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 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

NOW COMES Bank of America N.A. ("the Bank"), by and through counsel, McGuireWoods LLP, and submits this Memorandum 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 fails to allege sufficient facts to establish his claim for tortious interference with contract. In support of this motion, Defendant respectfully shows unto the Court as follows:

STATEMENT OF FACTS

Plaintiff initiated this action with the filing of a Complaint on February 25, 2009, alleging, *inter alia*, that the Bank tortiously interfered with an alleged agreement between The Steel Network ("TSN") and the Plaintiff. (Compl. ¶ 81-89.) In his Complaint, the Plaintiff alleges a protracted course of negotiations with Edward diGirolamo ("diGirolamo"), the President and majority shareholder of TSN, which ultimately resulted in an executed agreement in June 2008. (Compl. ¶ 24.) The alleged agreement between the parties, which purportedly consisted of a Share Repurchase Agreement, a Pledge Agreement, a Stock Power, and a Promissory Note, contemplated that Mr. Torres would receive annual payments until December

31, 2011 in exchange for his shares in TSN. (Compl. ¶ 25; Compl. Ex. F.) As security for their agreement, the parties executed a promissory note (the "Torres Note") which set forth the respective dates and amounts of payments allegedly due to the Plaintiff. (Compl. Ex. F.)

The Complaint alleges that, on or about December 30, 2008 – approximately two days before the first payment was due under the Torres Note, the Bank wrote a letter to TSN indicating that compliance with the terms of the Torres Note would constitute a breach of the Bank's pre-existing Loan Agreement (the "Bank Note"). (Compl. ¶ 27-28; Ex. G.) In the letter, the Bank indicated that compliance with the Torres Note would place TSN in violation of, *inter alia*, the debt service coverage ratio under the Bank Note. (Compl. ¶ 29; Ex. F.) The Bank also indicated that TSN could remedy the situation by modifying the Torres Note's payment terms and by subordinating the Torres Note to the Bank's pre-existing, valid loan agreement. (Compl. Ex. G.)

On January 1, 2009, Plaintiff alleges that the first installment of the Torres Note came due without any payment from TSN. (Compl. ¶ 30.) On or about January 5, 2009, Plaintiff alleges that he sent to TSN a Notice of Default. (Compl. ¶ 31.) Thereafter, on January 15, 2009, Plaintiff alleges that he sent to TSN a Declaration of Notice of Principal Sum Due. *Id.* Plaintiff alleges that TSN ignored his demands for payment and demanded that Plaintiff permit certain modifications to the Torres Note and enter into a Subordination Agreement as a prerequisite to any payments pursuant to the Torres Note. (Compl. ¶ 29; Ex. H.)

In response to TSN's request, Plaintiff's counsel drafted a substantially-modified Subordination Agreement and delivered it to TSN. (Compl. ¶ 32; Ex. K.) Plaintiff does not allege, and the agreements attached to the Plaintiff's Complaint do not indicate, that these changes were accepted by TSN or the Bank.

Plaintiff finally alleges that, on or about Friday, February 13, 2009, the Bank "notified TSN of its intent to call the Bank Note unless Mr. Torres either entered into the Subordination Agreement, or the agreement between TSN and Mr. Torres was unwound." (Compl. ¶ 33.) Plaintiff alleges that Defendant diGirolamo then sent a letter to the Plaintiff claiming that he had "breached a nondisclosure agreement and that therefore the (sic) TSN had the right to rescind all of its agreements with Mr. Torres." (Compl. ¶ 34; Ex. F.)

LEGAL STANDARD

Rule 12(b)(6) of the North Carolina Rules of Civil Procedure provides that a court shall dismiss a complaint when "the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). "The function of a motion to dismiss is to test the law of a claim, not the facts which support it." *Snyder v. Freeman*, 300 N.C. 204, 209, 266 S.E.2d 593, 597 (1980) (citation omitted). "When the complaint fails to allege the substantive elements of some legally cognizable claim, or where it alleges facts which defeat any claim, the complaint must be dismissed." *Oberlin Capital L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001). Further, "[w]here the complaint ... pleads facts which 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).

