Williams v Citigroup, Inc.
2021 NY Slip Op 32171(U)
October 27, 2021
Supreme Court, New York County
Docket Number: Index No. 650481/2010
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA CRANE** **PART** **60M**

Justice

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LINDA WILLIAMS,

Plaintiff,

- v -

CITIGROUP, INC.,CITIGROUP GLOBAL MARKETS, INC.,JP MORGAN SECURITIES, INC.,JP MORGAN CHASE & CO., GOLDMAN SACHS & CO.,

Defendant.

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INDEX NO. 650481/2010

MOTION DATE 09/13/2019

MOTION SEQ. NO. 020

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 020) 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128,

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were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Up on the foregoing documents, it is

In this action to recover damages for violation of the Donnelly Act (General Business Law § 340), defendants move for summary judgment dismissing the complaint. For the following reasons, the court grants the motion.

BACKGROUND

Plaintiff, an attorney specializing in structured finance, alleges that in the spring of 2005, she developed an innovative Airline Special Facility Bond (“ASFB”) structure for financing the construction and renovation of municipal airport terminals in the United States (plaintiff’s structure). According to plaintiff, her structure is superior to that of traditional ASFBs because it ties the credit rating of ASFBs to passenger demand for the terminal, rather than to the credit rating of the airline leasing the facility. Plaintiff’s structure, if implemented, would achieve a better credit rating and consequently lower interest rates (Joint Statement of Undisputed Material Facts at ¶¶ 7, 17 [NYSCEF Doc. No. 674]). Unlike traditional ASFBs, plaintiff’s structure utilizes a “bankruptcy-remote special purpose entity” (“SPE”) in place of the airline to lease the terminal (*id.* at ¶ 18). The SPE in turn sub-leases the terminal to the airline and assigns the rental payments it receives from the airline to the issuing municipality. That entity would then use those payments to pay the bondholders (*id.* at ¶ 19).

Defendants Citigroup, Inc. and Citigroup Global Markets, Inc. (together “Citi”), JP

Morgan Securities, Inc. and JP Morgan Chase & Co. (together "JP Morgan"), and Goldman Sachs & Co. ("Goldman Sachs") are investment banks who compete to underwrite ASFBs (*id.* at ¶ 6). In June 2005, while plaintiff was employed as an equity partner at Pillsbury Winthrop Shaw Pittman ("Pillsbury"), she and her colleagues introduced plaintiff's structure to Citi (*id.* at ¶ 29). Plaintiff alleges that Neil Attermann, a Citi executive responsible for advising airlines and underwriting airline bonds, responded favorably to the proposal. However, Citi ultimately chose not to market her structure (*id.* at ¶ 29; Second Amended Complaint at ¶¶ 76-83 [Doc. No. 329]). According to plaintiff, Citi chose not to do so because plaintiff's structure could have a negative impact on Citi's overall profits (Second Amended Complaint at ¶ 78 [Doc. No. 329]). She asserts that Citi went so far as firing a senior employee because of his long-standing relationship with her and his active promotion of her structure (*id.* at ¶ 79). According to plaintiff, it was necessary to fire this employee "to minimize any internal questions as [Citi] suddenly abandoned and then moved to block anyone else from pursuing the implementation of the innovative structure Plaintiff had developed" (*id.*).

Plaintiff contends that following Citi's "abrupt refusal" to market her structure to its airline and airport clients, plaintiff presented the structure to other investment banks, including JP Morgan and Goldman Sachs (*id.* at ¶ 87). JP Morgan and Goldman Sachs "instantly recognized the superiority" of her structure and "promptly and energetically" began recommending it to their major airline clients (*id.*). However, according to plaintiff, JP Morgan and Goldman Sachs refused to continue marketing her structure because of an agreement they made with Citi not to do so. She contends they also terminated or transferred employees who supported implementing the structure.

Plaintiff alleges that she was forced to resign from Pillsbury in March 2006 and, although she later obtained a position at Greenberg Traurig ("Greenberg") in June 2006, Greenberg terminated her employment in May 2007 (*id.* at ¶ 105). Plaintiff asserts that both terminations were the result of Citi demanding that these law firms participate in a boycott of her structure by severing their relationships with her.

Plaintiff asserts that through economic coercion, defendants also secured the participation of Banc of America Securities ("BAS"), American Airlines, and the Port Authority of New York and New Jersey (the "Port Authority") in the boycott. Plaintiff alleges that no bonds have been issued or refinanced using her structure because of the boycott,.

In this action, plaintiff seeks to recover damages for a violation of General Business Law § 340, commonly known as the Donnelly Act, predicated upon defendants' alleged antitrust conspiracy to boycott the use of her structure (*id.* at ¶¶ 139-159). According to the second amended complaint ("complaint"), defendants, utilizing the traditional ASFB structure, dominate the market for underwriting these bonds and reap far greater profits from both the proprietary trading of traditionally structured ASFBs in the secondary market and from the sale of derivative products linked to these bonds. These profits, the complaint asserts, are driven by the high taxexempt interest rates and market volatility that plague traditionally structured ASFBs. Plaintiff alleges that defendants, to preserve these benefits as well as certain profits made by some of defendants' large institutional clients, acted in concert to boycott plaintiff's structure and to coerce other participants in the ASFB market to join in the boycott. Plaintiff alleges defendants did so despite the tremendous cost savings plaintiff's structure could have provided their airline and municipal airport clients.

