UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATURAL PRODUCTS ASSOCIATION, Plaintiff, v. CAROLYN BEHRMAN, et al. Defendants.	Civil Action No.: 1:16-cv-00194-RJL **ORAL ARGUMENT REQUESTED**

MEMORANDUM IN SUPPORT OF DEFEDANTS' MOTION TO DISMISS[1]

INTRODUCTION

This case was initiated by the CEO of the Plaintiff against current and former Board members of the Plaintiff in retaliation for the Board's investigation of the CEO's misconduct. The Court lacks personal jurisdiction over the Defendants, and Plaintiff's Complaint against the Defendants fails to state a claim upon which relief may be granted. Therefore, the Complaint should be dismissed in its entirety.

PARTIES

I. PLAINTIFF NATURAL PRODUCTS ASSOCIATION.

Natural Products Association ("Plaintiff") is an Illinois not-for-profit corporation with its principal place of business in the District of Columbia. (Compl. ¶ 3.) Plaintiff represents retailers, manufacturers, wholesalers, and distributors of natural products, including natural foods, dietary supplements, and health and beauty aids. (Compl. ¶ 17.)

[1] This motion is brought by all Defendants other than Robert Craven and Nicholas Pascoe, who are represented by separate counsel.

II. MOVING DEFENDANTS.

Carolyn Behrman, Donelson Caffery, Claudia David-Roscoe, Frances Drennen, and Howard Pollack are current members of Plaintiff's board of directors. (Compl. ¶¶ 4, 5, 7, 9, and 13.) Ben Henderson, Angie O'Pry-Blades, and Stephen Distefano are former members of Plaintiff's board of directors. (Compl. ¶¶ 8, 10, and 11.) Together, the Moving Defendants are referred to in this memorandum as the "Directors."

BACKGROUND[2]

As CEO and Executive Director of Plaintiff, Daniel Fabricant manages and directs Plaintiff's operations, implements and enforces Plaintiff's policies, and is Plaintiff's official spokesperson. (Compl. ¶ 20.) Plaintiff's board of directors exercises general supervision over the CEO and Executive Director of Plaintiff. (*Id.*)

In their supervisory capacity over Fabricant, the Directors learned that Fabricant was the subject of numerous allegations of misconduct in his capacity as Plaintiff's CEO and Executive Director. Some of these allegations are set forth in a lawsuit brought by Plaintiff's former Senior Vice President and CFO, Brent Weickert, against Plaintiff, Fabricant, and other defendants. In the Complaint, Plaintiff expressly refers to this lawsuit—*Weickert v. Natural Products Association, et al.*, 1:16-CV-00142-RJL (the "Weickert Litigation"). (Compl. ¶¶ 48–49.) A true and correct copy of the complaint in the Weickert Litigation (the "Weickert Complaint") is attached as Exhibit A.[3]

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2 The following facts are derived from the Complaint for purposes of this motion to dismiss.

3 In deciding a motion brought under Rule 12, a court may consider "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint," *Gustave-Schmidt v. Chao*, 226 F.Supp.2d 191, 196 (D.D.C. 2002), or "documents 'upon which the plaintiff's complaint necessarily relies' even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss," *Hinton v. Corr. Corp. of Am.*, 624 F.Supp.2d 45, 46 (D.D.C. 2009). Moreover, "[a] court may take judicial notice of public records from other proceedings." *Jones v. Lieber*, 579 F. Supp. 2d 175, 179 (D.D.C. 2008) (citing *Covad*

In the Weickert Litigation, Weickert alleges that he discovered evidence that Fabricant had engaged in "prohibited, unethical, and often illegal behavior" in his capacity as CEO and Executive Director. (Weickert Compl. ¶ 11.) In light of this evidence, Weickert sent a letter to Plaintiff's President advising Plaintiff of Fabricant's misconduct, including the following:

- Fabricant visited strip clubs, charging expenses from these visits to his company credit card—including a $5,060.00 charge at the Spearmint Rhino Club and $350.00 at the That's Fritz Too Club.
- Fabricant took photographs at strip clubs and showed such photographs to a female Plaintiff employee.
- Fabricant charged expensive drinking and dining outings with fellow Plaintiff employee Corey Hilmas to his company credit card.
- Fabricant drank excessively, causing Plaintiff employees to comment on his behavior.
- Fabricant regularly used profanity, sexual innuendo, and sexual jokes in the workplace.
- Fabricant mocked an employee's religious practice.
- Fabricant insisted that women wear skirts and high heels, criticizing them if they did not.
- Fabricant retaliated against Weickert and other employees who complained of Fabricant's behavior.

