SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

MONEX FINANCIAL SERVICES LTD., an Irish Corporation, and PLANET PAYMENT, INC., a Delaware Corporation,

Plaintiffs,

INDEX No. 21215/06

MOTION DATE: March 10, 2009
Motion Sequence # 005

-against-

DYNAMIC CURRENCY CONVERSION, INC., a New York corporation, MARK A. SILVERMAN, an individual, and DAVID NAHOR, an individual,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Reply Affirmation X
Rule 19(a)..... X
Rule 19(b)..... X
Memorandum of Law..... XX
Reply Memorandum of Law..... X

This motion, by defendants Dynamic Currency Conversion, Inc. ("Dynamic") and Mark A. Silverman ("Silverman"), pursuant to CPLR 3212, for an Order of this Court,

granting summary judgment and dismissing plaintiffs', Monex Financial Services, Ltd. ("Monex") and Planet Payment, Inc. ("Planet"), first and second causes of action as asserted against both Dynamic and Silverman, and plaintiffs third and fourth causes of action as asserted only against Silverman, is **granted**.

FACTS

Pursuant to their Rule 19(a) Statement of Material Facts, pursuant to the Commercial Rules, the parties herein agree to the following:

Defendant, Dynamic, is a New York corporation that was founded by former defendant, David Nahor in December 2002. Plaintiffs' complaint against David Nahor was dismissed in a prior order of this Court. Dynamic Currency Conversion ("DCC") is a financial service that allows credit card holders to have transactions processed in their home currency when traveling abroad.

Non-party Global Card Services ("GCS") is a Florida corporation that was founded by non-party William Marshall ("Marshall") in 1994. At all relevant times, GCS was in the business of providing applications to merchants that accept credit cards in the travel and entertainment industries. Its customers include Princess Cruises ("Princess") and Royal Caribbean Cruises, Ltd. ("RCCL"). From 1994, when GCS was founded, until August 2003, Marshall was GCS's largest shareholder. Defendant Mark Silverman was the president of GCS circa 1999 to March 2006; and a director of GCS from March 1999 until August 2003.

At one time, in early 2002, GCS had considered hiring Nahor, founder of Dynamic, to assist GCS in offering DCC services to its clients. On February 26, 2002, GCS's Board of Directors, at a board meeting, discussed and approved the creation of a separate company to provide Dynamic's DCC services to its customers. After the February 26, 2002 board meeting, Silverman, GCS's then president, advised Nahor that while GCS would not hire him, it would work with a separate company, in which Nahor was involved, to offer DCC services to its clients. GCS's director and general counsel, Raul Puig, together with Silverman, negotiated a service contract on behalf of GCS under which GCS and Dynamic agreed to work together to integrate their services in such a way as to allow for the delivery of DCC services to GCS's merchant customers (the "GCS/Dynamic Agreement"). Puig reviewed and approved the GCS/Dynamic Agreement before it was executed on December 30, 2002. The parties herein do not dispute that

Silverman, GCS's President, believed that it was in GCS's interest to enter into the GCS/Dynamic Agreement because it would provide GCS with potential additional revenue streams and would allow it to offer its customers a currency conversion solution that was different from the currency conversion solutions offered by other companies with whom it worked so that its customers could determine which solution best suited their needs.

The GCS/Dynamic Agreement was not the first agreement related to DCC services that GCS had signed. Rather, it was preceded by two other agreements that GCS had signed jointly with DCC service providers other than Dynamic for the provision of DCC services. Specifically, on December 10, 2001, GCS entered into a "Teaming Agreement" with plaintiffs Monex and Planet along with an entity known as Planet Monex Inc. Pursuant to the Teaming Agreement, the parties agreed to "work together to develop the systems necessary to enable DCC services to be provided to their respective clients." Silverman, in his capacity as GCS's President, signed the Teaming Agreement on GCS's behalf. On April 15, 2002, GCS also entered into a written contract with National Westminster Bank to jointly provide DCC services to merchants.

The parties herein agree that in the GCS/Dynamic Agreement, defendant Dynamic "acknowledge[d] that GCS ha[d] existing DCC Service Agreements with other DCC Service Providers (see Exhibit C [to the GCS/Dynamic Agreement]) ...[and] waive[d] any claim to revenue sharing on activity related to" those agreements. Exhibit C to the GCS/Dynamic Agreement contains a handwritten list of GCS's "Existing DCC Service Agreements" as follows: (1) Planet Monex, Inc. Teaming Agreement dated December 10, 2001; and (2) Development Agreement for the Provision of DCC Services to the US Cruise Line industry between GCS and National Westminster Bank PLC, dated April 15, 2002. The parties herein further agree that GCS affirmatively represented and warranted in the GCS/Dynamic Agreement that it had "the right...to enter th[e GCS/Dynamic] Agreement." After the GCS/Dynamic Agreement was executed, GCS personnel, including Bill Marshall and others who reported to him, started building system specifications with Dynamic to develop the systems necessary for GCS and Dynamic to provide DCC services to Princess, which was then a GCS customer. Silverman had no role in the "technical aspects of [the] implementation." During the one year period following the execution of the GCS/Dynamic Agreement, Nahor, founder of Dynamic, visited GCS's offices approximately three to four times. With one exception, Nahor met with Bill Marshall and his staff during each of those visits in order to "implement[] the business that [Dynamic and GCS] had agreed to arrange."