When considering a motion to dismiss, "the court is not required to accept as true any conclusions of law or unwarranted deductions of fact . . . [and if] the complaint fails to allege the substantive elements of some legally cognizable claim . . . the complaint should be dismissed." *Branch Banking & Trust Co. v. Lighthouse Fin. Corp.*, 2005 NCBC 3 ¶ 8 (N.C. Super. Ct. July

13, 2005). However, where a Plaintiff attaches documents to a complaint, they become incorporated within it. *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007). Thus, the court here may properly consider all documents attached to and thereby incorporated into Plaintiff's Complaint in considering this Motion to Dismiss.

LEGAL ARGUMENT

I. PLAINTIFF'S COMPLAINT AGAINST BANK OF AMERICA SHOULD BE DISMISSED FOR FAILURE TO ALLEGE SUFFICIENT FACTS TO ESTABLISH TORTIOUS INTERFERENCE WITH CONTRACT

Plaintiff's complaint has failed to allege sufficient facts to establish a claim for tortious interference with contract. Under North Carolina law, such a claim requires proof of:

> (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 Complaint must be dismissed, as it fails to allege facts sufficient to establish that the Bank acted without justification.

The facts alleged in the Complaint clearly demonstrate that the Bank sought to protect its pre-existing contract with TSN by preventing a violation of the material terms of the Bank Note. The Complaint alleges that, on or about December 30, 2008, the Bank informed TSN that the Torres Note, as drafted, would place TSN in violation of the Bank Note. (Compl. ¶ 28, Ex. G.) This letter expressly states that:

> 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 included, 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).

Id. The Complaint and the attached letter clearly demonstrate the Bank's motivation: to prevent TSN from violating the terms of the Bank Note. Specifically, the facts alleged demonstrate a clear motivation to prevent TSN from using money obtained from the Bank's loan to pay substantial sums to the Plaintiff, thereby violating the terms of the Bank Note and potentially compromising TSN's ability to satisfy its obligations pursuant to its agreement with the Bank, which pre-dated any alleged agreement with the Plaintiff.

A. *The face of the Complaint affirmatively demonstrates that the Bank justifiably acted to protect its legitimate business interests*

North Carolina courts have held that interference with contract is "without justification" if the defendant's motives do "not reasonably relate[] 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)). Thus, the complaint must admit of no motive other than malice; a complaint admitting of *any* justified cause *must* be dismissed pursuant to Rule 12(b)(6). *Id.* (upholding trial court's order granting motion to dismiss where "the face of the complaint admits of motive for interference other than malice"); *Crowder Construction Co. v. City of Charlotte*, Mecklenburg County Super. Ct., File No. 08 CVS 9546 (March 11, 2009 Order) (granting motion to dismiss over tortious interference with contract where the defendant was merely "performing its duties under its separate prime contract with [a third party]") (attached hereto as Exhibit 1); *Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 367 S.E.2d 647 (1988) (affirming trial court's order granting motion to dismiss where rival business induced plaintiff's employees to terminate their terminable at will contract). Malice, for purposes of the tort of wrongful

interference with contract, is generally defined as a "wrongful act done intentionally without just cause or excuse." *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 689, 562 S.E.2d 82, 94 (2002).

B. *The face of the Complaint demonstrates that the Torres Note placed TSN in violation of its pre-existing Loan Agreement with the Bank*

Here, the Complaint shows on its face that the purported actions of the Bank were not motivated by malice but instead by the justifiable protection of its pre-existing contractual and proprietary interests. The December 30, 2008 letter from the Bank, which stated the numerous grounds on which the Torres Note placed TSN in violation of its pre-existing responsibilities under the Bank Note, is considered admitted for purposes of considering a motion to dismiss because it was attached to and incorporated in the Plaintiff's Complaint. *Weaver*, 187 N.C. App. at 204, 652 S.E.2d at 707; (Compl. Ex. G.) The Complaint makes *no attempt* to allege that the Torres Note did *not* place TSN in violation of the Bank Note. Therefore, the Court should accept as admitted that, as alleged in Exhibit G of the Plaintiff's Complaint, the Torres Note *would* have placed TSN in violation of its agreement with the Bank, which was valid and pre-dated any executed agreement between the Plaintiff and TSN.

C. *The Complaint demonstrates that the Bank's actions were proportionate to the interests it sought to protect and that it used proper means*

The Plaintiff also alleges that "on Friday, February 13, 2009, Bank of America notified TSN of its intent to call the Bank Note unless Mr. Torres either entered into the Subordination Agreement, or the agreement between TSN and Mr. Torres was unwound." (Compl. ¶ 33.) Again, this paragraph of the Complaint clearly evidences that the Bank did not act with "bad motive." *Bloch*, 143 N.C. App. at 239. In essence, this paragraph of the Complaint alleges that the Bank stated that it would exercise its powers under the Bank Note unless TSN took action to remedy its violation of the terms of the agreement. Simply put, exercising one's contractual

rights so as to protect one's contractual and proprietary interests cannot conceivably be considered a bad motive and, therefore, cannot given rise to a claim for tortious interference with contract.

Furthermore, the Complaint fails to allege that the Bank used any improper means to protect its legitimate business interest. Instead, the Complaint alleges that the Bank "acted without justification (Compl. ¶ 86) and that its efforts "were not reasonable (sic) related to the protection of ... [its] legitimate business interests." (Compl. ¶ 88.) However, the court need not accept these "conclusions of law [and] unwarranted deductions of fact" and may instead consider the facts as alleged to determine if they admit of any motive other than malice. *Crowder Construction Co., supra* (citing *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970)) (attached hereto as Exhibit 1). The Complaint *does not* allege that the Bank did not have the contractual right to call the Bank Note in the event of a violation of its terms. Exercising, or threatening to exercise, one's rights under a pre-existing contract cannot possibly be considered the use of improper means to interfere with a third-party's contract. Overall, it is apparent that the Bank's alleged actions pursuant to and in furtherance of its pre-existing contract with TSN constituted "a reasonable and bona fide attempt to protect the interest of the defendant." Hooks, 322 N.C. 220-21, 367 S.E.2d at 650 (quoting *Smith v. Ford Motor Co.*, 289 N.C. at 91, 221 S.E.2d at 294) (emphasis in original). (Compl. ¶ 33.)

Additionally, the Complaint also alleges that the Bank insisted that TSN either have Torres sign a Subordination Agreement in order to remedy the violation of the terms of the Bank Note, or, alternatively, breach the Torres Note. (Compl. ¶ 33.) Even accepting this allegation as true, it does not admit of any bad motive; instead, it clearly demonstrates that the Bank acted *pursuant to and in furtherance of* its pre-existing, valid contract with TSN.

Though the Complaint focuses on the purported Subordination Agreement as the primary act of allegedly unjustified interference, both the Subordination Agreement and the other modifications to the Torres Note allegedly sought by the Bank demonstrate that the Bank's alleged actions were justified. (Compl. Ex. G.) For example, the Bank stated that existing scheduled payments under the Torres Note could continue "provided that TSN can demonstrate to the Bank's satisfaction that it remains in compliance with all Bank covenants." (Compl. Ex. G.) Further, the Bank sought a modification of the maturity of the Torres Note to January 5, 2015 – the date of maturity of the Bank Note. *Id.* Finally, the Bank sought additional assurances from TSN, including an assurance that there were no "Material Adverse Changes" since its last financial statement. *Id.* In short, the facts alleged by the Plaintiff evidence only one motivation: protection of the Bank's pre-existing, valid contractual and proprietary interests under the Bank Note.

D. *The actions of the Bank, as alleged in the Complaint, are directly analogous to numerous North Carolina cases holding that interference was justified due to business competition*

The Bank's alleged actions here clearly fall under the wide latitude historically given to businesses to interfere with the contracts of their competitors. North Carolina courts have routinely and consistently held that "competition in business constitutes justifiable interference in another's business relations and is not actionable so long as it is carried on in furtherance of one's own interests and by means that are lawful." *Hooks*, 322 N.C. at 221, 367 S.E.2d at 650 (affirming trial court's order granting motion to dismiss where defendant, a rival business, induced plaintiff's employees to terminate their terminable at will contract); *see also Fitzgerald v. Wolf*, 40 N.C. App. 197, 200, 252 S.E.2d 523, 524 (1979) (upholding summary judgment in favor of defendant based on justified interference); *Childress v. Abeles,* 240 N.C. 667, 676, 84

S.E.2d 176, 183 (1954) ("If the plaintiff was in competition with the defendants, the defendants would be justified in interfering.); *S.N.R. Management Corp. v. Danube Partners*, 659 S.E.2d 442 (2008) (affirming trial court's order granting motion to dismiss where the face of the complaint demonstrated both plaintiff and defendant were developers competing for the purchase of property); *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 524, 586 S.E.2d 507, 511 (2003) (affirming trial court's grant of summary judgment to defendant where defendant, a rival landscaping business, was justified in interfering with contract in its bid for a landscaping contract); *Sellers v. Morton*, 661 S.E.2d 915 (2008) (affirming trial court's grant of summary judgment for defendant where defendant's legitimate business reason for selling assets was to satisfy lien to a third party); *White v. Cross Sales & Engineering Co.*, 177 N.C. App. 765, 629 S.E.2d 898 (2006) (affirming trial court's grant of summary judgment for defendant where the facts demonstrated "the intent of [the defendant] simply to protect its own interests, and not to cause harm to [the] plaintiff"); *Coordinated Health Services, Inc. v. Primary Health Choice, Inc.*, 176 N.C. App. 407, 626 S.E.2d 877 (2006) (unpublished decision) (affirming trial court's grant of summary judgment for defendant where defendant, a business competitor, allegedly hired away the plaintiff's at-will employees).

Undoubtedly, protection of the Bank's contractual and proprietary interests in the Bank Note falls under the wide latitude given to business competitors under North Carolina case law. The Bank is clearly analogous to a business competitor with the Plaintiff – the Bank was an entity competing with the Plaintiff to ensure that its contract with TSN was honored and that it received payments due under a valid agreement that predated that of the Plaintiff. At best, the facts as alleged by the Complaint evidence that the Bank's motive was to ensure that it received

loan principle and interest payments pursuant to an agreement that pre-dated any executed agreement between the Plaintiff and TSN.

Further, this matter is directly analogous to the facts in *Crowder Construction*, where the court held that the defendant was privileged to interfere with the plaintiff's contract with the City of Charlotte. *Crowder Construction, supra.* In *Crowder Construction*, the court granted the defendant's motion to dismiss, finding that the defendant's interference flowed from its activities when it "performed its duties under its separate prime contract with the City." *Id.* Thus, the court held, the defendant's motives were "reasonably related to the protection of a legitimate business interest." *Id.* (quoting *Privette v. Univ. of N.C.*, 96 N.C. App. 124, 134, 385 S.E.2d 185, 190 (1989). Here, as in *Crowder Construction*, the Complaint – even taken in its most favorable light – admits of no purpose *other than* that the Bank was acting pursuant to its contractual rights under the Bank Note in an attempt to prevent TSN from violating the terms of the agreement, which the Complaint admits were violated by provisions of the Torres Note.

