing her to career building prospects" (Am. Compl., at ¶ 3); (ii) "focused [Taylor's] attention on improving her skills, worked to create a unique image . . . that the public would accept, and developed and coordinated opportunities that furthered [her] career" (Am. Compl., at ¶ 25); (iii) "arranged for consultants to help [her] improve her skills (singing/vocal training, stage performance, branding /imaging /marketing, styling, etc.), encouraged [her] to write her own songs, educated [her] and her family about marketing" (Am. Compl., at ¶ 27); (iv) "initiated meetings with prominent members of the entertainment industry" (Am. Compl., at ¶ 28); exposed Taylor to "fashion, television, and film industries, and he created opportunities for [her] that contributed to her success" (Am. Compl., at ¶ 31); (v) "secured a performance for [Taylor] at the Florida Musical Festival . . . [and] arranged for [her] to perform on the single VIP stage" (Am. Compl., at ¶ 29a); (vi) "scheduled several showcase performances . . . in New York City venues" (Am. Compl., at ¶ (29b); (vii) "introduced [Taylor] to [record] executives" (Am. Compl., at ¶ 29c); (viii) "accompanied [Taylor] during a week-long showcase of [her] talent" (Am. Compl., at ¶ 29d); and (ix) "'shopped' [Taylor] to major record labels" (Am. Compl., at ¶ 32).

guiding her (Am. Compl., at ¶¶ 86, 88),[6] because this type of consideration is "incapable of measurement in terms of money." *Icovino*, 191 Misc. at 313, 77 N.Y.S.2d at 318. To require Taylor to return the purported value of such alleged benefits is contrary to law. *Id.* Similarly, while Plaintiff alleges that he was "occupied with efforts to promote and advance Taylor," and that he would have directed those efforts towards other clients (Am. Compl., at ¶ 93), the law does not permit a plaintiff to recover for such an alleged loss where the minor properly exercised her right to disaffirm. *Id.* Simply put, this is the very risk that Plaintiff assumed. Since "infants are not endowed with sufficient business acumen and sagacity in their dealings . . . persons transacting business with them . . . do so at their own peril." *In re Ferguson's Guardianship*, 41 N.Y.S.2d at 864.[7]

Moreover, while Plaintiff makes mention of the "efficient producing cause" doctrine (Am. Compl., at ¶¶ 89, 91) the reference is inapplicable to the instant matter as it refers to compensation for brokers in purchase and sale agreements.[8] *See R.B. Williams Holding Corp. v. Ameron International Corp.*, No. 98 Civ. 4589 VM, 2001 WL 266026 at *12 (W.D.N.Y. 2001); *see also Sibbald v. The Bethlehem Iron Company*, 83 N.Y. 378, 382 (1881) (analyzing the "efficient producing cause" doctrine to determine whether a broker brought a buyer and seller together in a purchase-sale agreement). Plaintiff purportedly acted as Taylor's manager; he was

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[6] The Swift Defendants of course vigorously deny that Plaintiff provided any such services to Taylor's benefit.

[7] This same reasoning dooms Plaintiff's effort to recover under a restitution or quantum meruit theory. Moreover, Plaintiff could not have had any expectation of receiving compensation for such services as, for example, allegedly arranging for vocal training consultants. (Am. Compl., at ¶ 27). *See, e.g., Leibowitz v. Cornell University*, 2007 WL 3019223 at *11-12 (S.D.N.Y. 2007) (expectation of compensation was unreasonable, particularly where no contract existed governing particular services performed).

[8] The Swift Defendants dispute the factual assertion that Plaintiff was the "efficient producing cause" of any agreements referenced in the Amended Complaint.

not a broker hired to procure a purchase or sale on her behalf. Accordingly, this doctrine is inapplicable.

Plaintiff has suggested that his unjust enrichment and quasi-contractual claims should be sustained in light of the decision in *Scott Eden Management v. Kavovit*, 149 Misc.2d 262, 563 N.Y.S.2d 1001 (Sup. Ct. Westchester Co. 1990), a case which the Westchester County Supreme Court characterized as one of "first impression." *Scott Eden* is inapposite. There, a minor signed several contracts for his acting services while he was under management with the plaintiff and for several years, the minor paid the plaintiff commissions on monies earned under those contracts. Following the minor's disaffirmance of the management agreement, the Court ordered the minor *to continue* to pay plaintiff the commissions it had been receiving all along. 149 Misc. 2d at 267, 563 N.Y.S. 2d at 1004.

