STATE OF NORTH CAROLINA WAKE COUNTY MICHAEL L. TORRES Plaintiff, v. THE STEEL NETWORK, INC., EDWARD DIGIROLAMO, and BANK OF AMERICA N.A. Defendants.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 09 CVS 3654 **DEFENDANT BANK OF AMERICA N.A.'S REPLY BRIEF**

NOW COMES Bank of America N.A. ("the Bank"), by and through counsel, McGuireWoods LLP, pursuant to Rule 15.7 of the General Rules of Practice and Procedure for the North Carolina Business Court, and submits this Reply Brief in Support of its Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that Plaintiff's Complaint establishes an insurmountable bar to recovery on his claim for tortious interference with contract. In support of this motion, the Bank respectfully shows unto the Court as follows:

I. PLAINTIFF'S CLAIM SHOULD BE DISMISSED

A. Plaintiff's sole claim against the Bank fails as a matter of law

Plaintiff's sole claim pled against the Bank is for tortious interference with contract. It is well established under North Carolina law that a plaintiff alleging tortious interference with contract must prove:

> (1) a valid contract between the plaintiff and a third person …; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff.

Embree Const. Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992). Here, the Plaintiff's claim against the Bank is subject to dismissal for failure to properly state a claim. Our courts have repeatedly held that where, as here, the face of the complaint discloses some insurmountable bar to recovery, the complaint is properly subject to dismissal pursuant to Rule 12(b)(6). *See, e.g., Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970).

B. The Complaint establishes that the Bank had a preexisting, valid contract and security interest in TSN

Here, the Plaintiff's Complaint establishes that on December 6, 2007, The Steel Network, Inc. ("TSN") and the Bank entered into a valid Loan Agreement (the "Bank Note"). (Compl. Ex. G) (attached hereto as Exhibit 1 with relevant portions highlighted). Thereafter, on June 26, 2008, the Complaint admits that Torres and TSN entered into a Promissory Note (the "Torres Note") and Stock Redemption Agreement (the "Redemption Agreement") in which Torres agreed to sell his outstanding shares to TSN in exchange for a promissory note. (Compl. ¶ 24, Ex. F.) Further, the Complaint admits that the Bank became aware that the Torres Note placed TSN in violation of one or more of the provisions of its preexisting, valid Loan Agreement with the Bank. (Compl. Ex. G.)

On December 30, 2008, the Bank advised TSN that the Torres Note violated the terms and conditions of its preexisting Loan Agreement with the Bank. (Compl. Ex. G.) As between TSN and the Bank, the December 30 correspondence outlined ways in which TSN could remedy its violations of the Loan Agreement, allowing it to go forward with its agreement with Torres. (Compl. Ex. G.) This proposal primarily involved the subordination of the Torres Note to the Bank Note such that the Bank's secured interest in TSN was not threatened by the payment of the Bank's loaned capital to Torres. (Compl. Ex. G.) Significantly, the Plaintiff alleges facts

only as related to the Torres Note and its alleged violation of the parties' underlying Redemption Agreement. He does not allege that TSN was prevented from using other funds or mechanisms to satisfy the underlying Redemption Agreement with Torres.

The letter, again addressing purely the Torres Note and not the underlying Redemption Agreement, suggested ways for TSN to continue using the Torres Note as a vehicle for completing the Redemption Agreement:

> TSN may prepay the Torres note at any time provided the source of said prepayment is from new equity to the company of a similar or greater amount than what is prepaid.

(Compl. Ex. G.) Moreover, the Bank specifically stated that payments to Mr. Torres *could be made*:

> Existing scheduled payments on January 1, 2009; January 1, 2010 and January 1, 2011 will be permitted provided that TSN can demonstrate to the Bank's satisfaction that it remains in compliance with all Bank covenants before and after the payment is made.

(Compl. Ex. G.) In short, Exhibit G, which was attached to and thereby incorporated into the Plaintiff's Complaint,[1] admits that the Bank sought to protect its preexisting contractual agreement and security interest in TSN. (Compl. Ex. G.) Moreover, Exhibit G admits that the Bank did not seek the termination of the Torres Note; instead, the Bank suggested that TSN might satisfy its contractual obligations to Torres through new equity which would not endanger the Bank's secured interest in TSN or cause a default on the preexisting, valid Loan Agreement.

Overall, the Plaintiff's Complaint and the attachments incorporated therein clearly demonstrate that the Bank had a preexisting business interest, that this interest was legitimate, and that the Bank specifically provided ways in which TSN could maintain its contractual agreement with Torres while curing its default on its preexisting, valid Loan Agreement. In

[1] *See Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007).

short, the Plaintiff's Complaint and the attachments incorporated therein demonstrate that the Bank acted reasonably and proportionately in order to protect its preexisting, legitimate business interest.