The parties do not dispute that Dynamic solicited Princess, one of GCS's customers, for DCC business. In fact, it is undisputed by the parties that Bill Marshall, founder of GCS, helped sell the joint GCS/Dynamic service to Princess. In May 2003, Princess, Dynamic and GCS began to negotiate the terms of an agreement under which GCS and Dynamic would provide DCC services to Princess. Nahor reported some of his discussions with Princess concerning the progress of the contract negotiations to Marshall and Silverman.

In the summer of 2003, GCS was acquired by First Horizon Merchant Services ("First Horizon"). Silverman provided copies of all of GCS's contracts to First Horizon prior to the acquisition, including the Teaming Agreement and the GCS/Dynamic Agreement. At the time of the acquisition, First Horizon's President, Ron Nation, was aware of the Teaming Agreement, as he had reviewed it in connection with First Horizon's due diligence efforts. Nation was also aware that GCS had other service contracts with other DCC service providers, including Dynamic. Upon the acquisition of GCS by First Horizon, GCS's Board of Directors resigned and were replaced by a single director to whom First Horizon's President, Ron Nation reported. Thus, as of August 2003, neither Silverman nor Marshall, nor any other former GCS director, remained on the GCS board.

During the summer of 2003, Nahor met with Silverman and First Horizon's senior management, including Ron and Vicky Nation, at First Horizon's offices in Denver, Colorado. During the meeting, Nahor explained Dynamic's business to First Horizon and that Dynamic "aspire[d] to be an important business partner" of First Horizon. Nation understood from the meeting that Dynamic's services "had a foundation of DCC, but it was a different approach from Planet Payment." On December 31, 2003, GCS, Dynamic and Princess entered into a tripartite agreement (the "Princess Agreement") under which GCS, in conjunction with Dynamic, would deliver DCC services to Princess. Nation was concerned about GCS's potential liability under drafts of the Princess Agreement and requested that specific changes be made to the contract to address to those concerns. First Horizon's outside counsel, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC ("Baker Donelson"), also participated in the negotiations with Princess and requested that Princess include changes to the drafts of the Princess Agreement that Ron Nation requested. Nation's concerns regarding the Princess Agreement were resolved to Nation's satisfaction and on January 28, 2004, Ron Nation sent a letter to Princess' in-house counsel "apologizing for inconveniences in negotiating" the Princess Agreement.

In March 2006, Nova Information Systems acquired the assets of GCS from First Horizon. On or about March 17, 2006, Nova informed Silverman that his position with GCS had been eliminated and that he was being terminated. Silverman was escorted out of GCS's premises that day. It is undisputed by the parties herein that prior to his termination, Silverman had no concern that he might lose his job with GCS in connection with the acquisition by Nova. After Silverman was terminated from GCS, Nahor asked him if he was interested in working for Dynamic. Silverman told Nahor that he was not sure what he wanted to do, but agreed to help Dynamic on a temporary basis while he evaluated his long-term employment options. Silverman ultimately accepted full time employment with Dynamic effective May 1, 2006.

In April 2006, after Silverman was terminated from GCS, he and Nahor jointly approached Jeffrey Turner, RCCL's then Director of Treasury Operations, in an effort to sell Dynamic's services to RCCL. At the time, RCCL was receiving DCC services from Monex pursuant to a July 29, 2002 contract. Monex provided DCC services to RCCL in conjunction with GCS. The Monex/RCCL Agreement was to expire on July 29, 2006. After considering what Turner believed to be substantial benefits of Dynamic's DCC product in relation to Monex's product, and Turner's trust in both Nahor and Silverman, Turner recommended to his then boss that RCCL elect to not renew the Monex/RCCL Agreement, and that RCCL should enter into a contract with Dynamic for the provision of DCC services. By email dated June 8, 2006, Turner advised GCS and Nova that RCCL had "elected to migrate [its] existing DCC services to Dynamic" and requested that GCS "coordinate this with [Nahor] of [Dynamic]." The parties herein agree that at no time did any employee of Nova seek to encourage Turner, or anyone else at RCCL, to not renew the Monex/RCCL Agreement or to utilize Dynamic's services. In fact, "Nova first learned of [RCCL's] decision to switch to [Dynamic] when it received formal notice from [RCCL] on June 8, 2006" and "[RCCL] made that decision without the assistance, advice or involvement of Nova." On June 30, 2006, RCCL and Dynamic entered into a Dynamic Currency Conversion Program Agreement under which Dynamic agreed to provide DCC services to RCCL. It is undisputed herein that neither Silverman nor Nahor attempted to persuade or encourage Nova to refrain from trying to convince RCCL not to switch DCC providers and to keep its DCC business with Monex.