(Weickert Compl. ¶ 12.)

After sending this letter, Weickert learned of another incident involving Fabricant and a female employee, and Weickert then sent another letter to Plaintiff's board of directors. (Weickert Compl. ¶ 14.) Weickert stated in his letter to the Board that, in May 2015, Fabricant took a female Plaintiff employee out drinking (including at a strip club), after which Fabricant ordered an Uber ride for the female employee. (*Id.*) The female employee was taken to a condominium she did not recognize upon waking the following morning. (*Id.*) After visiting the

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Communications Co. v. Bell Atlantic Corp., 407 F.3d 1220, 1222 (D.C. Cir. 2005)).

hospital, the female employee learned she had been administered a date rape drug and sexually assaulted. (*Id.*) Weickert also reported in this letter that Fabricant had a long history of taking out young female employees and drinking excessively. (Weickert Compl. ¶ 15.)

Significantly, Plaintiff does not challenge the truth of the allegations made in the Weickert Complaint. Instead, Plaintiff alleges only that the allegations are based on hearsay and rumors and that Plaintiff has conducted "a comprehensive and privileged inquiry into the allegations." (Compl. ¶ 32.) However, Plaintiff does not disclose the results of its investigation of Fabricant's misconduct.

Based upon these allegations of misconduct against Fabricant and consistent with their fiduciary duties, including their duty of general supervision over Fabricant and Plaintiff in their capacity as Board members (a supervisory duty Plaintiff acknowledges in paragraph 20 of the Complaint), the Directors addressed the issue. Plaintiff alleges that Defendant Henderson emailed Weickert in July 2015, stating that "something has to be done" and that "removing Dan [Fabricant] has to be priority #1." (Compl. ¶ 35.) Plaintiff also alleges that Defendants Henderson and Caffery sought a Board meeting "to discuss all past or current investigations of the job performance of Dr. Dan Fabricant." (Compl. ¶ 36.)

In September 2015 and December 2015, during meetings of Plaintiff's board of directors, the Directors advocated unsuccessfully for Fabricant's termination. (Compl. ¶¶ 44, 51.) Despite the Directors' reasonable basis for investigating Fabricant and advocating for his termination, Plaintiff alleges that the Directors acted out of self-interest. (Compl. ¶ 28.)

ARGUMENT

I. THE COURT LACKS PERSONAL JURISDICTION OVER THE DIRECTORS.

A plaintiff "bears the burden of establishing personal jurisdiction over *each* defendant." *D'Onofrio v. SFX Sports Grp., Inc.*, 534 F.Supp.2d 86, 89 (D.D.C. 2008) (emphasis added). "In

order to meet [its] burden, [a] plaintiff must allege specific facts on which personal jurisdiction can be based" and "cannot rely on conclusory allegations." *Id.* "Moreover, [a] plaintiff cannot aggregate factual allegations concerning multiple defendants in order to demonstrate personal jurisdiction over any individual defendant." *Id.* (citing *Rush v. Savchuk*, 444 U.S. 320, 331–32 (1980) (rejecting aggregation of co-defendants' forum contacts in determining personal jurisdiction because "the requirements of *International Shoe* must be met as to each defendant over whom a state court exercises jurisdiction")).

A court can exercise personal jurisdiction over a defendant through one of two jurisdictional theories: "(1) general, 'all purpose' adjudicatory authority to entertain a suit against a defendant without regard to the claim's relationship *vel non* to the defendant's forum-linked activity, and (2) specific jurisdiction to entertain controversies based on acts of a defendant that touch and concern the forum." *Kopff v. Battaglia*, 425 F.Supp.2d 76, 81 (D.D.C. 2006).

A. The Court Cannot Exercise General Jurisdiction Over the Directors.

"'[G]eneral jurisdiction' requires that the defendant's contacts within the forum be 'continuous and systematic' in order for the defendant to be forced to defend a suit arising out of any subject matter unrelated to the defendant's activities within the forum." *Conant v. Wells Fargo Bank, N.A.*, 24 F. Supp. 3d 1, 12 (D.D.C. 2014). Here, Plaintiff has alleged "no facts to satisfy the steep requirement of continuous and systematic contacts with the District of Columbia sufficient to impose general jurisdiction." *D'Onofrio*, 534 F.Supp.2d at 90.

B. The Court Cannot Exercise Specific Jurisdiction Over the Directors.

"Alternatively, the District of Columbia may exercise specific jurisdiction over a defendant if the plaintiff demonstrates that (1) the District of Columbia's long arm statute, D.C. Code § 13–423, authorizes jurisdiction, and (2) the exercise of jurisdiction comports with the federal requirement of constitutional due process." *Nat'l Cmty. Reinvestment Coal. v. NovaStar*

Fin., Inc., 631 F. Supp. 2d 1, 4 (D.D.C. 2009). "For there to be personal jurisdiction under the long-arm statute, [a] plaintiff must allege some specific facts evidencing purposeful activity by defendants in the District of Columbia by which they invoked the benefits and protections of its laws and specific acts connecting the defendants with the forum." *Robinson v. Ashcroft*, 357 F. Supp. 2d 146, 148 (D.D.C. 2004).

"[A] court does not have jurisdiction over individual officers and employees of a corporation just because the court has jurisdiction over the corporation." *Wiggins v. Equifax Inc.*, 853 F. Supp. 500, 503 (D.D.C. 1994). "Personal jurisdiction over the employees or officers of a corporation in their individual capacities must be based on their personal contacts with the forum and not their acts and contacts carried out solely in a corporate capacity." *Id.* "Thus, the corporation *ordinarily* insulates the individual employee from the court's personal jurisdiction." *Id.* (emphasis in original). This rule similarly applies to a corporation's board members. *See NAWA USA, Inc. v. Bottler*, 533 F. Supp. 2d 52, 57 (D.D.C. 2008) ("Just because Defendants were employed by, or were members of the board of directors of, a company which does business in the District, is not by itself sufficient to establish minimum contacts."). For example, this Court has declined to exercise jurisdiction over a company's Chairman and CEO where "all of the[] alleged jurisdictional facts involve[d] the individual defendants' official duties for [the corporation]—setting policies, communicating with employees, conducting investigations, and making employment decisions." *Richard v. Bell Atlantic Corp., Inc.*, 976 F.Supp. 40, 50 (D.D.C. 1997).

Here, the only allegations in the Complaint identifying conduct by the Directors in the District of Columbia are related to their official duties as members of the Board, and therefore, cannot serve as a basis to establish personal jurisdiction over the Directors. In paragraph 15 of

the Complaint, Plaintiff alleges that "Defendants are Directors of NPA, which has its principal place of business in the District of Columbia" and that "Defendants have travelled to and participated in NPA business and events in the District of Columbia." (Compl. ¶ 15.) These allegations are insufficient to establish personal jurisdiction over the Directors. Accordingly, the Complaint must be dismissed.

II. PLAINTIFF'S CLAIMS FAIL TO MEET APPLICABLE PLEADING REQUIREMENTS.

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007). In other words, "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]" *Id.* at 1965. Dismissal is properly granted "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

A. Plaintiff Fails to Satisfy the Requirements of Federal Rule of Civil Procedure 8.

Rule 8 of the Federal Rules of Civil Procedure requires that a complaint "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Reallegation and incorporation by reference of prior facts in a complaint, with no indication of the specific facts pertaining to each claim, is not sufficient to meet the plausibility standard for notice pleading under Rule 8. *See Rice v. District of Columbia*, 774 F.Supp.2d 25, 33 (D.D.C. 2011) ("An individual count must contain a plausible recitation of enough facts to support it.") A complaint "is insufficient [where] it is not clear which allegations pertain to which count, rendering the Court unable to determine whether [plaintiff] states a claim for relief under each count with sufficient specificity." *Pencheng Si v. Laogai Research Found.*, No. 09-2388-KBJ, 2013 WL 4478953, at *1 (D.D.C. Aug. 21, 2013);

see also Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1359 n. 9 (11th Cir. 1997) (finding "an all-too-typical shotgun pleading" where "a reader of the complaint must speculate as to which factual allegations pertain to which count").

For each Count in the Complaint, Plaintiff merely reincorporates previous allegations without providing any specific facts supporting each Count. Accordingly, Plaintiff has failed to satisfy the requirements of Rule 8, and the Complaint must be dismissed.

B. Plaintiff Fails to Plead Facts Identifying the Conduct of Particular Directors Sufficient to Provide a Meaningful Opportunity to Defend Against Plaintiff's Claims.

Where a plaintiff's case is based upon allegations against multiple defendants, the plaintiff must identify the specific conduct of particular defendants forming the basis of liability. This Court has held that where a complaint "does not identify any specific plaintiffs or defendants . . . or how a particular plaintiff was [harmed] by a particular defendant," the complaint "is insufficient to state a claim by a plaintiff against one of the defendants and survive a Rule 12(b)(6) motion to dismiss." *Major v. Plumbers Local Union No. 5*, 370 F. Supp. 2d 118, 129 (D.D.C. 2005). Accordingly, this Court has required that a complaint state "the precise claims of each plaintiff, including the time of any alleged events, and identif[y] which defendants are the subject of those specific allegations and resulting claims of each plaintiff." *Id.*; *see also Merrilees v. Merrilees*, 998 N.E.2d 147, 158 (Ill. Ct. App. 2013) (holding that failure to identify "the specific conduct or statements of each defendant . . . falls short of what is required to survive a motion to dismiss.").

Here, the Complaint does not allege specific conduct of Carolyn Berhman, Claudia David-Roscoe, Stephen Distefano, Frances Drennen, Angie O'Pry-Blades, and Howard Pollack. While Henderson and Caffery are mentioned in the allegations, the specific allegations do not

support any of the claims asserted.[4] Because the Complaint does not include allegations of any specific conduct of particular defendants that could form the basis of liability, the Complaint is subject to dismissal.

III. COUNT I FAILS TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTIES AGAINST THE DIRECTORS.

A. Plaintiff's Claim is Barred by the Business Judgment Rule.

"When a claim addresses matters of corporate governance or other internal affairs of a company, D.C. courts apply the law of the state of incorporation"—in this case, Illinois. *Am. Nat. Ins. Co. v. JPMorgan Chase & Co.*, 893 F. Supp. 2d 218, 230 (D.D.C. 2012). Under Illinois law, the business judgment rule "shields directors who have been diligent and careful in performing their duties[.]" *Miller v. Thomas*, 656 N.E.2d 89, 95 (Ill. Ct. App. 1995) (affirming circuit court's grant of motion to dismiss on business-judgment-rule theory). "The fact that defendants are no longer serving on the board of directors does not preclude them from raising the business judgment rule on their own behalf for the things they did while they were still directors." *Davis v. Dyson*, 900 N.E.2d 698, 715 (Ill. Ct. App. 2008). To defeat the business judgment rule, a plaintiff must allege that a director's failure to meet his or her fiduciary obligations "was by reason of inexcusable unawareness or inattention or lack of good faith on part of the directors." *Stamp v. Touche Ross & Co.*, 636 N.E.2d 616, 622 (Ill. Ct. App. 1993).

The business judgment "rule posits a powerful presumption in favor of actions taken by the directors in that a decision made by a loyal and informed board will not be overturned by the

[4] With respect to Ben Henderson, the Complaint alleges only that he expressed his opinion to Weickert and fellow Directors that Fabricant should be removed. (Compl. ¶¶ 38, 39, and 45.) With respect to Donelson Caffery, the Complaint alleges that "Henderson and Caffery had telephone and email communications regarding their intent to seek an executive session of NPA's Board 'to discuss all past or current investigations of the job performance of Dr. Dan Fabricant.'" (Compl. ¶ 36.) Expressing such opinions and seeking an executive session of the Board is conduct consistent with the Board's fiduciary duties.

courts unless it cannot be attributed to any rational business purpose." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993). "[T]he business judgment rule attaches to protect corporate officers and directors and the decisions they make, and our courts will not second-guess these business judgments." *Id.*; *see also Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995) (holding that a "court will not substitute its judgment for that of the board if the [board's] decision can be attributed to any rational business purpose").

Plaintiff alleges that after learning that Fabricant (the CEO and Executive Director of the corporation) was accused of misuse of corporate funds, sexual harassment, religious discrimination, and other misconduct, the Directors attempted to investigate the accusations and ultimately concluded that his termination was appropriate. In fact, Plaintiff acknowledges in paragraph 36 of the Complaint that the Directors sought to organize a Board meeting to discuss Plaintiff's investigation and whether Fabricant should be terminated. Contrary to Plaintiff's assertion of a breach of fiduciary duty, the Directors' conduct demonstrates that they satisfied, rather than violated, their fiduciary duties regarding Fabricant's misconduct.

On facts very similar to this case, the Delaware Court of Chancery declined to find a breach of fiduciary duty by corporate directors. In *OptimisCorp v. Waite*, No. CV-8773-VCP, 2015 WL 5147038 (Del. Ch. Aug. 26, 2015), the board of directors "met and voted to terminate the plaintiff CEO" after a "third party had conducted an investigation and concluded that the CEO had engaged in conduct . . . that could amount to sexual harassment." *Id.* The effort to terminate the CEO was unsuccessful. Thereafter, the CEO and the company sued the former directors who had sought his termination, alleging that they had "engaged in a long-running and wide-ranging conspiracy that involved, essentially, everyone who disagreed with the CEO's management of the company." *Id.* With respect to the fiduciary duty claim against the directors,

the Court determined that the directors' attempt to terminate the CEO, even if procedurally flawed, did not constitute a violation of fiduciary duties to the corporation. *Id.*

Here, the allegations in the Complaint establish that the Directors received information from a third party (*i.e.*, Weickert) regarding alleged misconduct by Fabricant, including (as in *OptimisCorp*) sexual harassment. Accordingly, like the directors in *OptimisCorp*, the Directors had a reasonable, good-faith basis to investigate Fabricant's conduct and seek his termination. Therefore, the breach of fiduciary duty claim must be dismissed.[5]

B. Plaintiff Fails to Plead Damages Supporting its Breach of Fiduciary Duty Claim.

"To state a claim for breach of fiduciary duty, a plaintiff must allege . . . damages proximately caused by the breach." *Illinois Non-Profit Risk Mgmt. Ass'n v. Human Serv. Ctr. of S. Metro-E.*, 884 N.E.2d 700, 713 (Ill. Ct. App. 2008). With respect to damages, Plaintiff alleges only that (1) Plaintiff "has lost potential members and business opportunities that would strengthen the position of the association"; (2) Plaintiff has "been forced to incur unnecessary costs and expenses, including attorneys' fees, accountants' fees, expenses and costs"; (3) "Defendants' failure to consider and adopt a budget in September 2014, has also resulted in lost or lower membership dues"; and (4) "Defendants harassing and vexatious conduct has also diverted the attention of NPA and its staff from carrying out its corporate purposes." (Compl. ¶ 53.) However, the Complaint contains no allegations that link the Directors' alleged breach of fiduciary duty to any of these categories of damages. Accordingly, the claim should be dismissed.

[5] Although Plaintiff alleges that the Directors were acting in bad faith (Compl. ¶ 61.), Plaintiff provides no facts to support that conclusory assertion.

IV. COUNT II FAILS TO STATE A CLAIM FOR WASTE OF CORPORATE ASSETS.

In support of Count II for waste of corporate assets, Plaintiff alleges that the Directors' "acts and omissions constitute waste of corporate assets of Plaintiff." (Compl. ¶ 66.) This allegation is insufficient under Illinois law to state a claim for corporate waste. "[W]aste is defined as an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." *Sherman v. Ryan*, 911 N.E.2d 378, 398 (Ill. Ct. App. 2009). To prevail on a claim of waste, the plaintiff must "show that the board 'irrationally squander[ed]' corporate assets—for example, where the challenged transaction served no corporate purpose or where the corporation received no consideration at all." *Id.*; *see also Murchie v. Sorensen*, 2015 WL 4716105, ¶ 27 (Ill. Ct. App. February 18, 2015) (same).

Here, there are no allegations supporting the conclusion that the Directors committed waste. Therefore, the Court should dismiss Count II.

V. PLAINTIFF'S CLAIM FOR TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS AND ECONOMIC ADVANTAGE (COUNT III) FAILS AS A MATTER OF LAW.

A. Plaintiff Fails to Plead Facts Necessary to Support a Claim of Tortious Interference.

Plaintiff alleges tortious interference with business relations and economic advantage. "Illinois courts have stated that the first element of a *prima facie* case for tortious interference, that plaintiff had a valid business expectancy, requires allegations of business relationships with *specific third parties*." *Du Page Aviation Corp. v. Du Page Airport Auth.*, 594 N.E.2d 1334, 1340 (Ill. Ct. App. 1992) (emphasis in original).[6]

[6] In general, "[t]o determine which jurisdiction's law applies in tort cases, District of Columbia courts blend a 'governmental interest analysis' with a 'most significant relationship' test." *Am.*

Here, Plaintiff asserts only that it "had a valid business relationship or expectancy with members, potential members, and the natural products industry" and that the Directors "interfered with such relationships." (Compl. ¶¶ 69–70.) The Complaint does not identify the specific current or potential business relationships that form the basis of this claim. Therefore, the claim fails.

In addition, "Illinois courts require that a tortious interference claim be supported by allegations that the defendant acted toward a third party." *Id.* (citing *Willcutts v. Galesburg Clinic Association*, 560 N.E.2d 1 (Ill. Ct. App. 1990)). In other words, Plaintiff must allege that the defendants directed their alleged tortious interference directly at a specific third party, as opposed to behavior directed towards the plaintiff that might have tangentially affected plaintiff's relationship with a third party. Here, Plaintiff has not alleged that the Directors directed interference at a specific third party. Instead, the alleged conduct was directed only towards Plaintiff itself. Therefore, the claim fails.

B. Plaintiff Cannot Overcome the Directors' Privilege Against Claims of Tortious Interference Under Illinois law.

Under Illinois law, corporate directors enjoy a conditional privilege against claims of tortious interference with contract and business expectancy. "Generally speaking, a party cannot 'interfere' with its own contract." *Stanford v. Kraft Foods, Inc.*, 88 F. Supp. 2d 854, 857 (N.D. Ill. 1999) (citing *Quist v. Bd. of Trustees of Community College Dist. No. 525*, 629 N.E.2d 807, 811–12 (Ill. 1994)). "Included in the definition of 'party' are a company's employees, officers, and directors through whom the company acts." *Id.* "These individuals are shielded from

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Nat. Ins. Co., 893 F. Supp. 2d at 229. Given that Plaintiff's tort claims in this lawsuit are based entirely on the Directors' conduct relating to corporate governance issues and internal affairs of Plaintiff, for purposes of this Motion, the Directors rely on Illinois law given that Illinois is Plaintiff's state of incorporation. *Id.* ("When a claim addresses matters of corporate governance or other internal affairs of a company, D.C. courts apply the law of the state of incorporation.").

liability for tortious interference with the company's contracts unless they take actions contrary to the interests of the organization, thus waiving any conditional privilege they may have." *Id.* This privilege is based upon the recognition that "[a] corporation can operate only through its officers and directors, [] and those agents must have the ability to exercise their business judgment without fear of personal liability." *Stafford v. Puro*, 63 F.3d 1436, 1442 (7th Cir. 1995) (citing *Swager v. Couri*, 395 N.E.2d 921, 927–28 (Ill. Ct. App. 1979)).