E. Plaintiff's allegations and legal conclusions regarding Article 9 are inapposite, incorrect, and should not be accepted for consideration of this Motion to Dismiss

Plaintiff attempts to obfuscate the facts by alleging that "the Subordination Agreement B of A demanded that Torres sign would have only reaffirmed that status that he [Torres] already held due to B of A's UCC filings." (Compl. ¶ 85.) This allegation is an attempted conclusion of law as well as an attempted deduction of fact; it is therefore not entitled to any weight. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). Additionally, these allegations constitute an abject misstatement of the law as well as the facts as alleged in the Plaintiff's Complaint.

The Uniform Commercial Code, Article 9, as found in N.C. Gen Stat. § 25-9-101 *et seq.*, generally provides an organized method for determining the priority of secured and unsecured creditors. The priority of secured and unsecured creditors is frequently subject to litigation

amongst competing creditors seeking payment. As set forth above, the Bank clearly had a legitimate interest in protecting its pre-existing, valid contractual and proprietary interests in the Bank Note. However, the Bank also has an interest in avoiding, wherever possible, the substantial expenditure of time and resources required by litigation. Plaintiff's references to Article 9 are inappropriate and wholly irrelevant given that Article 9 priority only comes into play in the event that default occurs and foreclosure proceedings become necessary. (Compl. ¶ 85.) Even assuming Plaintiff's allegations to be true, the Bank's alleged attempt to avoid the necessity for any judicial determinations of Article 9 priority cannot conceivably be considered a wrongful act "done intentionally without just cause or excuse or as a result of ill will." *Rhyne*, 149 N.C. App. at 689, 562 S.E.2d at 94.

Even accepting as true the Plaintiff's allegation that a Subordination Agreement would have merely reaffirmed the Bank's Article 9 priority over Torres (Compl. ¶ 85), the Complaint admits of other justifications for the Bank's alleged interference. As set forth above, granting Plaintiff all inferences in its favor, the only reasonable conclusion to be drawn from the facts as alleged is that the Bank sought to protect its pre-existing contractual interest with TSN by preventing a violation of the material terms of the Bank Note. For example, the Bank explicitly states in the December 30, 2008 letter that the Torres Note placed TSN in violation of paragraph 8.4 of the Bank Note, which specified a Debt to Worth Ratio that TSN was required to maintain. (Compl. Ex. G.) Further, the Bank indicated that the Torres Note placed TSN in violation of paragraph 8.23 of the Bank Note, which provided that TSN must maintain a specific Debt Service Coverage ratio. *Id.* The Bank's motivations were clear: to prevent TSN from violating the terms of the Bank Note. Even assuming, *arguendo*, that Plaintiff is correct in his allegation

that the Subordination Agreement would have merely reaffirmed the Bank's status, such an alleged mistake of law does not imply malice.

The Plaintiff has failed to allege facts sufficient to demonstrate that the Bank's only motive was "a malicious wish to injure the plaintiff." *Hooks*, 322 N.C. at 221, 367 S.E.2d at 650 (citing 86 C.J.S. Torts § 44 (1954)). The Complaint admits of only one motive on the part of the Bank – that of protecting its valid, pre-existing contractual and proprietary interests through lawful means. Specifically, the facts alleged plainly demonstrate a clear motivation to prevent TSN from using money obtained from the Bank's loan to pay substantial sums to the Plaintiff, thereby violating the terms of the Bank Note and potentially compromising TSN's ability to satisfy its obligations pursuant to its agreement with the Bank, which pre-dated any alleged agreement with the Plaintiff. Thus, because the Complaint admits of a justified cause for interference with the Plaintiff's contract, it must be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, the Bank respectfully requests that the court enter an order granting its motion to dismiss based on the failure of the Plaintiff to allege facts establishing his claim for tortious interference with contract and to award such other relief as the Court, in its discretion, shall deem necessary.

Respectfully submitted, this the 7th day of April, 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **DEFENDANT BANK OF AMERICA N.A.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** complies with Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

This the 7th day of April, 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 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** 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:

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This the 7th day of April, 2009.

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