ACTION AND PROCEDURE

Plaintiffs, Planet and Monex, in their amended complaint against defendants, Dynamic and Silverman, assert causes of action sounding in, ***inter alia***, tortious interference with contract and tortious interference with existing and prospective business

relations. The crux of plaintiffs' claim is that the Teaming Agreement they entered into with GCS in December 2001 was an exclusive arrangement which was breached when Silverman, GCS's President, entered into an "inconsistent" agreement with defendant, Dynamic. Specifically, in their amended complaint, plaintiffs advance the following theories: (1) defendant, Dynamic, obtained Princess and RCCL as clients by entering into a contract with GCS that was inconsistent with the Teaming Agreement; thus, plaintiffs claim that defendants, Dynamic and Silverman (GCS's President) tortiously interfered with the Teaming Agreement; (2) in complete and knowing disregard of GCS's contractual obligations with the plaintiffs (under the Teaming Agreement), defendants, Dynamic and Silverman, conspired to interfere with the Teaming Agreement and to replace it with their own contract with GCS, in order to obtain for themselves the money available to be earned under the Teaming Agreement; and (3) using that contract as a springboard, defendants then interfered with plaintiffs existing and prospective business relationships with Princess and RCCL and usurped those relationships for their own personal gain.

This Court previously dismissed, pursuant to a motion made by all defendants under CPLR 3211, all of plaintiffs' claims against David Nahor; plaintiffs' unjust enrichment claims against all defendants, namely, Dynamic, Silverman and Nahor; as well as plaintiffs' claims for tortious interference with existing and prospective business relations as against Dynamic. Thus, at this juncture, and upon their instant motion, pursuant to CPLR 3212, defendants, Dynamic and Silverman, seek summary judgment dismissal of the remaining causes of action; namely, the first and second causes of action sounding in tortious interference with contract as asserted against both Dynamic and Silverman; and the third and fourth causes of action for tortious interference with existing and prospective business relations, respectively, as asserted only against Silverman. For the sake of clarity, this Court will address each cause of action separately, and in turn.

First and Second Causes of Action: Dynamic
[Tortious Interference with Contract]

In their amended complaint, plaintiffs, Planet and Monex, providers of currency conversion services, allege that the "Teaming Agreement was breached by, among other acts, defendants' conspiracy to enter into the contract between GCS and [Dynamic], by GCS' and [Dynamic's] entry into a contract with Princess to supply DCC services to Princess, and by Nova's and [Dynamic's] entry into a contract with RCCL to supply DCC services to RCCL" (*Amended Complaint*, ¶43, ¶50). According to the plaintiffs, the breach of the Teaming Agreement occurred when GCS and Dynamic entered into their

own agreement for the provision of DCC services. Plaintiffs allege that this contract is "inconsistent" with GCS's obligations to the plaintiffs; specifically, plaintiffs claim that Teaming Agreement was "virtually exclusive" because it required GCS "to use 'reasonable effort to convince its customers...to use Planet/Monex's [DCC] solution" exclusively. Plaintiffs contend that by entering into the GCS/Dynamic Agreement and by providing DCC services to Princess in conjunction with Dynamic, GCS failed to use reasonable efforts to convince Princess to utilize Plaintiffs' services.

"A claim of tortious interference with contract requires: (1) the existence of a valid contract between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's intentional procurement of a breach of the contract without justification, (4) actual breach of the contract, and (5) resulting damages" (***Lama Holding Co. v. Smith Barney***, 88 NY2d 413, 424, 1996).

Defendants do not dispute that there was a contract - the Teaming Agreement - in place between the plaintiffs and GCS and that they knew about said contract. While there also does not seem to be a dispute that the plaintiffs sustained damages, defendants argue that they did not intentionally procure the breach of the Teaming Agreement; that is, that they did not intentionally induce GCS to breach the Teaming Agreement or render performance under the Teaming Agreement impossible.

This is a summary judgment motion. Summary judgment is the procedural equivalent of a trial (***Capelin Assoc. Inc. v. Globe Mfg. Corp.***, 34 NY2d 338, 1974) and will only be granted when the proponent establishes that there are no triable issues of fact (***Alvarez v. Prospect Hosp.***, 68 NY2d 320, 1986). Once the party seeking summary judgment has made a prima facie showing of entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact, or demonstrate an acceptable excuse for its failure to do so (***Alvarez v. Prospect Hosp.***, **supra**; ***Zuckerman v City of New York***, 49 NY2d 557, 562, 1980). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient (***Zuckerman v City of New York***, ***supra***).

Thus, in this case, defendants bear the burden of making a prima facie showing that they did not intentionally induce GCS to breach the Teaming Agreement with the plaintiffs or render performance under the Teaming Agreement impossible. In order to make a prima facie showing of entitlement to judgment as a matter of law, defendant must demonstrate that it did not "deliberately interfere" with the Teaming Agreement or that it did deliberately interfere with the Teaming Agreement, either by engaging in

lawful means or by pursuing illegal avenues, but that ultimately there was no breach of the Teaming Agreement (***NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.***, 87 NY2d 614, 1996; ***Carvel Corp. v. Noonan***, 3 NY3d 182, 2004). In this case, defendant, Dynamic, by relying upon, *inter alia*, the undisputed material facts as determined by the parties' Rule 19(a) statements, and the sworn affidavits of William Marshall and David Nahor, has successfully carried its prima facie burden.