Plaintiff asserts defendants knew that airlines would realize the full extent of cost savings plaintiff's structure could provide, which would result in her structure's universal adoption. The purpose of defendants' "conspiratorial boycott" was to ensure that plaintiff's structure would never be used, thereby making certain that all ASFBs would "instead continue to be structured in the same old (and now antiquated) manner they have been for decades" (*id.* at ¶ 3). Plaintiff contends that the only way this could have been accomplished is through the collective action of defendants.

The complaint also seeks to recover damages for tortious interference with prospective economic advantage. In this regard, plaintiff asserts that Citi caused Pillsbury and Greenberg to terminate her employment prematurely (*id.* ¶¶ 169-176). Plaintiff also asserts that all defendants caused certain entities, including BAS, American Airlines, and the Port Authority, to cease their joint work with plaintiff (*id.* ¶¶ 177-182).

Defendants now move for summary judgment dismissing the complaint. [1]

DISCUSSION

On a motion for summary judgment, the moving party bears the burden of making "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.,* 36 NY3d 69, 73-74 [2020]). If the moving party fails to make such a showing, the motion must be denied "regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*,

[1] In addition to the causes of action for violation of the Donnelly Act (first cause of action) and tortious interference with prospective economic advantage (third and fourth causes of action), the complaint includes a cause of action for tortious interference with contract (second cause of action), which has already been dismissed by the court (*see Williams v Citigroup, Inc.*, 104 AD3d 521, 522 [1st Dept 2013][affirming dismissal of plaintiff's claim for tortious interference with contract]).

68 NY2d at 324; *see Matter of New York City Asbestos Litig.*, 176 AD3d 506, 506 [1st Dept 2019]). However, where "the moving party proffers the required evidence, the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action" (T*rustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc*., 36

NY3d at 74 [internal quotation marks and citations omitted]). On the motion, the "facts must be viewed in the light most favorable to the non-moving party" (V*ega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012][internal quotation marks and citation omitted]) and it "should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]).

Judicial Estoppel

As a threshold matter, defendants argue that plaintiff is judicially estopped from pursuing the claims in this action because she failed to disclose their existence on her schedule of assets in an earlier Chapter 11 bankruptcy proceeding (Bankruptcy Docs [Doc. Nos. 662-664]). In opposition, plaintiff argues that judicial estoppel is not applicable here because she orally disclosed the potential claims which existed during her bankruptcy proceeding to the bankruptcy court and the U.S. trustee (Bankruptcy Tr. [Doc. Nos. 686, 688]).

Judicial estoppel "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed" (*MPEG LA, LLC v Samsung Elecs. Co., Ltd*., 166 AD3d 13, 21 [1st Dept 2018] [internal quotation marks and citation omitted]). The doctrine "is often applied to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy" (*Whitehurst v*

230 Fifth, Inc., 998 F Supp 2d 233, 247 [SD NY 2014] [internal quotation marks and citations omitted]). The doctrine's purpose in this regard is

> to protect the integrity of the judicial process and to protect judicial integrity by avoiding the risk of inconsistent results in two proceedings . . . . [T]he integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets. By failing to list causes of action on bankruptcy schedules of assets, the debtor represents that it has no such claims. Thus, the doctrine of judicial estoppel may bar a party from pursuing claims which were not listed in a previous bankruptcy proceeding . . . . For the doctrine to apply, there must be a final determination in the bankruptcy proceeding endorsing the party's inconsistent position concerning his or her assets. However, a discharge from bankruptcy is not required for the application of the doctrine. The bankruptcy court may accept the debtor's assertions by relying on the debtor's nondisclosure of potential claims in many other ways.

(*Flanders v E. W. Howell Co*., *LLC*, 193 AD3d 822, 823-824 [2d Dept 2021] [internal quotation marks and citations omitted]). Because judicial estoppel "is primarily concerned with protecting the judicial process, relief is granted only when the risk of inconsistent results with its impact on judicial integrity is certain" (*Pereira v Meisenberg*, 183 AD3d 768, 770 [2d Dept 2020] [internal quotation marks and citation omitted]).

It is undisputed that plaintiff did not list the claims asserted in this action on the schedule of assets in her prior bankruptcy proceeding (*see* Summary of Schedules [Doc. No. 663]). Although she orally disclosed her potential claims to the U.S. Trustee and the Bankruptcy Court, she did not make a written disclosure of the existence of such claims. There are no State court cases addressing the precise issue of whether oral disclosure of the existence of a claim to the bankruptcy court during the proceeding is sufficient. Plaintiff cites two Federal court cases—one from the Second Circuit Court of Appeals and one from the Sixth Circuit Court of Appeals—to support her contention that orally disclosing a claim to the bankruptcy court was sufficient under the circumstances.

In the first of these cases, *Ashmore v CGI Group*, *Inc.,* the Second Circuit "reaffirm[ed] that judicial estoppel is not a mechanical rule" and held that where a pro se debtor who listed his pending litigation on his statement of financial affairs ("SOFA"), rather than on his schedule of assets as the bankruptcy code required, "the debtor [was] not estopped from pursuing that litigation by virtue of the doctrine of judicial estoppel" (*Ashmore v CGI Group, Inc*., 923 F3d 260, 273, 281 [2d Cir 2019] [internal quotation marks and citations omitted). The *Ashmore* Court noted that the debtor also disclosed the litigation to the trustee at a creditor's meeting and provided the trustee with a copy of the complaint. The trustee then provided the communication to the bankruptcy court prior to the discharge of his debt. Therefore, the Court concluded that the trustee and the Court were on sufficient notice to take steps to protect the creditors' interests. The *Ashmore* Court distinguished cases in which a plaintiff's lawsuit was not disclosed at all in the bankruptcy proceedings, meaning that "the action was mentioned neither on the Schedule B nor on the SOFA, nor at the meeting of creditors, nor at any point in the bankruptcy proceedings" (*id.* at 280). As relevant here, the court then discussed two cases from other circuits that dealt with more analogous circumstances, in which pending litigation was orally disclosed to the bankruptcy trustee, but not included on any written bankruptcy filings, stating:

> In *Spaine v Community Contacts, Inc*., 756 F3d 542 [7th Cir 2014], the plaintiff, a pro se bankruptcy filer, failed to list a pending . . . claim on either her Schedule B or her SOFA. She had, however, told the bankruptcy trustee about her lawsuit, and claimed in an affidavit that she had not been told by the bankruptcy court of any need to amend her schedules. The *Spaine* Court, noting that the evidence showed only incomplete schedules that were timely corrected through an oral disclosure, concluded that in order for judicial estoppel to apply, the defendant would have needed to show more than an initial nondisclosure on a bankruptcy schedule. It then went on to state that Spaine's creditors were not and could not have been injured by incomplete Chapter 7 schedules that were orally corrected before Spaine received a discharge, and contrasted the case to others in which debtors engaged in affirmative misrepresentations, including those who denied their pending lawsuits when asked directly by the trustee. *It held that where, in*

> *contrast, the evidence was limited to an omission followed by a truthful oral disclosure, judicial estoppel was no longer the proper remedy.*
> The D.C. Circuit reached a contrary result in *Marshall v Honeywell Technology Systems Inc*., 828 F3d 923, 925 [DC Cir. 2016]). There, too, plaintiff failed to disclose [a] suit on either her SOFA or her Schedule B, but did make an oral disclosure. The court there found judicial estoppel appropriate, concluding, in contrast to the Seventh Circuit, that oral disclosure to the trustee did not constitute notice to her creditors and could not correct the false information she conveyed on her schedules. Its conviction that judicial estoppel was appropriate was strengthened by the facts of that case in which the debtor had listed some, but not all, of her administrative proceedings. This led the *Marshall* Court to the conclusion that her omission was not likely the product merely of inadvertence or mistake.
> We conclude that the circumstances here are more like those in *Spaine*, and, like the Seventh Circuit, we find judicial estoppel inappropriate

(*Ashmore,* 923 F3d at 280-281 [internal quotation marks and citations omitted] [emphasis added]).

In the second case relied upon by plaintiff, *Stephenson v Malloy*, the Sixth Circuit held that the debtor's communication with the bankruptcy trustee about his pending lawsuit constituted ample evidence that the omission of the lawsuit from the bankruptcy filings was inadvertent and consequently, the lawsuit was not barred by judicial estoppel (*Stephenson v Malloy*, 700 F3d 265, 275 [6th Cir 2012]). Defendants argue that *Stephenson* is distinguishable on the ground that here plaintiff informed the U.S. trustee of her claim, as opposed to informing a bankruptcy trustee who has the power to pursue the claim. However, given the purpose underlying judicial estoppel—to protect the integrity of the judicial process and to protect judicial integrity—and the fact that here plaintiff made a truthful oral disclosure to the bankruptcy judge and the U.S. trustee responsible for overseeing the bankruptcy case (*see* 28 USC § 586 [a][3]), the distinction is not relevant.

