STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 09-CVS-003654
MICHAEL L. TORRES, Plaintiff, v. THE STEEL NETWORK, INC., EDWARD DIGIROLAMO, BANK OF AMERICA N.A., Defendants.	BRIEF IN RESPONSE TO BANK OF AMERICA'S MOTION TO DISMISS

Bank of America frames its actions – demanding that one of its customers breach a four million dollar contract with a third party who had no relation at all to the Bank – as business as usual; just the normal and wholly justified acts of a company looking out for its own interests. But this is not business as usual, rather it is precisely the sort of conduct that the tort of tortious interference with contract was meant to protect against; protecting one's own interest *at the deliberate expense of another*. Bank of America deliberately and without justification induced The Steel Network, Inc. to breach its $3,968,750.00 contract with Plaintiff Michael Torres, causing Mr. Torres catastrophic damage. The Bank contends that because it is essentially in competition with every individual or company that contracts with its customers, it is therefore justified in inducing the termination of any of its customers' valid contracts so long as terminating those contracts benefits the Bank. This contention is absurd – the Bank's conduct was not justified, the Plaintiff has more than adequately pled his claim for tortious interference with contract, and Bank of America's motion to dismiss that claim should be denied.

FACTS

Plaintiff Michael L. Torres ("Mr. Torres or "Torres") is a former Vice President of Defendant The Steel Network, Inc. ("TSN") who owned 3,175,000 common shares of TSN. (Compl. ¶9). On or about June 26, 2008, he entered into an agreement with TSN to sell those shares for the sum of $3,968,750.00 (the "Stock Agreement"). *Id.* Exh. F. The first installment of $75,000 under that agreement was due on or before January 1, 2009. *Id.* Defendant Bank of America sent a letter to TSN on December 30, 2008, claiming that the Stock Agreement violated the terms of a loan agreement with the Bank that TSN had entered into in December of 2007 (the "Bank Note" or "Note"). *Id.* ¶7.

The Bank attempted to take advantage of Mr. Torres position by demanding that he sign an agreement that would both subrogate his interest to the Bank, appoint the Bank as his attorney-in-fact and require him to abandon all rights he had in regard to TSN. *Id.* ¶32. Counsel for TSN prepared an alternative to the Bank's agreement in which Mr. Torres agreed to subrogate his interest to that of the Bank, but did not abandon his rights as to TSN and did not appoint the Bank as his attorney-in-fact.[1] *Id.* The Bank refused to accept this modified subrogation agreement which met all of the demands set out by the Bank in its December 30, 2007 letter. *Id.* ¶33. Even though Mr. Torres had agreed to subrogate his interest to that of the Bank (by agreeing to sign the subrogation agreement that TSN's counsel prepared and that was acceptable to both TSN and Torres), but refused to appoint the Bank as his attorney-in-fact or to surrender his rights in regard to TSN, the Bank compelled TSN to breach its agreement with Torres. *Id.* ¶88. On February 13, 2009, Bank of America contacted the Steel Network and stated

[1] In its Brief, the Bank contends that this agreement was prepared by counsel for Torres and was not acceptable to TSN. (Bank Brief 2). Neither of these allegations is made in the complaint and the Bank's characterization is not correct.

that if TSN did not breach its contract with Torres, Bank of America would call its Note with TSN. *Id.* ¶33. TSN responded by terminating the Stock Agreement that same day. *Id.* ¶34.

ARGUMENT

As the North Carolina Supreme Court has noted, "[t]he system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985). When considering a motion to dismiss a complaint for failure to state a claim, the Court takes the complaint's factual allegations as true. *Embree Const. Group, Inc. v. Rafcor, Inc.*, 330 N.C. 487, 490-91, 411 S.E.2d 916, 919-20 (1992). "The complaint must be liberally construed and should not be dismissed unless it appears beyond a doubt that plaintiffs could not prove any set of facts to support the claim which would entitle them to relief." *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 602, 646 S.E.2d 826, 830 (2007).