Here, unlike in *Scott Eden*, Plaintiff's claim for unjust enrichment is not premised on allegations that the Swift Defendants denied Plaintiff commissions "on income from performance contracts already obtained" by Plaintiff. 149 Misc. 2d at 263, 563 N.Y.S. 2d at 1001. Rather, Plaintiff alleges restitution and quantum meruit theories for payment – broadly speaking – for his "efforts" and "services" and for the lost opportunities that Plaintiff allegedly chose to forego by purportedly paying attention to Taylor's career. (Am. Compl., at ¶¶ 90, 93). Such a theory of recovery is not recognized by New York law, and therefore Plaintiff's claims based on unjust enrichment and quasi-contract must be dismissed.

C. Plaintiff's Claim for Breach of Contract Must Be Dismissed

Plaintiff attempts to hold Taylor's parents to their guarantee of Taylor's performance in an effort to avoid the consequences of failing to obtain judicial approval of the EPMA. However, New York law explicitly prevents Plaintiff from binding Taylor and her parents to the continued performance of an unapproved, disaffirmed contract. New York General Obligations

Law § 3-107 voids parental guarantees of unapproved entertainment contracts with minors where, as here, the infant's contract is one which the court had jurisdiction to approve,[9] and where, as here, the infant refused to perform services (or the parent refused to cause the infant to perform services) "permitted by the contract to be performed" in New York.[10]

The EPMA, by its own terms, is to 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., Ex. A, p. 5). (emphasis added). Accordingly, since by disaffirming, Taylor refused to perform services in New York, § 3-107 applies and no liability can be attached to Taylor's parents on the guarantee.[11] Moreover, when Taylor disaffirmed the contract, she was refusing to perform all of the "services detailed in the EPMA" (Am. Compl., ¶ 24), which services were

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[9] General Obligations Law § 3-107 applies to contracts covered by General Obligations Law § 3-105, which has been replaced by New York Arts and Cultural Affairs Law § 35.03. Section 35.03 provides for judicial approval of contracts with minors who are rendering services as performing artists where such services are to be performed in New York. Thus, the New York courts have jurisdiction to approve the EPMA.

[10] The legislative history of § 3-107 explains that the "purpose is to make [judicial] approval of the contract . . . a condition precedent to liability of a parent or guardian upon the contract either as a party or as a guarantor of its performance." 1961 Leg. Doc. No. 65(1); 1961 Report, Recommendations and Studies, p. 253 *et seq.*

[11] In New York, contractual choice of law provisions are to be enforced as long as the selected state has a reasonable relationship to the agreement at issue. *Finucane v. Interior Construction Corp.*, 264 A.D.2d 618, 620, 695 N.Y.S.2d 322, 324 (1st Dep't 1999). Where, as here, one party to the contract resides in the selected state, New York courts find sufficient contacts to enforce the parties' contractual choice of law. *Id.* 264 A.D.2d at 620, 695 N.Y.S.2d at 324; *see also, DB Structured Products, Inc. v. Baltimore American Mortgage Corporation, Inc.*, No. 07 Civ. 4109, 2009 WL 399746 at *2 (S.D.N.Y. Jan. 23, 2009) (plaintiff had its principal place of business in New York and accordingly significant contacts with the state existed which made the parties' selection of New York law reasonable). The Amended Complaint easily establishes that the parties had sufficient contacts with New York to enforce the choice of law provision in the EPMA. Plaintiff alleges that he resided in New York at the time the parties entered into the agreements at issue. (Am. Compl., ¶ 9). Moreover, Plaintiff admits that the agreements were negotiated and agreed to in New York, signed by at least one party in New York, and that a substantial part of the events giving rise to Plaintiff's claims occurred in New York. (Am. Compl., ¶ 8).

"permitted by the contract to be performed" in New York. Upon disaffirmance, Taylor also was refusing to "promptly advise Manager [who was located in New York] of all viable offers of employment." (Am. Compl., Exhibit A, p. 1). Since the conditions of § 3-107 are satisfied, Taylor's parents cannot be liable for any purported guarantee they may have signed to the EPMA.