Defendants cite to *Ibok v SIAC-Sector Inc.* (470 Fed Appx 27, 28-29 [2d Cir 2012]), to support their position that the failure to disclose the existence of a claim to the bankruptcy court in writing warrants dismissal of the claim on the basis of judicial estoppel. In *Ibok*, the Court

held that the "*alleged* oral disclosure of [plaintiff's] lawsuit was insufficient to satisfy his disclosure obligations under the bankruptcy code, which requires a debtor to file complete and accurate schedules relating to his finances" (*id.* at 29 [emphasis added]). However, in *Ibok,* the Court noted that "the evidence submitted [on that appeal] demonstrated that [the plaintiff] made no . . . oral disclosure at any time during his bankruptcy proceedings" (*id.*). Moreover, *Ibok* preceded the Second Circuit's decision in *Ashmore* where the court reaffirmed that judicial estoppel is not a mechanical rule and indicated that a determination of whether a disclosure is sufficient to render the doctrine inapplicable depends on the facts and circumstances of each case (*see also Slater v United States Steel*, *Corp.*, 871 F3d 1174, 1176 [11th Cir 2017] ["when determining whether a plaintiff who failed to disclose a civil lawsuit in bankruptcy filings intended to make a mockery of the judicial system, a district court should consider all the facts and circumstances of the case"]; *cf. Guay v Burack*, 677 F3d 10,20 [1st Cir 2012] ["because the oral notice provided to the Trustee came from another party, and not from the [plaintiff], and the [plaintiff] repeatedly averred to the bankruptcy court that no such claims existed, the district court had an ample basis for concluding that there was a motive to conceal in the bankruptcy proceeding"]).

Here, plaintiff demonstrated that she made an oral disclosure to the Bankruptcy Court and the U.S. Trustee during the bankruptcy proceeding (*see* Transcripts [Doc. Nos. 686, 688]) and that she did not disclose other lawsuits while omitting the claims asserted here. Therefore, her case is distinguishable from *Ibok*. Furthermore, it was plaintiff's attorney (as opposed to another party) who brought the claims to the trustee and the bankruptcy court's attention. There is no evidence that plaintiff made any affirmative misrepresentation about these claims during

the bankruptcy proceeding. Accordingly, under the circumstances of this case, plaintiff is not precluded by the doctrine of judicial estoppel from advancing her claims.

Violation of the Donnelly Act (General Business Law § 340 [1])

In the complaint, plaintiff alleges that defendants conspired to boycott the use of her structure and coerced other participants in the ASFB market to join in their boycott. According to the complaint, defendants effectuated their boycott by: (1) using their dominance in the municipal bond underwriting business to influence other investment banks to participate in the boycott; (2) using the substantial fees both Pillsbury and Greenberg stood to earn from doing legal work for Citi as leverage to coerce those firms to terminate plaintiff's employment, thus depriving her of a platform from which to credibly market her structure; and (3) firing or reassigning key members of their municipal bond groups who internally promoted plaintiff's structure and recommended it to airlines and municipalities.

The complaint further alleges that defendants: (1) threatened bankers at other investment banks with economic reprisals if they utilized plaintiff's structure; (2) successfully pressured BAS to terminate a Technical Services Agreement it had entered into with plaintiff in September 2007, pursuant to which plaintiff agreed to provide BAS with technical assistance on any transaction involving the use of her structure while refraining from providing similar assistance to BAS's competitors; (3) persuaded the Port Authority to withdraw its approval "in concept" of the structure for use at La Guardia, JFK and Newark Liberty airports; and, to erect additional barriers, (4) caused lengthy "no-call" periods to be inserted in the ASFBs they underwrote. Plaintiff asserts that these actions amounted to an unlawful restraint on trade in violation of the Donnelly Act.

The Donnelly Act provides that "[e]very contract, agreement, arrangement or combination whereby . . . [c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained [is] against public policy, illegal and void" (General Business Law § 340 [1]). The Court of Appeals has held that the Donnelly Act was "modelled on the Federal Sherman Act of 1890, [and] should generally be construed in light of Federal precedent" (*X.L.O. Concrete Corp. v Rivergate Corp.*, 83 NY2d 513, 518 [1994] [internal quotation marks and citations omitted]). "An antitrust claim under the Donnelly Act . . . must allege both concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market" (*Global Reins. Corp.-U.S. Branch v Equitas Ltd.*, 18 NY3d 722, 731 [2012]). To succeed on such a claim

> a plaintiff must present evidence of a combination or some form of concerted action between at least two legally distinct economic entities in the form of *a conscious commitment to a common scheme* designed to achieve an unlawful objective. Once it has sufficiently demonstrated *the existence of an agreement*, the plaintiff must then establish that the agreement's objective was an unreasonable restraint of trade either per se or under the rule of reason. Only after an agreement is established will a court consider whether the agreement constituted an unreasonable restraint of trade

(*Anderson News, L.L.C. v American Media, Inc.*, 899 F3d 87, 97 [2d Cir 2018] [internal quotation marks and citations omitted] [emphasis added]).

Here, defendants have established through uncontroverted evidence that they did not share a "conscious commitment to a common scheme" to boycott plaintiff's structure. Among other things, defendants submitted deposition testimony from representatives of American Airlines and US Air, wherein these individuals testified that they were not coerced to refrain from using plaintiff's structure. Rather, their deposition testimony indicates that that these entities independently considered and rejected the idea.

In this regard, Beverly Goulet, American Airlines then Treasurer, testified that no one from Citi or any of the other defendant entities asked her to boycott the structure or threatened her with reprisal if American Airlines decided to use plaintiff's structure (Goulet EBT Tr. at 135136 [Doc. No. 642]). Goulet had no knowledge of anyone at American Airlines ever being threatened or being asked to boycott plaintiff's structure (*id.* at 136).

Goulet testified that when the concept of plaintiff's structure arose, she asked one of her staff members, Michael Thomas (a managing director in the Treasury Department of American Airlines), to evaluate it and was then told that it did not make sense to pursue (*id.* at 58). Goulet testified that, even assuming plaintiff's structure could result in millions of dollars in annual savings to American Airlines, there were countervailing considerations, such as the difficulty in execution, the expenses associated with it, and the likelihood that the structure would succeed (*id.* at 69). She testified that "in a company of our size, there were lots of considerations around what opportunities we would pursue and what opportunities we would not" (*id.* at 69).

The deposition testimony of Michael Tierney of Goldman Sachs also evinces that American Airline's decision was not the result of a boycott. Tierney testified that he recalled a conversation with Michael Thomas during which Thomas expressed that he "didn't think [that using plaintiff's structure] was going to work" and that even if it did, "it was going to take a tremendous amount of their time on the administrative side of things in dealing with lawyers internally and external and dealing with the rating agencies, and that there would be an enormous amount of not just time expense but money expense" (Tierney EBT Tr. at 105 [Doc. No. 651]). Tierney further testified that "given past results in other project financing, his skepticism was very, very high that they could spend all that money, spend all that time, and not get the desired result, and that they had lots of other things to do and were not inclined to want to get involved

with this" (*id.* at 106). Tierney testified that Thomas was "very sophisticated" and understood that implementing the structure could result in substantial savings to American Airlines but "he was just very skeptical that the desired result would be gotten even after a tremendous amount of time and money was spent on that whole process" (*id.* at 108).

Defendants also submit an email from Michael Wascom of American Airlines on June 20, 2008, almost three years after Tierney's conversation with Thomas. Wascom's email, in response to an inquiry from plaintiff's representative, indicates that senior executives at American Airlines had already vetted and rejected the idea because, among other things "[t]hey did not believe that most of our airports would accept some aspects of the structure" (Wascom Email [Doc. No. 624]).

Thom Weir of US Air also testified that defendants never asked him to boycott plaintiff's structure and never threatened him with reprisal if US Air decided to use the structure (Weir EBT Tr. at 173-176 [Doc. No. 653]). He did not recall "anybody threatening anybody else" in this regard (*id.* at 174). To the contrary, it was Weir's recollection that JP Morgan endorsed the idea of US Air using plaintiff's structure (*id.* at 175).

Weir could not specifically recall the discussion involving plaintiff's structure but testified in general that: "We get shown a lot of special purpose structures, and there is a loss of control with those structures, and I'd have to weigh that. I've certainly found situations where I could not enter a special purpose facility structure because of the loss of control [in that they] may act in an interest counter to that of the airlines" (*id.* at 71-72). He explained: "a default by the airline rather than allowing the airline to potentially restructure its obligations, . . . would . . . force the . . . airline off of the gates . . . immediately . . . depriving [it from being able to operate] the gates it needs to continue its operations. So . . . it's a sacrifice of control" (*id.* at 72-73). In

this regard plaintiff agrees that under her structure, "the SPE can evict the airline tenant from the facility and re-let the terminal to a competitor airline" (*see* Joint Statement of Material Facts at ¶ 20 [Doc. No. 674]).

In addition, David Kagan of the Port Authority testified that, contrary to the allegations in the complaint, defendants never persuaded the Port Authority to withdraw its approval to use plaintiff's structure. Rather, the Port Authority never approved plaintiff's structure to begin with (Kagan EBT at 25-26, 36 [Doc. No. 644]). Kagan testified that plaintiff misrepresented in the marketplace that the Port Authority approved her structure for use on future deals. However, the Port Authority never told her that it was endorsing her idea or that it would move forward with the proposed transaction involving her structure (*id.* at 25-26). Kagan testified that decision makers at Port Authority considered the structure but ultimately decided not to move forward with it (*id.* at 26).

This evidence demonstrates that defendants did not pressure or even persuade American Airlines, US Air, and the Port Authority to forego using plaintiff's structure or to withdraw their approval for its use. It evinces that they independently considered the structure, understood its benefits, and nevertheless rejected it based upon a variety of factors. This contradicts plaintiff's allegation that their decision not to use her structure was the result of a boycott defendants orchestrated.

Moreover, the opinion of defendants' expert, Dr. J. David Rush, demonstrates that plaintiff's allegations in this regard "do not comport with the realities of the industry" (Rush Report at 2 [Doc. No. 661]). Rush states:

> Large domestic airlines and airports employ sophisticated debt management personnel and do not depend on underwriters to tell them how to finance their facilities. While airports and airlines may ask underwriters to present different

> financing options to them for consideration, the airports and airlines, not the underwriter, then decide how to proceed

(*id.*). Rush further states that, in making decisions regarding debt and syndicate structure, municipalities and airlines take many factors into consideration, not just interest rates (*id.* at 16). He states that "[i]nterest rates are only one factor" and that in his "experience, the ease and certainty with which a financing can be completed are important considerations for borrowers, while complexity and uncertainty are unwelcome" (*id.* at 16). Rush concludes:

> In my opinion, the decision of airlines and airports to reject the . . . Structure was entirely understandable [given that a]n airline contemplating a transaction using [it] would first face the very real possibility that the rating agencies would not provide an investment grade rating . . . . The airline would then have to consider (i) whether the . . . Structure could satisfy true sale/true lease requirements; (ii) control issues, including the risk that the airline might wind up losing control of critical gates if it defaulted or declared bankruptcy; (iii) whether the . . . Structure would cause control problems for the airport; (iv) whether existing bonds could be refunded, and at what cost; (v) what reserves would be necessary; and (vi) how [plaintiff] would be compensated. . . . . It would have to contemplate spending large sums on legal opinions, rating assessments, demand studies, and market reports. . . . These problems, complexities, and costs, whether considered independently or in the aggregate, provide more than sufficient legitimate reasons not to proceed with the . . . Structure, and they are a far more plausible explanation of events than a Defendant-led boycott

(*id.* at 40). Rush also opines that an investment-grade rating was essential to plaintiff's structure and notes that John Coan, a BAS employee working with plaintiff, testified that the rating agencies were not on board with the structure (*id.* at 23).

The parties' Joint Statement of Undisputed Material Facts also sets forth that defendants Goldman Sachs and JP Morgan actively marketed plaintiff's structure to Jet Blue, American Airlines, Delta, Continental, US Air, Northwest, and the Port Authority, but these efforts were unsuccessful (*see* Joint Statement of Material Facts [Doc. No. 674]). This is entirely inconsistent

with plaintiff's claim that Goldman Sachs and JP Morgan colluded with Citi to orchestrate a boycott of the structure.

The deposition testimony of the employees of Goldman and JP Morgan who assisted plaintiff in marketing the structure also demonstrates that they left their respective positions at these companies for reasons other than retaliation for their endorsement of the structure (*see* Mullins EBT Tr. at 53-55 [Doc. No. 646]; Tierney EBT Tr. at 120-121 [Doc. No. 651]; *see also* Mullins Affidavit at ¶ 32 [Doc. No. 673] ["I understand that (plaintiff) has alleged that JPMorgan transferred me in order to prevent me from continuing to work with her. That is false, as my move out of the Public Finance department was my idea and was done of my own volition. It had nothing to do with (plaintiff), the Structure, my efforts to jointly promote the Structure to airlines, or any other matters I had worked on in Public Finance"]). Similarly, Jeffrey C. Heckman of Citi, who plaintiff alleges was terminated because of his relationship with her and his active promotion of the structure, testified that he was terminated as a result of restructuring at the company and that ten to twelve people were let go on the same day (Heckman EBT Tr. at 138 [Doc. No. 341]).

While Citi acknowledges that, unlike Goldman and JP Morgan, it chose not to assist plaintiff actively in marketing the structure, defendants proffer evidence showing that it chose not to do so for reasons other than a concern for its own profits or as part of an agreement with Goldman and JP Morgan to boycott its implementation. In this regard, Neal Atterman of Citi testified: "we concluded that the structure did not provide the benefits that [plaintiff] and Pillsbury claimed that it did, and we thought that . . . putting it into effect would be complicated and difficult" (Atterman EBT Tr. at 154 [Doc. No. 635]). Atterman explained that there were concerns over "how much control could an airport have versus how much control would be

required for the" special purpose entity, "whether there would be sufficient passengers at the airport that would then . . . enable the facility to generate enough revenue to pay debt service in bad times," and the "issue of no airline control" (*id.* at 156-157). Atterman testified that, nevertheless, Citi did not want to dissuade its clients from using plaintiff's structure if the client "thought that it had merit to it" and that Citi actually informed US Air that it "would be willing to have [plaintiff] work as special counsel" (*id.* at 531-532).

Citi's assertion that it had legitimate reasons for choosing not to market plaintiff's structure is further supported by the opinion of defendants' expert that given the structure's

> uncertainties and complexity, . . . it was reasonable for underwriters to decide either not to present [it] as a possible replacement for certain ASFB bonds or to present [it] to airlines and airports so the airlines and airports could make a determination as to whether it was appropriate to pursue . . . . Any reluctance of underwriters to endorse the . . . Structure can be readily explained by the uncertain outcomes and certain costs as well as the relationship damage that could result to the underwriters from the unsuccessful pursuit of a recommended structure

(Rush Report at 3 [Doc. No. 661]).

Finally, contrary to plaintiff's allegations that Citi pressured Pillsbury and Greenberg to terminate her employment to deprive her of a platform from which to market her structure, the evidence defendants presented in support of their motion evinces that plaintiff was not let go from these firms in response to pressure Citi asserted on them (*see* Rosenbaum EBT Tr. at 238-239 [Doc. No. 648]; Schumaecker EBT Tr. at 144, 146, [Doc. No. 650]).

The foregoing submissions eliminate the existence of any triable issue of fact as to whether defendants shared a "conscious commitment to a common scheme" to boycott plaintiff's structure, thus demonstrating defendants' entitlement to summary judgment as a matter of law on the Donnelly Act cause of action. In response to defendants' *prima facie* showing, plaintiff fails to raise an issue of fact.

> [T]o raise a genuine issue of material fact as to an antitrust conspiracy, the plaintiff must present direct or circumstantial evidence that tends to exclude the possibility that the alleged conspirators acted independently. This [does] not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct; rather, the evidence need be sufficient only to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not

(*Anderson News, L.L.C.,* 899 F3d at 98 [internal quotation marks and citations omitted]; *see Home Town Muffler v Cole Muffler*, 202 AD2d 764, 766 [3d Dept 1994] ["There has to be evidence that tends to exclude the possibility that the alleged conspirators were acting independently"]).

Here, plaintiff cites no evidence that tends to exclude the possibility that defendants acted independently to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not. The fact that JP Morgan, Goldman Sachs, the Port Authority, and US Air were initially interested in her idea, but later decided not to promote or implement it, does not establish a conspiracy to boycott the structure. Similarly, American Airlines refusal to use the structure alone does not establish the existence of a boycott. While plaintiff asserts that Goldman Sachs and JP Morgan stopped marketing the structure because they realized that the airlines would not approve it due to Citi's "tactics," the evidence defendants submitted demonstrates that the airlines decided not to use the structure through independent consideration of the benefits, risks, and costs involved in implementing it.

Plaintiff draws the court's attention to evidence such as the opinion of her expert Mark Adelson to support her assertion that defendants had a motive to stop the airlines from using her structure (Adelson Report [Doc. No. 884]). However, even assuming defendants had a motive to arrange a boycott of her structure, "motive alone is insufficient to prove a conspiracy" (*Staples, Inc. v W.J.R. Assocs*., 2007 US Dist LEXIS 67539, *5, 2007 WL 2725386, *2 [ED NY 2007]).

Further, while Adelson opines that the structure could have achieved investment-grade ratings from at least one of the major rating agencies, he does not dispute the evidence from defendants that the decision not to use the structure involved other considerations. And while plaintiff presents proof that she contends establishes that her structure would have resulted in significant savings for the airlines (*see e.g.* Pearsall Report [Doc. Nos. 880, 881]), this is not sufficient to create an issue of fact as to whether defendants agreed to orchestrate a boycott of the structure. In other words, the evidence plaintiff presented does not refute the evidence that the airlines had what they believed to be legitimate business reasons for deciding not to use it. The question is not, as plaintiff seems to suggest, whether the airlines and the Port Authority made the best decision or even a sound decision about using her structure. The question is whether they did not use the structure because of some form of concerted action or agreement on the part of defendants to organize a group boycott. Plaintiff failed to raise an issue of fact in this regard. Indeed, plaintiff presents no evidence suggesting that defendants communicated with each other about preventing the airlines or the Port Authority from using the structure through coercion or any other means.

The remainder of plaintiff's conclusory assertions also fail to raise an issue of fact requiring a trial. Therefore, defendants' motion is granted and the cause of action to recover damages pursuant to the Donnelly Act is dismissed.

Tortious Interference with Prospective Economic Advantage

In the complaint, plaintiff also asserts two cause of action for tortious interference with prospective economic advantage. Plaintiff asserts in this regard that (1) all of the defendants "through economic coercion" caused certain entities, including BAS, American Airlines, and the Port Authority, to cease working with her and (2) Citi caused the law firms of Pillsbury and

Greenberg to terminate her employment prematurely.

Statute of Limitations

First, defendants argue that the cause of action alleging defendants interfered with plaintiff's employment relationships with both Pillsbury and Greenberg is time-barred. Defendants are correct with respect to plaintiff's termination from Pillsbury, but not with respect to Greenberg.

A three-year statute of limitations applies to causes of action for tortious interference with prospective economic advantage (*see Susman v Commerzbank Capital Mkts. Corp*., 95 AD3d 589, 590 [1st Dept 2012]). With respect to Pillsbury, plaintiff resigned from that firm on March 31, 2006. She did not commence this action until more than four years later: May 28, 2010. Plaintiff asserts that this branch of her claim is nevertheless timely because she initially commenced this action in federal court. Therefore, she asserts, the statute of limitations was tolled under 28 USC § 1367 (d), which provides a 30-day grace period to refile in a state court after a non-merits dismissal of supplemental claims "unless State law provides for a longer tolling period." This argument is without merit because plaintiff's claim was voluntarily dismissed pursuant to Fed. R. Civ. P. 41 (a)(1) (*see* Notice of Voluntary Dismissal [Doc. No. 414]), and therefore 28 USC § 1367 (d) does not apply (*see Sherman v Town of Chester*, 2015 WL 1473430, *6-7 , 2015 U.S. Dist. LEXIS 43322, *17-18 [SD NY 2015]).

Plaintiff's alternative contention that she is entitled to the benefit of the six-month saving provision of CPLR 205(a) is also without merit. That section only applies to actions that were timely commenced and "terminated in any other manner than by a voluntary discontinuance," which is the case here (CPLR 205 [a]; *see Federal Natl. Mtge. Assn. v Jeanty*, 188 AD3d 827, 830 [2d Dept 2020]; *cf. Raji v SG Ams. Sec., LLC*, 189 AD3d 514, 514-515 [1st Dept 2020]).

With respect to Greenberg, plaintiff was terminated from that firm on May 31, 2007 and she commenced this action within three years. Contrary to defendants' contention, the statute of limitations on this claim did not begin to run until plaintiff was terminated (*see generally City Store Gates Mfg. Corp. v Empire Rolling Steel Gates Corp*., 113 AD3d 718, 719 [2d Dept 2014] ["Generally, tort claims accrue upon an injury being sustained, not upon the defendant's wrongful act or the plaintiff's discovery of the injury"]).

Merits of the Tortious Interference Claims

In any event, defendants are entitled to dismissal of all of plaintiff's tortious interference claims on the merits. The tort of "interference with business relations applies to those situations where [a] third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of the defendant" (*WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 257 [1st Dept 1992]). To state such a claim, plaintiff must allege: "(a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship" *(Zetes v Stephens*, 108 AD3d 1014, 1020 [1st Dept 2013]).

"This standard is met where the interference with prospective business relations was accomplished by wrongful means or where the offending party acted for the sole purpose of harming the other party" (*Influx Capital, LLC v Pershin*, 186 AD3d 1622, 1624 [2d Dept 2020] [internal quotation marks and citations omitted]). "Wrongful means include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" (*American Preferred Prescription, Inc. v Health Mgmt.,* 252 AD2d 414, 418 [1st Dept 1998][quotation marks and citations omitted]). However, "more than simple persuasion is

required" (*Snyder v Sony Music Entertainment,* 252 AD2d 294, 300 [1st Dept 1999]). In general, "[c]onduct that is not criminal or tortious will generally be lawful and thus insufficiently culpable to create liability for interference with prospective contracts or other nonbinding economic relations" (*Stuart's, LLC v Edelman*, 196 AD3d 711, 714 [2d Dept 2021] [internal quotation marks and citations omitted]). Additionally, "conduct which is motivated by economic self-interest cannot be characterized as solely malicious" (*id.* at 714).

Here, defendants have established that they did not act for the *sole* purpose of harming plaintiff, as articulated in the complaint, but rather with the intent to benefit themselves. Therefore, to meet the standard, plaintiff must demonstrate that the interference with her business relations was accomplished by "wrongful means."

The "wrongful means" underlying plaintiff's claim that defendants interfered with her business relationship with BAS, American Airlines, and the Port Authority is based upon the defendants' alleged violation of the Donnelly Act—specifically, that they imposed economic pressure on these entities for the purpose of thwarting their use or promotion of plaintiff's structure. However, the court has already concluded that no violation of the Donnelly Act occurred. There are no other allegations in the complaint establishing that defendants used wrongful means to interfere with her business relations in this regard. The complaint does not allege any other facts suggesting that defendants violated the law or that their actions were criminal or independently tortious (*see generally Snyder v Sony Music Entertainment, Inc*., 252 AD2d at 300 ["The only evidence of wrongful means offered by the plaintiff is the alleged slanderous statement . . . . However, we have already concluded that defendants have established as a matter of law that no slander occurred. As [plaintiff] has failed to submit evidence of some other tortious conduct by defendants, the wrongful means requirement has not been met"]).

With respect to plaintiff's employment relationships with both Pillsbury and Greenberg, as discussed above, defendants presented evidence that these employment relationships were not placed in jeopardy by Citi' interference. Therefore, it cannot be said that "but for" defendants' interference, plaintiff's employment relationship with them would have continued (*see id*.; see also *Vigoda v DCA Prods. Plus,* 293 AD2d 265, 266-267 [1st Dept 2002]; *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 49 [1st Dept 2009]).

In opposition to defendants' motion, plaintiff fails to raise an issue of fact. She asserts that the "wrongful means" underlying these causes of action is that defendants "engaged in fraud." However, this theory was not set forth in the complaint and is raised by plaintiff for the first time in opposition to defendants' motion. "A court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint" (*Mazurek v Schoppmann*, 159 AD3d 814, 815 [2d Dept 2018]; *see Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]).

Thus, that branch of defendants' motion which seeks summary judgment dismissing the causes of action to recover damages for tortious interference with business relations is granted and these causes of action are dismissed.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly, with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

10/27/2021

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MELISSA CRANE, J.S.C.

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