A complaint may not be dismissed unless: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. *Id.* (citing *Newberne v. Dept. of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 204 (2005)). The Plaintiff's Complaint properly pleads the elements of tortious interference, sets forth facts that more than support its allegations, and those facts do not defeat Mr. Torres' claim. Mr. Torres has properly stated a claim for relief against Bank of America, and this Court should not dismiss his claim against that Defendant.

I. TORRES HAS PROPERLY STATED A CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACT.

Plaintiff Michael Torres has alleged that Defendant Bank of America, acting without justification, deliberately induced Defendant TSN to breach its multi-million dollar contract to purchase Torres' stock causing catastrophic damage to Mr. Torres. The elements of tortious interference with contract are: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against the third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; and (4) in doing so acts without justification; (5) resulting in actual damage to the plaintiff. *Embree,* 330 N.C. at 498, 411 S.E.2d at 924; *United Laboratories, Inc. v. Kuykendall,* 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988).

Torres' Complaint properly alleges all of the elements of tortious interference and more than satisfies the liberal Rule 12(b)(6) standard. First, Torres had a valid contract with TSN under which he was to be paid $3,968,750.00 for his stock. (Compl. ¶ 24, 36). Second, Bank of America knew of the contract between the parties. *Id.* ¶ 27. Third, the Complaint alleges (and TSN's Answer admits upon information and belief) that Bank of America intentionally induced TSN to breach its contract with Torres. *Id.* ¶ 87; TSN's Answer ¶ 87. Fourth, the Complaint explicitly states that "B of A acted without justification" and sets out facts that show that Bank of America acted for other than a legitimate business purpose. (Compl. ¶ 85-89). Fifth, Michael Torres was financially devastated when Bank of America induced TSN to refuse to pay the nearly four million dollars owed under the contract. *Id.* ¶ 89.

Bank of America does not dispute that Torres has properly pled four of the five prongs of a tortious interference claim. The only element the Bank attacks in its Brief is the fourth element, lack of justification.

II. WHETHER OR NOT BANK OF AMERICA WAS JUSTIFIED IN INDUCING TSN TO BREAK ITS CONTRACT WITH TORRES IS A QUESTION FOR A JURY.

Interference with a contract must be without justification. *Pinewood*, 184 N.C. App. at 605, 646 S.E.2d at 832. Interference is without justification if the defendant's motives are not "reasonably related to the protection of a legitimate business interest." *Id.* The complaint must admit of no motive for interference other than malice. *Id.* at 832-33. The word "malice," in the context of a tortious interference claim "does not import ill will, but refers to an interference with design of injury to plaintiff or gaining some advantage at his expense." *Brewer v. Hatcher*, 52 N.C. App. 601, 605, 279 S.E.2d 69, 71 (1981).

Whether a defendant's conduct is justified depends upon "the circumstances surrounding the interference, the actor's motive or conduct, the interests sought to be advanced, the social interest in protecting the actor, and the contractual interests of the other party." *Embree,* 330 N.C. at 498, 411 S.E.2d at 925. "Unless it appears on the face of the complaint that a defendant's conduct was justified, justification is an affirmative defense." *Id.* at 499, 411 S.E.2d at 925 (quoting *Freed v. Manchester Serv., Inc.*, 331 P.2d 689, 691 (1958)). In its Brief, Bank of America distorts the 12(b)(6) standard, claiming that "a complaint admitting of *any* justified cause *must* be dismissed pursuant to Rule 12(b)(6)," even if the facts tend to show that the Bank's conduct was malicious. (Bank Brief 5) (emphasis in original). As this Court is well aware, that is not the standard it should apply in considering this motion. A motion to dismiss should only be granted when the facts show that the plaintiff could not prove any set of facts to

support the claim which would entitle him to relief. *Pinewood*, 184 N.C. App. at 602. 646 S.E.2d at 830. The Bank's proposal guts the very concept of notice pleading and would require a plaintiff to carefully craft his facts to avoid even the possibility of an interpretation that might favor the defendant.