It is undisputed on this record that while Dynamic was aware that GCS had other service agreements and that it knew specifically about the Teaming Agreement, it is equally undisputed by the parties herein that GCS affirmatively represented and warranted in the GCS/Dynamic Agreement that it had "the right...to enter th[e GCS/Dynamic] Agreement". In his sworn affidavit, William Marshall states:

> Based on the advice of GCS's counsel, GCS did not believe that the Teaming Agreement prohibited GCS from entering to DCC agreements with other DCC service providers. After the Teaming Agreement was signed, therefore, GCS, continued to pursue DCC opportunities with DCC service providers other than Planet Monex. For example, on or about April 15, 2002, GCS entered into a written contract with National Westminster Bank to jointly provide DCC services to merchants (*Marshall Aff.*, ¶¶9, 11).

Of the elements of a tortious interference with contract claim, the element of intentional procurement of the third party's breach requires a showing that, but for the defendant's acts, the agreement would not have been breached (***Lana & Samer, Inc. v. Goldfine***, 7 AD3d 300, 1st Dept., 2004). In this case, defendant, Dynamic has successfully established that even if it had not entered into its own contract with GCS (which plaintiffs claim is the breach of the Teaming Agreement) the Teaming Agreement would nevertheless have been breached. The undisputed facts establish that prior to the execution of the Dynamic/GCS Agreement on December 30, 2002, on April 15, 2002, GCS entered into a "Development Agreement for the Provision of DCC Services to the US Cruise Line Industry between GCS and National Westminster Bank PLC." Further, the parties herein agree that the GCS/Dynamic Agreement was the not first agreement related to DCC services that GCS had signed; that it was preceded by two other agreements that GCS had signed for the provision of DCC services jointly with DCC service providers other than Dynamic; and, of these other agreements, one was the Teaming Agreement and another was the Agreement with National Westminster Bank.

Based upon the foregoing, this Court finds that defendants have shown that they

did not intentionally induce GCS to breach its agreement with the plaintiffs. Further, the alleged breach of the Teaming Agreement did not take place as a result of the GCS/Dynamic Agreement; rather, the breach occurred, if at all, when GCS entered into a contract with National Westminster Bank for the provision of DCC services in April 2002.

In light of defendant Dynamic's showing of entitlement to judgment as a matter of law, the burden shifts to the plaintiffs, as the party opposing the motion, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (***Alvarez v. Prospect Hosp.***, 68 NY2d 320, 1986).

In opposition, with respect to their intentional inducement element of the tortious interference with contract claim, plaintiffs argue that, as a result of the Dynamic/GCS Agreement, the defendant, Dynamic, developed its own competing currency conversion system with GCS and then solicited and obtained Princess as a customer despite having full knowledge that Planet and Monex were already well along in seeking the Princess business under the Teaming Agreement. Plaintiffs claim that, as Monex and Dynamic were the only two currency converting companies that Princess had considered, if Dynamic had not acted, plaintiff Monex would have secured the Princess business. Plaintiffs also argue that Dynamic followed suit in subsequently obtaining RCCL as its customer.

It is well settled that, as the party opposing the motion, plaintiffs are required to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve. Mere conclusions and unsubstantiated allegations or assertions are insufficient (***Zuckerman v. City of New York***, ***supra*** at 562). Here, plaintiffs fail to provide any proof, in admissible form, supporting its conclusory statements and arguments. There is no admissible proof that Dynamic had "full knowledge" that they were "well along" in seeking Princess and RCCL's business; that Princess and RCCL had only considered Monex and Dynamic for its currency conversion services; or that had Dynamic not acted, they would have secured the Princess and RCCL business. In addition, plaintiffs have simply failed to offer any contradictory evidence that GCS did not breach the Teaming Agreement (first) when it entered into the April 2002 contract with National Westminster Bank.

Even more importantly, plaintiffs have failed to present any evidence that there was an actual breach of the Teaming Agreement by GCS. Liability under this tort is linked with an actual breach of the contract; and defendant's interference must cause the

breach of the contract (***Burrowes v. Combs***, 25 AD3d 370, 1st Dept., 2006, *leave to app. denied* 7 NY3d 704, 2006). In that regard, plaintiffs have failed to furnish any evidence that GCS did not use "reasonable efforts" to convince its customers to use their currency conversion system, as opposed to the services offered by Dynamic.