Additionally, in trying to hold Taylor's parents to a guarantee of Taylor's performance, Plaintiff essentially seeks to render Taylor's disaffirmance a nullity. However, infants have an "absolute right" to disaffirm agreements on the ground of infancy. *Hantash v. V Model Management New York, Inc.*, No. 07 Civ. 3363, 2007 WL 2324326 at *1; *Cohen v. Brunswick Record Corp.*, 31 Misc. 2d 525, 527, 221 N.Y.S.2d 893, 895 (Sup. Ct. NY Co. 1961). Significantly, New York courts have given teeth to its strong public policy of protecting the absolute right of infants to disaffirm their contracts by voiding parental guarantees of infant's contracts.[12] *See Metropolitan Model Agency USA, Inc. v. Rayder*, 168 Misc. 2d. 324, 327, 643 N.Y.S. 2d 923, 925-26.

In *Metropolitan Model*, a modeling agency sued the parents pursuant to their guarantee of their minor daughter's contract after the minor failed to re-execute her contract upon attaining the age of majority in accordance with its terms. *Metropolitan Model*, 168 Misc. 2d at 325-26, 643 N.Y.S.2d at 924-25. Because the contract was unenforceable under New York Arts and Cultural Affairs Law § 35.05 governing child models, the Court held the guarantee to be void and found it was an unlawful effort to circumvent New York's public policy of protecting minors from their own improvident contracts. 168 Misc. 2d at 327, 643 N.Y.S.2d at 925-26. Although

[12] An infant is "a person who has not attained the age of eighteen years." CPLR § 105. As used in this memorandum, the words "infant" and "minor" are interchangeable.

Florida law governed the contract, the Court refused to apply the law of the sister state "when to do so would violate [New York] public policy." *Id.*, 168 Misc. 2d at 327, 643 N.Y.S.2d at 926. Specifically, the court held that enforcing the guarantee would put "substantial pressure on the parents to urge their daughter to comply with an agreement she entered into as a minor, even if that agreement is not otherwise enforceable." 168 Misc. 2d at 327, 643 N.Y.S.2d at 925-26.

The same policy considerations are at stake here. In order to protect minors entering into contracts, New York Arts and Cultural Affairs Law § 35.03 provides that to secure judicial approval, there must be a showing that "the contract is reasonable and provident and for the best interests of the infant." *Id.* at § 35.03(5)(k). Significantly, the statute also provides that no contract shall be approved if it binds the infant for a period of more than three years absent representation by experienced entertainment counsel, in which case the period is extended to seven years. *Id.* at § 35.03(2)(d).

Here, because the term of the EPMA extended for an indeterminate duration, it would not have comported with the time limitations in the statute and thus could not have been judicially approved. 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. (Am. Compl., Exhibit A, p.1). This open-ended duration contemplated by the EPMA indicates that the contract was never in Taylor's best interest. To hold Taylor's parents liable on a guarantee of such a such a statutorily impermissible contract is to force them to "urge their daughter to comply with an agreement" that she otherwise has the absolute right to disaffirm (*Metropolitan Model*, 168 Misc. 2d at 327, 643 N.Y.S.2d at 926) and which would have violated the limits of § 35.03(2)(d).

Thus, any guarantee of the EPMA made by Taylor's parents is void, and Plaintiff's second cause of action for breach of contract against Taylor's parents must be dismissed.[13]

D. Plaintiff's Claim for Promissory Estoppel and Estoppel in Pais Must Be Dismissed

Plaintiff's claim for promissory estoppel and estoppel in pais against Taylor's parents continues Plaintiff's "everything but the kitchen sink" approach to recover under the EPMA despite failing to procure judicial approval of the contract.[14]

1. Promissory Estoppel

To establish a claim for promissory estoppel, a plaintiff must show: "a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance." *Ripple's of Clearview, Inc. v. Le Havre Associates*, 88 A.D.2d 120, 122, 452 N.Y.S.2d 447, 449 (2d Dep't 1982). A plaintiff must establish a substantial change in position resulting in an "unconscionable injury". *Reiter Sales, Inc. v. Scovill Fasteners, Inc.*, 9 Misc. 3d 1109(A), 806 N.Y.S.2d 448, 2005 WL 2242846 at *5 (Sup. Ct. Nassau Co., 2005); *Rosenbach v. Diversified Group, Inc.*, 12 Misc.3d 1152(A) at *5, 819 N.Y.S.2d 851 (Sup. Ct. NY Co., 2006).

The crux of Plaintiff's allegations are that Taylor's parents made two promises: (1)"to guarantee that Taylor would perform as expected" and (2) never "to encourage and/or suggest to

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[13] To the extent that Plaintiff attempts to hold Taylor's parents liable for breach of alleged promises to "compensate Dymtrow for his services as agreed and as set forth in the EPMA" and to "ensure his financial stability with Taylor; and that Mr. Dymtrow would be paid for his services" (Am. Compl., ¶¶ 97, 98), these alleged promises are part and parcel of Taylor's parents' guarantee. Accordingly, these promises are equally unenforceable.

[14] Plaintiff's purported "third claim" actually names two distinct causes of action: one for promissory estoppel and one for estoppel in pais. The squeezing of two separate claims into the same set of paragraphs results in an incomprehensible ambiguity as to what allegations are intended to support what claims.

Taylor that she should disaffirm the EPMA." (Am. Compl., ¶¶ 108-110). Plaintiff, however, has wholly failed to demonstrate the required elements for a promissory estoppel claim. First, Plaintiff fails to properly allege that he suffered a substantial change in position resulting in unconscionable injury. Plaintiff merely asserts, in a most conclusory manner, that "Mr. Dymtrow suffered unconscionable injury and/or a substantial change in his circumstances as a result of Andrea's and Scott Swift's promises and conduct." (Am. Compl., ¶ 115). However, this vague allegation is woefully insufficient to meet the pleading requirements. *See Rosenbach*, 12 Misc.3d 1152(A) at *5, 819 N.Y.S.2d 851 ("plaintiffs allege only that they 'sustained and suffered unconscionable injuries totaling over $15 million.' These conclusory allegations do not plead unconscionable injury"). This is precisely the mere stating of "labels and conclusions, and a formulaic recitation of the elements of a cause of action" that the Supreme Court in *Bell Atlantic Corp. v. Twombly* found insufficient to overcome a 12(b)(6) motion. 550 U.S. at 555, 127 S. Ct. at 1964-65.

Furthermore, the Second Circuit, applying New York law, "has defined 'unconscionable injury' as 'injury beyond that which flows naturally . . . from the non-performance of the unenforce[d] agreement." *Shain v. Center for Jewish History, Inc.*, No. 04 Civ. 1762, 2006 WL 3549318 at *6 (S.D.N.Y. 2006), quoting *Merex A.G. v. Fairchild Weston Systems, Inc.*, 29 F.3d 821, 826 (2d Cir. 1994). Plaintiff alleges that, as a consequence of the alleged promises, he expended effort "building, managing, and maintaining Taylor's career and success." (Am. Compl., ¶ 114). But Plaintiff allegedly expended such efforts *pursuant to Plaintiff's obligations under the EPMA* and accordingly an attempt to be compensated for such purported efforts merely alleges an injury which "flows naturally" from the non-performance of the EPMA. Moreover, the alleged loss of expected future income due to proper termination of an agreement

is not an unconscionable injury. *See Reiter Sales, supra*, 2005 WL 2242846 at *5 (Sup. Ct. 2005) (loss of business and income from a contract's legal termination did not establish substantial change in position or unconscionable injury).

Additionally, Plaintiff's reliance on Taylor's parents' alleged promises was not reasonable or foreseeable. First, with regard to the alleged promise to guarantee that Taylor would perform as expected, New York law explicitly prevents the enforcement of a parental guarantee of a minor's unapproved entertainment contract connected with New York. *See* General Obligations Law § 3-107 and discussion, *supra*, at Point C. Accordingly, Plaintiff's failure to obtain judicial approval of the contract prevents him from now claiming that he reasonably relied upon Taylor's parents' promises to guarantee Taylor's performance under the EPMA. *See Reiter Sales, supra*, at *5 (Court found that the plaintiff could not have reasonably expected that he would remain the sole distributor given that the parties could terminate plaintiff's exclusive right under the agreement).