The Supreme Court in *Embree* emphasized that a plaintiff pleading a tortious interference claim does not face the heightened pleading standard Bank of America demands. "[I]t is unreasonable to require the plaintiff to negate in its pleadings facts that more properly support a defense." *Embree,* 330 N.C. at 499, 411 S.E.2d at 925. In *Embree,* the plaintiff alleged in its complaint that two defendants had "acted in their own interest" to avoid further liability on a guaranty when they induced a company to breach its contract with the plaintiff, and that those acts were without justification. *Id.* at 501, 411 S.E.2d at 926. Those allegations were sufficient to prevent dismissal of a claim of tortious interference under Rule 12(b)(6). Likewise, in *Pinewood* when the complaint (1) alleged that the defendant's conduct was not justified and (2) offered facts that "[i]f proved, … tend to support plaintiffs' accusation of malice," the court deemed it sufficient to survive a motion to dismiss. 184 N.C. App. at 606-07, 646 S.E.2d at 833. In its Brief, Bank of America asserts that "exercising one's contractual right so as to protect one's contractual and proprietary interests cannot conceivably be considered a bad motive and, therefore, cannot given [*sic*] rise to a claim for tortious interference." (Bank Brief 5-6). On the contrary, protecting one's own interest *at the deliberate expense of another* is the very definition of malicious conduct – and that is precisely the conduct the Bank engaged in here.

First, the Torres Complaint alleges that the Bank's conduct was without justification and not reasonably related to its legitimate business purposes. (Compl. ¶¶ 86, 88). While the Bank claims the Court should ignore these assertions as "unwarranted" (Bank Brief 6), *Embree* and

Pinewood show that they are a necessary part of pleading the elements of tortious interference. Second, the Complaint sets out facts that show that Bank of America had no legitimate business purpose for its actions. The Bank attempted to take advantage of Mr. Torres position by forcing him to sign an agreement that would subrogate his interest to the Bank, appoint the Bank as his attorney-in-fact and require him to abandon all rights he had in regard to TSN. (Compl. ¶32). When Mr. Torres agreed to subrogate his interest to that of the Bank (by agreeing to sign the subrogation agreement that TSN's counsel prepared and that was acceptable to both TSN and Torres), but refused to appoint the Bank as his attorney-in-fact or to surrender his rights in regard to TSN, the Bank compelled TSN to breach its agreement with Torres. *Id.* ¶88. The Bank makes much of its right to call TSN's Note at any time, and the plaintiff does not dispute that the Bank has always had the right to call that Note.[2] But the complaint alleges that the Bank did far more that simply threaten to call its Note. The Bank specifically told TSN to either compel Torres to sign an agreement that would harm him and would allow the Bank to gain a substantial advantage over him or that TSN should breach its agreement with Michael Torres. *Id.*

It is important to keep in mind that Torres *has no relation at all to Bank of America*. He was not a customer of the Bank and had no duty to the Bank to subrogate his interest to that of the Bank, to appoint the Bank as his attorney-in-fact, or to surrender all rights in the money owed to him by TSN. The Bank claims that its actions were motivated by a desire to protect its "pre-existing, valid contractual and proprietary interests." (Bank Brief 8). But the Bank had many options to protect its interests that did not involve Michael Torres. It always had a right to call

[2] Torres does, however, dispute the Bank's contention (made without any citation to case law) that any fact alleged in an attachment to a complaint that is not explicitly denied in the complaint should be deemed admitted. (Bank Brief 6). Rather, the Complaint states that the Bank's letter to TSN (attached to the Complaint as Exh. G) "*claimed* that the Note entered into by TSN and Mr. Torres violated a loan agreement which TSN entered into in December of 2007." (Comp ¶ 28). Drawing all inferences in favor of the plaintiff, the Court should assume that the Torres Note *does not* violate the terms of the Bank's agreement with TSN.

its Note with TSN. It never had a right, however, to induce TSN to breach its four million dollar contract with Torres merely to offer insurance that its Note would be paid.

North Carolina courts have not addressed the issue of whether, as a matter of law, a Bank may freely coerce its clients to breach valid agreements with third parties in order to ensure that the Bank is paid on a pre-existing obligation. The Sixth Circuit in *Melamed v. Lake County National Bank*, 727 F.2d 1399, 1404 (6th Cir. 1983) (attached as Exhibit A) faced facts similar to these. In *Melamed* a Bank induced an equipment manufacturer to breach its contract with one of its customers in order to ensure that its credit line would be paid. *Id.* The Bank argued that its actions were justified on the face of the complaint, claiming that "it did nothing more than any lienor would do to protect its interest." *Id.* The court denied a motion to dismiss under Federal Rule 12(b)(6), finding that the issue of justification should be decided by a jury. *Id.* at 1405.

Bank of America relies heavily on a Business Court case from earlier this year, *Crowder Construction Co. v. City of Charlotte*, Mecklenburg County Super. Ct., File No. 08 CVS 9546 (March 11, 2009 Order) stating that this matter is "directly analogous to the facts in *Crowder Construction*." (Bank Brief 10). In *Crowder Construction*, a consultant was employed for the specific purpose of reviewing a city's contracts. One of the contractors claimed that the consultant had interfered with the contractor's contract with the city by failing to properly administer that contract and by refusing to negotiate proper payment. The court held that because the consultant was charged by the city with administering its contracts, a claim for tortious interference with those same contracts should be dismissed. On its face the complaint showed that the interference was justified, since the city had hired the consultant to "interfere" in the contract at issue. These cases are not at all analogous – in fact, beyond the existence of a contract in each case the two have little to do with each other.

The Bank also relies on a line of North Carolina cases that recognize business competitors may in some circumstances interfere in the contracts of competitors, asserting that "[t]he Bank is clearly analogous to a business competitor with the Plaintiff." (Bank Brief 9). The assertion that the country's largest bank is in competition with the terminated officer of one of its customers just because the bank made a loan to that customer makes little sense. In *Childress v. Abeles*, 240 N.C. 667, 676, 84 S.E.2d 176, 183 (1954), the Supreme Court noted that the mere fact that two parties were dealing with the same third party did not make the two parties competitors. The Bank's position perverts the legitimate public policy interest at play in those cases, namely that this tort should not be used as an excuse to stifle lawful competition. *See, e.g., People Sec. Life Ins. v. Hooks,* 322 N.C. 216, 367 S.E.2d 647 (1988); *Childress,* 240 N.C. at 676, 84 S.E. at 183 (12(b)(6) motion involving competitors); *S.N.R. Mgt. Corp. v. Danube Partners,* 659 S.E.2d 442 (2008) (12(b)(6) motion involving competitors); *see also, Fitzgerald v. Wolf,* 40 N.C. App. 197, 252 S.E.2d 523 (1979) (summary judgment involving competitors); *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.,* 160 N.C. App. 520, 586 S.E.2d 507 (2003) (summary judgment involving competitors); *Sellers v. Morton,* 661 S.E.2d 915 (2008) (summary judgment involving competitors); *White v. Cross Sales & Eng'g Co.,* 177 N.C. App. 765, 629 S.E.2d 898 (2006) (summary judgment involving competitors); *Coordinated Health Svs., Inc. v. Primary Health Choice, Inc.,* 176 N.C. App. 407, 626 S.E.2d 877 (2006) (unpublished decision) (summary judgment involving competitors).

In this case, the Bank essentially contends that it is in competition with every individual or company that contracts with its customers, and that it therefore has an unqualified right to induce the termination of any valid contract it chooses, so long as terminating that contract benefits the Bank. This contention is absurd – the Bank's conduct is not, as it contends, justified

as a matter of law. Rather, to determine whether or not this conduct was justified a jury must consider both the circumstances surrounding this interference and the public policy questions involved in allowing a bank to freely interfere with the contracts of its customers in order to gain a business advantage. Torres has more than adequately pled his claim for tortious interference with contract, and any issues regarding justification should be raised as an affirmative defense and ultimately decided by a jury. Bank of America's motion to dismiss Torres' claim for tortious interference should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny Defendant Bank of America's Motion to Dismiss.

Dated: July 7, 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rule 15.8 of the North Carolina Business Court's Local Rules and is less than 7,500 words in length.

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I hereby certify that I have served this **Brief in Response to Defendant's Motion to Dismiss** on the following parties by depositing a copy enclosed in a post-paid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service:

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