It is well settled, as a matter of law, that where a party in opposition to a motion for summary judgment fails to submit sufficient proof to raise a triable issue of fact, the court may infer that none exists (***Banasik v. Reed Prentice, Division of Package Machinery Co.***, 34 AD2d 746, 1st Dept., 1970, *affd.* 28 NY2d 770,1971). Plaintiffs' conclusory argument that the issues surrounding the intentional inducement of the breach of the contract are ordinarily reserved for the jury, and that a reasonable jury could decide, on these facts, that Dynamic was involved in and intentionally interfered with plaintiffs' rights under the Teaming Agreement is insufficient to defeat defendant's motion for summary judgment. As stated above, there is no evidence on these facts that defendant Dynamic did anything to induce GCS not to comply with its obligations under the Teaming Agreement with the plaintiffs. The threshold issue in this case is not whether Dynamic intended for GCS to breach a contractual obligation to the plaintiffs; rather, the issue is whether Dynamic's conduct is legally sufficient to constitute inducement such that GCS would breach its Teaming Agreement.

The parties' remaining arguments, dealing with whether Dynamic had sufficient knowledge that the Teaming Agreement allegedly precluded GCS from entering into an agreement with Dynamic, are misplaced. A prerequisite to establishing scienter in a claim of tortious interference with a contract is that defendant had knowledge of the *contract* (***Guard-Life Corp. v. S Parker Hardware Mfg. Corp.***, 50 NY2d 183, 193, 1980; ***Israel v. Wood Dolson Co.***, 1 NY2d 116, 1956; ***Bayside Carting, Inc. v. Chic Cleaners***, 240 AD2d 687, 2nd Dept., 1997). While the knowledge on defendant's part of plaintiff's contract rights must be actual (***Burns Jackson Miller Summit & Spitzer v Lindner***, 88 AD2d 50, 2nd Dept., 1982 *aff'd*, 59 NY2d 314, 1983; ***Roulette Records, Inc. v Princess Production Corp.***, 15 AD2d 335, 1st Dept., 1962 *aff'd*, 12 NY2d 815, 1962), it is not necessary that defendant have full knowledge of the detailed terms of the contract provisions (***Gold Medal Farms, Inc. v Rutland County Co-operative Creamery, Inc.***, 9 AD2d 473, 3rd Dept., 1960). Defendant can be totally unaware of, and is in fact usually indifferent to, the legal particulars of the contract (***Guard-Life Corp. v. S Parker Hardware Mfg. Corp.***, ***supra*** at 193). Thus, whether or not the Teaming Agreement precluded GCS from entering into the GCS/Dynamic Agreement in December 2002 and whether or not Dynamic had knowledge of this preclusion is academic on this motion, particularly in light of the parties agreement, in their Rule 19(a) statements, that GCS

affirmatively represented to the defendant that it was not prohibited from entering into the subsequent agreement with it. Thus, it is irrelevant whether the Teaming Agreement prohibited GCS from entering into a contract with Dynamic or whether Dynamic knew that GCS was supposedly precluded from entering into a contract with it. All that is required for a plaintiff to recover damages for a claim for tortious interference with a contract is a demonstration that defendant, knowing of plaintiff's contract with a third party, intentionally induced a breach of the contract between the plaintiff and the third party without reasonable justification or excuse (***Guard Life Corp. v. S Parker Hardware Mfg. Co.***, ***supra***).

Thus, defendant, Dynamic's motion for summary judgment dismissal of plaintiffs' first and second causes of action for tortious interference with contract is **granted**.

First and Second Causes of Action: Silverman
[Tortious Interference with Contract]

As stated above, it is undisputed in this case that a contract existed between plaintiffs and GCS and that defendant Silverman knew of the contract. However, there is no evidence that Silverman intentionally induced his company GCS (of which he was the president) to breach its Teaming Agreement with the plaintiffs.

As alleged against Mark Silverman, plaintiffs' first and second causes of action, purport to allege a cause of action to pierce the corporate veil. This cause of action alleges that as the president of GCS, he exceeded his authority in entering into the Princess/Dynamic/GCS contract which plaintiffs assert is a separate breach of the Teaming Agreement by GCS for which he should be personally liable. Plaintiffs also claim that Silverman acted for his own personal benefit, as opposed to GCS's interest, because he sought to personally profit through the shareholder "earnout" he was supposed to receive from the sale of GCS to First Horizon. Based on these allegations, plaintiffs claim that the Court should pierce the corporate veil to hold the defendant personally liable. This cause of action fails because there is no evidence that Silverman exceeded his scope of authority at any point, diverted any opportunities from GCS, or acted to further his own personal interest as opposed to GCS's interests.

A cause of action for piercing the corporate veil is dependent upon the existence of corporate liability to the plaintiffs. The liability of the corporation is then imposed upon the principals of the corporation because of abuse or misuse of the corporate form. In this case, plaintiffs Planet and Monex have not established the existence of any liability of

GCS to plaintiffs. In fact, plaintiffs have not even sued GCS on any of the causes of action. Since GCS is not liable to plaintiffs on any of the causes of actions, Silverman cannot be held liable as a principal of GCS.