It is also unreasonable to suggest that Plaintiff relied on Taylor's parents' alleged promise never to encourage disaffirmance of the EPMA. A parent has an absolute right to advise a child to disaffirm a contract, irrespective of motive. *See Lee v. Silver*, 262 A.D. 149, 151, 28 N.Y.S.2d 333, 336 (1st Dep't. 1941) ("Public policy dictates that parents should have an absolute right to advise their infant children with regard to all matters . . .[s]uch an unrestricted right is one most calculated to promote the best interests of the family relationship"). This policy is fundamental and accordingly Plaintiff could not have reasonably expected that a parent's alleged promise regarding abstaining from advising a child would be enforceable.

Finally, Plaintiff's claim for promissory estoppel as to Taylor's parents' first alleged promise – to guarantee that Taylor would perform as expected – must be also dismissed as it is

merely duplicative of the insufficiently pled breach of contract claim. Plaintiff has not asserted a legal duty extraneous to the guarantee nor has he alleged a promise outside the scope of the guarantee. *See Simpri v. The City Of New York*, No. 00 Civ. 6712, 2003 WL 23095554 at *8 (S.D.N.Y. 2003) (court dismissed promissory estoppel claim on the grounds that an employer's failure to do what it promised in exchange for an employee's action may result in a breach of contract claim; "promissory estoppel is not, however, the appropriate remedy"); *Four Finger Art Factory, Inc. v. Dinicola*, 2000 WL 145466 at *8 (S.D.N.Y. 2000) (court dismissed defendant's promissory estoppel claim, finding "to the extent the claim is based on promises that are consistent with the undertakings contained in the contract", the promissory estoppel claim "should be dismissed as duplicative of the breach of contract claim"); *Celle v. Barclays Bank, PLC*, 48 A.D.3d 301, 851 N.Y.S.2d 500, 501 (1st Dep't 2008) (motion to dismiss granted because "in the absence of a duty independent of the agreement", promissory estoppel claim was duplicative of breach of contract claim); *Prichard v. 164 Ludlow Corp.*, 14 Misc.3d 1202(A), 831 N.Y.S.2d 362, 2006 WL 3626306 at *10 (Sup. Ct. NY Co. 2006) (motion to dismiss granted because "a plaintiff may not convert a simple breach of contract claim into one sounding in a tort, such as promissory estoppel, unless a legal duty extraneous to the contract has been breached"). Plaintiff merely asserts that Taylor's parents allegedly promised to protect Plaintiff's economic interests, to guarantee that Taylor would perform pursuant to the EPMA, and to assume all financial obligations Taylor owed under the agreement. (Am. Compl. at ¶¶ 108-110). These alleged promises fall entirely within Plaintiff's second cause of action for breach of contract and therefore must be dismissed.

2. Estoppel in Pais

"Estoppel in pais" is an archaic alternate name for "equitable estoppel." N.Y. Jur. Estoppel § 3. Under any name, this claim is another attempt to circumvent the established public policy of protecting the absolute right of minors to disaffirm their contracts. To assert a claim for equitable estoppel under New York law, the party asserting estoppel must show that the party alleged to be estopped "(1) engaged in conduct which amounts to a false representation or concealment of material facts; (2) intended that such conduct would be acted upon by the other party; and (3) knew the real facts." *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 301 (2d Cir. 1996) (*brackets omitted*). "In addition, the party alleging estoppel must also show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position." *Id.* at 301-02.

This claim is also fatally deficient since, other than a robotic recitation of the element (see Am. Compl., ¶ 114), Plaintiff does not plead reliance on any specific conduct of Taylor's parents related to any alleged false representation or concealment of facts. In addition, as discussed above in connection with Plaintiff's claim for promissory estoppel, Plaintiff fails to allege a prejudicial change in position. Plaintiff merely states that he changed his "position for the worse" by allegedly expending substantial efforts "building, managing, and maintaining Taylor's career and success." (Am. Compl., ¶ 114). But, as previously noted, Plaintiff allegedly expended such efforts *pursuant to Plaintiff's obligations under the EPMA*. Moreover, unfulfilled expectations do not make out a change in position, let alone a prejudicial change. *In the Matter of Yamile Mendez et al., v. W. Ann Reynolds et al.*, 248 A.D.2d 62, 66, 681 N.Y.S.2d 494, 497 (1st Dep't. 1998).

The crucial material fact in this case is that Taylor was a minor when she signed the EPMA. Plaintiff knew Taylor was a minor, yet chose to contract with her anyway and then avoided the court's scrutiny and approval of the terms of that contract as required under New York law. To allow Plaintiff's claims to proceed any further would flout established New York public policy to protect a minor's absolute right to disaffirm her contract. Accordingly, Plaintiff's claims for promissory estoppel and estoppel in pais must be dismissed.

E. Plaintiff's Claim for Tortious Interference Must Be Dismissed

Plaintiff's claim for tortious interference against Taylor's parents for allegedly inducing their daughter to disaffirm the EPMA fails because New York law states that parents have an absolute right to advise their infant children to disaffirm a contract, without any inquiry as to motive. *Lee v. Silver*, *supra*, 262 A.D. at 151, 28 N.Y.S.2d at 336. Accordingly, despite Plaintiff's wholly unfounded allegations that Taylor's parents' "activities and inducements" of Taylor to disaffirm her EPMA "had been undertaken intentionally, willfully, and/or with malice or through the use of dishonest, unfair or improper means" (Am. Compl., ¶ 122), Plaintiff's tortious interference claim must be dismissed.

In *Lee*, plaintiffs alleged that an infant vocalist's mother "wrongfully and maliciously induced her daughter to repudiate and break [an] agreement" that the infant had entered into with two personal managers and later disaffirmed while still a minor. *Id.*, 262 A.D. at 151, 28 N.Y.S.2d at 335. The Court held that while a cause of action exists against a person who maliciously procures another to breach a contract for personal services, parents have immunity from this rule when advising their children to disaffirm a contract:

> 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.

262 A.D. at 151, 28 N.Y.S.2d at 336 (emphasis added).

Subsequent law has confirmed a minor's right to disaffirm a contract without creating liability for the person who urged the minor to do so, even if the person is not a parent. In *Cohen v. Brunswick Record Corp.*, 31 Misc. 2d 525, 527, 221 N.Y.S.2d 893, 896 (Sup. Ct. N.Y. Co. 1961) the plaintiff alleged that the defendant record company "wrongfully, maliciously and for the purpose of harming the plaintiff [and his record company] induced" an infant singer to disaffirm his existing recording contract in order to record for the defendant. 31 Misc. 2d at 526, 221 N.Y.S.2d at 895. Noting the infant's "absolute right" to disaffirm the agreement (31 Misc. 2d at 527, 221 N.Y.S.2d at 895), the Court dismissed the claim against the defendant, reasoning that:

> The exercise of a legal right to terminate an agreement by a contracting party can not be the subject of an action against a third party for procuring such alleged breach. . . . At best, plaintiff's rights in the agreements in question were enforceable merely at the will of the infant and no action can arise for inducing the legal termination thereof."

31 Misc. 2d at 527, 221 N.Y.S.2d at 895-96.

In any event, Plaintiff's conclusory allegations that Taylor's parents actions' "had been undertaken intentionally, willfully, and/or with malice or through the use of dishonest, unfair or improper means" cannot survive a motion to dismiss. (Am. Compl., ¶ 122) *See Joel v. Weber*, 153 Misc.2d 549, 551, 581 N.Y.S.2d 579, 581 (Court granted motion to dismiss plaintiff's tortious interference claim, as complaint failed to "set forth necessary facts to show conduct that could be deemed 'improper'" and "the conclusory allegations that defendant acted 'wrongfully,

knowingly, intentionally, maliciously and without reasonable justification or excuse' were insufficient to satisfy the pleading requirement").

Furthermore, in light of New York's well-established public policy regarding a parent's absolute right to induce a child's disaffirmance of a contract, Plaintiff's allegations that Taylor's parents' actions were "illegal" and constituted "unlawful conduct" (Am. Compl., ¶ 122) are not only irrelevant, but also patently ridiculous. A father's threat to cease funding his daughter's musical career cannot reasonably be construed as "unlawful" or "illegal", and plaintiff fails to describe any "other unlawful conduct" that allegedly occurred. Because Plaintiff's allegations fail to demonstrate that Taylor's parents exceeded their absolute right to encourage Taylor to disaffirm her contract, the claim for tortious interference must be dismissed.