"When conduct is privileged, the plaintiff must prove actual malice on the defendant's part to prevail on a tortious interference claim." *Id.* The burden is on the Plaintiff to plead and prove such malice. *HPI Health Care Services, Inc. v. Mt. Vernon Hosp.*, 545 N.E.2d 672, 677 (Ill. 1989). To properly state a claim for tortious interference against a conditionally privileged corporate director, "a plaintiff must state more than a mere assertion that the defendant's conduct was unjustified." *Id.* "Instead, the plaintiff must set forth factual allegations from which it can reasonably be inferred that the defendant's conduct was unjustified." *Id.* (citing *Arlington Heights Nat. Bank v. Arlington Heights Federal Sav. & Loan Ass'n*, 229 N.E.2d 514, 518 (Ill. 1967) ("A further requirement of a legally sufficient complaint is that it set forth factual allegations from which actual malice [i.e., lack of justification] may reasonably be said to exist as opposed to the bare assertion of actual malice.").) Plaintiffs must "specifically plead a lack of justification, in part, to prevent the inevitable chilling effect that would occur if management [] could be subject to litigation every time they exercised their business discretion[.]" *Id.*

Here, Plaintiff's claim for tortious interference does not state facts demonstrating the actual malice necessary to overcome the Directors' conditional privilege. Although Plaintiff alleges that the alleged interference was made with malice in paragraph 72 of the Complaint, "a plaintiff must state more than a mere assertion" of malice. *Id.* Instead, Plaintiff must set forth

specific factual allegations from which malice could be inferred. The Complaint contains no such allegations.

To the contrary, the Complaint and the Weickert Complaint provide ample justification for the Director's good-faith investigation of Fabricant and their decision that it was in Plaintiff's best interest to terminate Fabricant's employment. As discussed above, the Complaint makes clear that allegations of misconduct had been made against Fabricant in his capacity as Plaintiff's CEO and Executive Director. Because the Complaint does not adequately plead that the Directors' conduct was motivated by malice, Plaintiff has not overcome the privilege enjoyed by the Directors against a tortious interference claim under Illinois law. Accordingly, the Court should dismiss Count III.

C. Plaintiff Fails to Plead Damages Supporting its Claim.

To state a claim for tortious interference, a plaintiff must allege damages caused by the defendant's conduct. *See Corroon & Black of Illinois, Inc. v. Magner*, 494 N.E.2d 785, 794 (Ill. Ct. App. 1986). As noted above in Section II.B, Plaintiff asserts various general categories of alleged damages. However, the Complaint does not contain allegations that link the Directors' alleged tortious interference to any of these categories of damages. Accordingly, the claim should be dismissed.

VI. PLAINTIFF'S CLAIM FOR CIVIL CONSPIRACY (COUNT IV) FAILS AS A MATTER OF LAW.

A. Plaintiff Fails to Plead Facts Necessary to Support a Claim of Civil Conspiracy.

In Count IV of the Complaint, Plaintiff alleges that the Directors' actions constituted a civil conspiracy against Plaintiff. However, under Illinois law, "a claim of civil conspiracy must be based upon an underlying tort and, in the absence of allegations supporting such a tort, the civil conspiracy claim fails." *Lewis v. Lead Indus. Ass'n, Inc.*, 793 N.E.2d 869, 878 (2003).

Because the torts underlying Plaintiff's civil conspiracy claim fail for the reasons stated above, Count IV also must be dismissed.

B. Plaintiff's Civil Conspiracy Claim Fails Under Illinois Law.

Under Illinois law, "a civil conspiracy cannot exist between a corporation's own officers or employees." *Van Winkle v. Owens-Corning Fiberglas Corp.*, 683 N.E.2d 985, 991 (Ill. Ct. App. 1997) (citing *Salaymeh v. InterQual, Inc.*, 508 N.E.2d 1155, 1158 (Ill. Ct. App. 1987); *Bonanno v. La Salle & Bureau County R.R. Co.*, 409 N.E.2d 481, 486 (Ill. Ct. App. 1980)). This rule also applies to a corporation's directors. Where individuals "were officers and directors of the same corporation[. . . a] conspiracy theory is legally impossible[.]" *Plastic Film Corp. of Am. v. Unipac, Inc.*, 128 F. Supp. 2d 1143, 1146 (N.D. Ill. 2001) (citing *Van Winkle*). In *Bonanno*, the Illinois Court of Appeals affirmed the denial of a request for leave to amend where the plaintiff sought to add claims of civil conspiracy against officers and directors of a corporation given that "a civil conspiracy cannot exist between a corporation and its agents or employees[.]" 409 N.E.2d at 486. Plaintiff only alleges a conspiracy between directors of Plaintiff and an employee of the Plaintiff (Weickert)—a group of individuals who are legally incapable of committing the civil conspiracy alleged by Plaintiff. Accordingly, the Court should dismiss Count IV.

C. Plaintiff Fails to Plead Damages Supporting its Claim.

To state a claim for civil conspiracy, a plaintiff must allege an injury (*i.e.*, damages) caused by the alleged conspiracy. *See Canel & Hale, Ltd. v. Tobin*, 710 N.E.2d 861, 873 (Ill. Ct. App. 1999). As noted above in Section II.B, Plaintiff asserts various general categories of damages. The Complaint does not contain allegations that link the Directors' alleged conspiracy to any of these categories of damages. Accordingly, the claim should be dismissed.

VII. PLAINTIFF IS NOT ENTITLED TO A DECLARATORY JUDGMENT FOR INDEMNIFICATION OR CONTRIBUTION (COUNT V).

In Count V (which is labeled as Count IV in the Complaint), Plaintiff seeks a declaration of the Court that Plaintiff is entitled to indemnification or contribution under Illinois law from the Directors for defense fees, expenses, costs and potential liability incurred by Plaintiff in the Weickert Litigation. This claim fails under Illinois law.

"The elements of contribution and indemnification are different." *Heinrich v. Peabody Int'l Corp.*, 459 N.E.2d 935, 938 (Ill. 1984). A plaintiff seeking contribution must show "a common injury which [plaintiff's] acts and those of the contributor combined to bring about and which makes them subject to liability in tort." *Id.* Here, of course, there is no basis for the Directors to provide contribution to Plaintiff for the Weickert Litigation. The Weickert Complaint focuses on Fabricant's conduct. Therefore, Plaintiff cannot make a claim for contribution against the Directors.

A plaintiff seeking indemnification, on the other hand, must allege "a pre-tort relationship with the indemnitor and some significant difference in the nature of their respective conduct which justifies a shifting of liability." *Id.* There is no allegation in the Complaint that there is a significant difference in the nature of Plaintiff's and the Directors' respective conduct that justifies a shift of liability to the Directors. Plaintiff has not made such an allegation because it has no basis for doing so.[7] As noted above, it is clear that the potential liability faced by the Plaintiff in the Weickert litigation is based on Fabricant's conduct. Therefore, Plaintiff is not entitled contribution or indemnification, and Count V should be dismissed with prejudice.

[7] Notably, Count V reverses the actual indemnification relationship that exists between Plaintiff and the Directors. Illinois law and Plaintiff's governing documents provide that a Director is entitled to indemnification from Plaintiff in the event that the Director is sued based upon service on Plaintiff's Board. Accordingly, the Directors will be seeking indemnification from Plaintiff.

CONCLUSION

For the reasons set forth herein, Defendants respectfully request that Plaintiff's claims be dismissed with prejudice. Defendants respectfully request oral argument on this motion.

Dated: March 3, 2016

Respectfully submitted,

/s/ Theodore R. Flo

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was electronically filed via CM/ECF with notice of same being electronically served by the Court on all parties.

Dated: March 3, 2016

/s/ Theodore R. Flo
Theodore R. Flo (Bar No. 979374)