Furthermore, in order to pierce the corporate veil, the plaintiffs must prove that the owner of the corporation completely dominated the corporation in regard to the transaction involved and that the domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff being damaged (***Matter of Morris v. New York State Dept. of Taxation and Finance***, 82 NY2d 135, 1993; ***Old Republic National Title Ins. Co. v. Moskowitz***, 297 AD2d 724, 2nd Dept., 2002). In making the determination as to whether to pierce the corporate veil, the court must determine whether a corporate officer or principal to be held liable (1) exerted domination and control over corporation which is so complete that the corporation has no separate mind, will or existence of its own; (2) used this domination and control to commit fraud or wrong or any other dishonest or unjust act; and (3) whether injury or unjust loss resulted to plaintiff from said control and wrong (***Bowles v. Errico***, 163 AD2d 771, 3rd Dept., 1990; *see also,* ***Maggio v. Becca Construction Co., Inc***. 229 AD2d 426, 2nd Dept., 1996).

It is well-settled that an agent cannot be held liable for inducing his principal to breach a contract with a third party unless he or she engaged in independently tortious acts or acted for his or her own benefit (***Karthiganer Associates, P.C. v. Town of New Windsor***, 108 AD2d 898, 899, 2nd Dept., 1985; ***Courageous Syndicate, Inc., v. People-to-People Sports Committee, Inc.***, 141 AD2d 599, 600, 2nd Dept., 1988).

Plaintiffs in this case do not dispute that Silverman was GCS's President when GCS allegedly breached the Teaming Agreement. Nor do they dispute that he cannot be personally liable for that alleged breach, absent evidence that he committed an independent tort, somehow exceeded the scope of his authority or acted to further his own personal interest. In the face of defendants' prima facie showing of entitlement to judgment as a matter of law, plaintiffs again fail to submit any evidence from which a reasonable jury could conclude that any of these exceptions are satisfied.

This Court in its previous Order denying Silverman's motion to dismiss the tortious interference claims against him in the amended complaint, held that "[d]iversion of a business opportunity is an independent tort that sufficiently supports personal liability against Silverman in this case." However, at this juncture, in the face of defendants' motion for summary judgment, plaintiffs have failed to advance any evidence whatsoever that Silverman diverted any business opportunity away from his employer, GCS. Rather,

plaintiffs admit that Silverman believed that entering into the GCS/Dynamic Agreement was in GCS's best interest because it would provide GCS with additional revenue streams and allow GCS to offer its customers a DCC solution that was different from plaintiffs' so that GCS's customers could determine which solution best suited their needs. Further, plaintiffs admit that Bill Marshall, GCS's founder, testified that Silverman "had absolute authority to do anything he wanted to do with any of the contracts that he was negotiating at that time"; that GCS's Board of Directors discussed and approved the creation of a separate company to provide DCC services to GCS customers - without Monex; that GCS director and general counsel, Raul Puig, "informed Nahor that GCS would not contract with an individual" and "directed [Nahor] to form Dynamic for the purpose of contracting with GCS for the provision of DCC services"; that Puig negotiated a service contract on behalf of GCS under which GCS and Dynamic agreed to work together to integrate their services in such a way as to allow for the delivery of DCC services to GCS's merchant customers; and that Puig "reviewed and approved the GCS/Dynamic Agreement before it was executed" by Silverman. Thus, by plaintiffs' own admissions Silverman did not divert any opportunity from GCS, or commit any other independent tort that could warrant the imposition of personal liability against him.

Plaintiffs' argument that, although Silverman was authorized by GCS to sign the GCS/Dynamic Agreement, he was not authorized by GCS's successor, First Horizon, to sign the tripartite Princess Agreement one year later, which plaintiffs assert was a separate breach of the Teaming Agreement by GCS for which he should be personally liable, is entirely meritless.

The record reflects that the parties do not dispute that Bill Marshall built the system specifications necessary for GCS and Dynamic to jointly provide DCC services to Princess and worked with Dynamic to do so; that Nahor reported some of his discussions with Princess concerning the progress of the contract negotiations to Marshall and that Marshall helped sell the joint GCS/Dynamic service to Princess. Plaintiffs also admit that, after GCS was acquired by First Horizon, First Horizon's president, Ron Nation, reviewed both the Teaming Agreement and the GCS/Dynamic Agreement and was aware of their terms; that in the summer of 2003, Nation met with Dynamic's President, Nahor, who told Nation that Dynamic "aspire[d] to be an important business partner" of First Horizon; that Nation wanted certain specific points relating to GCS's potential liability under the Princess Agreement "covered" and to "the extent that they would be covered...[Silverman] could negotiate on his own"; that Nation requested that specific changes be made to the Princess Agreement to address his concerns; that First Horizon's outside counsel, Baker Donelson, participated in the negotiations with Princess at

Nation's direction and included changes to drafts of the Princess Agreement that Nation requested; that Baker Donelson was provided a copy of the Princess Agreement on January 9, 2004, shortly after it was executed on December 31, 2003; and on January 28, 2004, Nation sent a letter to Princess' in-house counsel "apologiz[ing] for inconveniences [in] negotiating" the Princess Agreement, and thanking Princess "for the opportunity to provide GCS services to Princess."