C. The Complaint admits that the Bank justifiably protected its preexisting contract and security interest

Where, as here, a Plaintiff's Complaint and the attachments incorporated therein plead facts that deny the right to any relief on the alleged claim, the Complaint may properly be dismissed by a motion under Rule 12(b)(6). *Jackson v. Carolina Hardwood Co.*, 120 N.C. App. 870, 872-73, 463 S.E.2d 571, 573 (1995). A motion to dismiss a claim of tortious interference with contract is properly granted where the complaint shows that the interference was justified or privileged. *Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 220, 367 S.E.2d 647, 650 (1988). The interference is without justification if the defendant's motives for procuring termination of the contract were not "reasonably related to the protection of a legitimate business interest of the defendant." *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 674, 541 S.E.2d 733, 738 (2001) (quoting *Privette v. University of North Carolina*, 96 N.C. App. 124, 134, 385 S.E.2d 185, 190 (1989)). A complaint must admit of no motive other than malice to survive a motion to dismiss. *Crowder Construction Co. v. City of Charlotte*, Mecklenburg County Super. Ct., File No. 08 CVS 9546 (March 11, 2009 Order).

Though the Plaintiff summarily alleges that the Bank acted without justification, (Compl. ¶ 86) and that its efforts "were not reasonable related to the protection of any of [its] legitimate business interests," (Compl. ¶ 88) this is a legal conclusion that the court is not required to accept. *Crowder Construction Co.* (March 11, 2009 Order); *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). Plaintiff's Complaint and the attachments incorporated therein

demonstrate that the Bank not only sought to protect its preexisting contact and security interest in TSN, but that it also provided TSN with suggestions as to how it could continue to honor both its preexisting contractual agreement with the Bank *and* its Redemption Agreement with Mr. Torres.

D. The Complaint admits that the Bank had a proper motive

The Plaintiff has failed to adequately plead a factual basis to support a claim of malice. Though even general allegations characterizing a defendant's conduct as malicious are insufficient as a matter of pleading, the Plaintiff has failed to do even that. *Spartan Equipment Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 559, 140 S.E.2d 3, 11 (1965). The Complaint and the attachments incorporated therein admit of a proper motive for the Bank's purported interference with Torres Note: the protection of its valid, preexisting Loan Agreement and secured interest in TSN. (Compl. Ex. G.)

Moreover, the face of the Complaint and the attachments incorporated therein admit that the Bank's actions were both justified and reasonable related to the protection of its preexisting contractual interest with TSN. Where, as here, the Plaintiff's Complaint admits of motives other than malice and/or admits that the Defendant's actions were justified, a claim for tortious interference with contract must be dismissed. *See Hooks*, 322 N.C. at 221-22, 367 S.E.2d at 650 (upholding dismissal where face of complaint revealed defendant's action were justified); *S.N.R. Management Corp. v. Danube Partners*, 659 S.E.2d 442, 452 (N.C. Ct. App. 2008) (unpublished decision) (upholding dismissal where face of complaint showed actions were justified); *Filmar Racing, Inc.*, 141 N.C. App. at 675, 541 S.E.2d at 739 (upholding dismissal where face of complaint alleged that defendants had a legitimate business interest); *Spartan Equipment Co.* 263

N.C. at 559, 140 S.E.2d at 11 (upholding dismissal of claim where face of complaint failed to properly allege malicious conduct).

II. CONCLUSION

This case is straightforward. The Bank loaned money to TSN and took a secured interest in it in return. TSN was obligated to spend this money to fund operations, rather than enter into Stock Repurchase Agreements with its former officers. The Bank did not prevent TSN from entering into the Stock Redemption Agreement with Torres, nor did the Bank unjustly interfere with TSN's performance of that agreement. Rather, when the Bank became aware that TSN had violated the underlying Loan Agreement, it put TSN on notice that it had to either fund the Redemption Agreement using new equity or modify the Torres Note to correspond and comply with the terms of TSN's preexisting Loan Agreement with the Bank.

By analogy, one may not contract with a bank for a home loan, yet decide at closing, after the Bank has taken a secured interest in the home, to use the loan proceeds for a different purpose. In such a case, the third party would have no action against the bank for refusing to allow the borrower to use the funds for a purpose contrary to the parties' original design. Likewise, TSN may have breached its contract with Mr. Torres; however, Mr. Torres's sole remedy lies in a breach of contract action against TSN, and not in any action against the Bank for protecting its preexisting, valid Loan Agreement and security interest in TSN.

The Plaintiff's Complaint and incorporated attachments admit of an insurmountable bar to recovery on the Plaintiff's claim against the Bank for tortious interference with contract. *Sutton*, 277 N.C. at 102, 176 S.E.2d at 166. Because the Plaintiff's claim for tortious interference with contract fails as a matter of law, it must be dismissed pursuant to Rule 12(b)(6).

Respectfully submitted, this the 17th day of July, 2009.

McGuireWoods LLP

/s/ Mark E. Anderson
Mark E. Anderson
N.C. State Bar No. 15764
2600 Two Hannover Square
Raleigh, North Carolina 27601
Telephone: (919) 755-6600
Facsimile: (919) 755-6699
Attorneys for Bank of America, N.A.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **DEFENDANT BANK OF AMERICA N.A.'S REPLY BRIEF** complies with Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

This the 17th day of July, 2009.

/s/ Mark E. Anderson
Mark E. Anderson

CERTIFICATE OF SERVICE

I hereby certify that a copy of **DEFENDANT BANK OF AMERICA N.A.'S REPLY BRIEF** has been served upon counsel of record to this action by submission to the Court's electronic filing system and by mailing a copy thereof, properly addressed with postage prepaid, United States first class mail, to the following:

James C. White
Law Office of James C. White
P.O. Box 16103
Chapel Hill, North Carolina 27516
jimwhite@jcwhitelaw.com

K. Alan Parry
Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P.
Post Office Box 2611
Raleigh, North Carolina 27602-2611
aparry@smithlaw.com

This the 17th day of July, 2009.

McGuireWoods LLP

/s/ Mark E. Anderson
Mark E. Anderson
N.C. State Bar No. 15764
2600 Two Hannover Square
Raleigh, North Carolina 27601
Telephone: (919) 755-6600
Facsimile: (919) 755-6699
Attorneys for Bank of America, N.A.

Bank of America

Bank of America
Commercial Banking
NC7-002-17-03
421 Fayetteville Street Mall
Raleigh, NC 27601

December 30, 2008

Mr. Edward di Girolamo
President
The Steel Network
3221 Wellington Court
Raleigh NC 27615

Re: Torres Note - Terms to permit Subordinated Debt

Dear Ed:

You have informed Bank of America (the "Bank") that The Steel Network ("TSN") has entered into a Stock Redemption Agreement and, as part of this transaction, executed a Promissory Note (the "Torres Note") as of June 26, 2008 and in the face amount of $3,968,750.00.

Upon review of the Torres Note it is our conclusion that the Torres Note as proposed violates the Loan Agreement dated December 6, 2007 between the Bank and TSN, as Amended. Violations include, but are not necessarily limited to, paragraph 8.4 (debt to Worth Ratio) and paragraph 8.23 Debt Service Coverage ratio (as amended August 29, 2008).

In order to resolve these violations we propose the following:

- The Torres Note must be fully subordinated to the Bank for payment and collateral in a form satisfactory to the Bank. This subordination, agreed to by the Bank, TSN and Mr. Torres, will include the following:
  - Existing scheduled payments on January 1, 2009; January 1, 2010 and January 1, 2011 will be permitted provided that TSN can demonstrate to the Bank's satisfaction that it remains in compliance with all Bank covenants before and after the payment is made. Said payments will be included as Distributions for the purposes of calculating Debt Service Coverage.
  - No payment of interest, principal or fees other than those payments scheduled through January 1 2011 in the Note will be made by TSN or accepted by Mr. Torres without the express written approval of the Bank. However, TSN may prepay the Torres note at any time provided the source of said prepayment is from new equity to the company of a similar or greater amount than what is prepaid. In such case TSN agrees to

EXHIBIT G

Bank Exhibit 1

notify the Bank of its intention to accept new equity and prepay the Torres note.

- The maturity of the Torres note is amended to January 5, 2015, being the date of the final maturity of existing Bank debt.
- The Bank will be provided a copy for review of the Stock Redemption Agreement.
- TSN warrants it has had no Material Adverse Changes since its last financial reporting period of September 30, 2008.
- The Bank will be paid a $25,000.00 amendment and waiver fee. TSN will be responsible for all Bank costs including legal expenses and closing costs, if any.

Please understand that this proposal is intended to offer our thoughts on a way forward but is not of itself a waiver of these or any other defaults under the Loan Agreement and should not otherwise be construed as a commitment to lend, renew, amend or take other action. The Bank hereby expressly reserves all rights under the existing loan documents.

Please contact me at (919) 829-6556 should you have any questions. We look forward to further discussions with you to resolve this matter.

Sincerely,

BANK OF AMERICA, N.A.

By:_____
Name: Ian MacGregor
Title: Senior Vice President