Not only does Plaintiff's tortious interference claim fail due to a parent's absolute right to advise a child to disaffirm a contract, it also fails because Plaintiff has not, and cannot, sufficiently allege the elements of a claim for tortious interference with existing contractual relations. The elements of this claim are: (1) the existence of a valid contract between plaintiff and a third party; (2) defendant's knowledge of that contract; (3) an intentional act by defendant with the purpose of inducing the third party to breach the contract; and (4) damages resulting from the breach. *Imtrac Industries, Inc. v. Glassexport Company Ltd.*, 1996 WL 39294 at *7 (S.D.N.Y. 1996). Plaintiff cannot establish the third element of this claim because there was no breach of the EPMA; rather, Taylor disaffirmed the contract in accordance with her legal right. In *E.R. Squibb & Sons v. Ira J. Shapiro, Inc.*, 64 N.Y.S.2d 368 (Sup. Ct. NY Co., 1945), the Court dismissed a claim against defendants who allegedly induced a plaintiff to exercise his legal right of termination under a contract. In doing so, the court explained that:

> [T]he defendants thus did no more than persuade the plaintiff to exercise a lawful right; that such persuasion may have caused

> Shapiro a monetary loss gives no right of action, and it is immaterial what the motives of defendants were, even though to better their own position. They did not induce plaintiff to breach a contract; all that they did was to persuade it to lawfully exercise a legal right of termination.

Id. at 370. *See also NYC Management Group, Inc. v. Brown-Miller*, 2004 WL 1087784 at *6 (S.D.N.Y. May 14, 2006) (disaffirmance of voidable contract by infant "does not literally constitute a breach, and, therefore, an essential element of a claim for tortious interference with contract would appear to be missing").

F. Plaintiff's Claim for Breach of Implied Covenant of Good Faith and Fair Dealing Must Be Dismissed

In a last-ditch effort to circumvent well-established New York law relating to minors and parental guarantees, Plaintiff alleges a breach of Scott and Andrea Swift's purported implied covenant of good faith and fair dealing. Plaintiff's claim fails, however, as Plaintiff does not demonstrate the existence of a valid contract from which such a duty would arise. *See Schorr v. Guardian Life Ins. Co. of America*, 44 A.D.3d 319, 319, 843 N.Y.S.2d 24, 25 (1st Dep't 2007). While Plaintiff suggests that such a duty is implied in Taylor's parents' guarantee and related promises, that guarantee is unenforceable pursuant to General Obligations Law § 3-107 for the reasons discussed above in Point C. Accordingly, because the underlying guarantee is unenforceable, no covenant of good faith and fair dealing can be implied. There can be no implied duty in an unenforceable contract. *See, e.g. Gotham Boxing Inc. v. Finkel*, Nos. 601479-07, 2008 WL 104155, at *7 (Sup. Ct. NY Co., 2008) (claim for breach of implied covenant of good faith and fair dealing is dismissed because underlying contract was not approved by the New York State Athletic Commission as required by law); *American-European Art Assoc. v. Trend Galleries, Inc.*, 227 A.D.2d 170, 171, 641 N.Y.S.2d 835, 836 (1st Dep't 1996) (no breach of implied duty of good faith and fair dealing because contract did not comply with the Statute of

Frauds); *see also Dalton v. Educational Testing Service*, 87 N.Y.2d 384, 389, 663 N.E.2d 289 (1995) ("[t]he duty of good faith and fair dealing . . . is not without limits, and no obligation can be implied that 'would be inconsistent with other terms of the contractual relationship.'")[15]

CONCLUSION

For the reasons set forth herein, Plaintiff's 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: March 20, 2009
New York, New York

Respectfully submitted,

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[15] Moreover, as the *Metropolitan Model* court recognized, to enforce such a parental guarantee would put "substantial pressure on the parents to urge their daughter to comply with an agreement she entered into as a minor, even if that agreement is not otherwise enforceable." *Id.* at 327, 643 N.Y.S.2d at 926.