Based upon the foregoing admissions by the plaintiffs, this Court finds that their argument that Silverman did not have the authority to enter into the Princess Agreement, is factually unsupported. Given plaintiffs' admissions that Nation's concerns regarding the Princess Agreement were resolved to Nation's satisfaction and that Nation, along with First Horizon's outside counsel, participated in the negotiation and drafting of the Princess Agreement, and specifically approved it, there is no question that Silverman was authorized by First Horizon to sign the Princess Agreement on GCS's behalf.

Plaintiffs' argument, that Silverman should be personally liable for GCS's alleged breach of the Teaming Agreement because he sought to personally profit through the shareholder "earnout" he was supposed to receive from the sale of GCS to First Horizon, is also meritless. In order to impose liability against a corporate officer for the corporation's breach of contract, the plaintiff must prove that the officer sought to profit, *at the corporation's expense*, and that any gain which a defendant enjoys in his capacity as a shareholder of the corporation is, therefore, legally insufficient to establish personal liability against him (***Joan Hansen & Co. v. Everlast World's Boxing Headquarter Corp.***, 296 AD2d 103, 110, 1st Dept., 2002; ***Roselink Investors, LLC v. Shenkman***, 386 F. Supp. 2d 209, 228, SDNY 2004). Plaintiffs present no evidence in this case that Silverman sought to profit at GCS expense, or at the expense of GCS' parent company, First Horizon. Indeed, plaintiffs admit that Silverman believed that he was acting in GCS's best interests and that any shareholder earnout First Horizon agreed to pay was based on GCS's profitability, which Silverman sought to maximize. Thus, plaintiffs' argument, that Silverman's personal interest was somehow not aligned with the interests of GCS or First Horizon, is unfounded.

Plaintiffs' argument, that Silverman assisted Dynamic in 2002 in order to "ensure an employment opportunity for himself", is equally meritless and pure speculation. There is no evidence on this record whatsoever to support plaintiffs' baseless assertion. There are no facts to rebut defendants' testimony that, prior to Silverman's unexpected termination from GCS in March 2006, Silverman and Nahor never discussed the possibility of Silverman leaving GCS or working for Dynamic, and that Silverman never

even considered working for Dynamic until after his termination from GCS.

There is no proof in this record that Mark Silverman ever acted in other than in his capacity as president of GCS or a member of the corporation. There is also no proof that Silverman's acts were motivated by self interest. Plaintiffs have not shown how GCS might personally benefit in any way from Silverman's alleged breach of the contracts with plaintiff (*cf.* ***Bradkin v. Leverton***, 32 AD2d 1057, 1058, 2nd Dept., 1969, *revd. on other grounds* 26 NY2d 192, 1970). Accordingly, Silverman is entitled to summary judgment in his favor as to plaintiffs' claims for tortious interference with the Teaming Agreement.

First and Second Causes of Action: Dynamic and Silverman
[Tortious Interference with Contract: Nova]

Plaintiffs' claims for tortious interference with contract, with regard to Nova, are based upon allegations that defendants, Dynamic and Silverman, allegedly induced Nova to breach the Teaming Agreement with the plaintiffs. There is, however, no evidence on this record that defendants, Dynamic and/or Silverman, even communicated with anyone from Nova. Further, Plaintiffs allege that "[t]he Teaming Agreement was breached by...Nova and [Dynamic's] entry into a contract with [RCCL] to supply DCC services to [RCCL]." Yet, plaintiffs overlook the fact that there is no contract (or no evidence has been provided to this Court) between Nova (or GCS) and RCCL for the provision of DCC services.

It is clear to this Court that Dynamic did not breach the Teaming Agreement by entering into a contract with RCCL because Dynamic was not a party to the Teaming Agreement and had no contractual obligations under it. Plaintiffs have no factual support for their argument that defendants somehow induced Nova to breach the Teaming Agreement or that Nova failed to use "reasonable efforts" to convince RCCL to continue using Plaintiffs' DCC services. Rather, plaintiffs do not dispute that at no time did any employee of Nova seek to encourage RCCL not to renew the Monex/RCCL Agreement or to utilize Dynamic's services; that RCCL made the decision to switch DCC providers and to utilize Dynamic's services without any assistance, advice or involvement of Nova; and that neither Silverman nor Nahor attempted to persuade or encourage Nova to refrain from trying to convince RCCL not to switch DCC providers and to keep its business with Monex. Plaintiffs' conclusory argument, therefore, that had the defendants not caused GCS to enter into the Princess Agreement, "they would not have been able to further induce the breach of the Teaming Agreement by entering into the [RCCL/Dynamic] Contract" is unsupported and meritless. There is no evidence that Nova breached the

Teaming Agreement. Nor is there any evidence that defendants caused such breach.

Therefore, defendants, Dynamic and Silverman's motion for summary judgment dismissal of plaintiffs' tortious interference claims to the extent that they are based upon allegations of Nova, is **granted**.

Third and Fourth Causes of Action: Silverman

[Tortious Interference with Existing and Prospective Business Relations]

Plaintiffs' third and fourth causes of action against Silverman allege that he tortiously interfered with their alleged business relations with RCCL and Princess "through the improper contract...entered between GCS and [Dynamic]." To establish a claim based on tortious interference with existing business relations, a plaintiff must show (1) the existence of a business relation with a third party, (2) defendant's interference with the relation by use of dishonest, unfair or improper means, and (3) plaintiff sustained damages (***Fonar Corp. v. Magnetic Resonance Plus, Inc.***, 957 FSupp 477, 481-482, SDNY 1997; ***M.J. & K. Co., Inc. v. Matthew Bender & Co., Inc.***, 220 AD2d 488, 490, 2nd Dept., 1995). Similarly, "[t]ortious interference with [prospective] business relations applies to those situations were the third parties would have entered into an extended or contractual relationship with plaintiff but for the wrongful acts of the defendant" and "[i]n such an action the motive for the interference must be solely malicious" (***M.J. & K. Co., Inc. v. Matthew Bender & Co., Inc.***, ***supra***). A necessary allegation for the claim for tortious interference with prospective business relations is that defendant's conduct was motivated solely by malice or to inflict injury by unlawful means, beyond mere self-interest or other economic considerations" (***Shared Communications Servs. Of ESR, Inc. v. Goldman Schs & Co.***, 23 AD3d 162, 163, 1st Dept., 2005). " 'Wrongful means' includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions, and some degree of economic pressure, but more than simple persuasion is required" (***Snyder v. Sony Music Entertainment***, 252 AD2d 294, 300, 1st Dept., 1999).

In its prior Order, this Court denied defendant, Silverman's motion, pursuant to CPLR 3211, to dismiss plaintiffs' third and fourth causes of action on the grounds that plaintiffs had sufficiently alleged that Silverman (a corporate officer of GCS) steered RCCL (Monex's existing customer) and Princess (Monex's prospective customer) as well as diverted other potential business opportunities away from the plaintiffs thereby inducing the breach of the Teaming Agreement. This Court also held that Plaintiffs' allegation that defendant, Silverman, "tortiously and improperly" interfered with

plaintiffs' prospective business relationship by "dishonest[ly] conceal[ing] his role in the negotiations between [Dynamic] and Princess" sufficiently stated a cause of action sounding in tortious interference with prospective business relations against Silverman.

This, however, is a summary judgment motion. The burdens the parties on a summary judgment motion are very different than the burdens on a motion to dismiss. Plaintiffs have failed to provide any evidence, in opposing defendants' motion for summary judgment, that Silverman's conduct was motivated solely by malice or to inflict injury by unlawful means.

"Conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship" (***Carvel Corp. V. Noonan***, 3 NY3d 182, 192, 2004). Here, plaintiffs have failed to identify any tortious conduct by Silverman that was directed towards RCCL or Princess. There is no proof of any independent wrongful conduct, other than asserting that defendants tortiously interfered with the Teaming Agreement between GCS and plaintiffs.

In addition, as established above, it cannot be overlooked that Silverman was acting in his capacity as an officer of GCS when the alleged breach occurred and did not commit any independent tortious acts and therefore is not liable for allegedly causing GCS to breach the Teaming Agreement.

Plaintiffs' allegations that Silverman "dishonest[ly] conceal[ed] his role in the negotiations between [Dynamic] and Princess" overlooks the undisputed facts that other individuals at First Horizon, including Ron Nation, and First Horizon's legal counsel, were also involved in the negotiation. Moreover, this bald claim is legally insufficient to meet the wrongful means requirement of their tortious interference claim because the alleged omission is nothing more than a breach of the Teaming Agreement for which Silverman cannot be personally liable. "Allegations of fraudulent...concealment will not change the nature of the action from breach of contract into fraud" (***Shea v. Angulo***, 1993 WL 498013, SDNY 1993). Thus, a corporate officer cannot be liable in tort for allegedly concealing his conduct which results in a corporation's breach of contract. Plaintiffs have failed to establish that Silverman, a corporate officer of GCS during the relevant period, had any duty of disclosure independent of the Teaming Agreement between GCS and Plaintiffs. Silverman's alleged failure to disclose GCS's negotiation with Princess cannot support a claim for fraud or any other tort. Furthermore, it cannot be overlooked that Silverman had no duty to disclose Dynamic's negotiations with RCCL in the Spring of

2006 as he did not even work for GCS or Nova at that time. Thus, the alleged omissions do not satisfy the "wrongful means" requirement of plaintiffs' tortious interference with business relations claims and the claims are therefore **dismissed**.

Accordingly, defendants, Dynamic and Silverman's motion, pursuant to CPLR 3212, for an Order of this Court granting summary judgment dismissal of plaintiffs' amended complaint is **granted** and plaintiffs' claims are **dismissed** in their entirety.

This shall constitute the decision and order of this Court.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Settle Judgment on Notice.

Dated APR 24 2009

XXX J.S.C.

ENTERED
APR 28 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE