

Ellison v Island Def Jam Music Group

2009 NY Slip Op 30139(U)

January 13, 2009

Supreme Court, New York County

Docket Number: 117050/07

Judge: Marilyn Shafer

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Horilyn Grafer
Justice

PART 8

Ellison, D

INDEX NO. 117050/07

- v -

MOTION DATE _____

Island

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion
are decided in accord with the annexed
memorandum.

FILED

JAN 23 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1-13-09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: 1AS PART 8

-----X
DOUGLAS ELLISON and FOUR KINGS
PRODUCTIONS, INC.,

Plaintiffs,

Index No.: 117050/07
DECISION/ORDER

-against-

THE ISLAND DEF JAM MUSIC GROUP, a Division
of UMG RECORDINGS, INC., SHALIK BERRY,
LYNETTE PAYNE and LEMUEL PAYNE,
Defendants.

FILED
JAN 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X
HON. MARILYN SHAFER, J.S.C.:

In this commercial contract action, one set of defendants moves to dismiss plaintiff's causes of action against them, and another set of defendants moves separately to dismiss the entire complaint, while plaintiffs cross-move for partial summary judgment and/or leave to amend the complaint (motion sequence numbers 001 and 002, respectively). For the following reasons, the first and second motion are both granted in part and denied in part, and the cross motion is denied in full.

BACKGROUND

The Parties

This action encompasses a number of contractual disputes over the rights to certain management and recording fees that were incurred by non-party singer/songwriter/performer/recording artist Chrisette Michelle Payne, who is professionally known as "Chrisette Michelle" (Chrisette). See Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶ 10. Defendants Lynette Payne and Lemuel

Payne (the Paynes) are Chrisette's parents. *Id.*, ¶¶ 8-9. Corporate defendant The Island Def Jam Music Group (IDJ) is a New York State licensed artists' management and recording company that claims to be the sole provider of Chrisette's management and recording services. *Id.*, ¶ 6. Defendant Shalik Berry (Berry) is an IDJ employee. *Id.*, ¶ 7. For its part, plaintiff Four Kings Productions, Inc. (Four Kings), another New York State licensed artists' management company, also asserts that it is Chrisette's exclusive manager. *Id.*, ¶¶ 4-5, 10, 12. Plaintiff Douglas Ellison (Ellison) is an officer of Four Kings (collectively, plaintiffs). *Id.*, ¶ 3.

The Contracts

The parties' rights and obligations towards each other are set forth in four contracts and several sub-agreements thereto. Chrisette and plaintiffs entered into the first of these on January 31, 2005, when she and Ellison executed an "exclusive artist management agreement" (the Four Kings management agreement). *Id.*; Exhibit 1-A. The Four Kings management agreement has a five-year term,¹ and provides, in pertinent part, as follows:

7. Exclusivity:

- (a). Artist shall not, during the Term of this Agreement, engage any other person, firm or corporation or otherwise, to act on his [her] behalf in the capacity of a personal manager or to perform any of the services or undertakings of Manager as provided for herein.
- (b). Notwithstanding the foregoing, nothing contained in this Agreement shall be construed as limiting Artist's ability to retain legal advice and counsel, investment counsel or the services of an accountant.

9. Performance and Rehearsal Obligations:

Artist will use best efforts to work at such times and at such places as a Manager

¹ The Four Kings management agreement actually specifically provided for a one-year "initial term," and for two consecutive, irrevocable two-year renewal option terms. *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1-A.

directs, and in connection with such employment the Artist will comply with the rules and regulations covering such employment in all respects, including appearances at rehearsals, when required.

10. Public Appearances:

Artist further covenants and expressly agrees not to publicly appear or perform for anyone, directly or indirectly, without first obtaining Manager's approval. Artist's failure to obtain manager's approval shall be deemed a material breach of this Agreement.

11. Compensation:

(a). As compensation for services rendered hereunder, Artist hereby agrees to pay Manager as and when received by Artist a sum equal to Twenty Percent (20%) of Artist's gross earnings (as defined in paragraph 11 (b)(1)).

Notwithstanding the foregoing, Manager shall receive from Artist, or Artist's business manager or other authorized third party, or shall retain from Artist's gross earnings during the Term hereof, as the case may be, a sum of money equal to Twenty Percent (20%) of Artist's gross earnings.

(b)(1). The term "gross earnings," as used herein, refers to the total of all earnings, which shall not be accumulated or averaged, whether in the form of salaries, earnings, fees, bonuses, royalties, advances against royalties, sponsorship fees, endorsement fees, residuals, deferred compensation, union payments in connection with Artist's services, interest, percentages, shares of profits, or any other kind or type of income which is reasonably related to Artist's career in the entertainment, live performance, personal engagements, amusement, music recording, music publishing (any and all income derived from music publishing), music production (including but not limited to income earned in connection with Artist's rendering producer or re-mixer services), Artist's production company, Artist's record label, motion picture, television, radio, literary, theatrical and advertising fields and all similar areas whether now known or hereafter devised, in which Artist's artistic talents are developed and exploited, received by Artist or by any person, firm or corporation (including Manager) on Artist's behalf, including but not limited to Artist's heirs, executors, administrators or assigns.

Id. Chrisette and Ellison also executed an "exclusive recording agreement" (the Four Kings recording agreement) on January 31, 2005. *Id.*; Exhibit 1-B. The Four Kings recording agreement provides, in pertinent part, that: 1) Chrisette would immediately provide Four Kings with five demonstration copy recordings (demos) "produced by producers selected by and/or affiliated with" Four Kings; 2) Chrisette would deliver one album's worth of recorded material to

Four Kings for the first contract period with six options for additional albums during additional subsequent contract periods; and 3) that Four Kings would have 24 months in which to obtain for Chrisette an offer for a distribution agreement from a major record label. The Four Kings recording agreement also specifically states as follows:

2. Term and Product Commitment:

(d) During each contract period, Artist shall render her recording services exclusively to Company in accordance with the terms and conditions hereof. In connection with each contract period hereof, Artist shall record and deliver to Company sufficient master recordings to constitute one (1) Album ("the Minimum Recording Commitment"). Company shall pay and/or cause to be paid by distributor all recording costs in connection with the masters and all recording costs shall be deemed advances to Artist hereunder and fully recoupable from Artist as royalties. All such master recordings shall be deemed to be works made for hire and all right, title and interest therein and thereto, including all copyrights therein, shall be deemed irrevocably transferred to Company or its designee.

3. Advances:

(a) All monies paid to you, or on your behalf, including recording costs, shall constitute advances. Upon complete execution of the Distribution Agreement (including and inducement letters required by Distributor), and subject to Artist's full performance of Artist's obligations hereunder, Company shall pay Artist [50%] of the "Net Advances" actually received by Company from any Distributor (including its successor) authorized to distribute recordings embodying the Masters against a non-returnable advance previously received by Company. "Net Advances," as used in the preceding sentence, shall mean the gross advances actually received by Company but specifically including reasonable legal fees incurred in securing any Distribution Agreement, including such items as Recording Costs, Video production costs and payments to third parties (excluding the advances and royalties payable to the individual producer(s) of the Masters), payments in connection with the exploitation of rights hereunder and otherwise, and any other bona fide costs or expenses incurred by Company in connection with the production, promotion or exploitation of the Masters (other than Company's office overhead expenses).

Id. The Four Kings recording agreement also had a co-publishing agreement annexed thereto as Exhibit A (the Four Kings co-publishing agreement), which provides that:

WHEREAS, You [i.e., Chrisette] and Company [i.e., Four Kings] have entered

into an exclusive recording artist agreement ("Recording Agreement") dated as of this 31st day of January, 2005 to which this Exhibit is incorporated by reference.

WHEREAS, the parties intend that this co-publishing agreement to be entered into simultaneously and in conjunction with the Recording Agreement. The terms of this Co-publishing Agreement shall be coterminous with the Recording Agreement (herein "Term").

NOW THEREFORE, the parties agree as follows:

1. You hereby irrevocably and absolutely assign, convey and set over to Company or Company's publishing designee ("Publisher") an undivided fifty (50%) percent interest in your copyright (and all renewals and extensions thereof) and all other rights in and to all musical compositions throughout the world and in perpetuity (each referred to as the "Controlled Composition" and collectively referred to as the "Controlled Compositions") now in existence or which is created or acquired by you or any entity in which you have a direct or indirect interest during the Term hereof. For purposes of this Agreement, "Controlled Composition" is any composition which is written, composed or acquired, in whole or in part, directly or indirectly, by you or by any person or entity in which you have a direct or indirect interest.

2. (a) Publisher shall be the exclusive administrator of all rights in and to each Controlled Composition, and it shall be entitled to exercise any and all rights with respect to the control, exploitation and administration of each Controlled Composition

Id.; Exhibit 1-B (A).

On September 26, 2005, instead of entering into a distribution agreement, as was originally contemplated, Chrisette, Ellison and IDJ executed a second exclusive recording agreement (the IDJ recording agreement), pursuant to which plaintiffs agreed to cause Chrisette to record and deliver to IDJ: 1) one album during the initial contract period; and 2) options for four subsequent albums during four subsequent contract periods. The IDJ recording agreement also provides, in pertinent part, as follows:

3. Rights:

(a) All Master Recordings recorded during the Term which embody the

performances of Artist, from the inception of the recording thereof, all artwork created for use on or in connection with Phonograph Records or other derivatives of such Master Recordings including, without limitation, for use in advertising and on Artist Websites ("Artist Artwork"), and including, without limitation, Mobile Materials, shall be deemed "works made for hire" for IDJ. All such Master Recordings, from the inception of the recording thereof, and all Phonograph Records and other reproductions made therefrom, together with the performances embodied therein, and all Artwork and Mobile Materials, and all copyrights therein and thereto, and all renewals and extensions thereof, shall be entirely IDJ's property, free of any claims whatsoever by Grantor [i.e., Four Kings], Artist [i.e., Christette], or any other Person, throughout the world and in perpetuity.

(c) Prior to the commercial release of each Album of the Minimum Recording Obligation, IDJ shall meaningfully consult with Grantor regarding the material elements of the marketing plan for each such Album at a time reasonably designated by IDJ, it being expressly understood that IDJ's decisions with respect thereto shall control.

Recording Agreement Form

3.01. Grantor [i.e., Four Kings] shall be responsible for coordination of recording sessions and Grantor, Artist and the individual producers shall render their services subject to the terms and conditions hereof to the best of their ability and in accordance with first-class standards of performance for the production of Master Recordings in the Phonograph Record Industry.

3.02. Prior to making each recording, Grantor shall designate and submit to IDJ for IDJ's approval each of the following "Recording Elements," before proceeding further: (a) selection of the individual producer(s) of the master recordings hereunder, (b) selection of Compositions to be recorded, (c) specification of accompaniment, arrangement and copying services, and (d) selection of dates of recording and studios where recording is to take place. ... If IDJ shall disapprove any Recording Element submitted by Grantor or the Proposed Budget submitted by Grantor, then, after Grantor's and IDJ's prompt, good-faith negotiations to attempt to agree mutually on the Recording Elements or the recording budget, IDJ's unilateral, good-faith decision ... shall be final.

10. Grantor's Additional Warranties and Representations

10.01 (b) There is in existence between Grantor and Artist a valid and enforceable agreement pursuant to which Artist is required to perform exclusively for Grantor during the Term. Grantor will waive none of its rights under such contract and shall take all steps necessary or desirable to keep same in full force and effect so that IDJ shall have the full benefit of Artist's exclusive services as if Artist had contracted hereunder directly with IDJ.

Id.; Exhibit 1-C. Afterwards, on November 15, 2005, Chrisette, Ellison and non-party EMI April Music, Inc. (EMI), a Connecticut licensed music publishing company, entered into a second co-publishing agreement (the EMI co-publishing agreement), which provides, in pertinent part, as follows:

Background.

A. Writer [i.e., Chrisette] and Company [i.e., Four Kings] are parties to a co-publishing agreement (the "Underlying Agreement") pursuant to which Writer has assigned and transferred to Company 50% of her right, title and interest, including 50% of her copyright interest, and 100% of her administration and exploitation rights, in and to all "Compositions" (as defined below).

B. Company wishes to assign and transfer to Publisher [i.e., EMI] 50% of Company's right, title and interest, including 50% of Company's copyright interest, and 100% of Company's administration and exploitation rights, in and to the Compositions, on the terms and conditions of this agreement.

C. Writer wishes to assign and transfer to Publisher 50% of her remaining copyright interest in and to the Compositions, on the terms and conditions of this agreement.

D. Upon the operation of this Agreement, Publisher shall acquire 50% of all right, title and interest, including 50% of the copyright, and 100% of administration and exploitation rights, in and to all Compositions, to the extent of "Your Interest" (as defined below) therein. Company is retaining a 25% copyright interest, and Writer is retaining a 25% copyright interest.

Id.; Exhibit 1-D.

After all of the foregoing contracts were signed, Chrisette embarked upon a somewhat successful musical career. Unfortunately, the parties were less successful in maintaining their respective business relationships vis-à-vis Chrisette, and these deteriorated progressively.

Firstly, plaintiffs assert that, commencing in February of 2006, IDJ and Berry took complete

control over Chrisette's rehearsing, recording and performing activities and acted on numerous occasions to either fail to consult plaintiffs or to actively exclude plaintiffs in connection therewith. *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶¶ 27-67. Secondly, plaintiffs assert that, commencing in March of 2006, Lynette Payne began usurping Ellison's managerial functions with respect to Chrisette. *Id.*, ¶¶ 37-39. Plaintiffs claim that Lynette Payne went so far as to defame Ellison to non-party Kendall Renvanales (Renvanales), a well-known recording engineer, in April of 2007. *Id.*, ¶¶ 68-87. Plaintiffs also claim that, in April of 2007, Lynette Payne caused non-party booking agency Monterey Peninsula Artists/Paradigm (Monterey) to send e-mails to various concert promoters authorizing them to remit payment for any live performances by Chrisette directly to Monterey for deposit in a bank account owned by Lynette and Lemuel Payne. *See* Smith Affirmation in Opposition, Exhibits J, K. Thereafter, on June 27, 2007, Chrisette served Ellison with written notice to terminate both the Four Kings management agreement and the Four Kings recording agreement. Finally, on July 11, 2007, Chrisette commenced a breach of contract action against Ellison and Four Kings in this court (Index Number 602283/07, Stallman, J.). On January 14, 2008, Justice Stallman issued a decision disposing of Chrisette's motion to dismiss Ellison's and Four Kings' affirmative defenses and counterclaims. *See* Notice of Motion (motion sequence number 001), Long Affirmation, Exhibit G. The balance of that action is still pending, however, and it has not yet been determined what, if any, contractual or other liability exists as between Chrisette and the plaintiffs herein.

Prior Proceedings

Plaintiffs commenced this action on December 21, 2007. Their complaint sets forth

causes of action for: 1) breach of paragraph 3 (c) of the IDJ recording agreement (against IDJ); 2) breach of paragraph 3.01 of the IDJ recording agreement (against IDJ); 3) breach of paragraph 3.02 of the IDJ recording agreement (against IDJ); 4) aiding and abetting (against IDJ); 5) tortious interference with the Four Kings recording agreement (against IDJ); 6) tortious interference with the Four Kings management agreement (against IDJ); 7) breach of the implied covenant of good faith and fair dealing in the IDJ recording agreement; 8) aiding and abetting (against IDJ and Berry); 9) tortious interference with the IDJ recording agreement (against IDJ and Berry); 10) tortious interference with prospective contractual relations (against IDJ and Berry); 11) aiding and abetting (against Lynette Payne); 12) tortious interference with paragraph 7 (a) of the Four Kings management agreement (against Lynette Payne); 13) tortious interference with paragraph 9 of the Four Kings management agreement (against Lynette Payne); 14) tortious interference with prospective contractual relations (against Lynette Payne); 15) tortious interference with prospective contractual relations (against Lynette Payne); 16) unjust enrichment (against Lynette Payne); 17) conversion (against Lynette Payne); 18) defamation (against Lynette Payne); 19) aiding and abetting (against Lemuel Payne); 20) tortious interference with the Four Kings management agreement (against Lemuel Payne); 21) unjust enrichment (against Lemuel Payne); 22) conversion (against Lemuel Payne); and 23) conspiracy (against all defendants). All defendants interposed timely answers with counterclaims. The Paynes and IDJ/Berry now move separately to dismiss the complaint. Plaintiffs oppose these motions and cross-move for certain related relief.

DISCUSSION

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the test "is

not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 (1st Dept 1998), quoting *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any “cognizable legal theory.” See e.g. *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 (2001). However, where the allegations in the complaint consist only of bare legal conclusions, or of factual claims which are inherently incredible or are flatly contradicted by documentary evidence, the foregoing considerations do not apply. See e.g. *Tectrade Intl. Ltd. v Fertilizer Dev. and Inv., B.V.*, 258 AD2d 349 (1st Dept 1999); *Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233 (1st Dept 1994).

The Paynes’ Motion

The Paynes’ motion seeks to have plaintiffs’ 11th through 23rd causes of action dismissed, pursuant to CPLR 3211 (a) (7), for failure to state legally valid claims. The court finds as follows.

Plaintiffs’ 11th cause of action is directed against Lynette Payne for “aiding and abetting” Chrisette’s breach of the Four Kings management agreement. It specifically alleges that:

By ordering Monterey to make payment unto her instead of paying plaintiffs, as the [Four Kings management agreement] required, [Lynette Payne] aided and abetted [Chrisette] in breaching the [Four Kings management agreement] by intercepting on behalf of [Chrisette] payments originally sent as contemplated ... and sequestering the payment intercepted.

See Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint),

¶ 202. New York State law requires that, to state a claim for aiding and abetting a breach of fiduciary duty:

a plaintiff must plead a breach of fiduciary duty, that the defendant knowingly induced or participated in the breach, and damages resulting therefrom. Moreover, a “person knowingly participates in a breach of fiduciary duty only when he or she provides ‘substantial assistance’ to the primary violator.” “Actual knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty.” In the absence of any allegation that the ... defendants had actual knowledge of the primary wrong or that these parties rendered substantial, as opposed to inadvertent assistance to the underlying breach of fiduciary duty, [a] complaint does not advance a valid claim for aiding and abetting breach of fiduciary duty on their part.

Bullmore v Ernst & Young Cayman Islands, 45 AD3d 461, 464 (1st Dept 2007) (internal citations omitted). Here, the Paynes raise three arguments that plaintiffs’ aiding and abetting claim against Lynette Paine is deficient. First, the Paynes cite a decision by the U.S. District Court for the Southern District of New York (Scheindlin, J.) in *Pension Comm. of Univ. of Montreal Pension Plan v Banc of America Securities, LLC* (446 F Supp 2d 163 [SD NY 2006]) for the proposition that New York law imposes an additional element of proximate causation in any claim for aiding and abetting a breach of fiduciary duty. They then argue that the complaint fails to sufficiently plead that Lynette Payne’s actions were the proximate cause of the monetary damages that plaintiffs allegedly incurred. See Memorandum of Law in Support of Motion (motion sequence number 001), at 6-7. The erroneous notion that there exists a blanket rule requiring proximate causation to be pled in all causes of action for aiding and abetting a breach of a fiduciary duty has gained some traction in the federal courts of this district. See e.g. *Kolbeck v LIT America, Inc.*, 939 F Supp 240 (SD NY 1996), *aff’d* 152 F3d 918 (2nd Cir 1998). However, this court’s research

has not disclosed any New York State court appellate authority to support such a proposition. Instead, the prevailing rule appears to be that a plaintiff who pleads a breach of fiduciary duty is *not* required to meet the higher standard of loss or proximate causation *unless* the claim is raised in the context of an attorney/client relationship. *See e.g. Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180 (1st Dept 2000), citing *Diamond v Oreamuno*, 24 NY2d 494 (1969); *but see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 21 (1st Dept 2008) (“we conclude that to recover under a claim for damages against an attorney arising out of the breach of the attorney’s fiduciary duty, the plaintiff must establish the ‘but for’ element of malpractice, irrespective of how the claim is denominated in the complaint”).² Here, because plaintiffs and Lynette Payne do not enjoy an attorney/client relationship, New York State law does not require that plaintiffs plead or prove proximate causation as part of their aiding and abetting a breach of fiduciary duty claim against Payne. Thus, the court rejects Paynes’ first dismissal argument as inapposite.

The Paynes next argue that the complaint fails to sufficiently plead that Lynette Payne had “actual knowledge” of Chrisette’s purported breach of the Four Kings management agreement, and that it should instead be inferred that Lynette was acting on the good faith belief that Chrisette had terminated that agreement before Lynette began directing Monterey to remit payments to her instead of to plaintiffs. *See* Memorandum of Law in Support of Motion (motion sequence number 001), at 7-8. Plaintiffs correctly note that this is a factual, rather than a legal, argument which is improper when raised in the context of a dismissal motion. *See* Plaintiffs’

² There is some evidence that the federal courts are aware of this distinction. *See Northwestern Natl. Ins. Co. of Milwaukee, Wis. v Alberts*, 769 F Supp 498, 506 (SD NY 1991), citing *ABKCO Music v Harrison’s Music*, 722 F2d 988 (2nd Cir 1983).

Memorandum of Law in Opposition to Motion and in Support of Cross Motion, at 57-58.

Nonetheless, plaintiffs also submit an e-mail from Lynette Payne, dated April 16, 2007, which demands remission of payment for Chrisette's services to her instead of plaintiffs and which also predates Chrisette's June 27, 2007 notice to terminate the Four Kings management agreement.

Id. at 55-56; Smith Affirmation in Opposition, Exhibit J. The Paynes reply that, despite any documentary evidence, the complaint must fail because the pleadings regarding Lynette Payne's state of mind are inadequate. *See* Defendants' Reply Memorandum, at 5-7. The court disagrees. The complaint can be fairly read as alleging that Lynette Payne knew of the existence of the Four Kings management agreement, and that her attempts to have payments remitted to parties other than plaintiffs contributed to Chrisette's breach of that agreement. All of the Paynes' arguments on the issue of "actual knowledge" really turn upon the interpretation that is to be given to documentary - i.e., *factual* - evidence, and do not address the pleadings at all. However, as previously noted, when confronted with a dismissal motion, the court's role is to determine "whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained" [citations omitted]." *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d at 176. Here, the court finds that Lynette Payne's "actual knowledge" may be "reasonably implied" from the language of the complaint. Therefore, the court rejects the Paynes' second dismissal argument.

The Paynes finally argue that plaintiffs' "claim ... for aiding and abetting ... is nothing more than a conspiracy claim dressed up in aiding and abetting clothing." *See* Memorandum of Law in Support of Motion (motion sequence number 001), at 8. However, the Paynes offer no legal support for this argument. It is true, as will be discussed, that New York State law does not

recognize a civil conspiracy tort. However, New York State law does recognize claims for aiding and abetting breaches of fiduciary duties, and the court finds that the instant claim is adequately pled. Whether this claim withstands closer scrutiny at trial remains to be seen. The court is particularly concerned with the issue of whether or not Chrisette stood in a fiduciary relationship to plaintiffs.³ Nonetheless, at this juncture, the court believes that the better course is to preserve plaintiffs' cause of action. Accordingly, the portion of the Paynes' motion that seeks dismissal of plaintiffs' aiding and abetting claim against Lynette Payne should be denied.

Plaintiffs' 12th and 13th causes of action allege, respectively, that Lynette Payne tortiously interfered with paragraphs 7 (a) and 9 of the Four Kings management agreement. The party who claims tortious interference with preexisting contractual relations must allege: "(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.'" *Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299 (1st Dept 1999), quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 (1996). With regard to the 12th cause of action, the complaint states that Lynette "act[ed] in the capacity of [Chrisette]'s personal manager" in derogation of paragraph 7 (a) of the Four Kings management agreement by: 1) setting up unauthorized rehearsals; 2) diverting payments from Monterey and sequestering the funds; and 3) receiving and making calls to [DJ] on Chrisette's behalf and thereby alienating plaintiffs from Chrisette. *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶¶ 211-213. The Paynes argue

³ Justice Stallman specifically left this issue open in his decision of January 4, 2008. *See* Notice of Motion (motion sequence number 001), Long Affirmation, Exhibit G, at 7-8.

that the complaint fails to sufficiently plead either: 1) that Chrisette breached the Four Kings management agreement; 2) that Lynette Payne's actions were the proximate cause of said breach; 3) that Lynette Payne's actions were not justified; or 4) that Lynette Payne's actions resulted in plaintiffs being monetarily damaged. *See* Memorandum of Law in Support of Motion (motion sequence number 001), at 8-11. Plaintiffs' opposition papers fail to address these points.

Instead, plaintiffs argue the issue of the enforceability of the Four Kings management agreement, which the Paynes do not question in their motion. *See* Plaintiffs' Memorandum of Law in Opposition, at 69-73. Thus, it is left to the court to review each of the Paynes' arguments ab initio. The court rejects the first of these because the complaint plainly sets forth three allegations that Chrisette breached the Four Kings management agreement. *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶¶ 211-213.

As to the Paynes' second argument, it is indeed true that the proponent of a tortious interference with contract claim must plead and prove proximate causation. *See e.g. Lana & Samer v Goldfine*, 7 AD3d 300 (1st Dept 2004). However, the Paynes' allegation that the complaint fails to explain how Lynette's actions caused Chrisette to breach of the Four Kings management agreement is untenable. Paragraph 7 (a) of the Four Kings management agreement plainly states that the "Artist shall not ... engage any other person ... to act on his [her] behalf in the capacity of a personal manager or to perform any of the services or undertakings of Manager as provided for herein." Setting up rehearsals, receiving payments and making phone calls to A&R companies are clearly among the "managerial services or undertakings" specified in paragraphs 2 and 14 of the Four Kings management agreement. Thus, the court rejects the Paynes' second dismissal argument as well. Likewise, the court rejects the Paynes' economic justification argument as

unsupported. Their allegation that “any diversion of money to the Payne family, or any usurping of Mr. Ellison’s managerial duty ... was taken in order to protect the Artist’s money and career from Mr. Ellison who had ... developed a reputation among the Payne family as untrustworthy” hardly makes out a valid claim of “economic justification” under New York State law. *See e.g. Barrett v Toroyan*, 39 AD3d 366 (1st Dept 2007). Finally, the Paynes’ claim that the complaint fails to explain how Lynette’s actions caused plaintiffs to be monetarily damaged is also unavailing. The complaint plainly states that “plaintiffs have been damaged and continue to be monetarily damaged in an amount which is not ascertainable without a proper accounting.” *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶ 216. This allegation is sufficient for the purposes of a CPLR 3211 motion - the how and how much monetary damage plaintiffs sustained (if any) are to be resolved at trial. Accordingly, the court finds that the portion of the Paynes’ motion that seeks dismissal of plaintiffs’ 12th cause of action should be denied.

In their 13th cause of action, plaintiffs claim that Lynette Payne tortiously interfered with paragraph 9 of the Four Kings management agreement, which provides that:

Artist will use best efforts to work at such times and at such places as a Manager directs, and in connection with such employment the Artist will comply with the rules and regulations covering such employment in all respects, including appearances at rehearsals, when required.

Id.; Exhibit 1-A. The complaint states that, in August of 2007, Lynette Payne scheduled a rehearsal for Chrisette with a well-known backup band which Chrisette arrived late to, departed early from and failed to pay for. *Id.*; Exhibit 1, ¶¶ 221-231. In their motion, the Paynes raise the same four arguments against this cause of action as they did against the previous one. Although,

once again, plaintiffs failed to address the Paynes' arguments, the court finds said arguments unavailing. Firstly, the complaint clearly alleges that Chrisette breached paragraph 9 of the Four Kings management agreement. *Id.*, ¶ 231. Secondly, proximate cause may be fairly inferred from the allegations that Lynette Payne: 1) set up the rehearsal; 2) advised Chrisette to call it off and leave early; and 3) advised the backup band to look to IDJ for payment. *Id.*, ¶¶ 221, 226, 229. Thirdly, as discussed above, the Paynes' allegations do not disclose the existence of economic justification. Finally, the allegation of monetary damages is sufficient. *Id.*, ¶ 233. Accordingly, the court finds that the portion of the Paynes' motion that seeks dismissal of plaintiffs' 13th cause of action should be denied.

Plaintiffs' 14th and 15th causes of action allege that Lynette Payne tortiously interfered with certain "prospective business relations" embodied in the provisions for renewal option periods that were set forth in the IDJ recording agreement and the Four Kings management agreement, respectively. The required elements of a cause of action for tortious interference with prospective business relations are: (a) business relations with a third party; (b) the defendant's interference with those business relations; (c) the defendant acting with the sole purpose of harming the plaintiff or using wrongful means; and (d) injury to the business relationship. *See Carvel Corp. v Noonan*, 3 NY3d 182 (2004); *NBT Bancorp v Fleet/Norstar Financial Group*, 87 NY2d 614 (1996); *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183 (1980). "Wrongful means" include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract." *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d at 191. Because simple economic

“persuasion” does not qualify as wrongful means, for economic pressure to be wrongful, it must be “extreme and unfair.” *Carvel Corp. v Noonan*, 3 NY3d at 195.

Here, the 14th cause of action in the complaint alleges: 1) that Lynette solicited the attention of numerous artists and producers (including Renvanales) “vilifying plaintiffs and encouraging each to shun plaintiffs”; and 2) that Lynette told Renvanales “that she would employ ‘any means necessary’ to destroy plaintiffs’ career and livelihood.” *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶¶ 240-241. The Paynes argue that these allegations do not constitute “wrongful means” as defined above. Plaintiffs do not address this point of argument in their opposition papers. *See* Plaintiffs’ Memorandum of Law in Opposition, at 73-74. The court finds that the Paynes’ argument is meritorious. Plaintiffs do not allege that Lynette Payne engaged in any “physical violence, fraud or misrepresentation.” Read in the most generous light, the complaint alleges that Lynette Payne engaged in a campaign of non-economic persuasion against plaintiffs’ prospective business interests. This is not sufficient to support a cause of action. *See Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d at 191. Accordingly, the court finds that plaintiffs 14th cause of action should be dismissed.

Plaintiffs’ 15th cause of action sets forth identical allegations to those contained in the 14th cause of action, but directs those allegations to the claim that Lynette Payne’s actions caused plaintiffs to lose the benefit of payment during options renewal periods set forth in the Four Kings management agreement. *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶¶ 244-254. However, for the reasons discussed above, the court has found that the allegations in the complaint do not support any claim that Lynette Payne

employed “wrongful means” as the law defines that term. Accordingly, the court also finds that plaintiffs’ 15th cause of action should be dismissed.

Plaintiffs’ 16th cause of action alleges unjust enrichment by Lynette Payne by diverting payment from Monterey for Chrisette’s live performances into her and Lemuel Payne’s bank account. *Id.*, ¶¶ 255-265. “The criteria for recovery under a theory of unjust enrichment are: ‘(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services.’” *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 (1st Dept 2002), quoting *Moors v Hall*, 143 AD2d 336, 337-338 (2d Dept 1988). Here, the complaint alleges that: 1) plaintiffs originally engaged Monterey and received payment from Monterey for Chrisette’s live performances; and 2) that Lynette Payne, although aware of the provision of the Four Kings management agreement under which plaintiffs were entitled to 20% of the amounts that Chrisette earned from live performances, caused Monterey to remit 100% of all such earnings to herself. *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶¶ 259-263. The Paynes first argue that this cause of action should be dismissed because it “implicates the potential liability of a third party [i.e., Monterey] for breach of contract.” *See* Memorandum of Law In Support of Motion (motion sequence number 001), at 14. However, it is clear that Monterey was not a party to the Four Kings management agreement and that plaintiffs, therefore, can raise no contractual claim against it. It is also clear that the instant cause of action is directed solely against Lynette Payne for recovery - in quantum meruit - of monies that Monterey admittedly paid to her. The court is unaware on any equitable theory which would require Monterey to pay those sums twice. *See*

e.g. Manufacturers Hanover Trust Co. v Chemical Bank, 160 AD2d 113 (1st Dept 1990). Thus, the court rejects this argument. The Paynes next argue that plaintiffs failed to properly allege that they performed in good faith under the Four Kings management agreement. *See* Memorandum of Law In Support of Motion (motion sequence number 001), at 14. Plaintiffs correctly note that this claim is untenable in view of the complaint's allegation⁴ that Ellison initially retained Monterey to act as Chrisette's booking agent and received payment for her from it. *See* Memorandum of Law in Opposition to Motion, at 87-88. Since, as previously discussed, this activity is defined as a "managerial service or undertaking" in paragraphs 2 and 14 of the Four Kings management agreement, plaintiffs' allegation must be fairly read as a claim that Ellison discharged his services in good faith. The Paynes further contend that Ellison inadvertently admitted to having improperly received certain advances on Chrisette's behalf in excess of what they were entitled to under the Four Kings management agreement. *See* Memorandum of Law In Support of Motion (motion sequence number 001), at 14-15. However, although this allegation may make out an equitable defense of unclean hands at trial, it is not sufficient to overcome the instant pleadings on this CPLR 3211 motion to dismiss. Accordingly, the court rejects the Paynes' final argument and finds that the portion of this motion that seeks dismissal of the 16th cause of action should be denied.

Plaintiffs' 17th cause of action alleges that Lynette Payne converted monies to which plaintiffs were entitled. As the Appellate Division, First Department, noted in *Republic of Haiti v Duvalier* (211 AD2d 379, 384 [1st Dept 1995]):

⁴ *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶¶ 258-259.

The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner. Where the property is money, it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner. The funds of a specific, named bank account are sufficiently identifiable [internal citations omitted].

Here, the complaint states that “[Lynette] Payne has received monies from various entities, including ... monies stemming from [Chrisette]’s public performances and [from] Monterey.” See Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶ 268. The Paynes argue that plaintiffs’ claim is indefinite, however, because: 1) some of Chrisette’s performances were uncompensated as they were given for promotional purposes; and 2) because other of Chrisette’s performances were given after she served the termination letter; and conclude, therefore, that plaintiffs are not entitled to any compensation for these categories of performances. See Memorandum of Law In Support of Motion (motion sequence number 001), at 15-16. Plaintiffs respond that their allegations are sufficient because: 1) the matter of which performances generated income and which did not is an issue to be determined at trial; and 2) there is also an open question as to whether the termination letters that Chrisette served were legally valid. See Memorandum of Law in Opposition to Motions, at 88-91. The court agrees with plaintiffs, because it finds that the complaint sets forth sufficient facts to support a calculation of damages based upon a determination of a percentage of Chrisette’s net profits. See e.g. *Miller v Lasdon*, 78 AD2d 628 (1st Dept 1980); *Salvador v Waldom Const. Co.*, 237 NYS2d 773 (App Term, 1st Dept 1963). Accordingly, the court finds that the portion of this motion that seeks dismissal of plaintiffs’ 17th cause of action should be denied.

Plaintiffs’ 18th cause of action alleges that Lynette Payne defamed plaintiffs by making

unjustified accusations of embezzlement and stealing. In *Dillon v City of New York* (261 AD2d 34 37-38 [1st Dept 1999]), the Appellate Division, First Department, held that:

Defamation has long been recognized to arise from "the making of a false statement which tends to 'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society'." The elements are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se. CPLR 3016 (a) requires that in a defamation action, "the particular words complained of ... be set forth in the complaint." The complaint also must allege the time, place and manner of the false statement and specify to whom it was made.

In evaluating whether a cause of action for defamation is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction. "Courts 'will not strain' to find defamation 'where none exists'." Loose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable [internal citations omitted].

In *Steinhilber v Alphonse* (68 NY2d 283, 289-290 [1986]), the Court of Appeals further noted that:

The rule ... may be simply stated. An expression of pure opinion is not actionable. It receives the Federal constitutional protection accorded to the expression of ideas, no matter how vituperative or unreasonable it may be. A "pure opinion" is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be "pure opinion" if it does not imply that it is based upon undisclosed facts. When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a "mixed opinion" and is actionable. The actionable element of a "mixed opinion" is not the false opinion itself - it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking [internal citations omitted].

Here, the complaint specifically states: 1) that "on or about January 2007 [Lynette] Payne called

[Renvanales] and vilified and defamed Ellison, telling [Renvanales] that Ellison was ‘embezzling’ and stealing from [Christette]”; 2) that “subsequently a lawsuit was brought by [Christette] against plaintiffs with one of the causes of action for embezzlement,” but that “the claims against plaintiffs for embezzlement were withdrawn by [Christette]’s counsel”; and 3) that, in the interim, “the false charges and accusations of embezzlement [had been] published by numerous websites, including ... www.contactmusic.com, www.jenniferhudson.net, www.about.com and www.allhiphop.com.” See Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶¶ 273, 277-279. The Paynes raise four arguments to dismiss this claim. First, they assert that “just because New York does not have a private right [i.e., cause] of action for embezzlement or stealing does not make Mrs. Payne’s statements ... untrue.” See Memorandum of Law In Support of Motion (motion sequence number 001), at 17. Plaintiffs’ opposition papers do not address this point; however, this is of no moment since the Paynes’ first argument is merely an exercise in circumlocution which constitutes no viable challenge to the purported falsity of Lynette Payne’s complained of statements. Thus, the court rejects it. The Paynes next argue that “Mrs. Payne had good reason to form an opinion that Mr. Ellison was stealing and embezzling from [Christette].” *Id.* at 18. Plaintiffs respond that it is impossible to view Lynette Payne’s statements as purely a matter of opinion. See Memorandum of Law in Opposition to Motions, at 92-96. The court agrees. Pursuant to the Court of Appeals holding in *Steinhilber v Alphonse*, it is clear that Lynette Payne’s statements to Renvanales were an actionable “mixed opinion” that contained the implication that Lynette Payne knew certain facts about Ellison (i.e., the details of his purported theft) that supported her opinion and were detrimental to Ellison. Thus, the court rejects this

argument, too. The Paynes next argue that Lynette Payne enjoyed a “qualified privilege” because she only made her statements to current or former employees of Four Kings and/or Ellison. *See* Memorandum of Law In Support of Motion (motion sequence number 001), at 18. The court will not delve into the Paynes’ legal reasoning on this point, however, since the complaint clearly alleges that Lynette Payne published her statements on public websites. *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶ 278. Thus, the court rejects this argument as well. Finally, the Paynes argue that, because Ellison is a public figure, New York State law requires that plaintiffs allege that Lynette Payne uttered her statements against him with “actual malice.” *See* Memorandum of Law In Support of Motion (motion sequence number 001), at 18. Plaintiffs deny that Ellison is a public figure. *See* Memorandum of Law in Opposition to Motions, at 98-99. The court again agrees. In *Wilsey v Saratoga Harness Racing, Inc.* (140 AD2d 857, 858 [3d Dept 1988]), the Appellate Division, Third Department, summarized the applicable law as follows:

Public figures include those who assume roles of especial prominence in the affairs of society. Often this involves people who thrust themselves to the forefront and thus become public figures, not for all purposes, but with respect to that particular issue. People in whom the public has a continuing interest and who have taken steps to attract such interest, such as professional athletes and certain entertainers, are often public figures [internal citations omitted].

In *Daniel Goldreyer, Ltd. v Dow Jones & Co.* (259 AD2d 353, 353 [1st Dept 1999]), the Appellate Division, First Department, found that the plaintiff, “an art restorer, controversial and well-known in the profession, but not outside of it” was “cast as an involuntary limited purpose public figure” when the defendant published a brief article ridiculing his art restoration techniques. Here, however, there can be no question of casting Ellison as a “limited purpose

public figure” since the Paynes’ sole allegation - that Ellison’s name appears on one of Chrisette’s albums - does not demonstrate that Ellison is sufficiently prominent in the field of artist management to justify deeming him as a public figure.⁵ Accordingly, the court rejects the Paynes’ final argument and finds that the branch of their motion that seeks dismissal of plaintiffs’ 18th cause of action should be denied.

Plaintiffs’ 19th cause of action alleges that Lemuel Payne aided and abetted Chrisette’s breach of her fiduciary duties to plaintiffs. *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶¶ 284-291. In support of their motion, the Paynes raise the same three arguments against this claim that they raised against plaintiffs’ 11th cause of action for aiding abetting against Lynette Payne. *See* Memorandum of Law In Support of Motion (motion sequence number 001), at 19-20. However, for the reasons discussed above, the court has found that all of these arguments are misplaced and unavailing. Accordingly, the court finds that the branch of the Paynes’ motion that seeks dismissal of plaintiffs’ 19th cause of action should be denied.

Plaintiffs’ 20th cause of action alleges that Lemuel Payne tortiously interfered with paragraph 14 of the Four Kings management agreement by receiving, or permitting to be received, payments into his and Lynette Payne’s joint bank account of monies that were actually due to plaintiffs. *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶¶ 292-304. Oddly, neither of the Paynes’ memoranda of law set forth any arguments as to why this cause of action should be dismissed. Accordingly, the court deems this

⁵ The court here notes that the Paynes failed to even recite in what capacity Ellison’s name appears on Chrisette’s album.

argument abandoned, and finds that the branch of the Paynes' motion that seeks dismissal of plaintiffs' 20th cause of action should be denied.

Plaintiffs' 21st cause of action against Lemuel Payne recites, verbatim, the allegations of the unjust enrichment claim set forth in their 16th cause of action against Lynette Payne. *Id.*, ¶¶ 305-310. Similarly, the Paynes' motion relies upon the identical arguments that they raised against that prior claim. *See* Memorandum of Law in Support of Motion (motion sequence number 001), at 20. Accordingly, because the court previously found that those arguments were meritless, it now finds that the branch of the Paynes' motion that seeks dismissal of plaintiffs' 21st cause of action should be denied for the same reasons discussed *supra*.

Plaintiffs' 22nd cause of action against Lemuel Payne recites, verbatim, the allegations of the conversion claim set forth in their 17th cause of action against Lynette Payne. *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶¶ 311-316. Similarly, the Paynes' motion relies upon the identical arguments that they raised against that prior claim. *See* Memorandum of law in Support of Motion (motion sequence number 001), at 20. Accordingly, because the court previously found that those arguments were meritless, it now finds that the branch of the Paynes' motion that seeks dismissal of plaintiffs' 22nd cause of action should be denied for the same reasons discussed *supra*.

Plaintiffs' 23rd cause of action alleges civil conspiracy by all of the defendants herein. *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶¶ 317-340. However, it is axiomatic that New York State law does not recognize a cause of action for civil conspiracy. *See e.g. 85 Fifth Ave. 4th Floor, LLC v I.A. Selig, LLC*, 45 AD3d 349 (1st Dept 2007). Accordingly, plaintiffs' 23rd cause of action should be dismissed as improper.

Because the court dismisses this claim, it need not reach the Paynes' ancillary request that paragraph 337 of the complaint (which is a part of the 23rd cause of action) be stricken because it makes improper reference to settlement negotiations. *See* Memorandum of Law in Support of Motion (motion sequence number 001), at 20-21.

IDJ and Berry's Motion

IDJ and Berry also move that the complaint be dismissed as against them pursuant to CPLR 3211. Plaintiffs' first, second and third causes of action each allege that IDJ breached a discrete portion the IDJ recording agreement. The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). Here, IDJ raises two arguments⁶ to dismiss each breach of contract claim.

In the first cause of action, plaintiffs allege that IDJ breached paragraph 3 (c) of the IDJ recording agreement, which provides that “[p]rior to the commercial release of each Album of the Minimum Recording Obligation, IDJ shall meaningfully consult with Grantor regarding the material elements of the marketing plan for each such Album at a time reasonably designated by IDJ, *it being expressly understood that IDJ's decisions with respect thereto shall control* [emphasis added].” *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶ 95. Plaintiffs specifically contend that IDJ “did not discuss or attempt to confer with plaintiff concerning any of the elements of the marketing plan” for Chrisette’s first album, but instead “thwarted plaintiffs’ attempts to arrange for consultation.” *Id.*, ¶ 96. IDJ argues that plaintiffs’ claim is barred because the plain language of the above contractual

⁶ *See* fn 7, *infra*.

provision grants IDJ the sole, final authority over Chrisette's marketing plan and, thus, precludes any claim of breach. See Memorandum of Law in Support of Motion (motion sequence number 002), at 7-9. IDJ cites the decision by the U.S. District Court for the Southern District of New York in *Times Mirror Magazines v Field & Stream Licenses* (103 F Supp 2d 711 [SD NY 2000], *aff'd* 294 F3d 383 [2nd Cir 2002]) to support its argument that where contractual language expressly permits a party to carry out certain activity, there can be no finding of breach other than a de minimis contractual violation. *Id.* at 8-9. Plaintiff's respond that IDJ mischaracterizes the holding of *Times Mirror Magazines v Field & Stream Licenses*, and argues that that case is inapplicable to the facts at bar because it involved issues of materiality and waiver which are not present in this action. See Memorandum of Law in Opposition to Motions, at 10-20. Plaintiff argues instead that New York State law requires the court to interpret the IDJ recording agreement so as to give effect to all of its provisions - i.e., the portion that entitles plaintiff to "meaningfully consult" with IDJ regarding Chrisette's marketing plan, as well as the portion that gives IDJ final authority over said plan. *Id.* After careful consideration, the court disagrees. In *Desmond v 20th Century Fox Record Corp.*, (36 AD2d 925, 926 [1st Dept 1971]), the Appellate Division, First Department, upheld contractual language by which the plaintiff/recording artist had granted defendant the unreserved "right to reproduce and sell phonographic records of any size or speed, tape cartridges, cassettes and reels of plaintiff's performances, and to use plaintiff's name and picture in connection therewith," and dismissed the plaintiff's breach of contract claim. The Court specifically noted that "by virtue of the Agreement, [defendant] had the right to" engage in this activity "provided, of course, it acted fairly." *Id.* at 926. Here too, the IDJ recording agreement gives IDJ final authority over Chrisette's marketing plan, and although it

does permit plaintiffs the opportunity to “meaningfully consult” with respect thereto, it does not reserve plaintiffs any specific recourse in case plaintiffs should be denied that opportunity.

Because IDJ’s final authority is contractually mandated, the court cannot find IDJ in breach of the contract for exercising that authority. As will be discussed, plaintiffs’ only potential recourse in this matter may be sought in their claim for breach of the covenant of good faith and fair dealing. Accordingly, the court finds that the portion of IDJ and Berry’s motion that seeks dismissal of plaintiffs’ first cause of action should be granted.

In their second cause of action, plaintiffs allege that IDJ breached paragraph 3.01 of the IDJ recording agreement, which provides that “Grantor [i.e., Four Kings] shall be responsible for coordination of recording sessions and Grantor, Artist and the individual producers shall render their services subject to the terms and conditions hereof.” *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶ 104. Plaintiffs contend that IDJ “has arranged various recording sessions on behalf of [Chrisette] ... with various other performing artists without the knowledge or consent of plaintiffs.” *Id.*, ¶ 103. IDJ argues that plaintiffs’ claim takes the above contractual language out of context, and that said claim is plainly barred by the subsequent contractual language (set forth in paragraph 3.02 of the IDJ recording agreement) which grants IDJ the final authority over all of Chrisette’s recording sessions. *See* Memorandum of Law in Support of Motion (motion sequence number 002), at 10. Plaintiffs reply with the same argument, discussed above, that the court must construe the contract so as to give effect to all of its terms - i.e., plaintiffs’ right to coordinate recording sessions as well as IDJ’s final authority thereover. *See* Memorandum of Law in Opposition to Motions, at 28-36. The court rejects this argument for the same reasons as discussed above.

There is no justification to find IDJ in breach of a contract that gives it final authority over all aspects of an artist's recording sessions simply because the artist's manager did not "coordinate" those recording sessions. The court here takes further note of two points that it believes are salient: first, that the contract does not provide any recourse to plaintiffs in the event that they do not "coordinate" a recording session; and second, that the recording sessions described in the complaint all appear to have involved only employees of IDJ - whom plaintiffs would presumably have had no authority to supervise or coordinate in any case. Accordingly, the court finds that the portion of IDJ and Berry's motion that seeks dismissal of plaintiffs' second cause of action should be granted.

In their third cause of action, plaintiffs allege that IDJ breached paragraph 3.02 of the IDJ recording agreement, which provides, in part, that "If IDJ shall disapprove any Recording Element submitted by Grantor or the Proposed Budget submitted by Grantor, then, after Grantor's and IDJ's prompt, good-faith negotiations to attempt to agree mutually on the Recording Elements or the recording budget, IDJ's unilateral, good-faith decision ... shall be final." *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶ 114. The complaint states that Ellison did not approve either the songs or the producers that ultimately appeared on Chrisette's album. *Id.*, ¶¶ 112-114. IDJ again argues that the final sentence of the above paragraph, which states that "IDJ's unilateral, good-faith decision ... shall be final," bars plaintiffs' breach of contract claim. *See* Memorandum of Law in Support of Motion (motion sequence number 002), at 11-14. Plaintiffs respond with the same arguments as discussed above. *See* Memorandum of Law in Opposition to Motions, at 43-44. The court again rejects those arguments for the same reasons as discussed above. Because the IDJ

recording agreement grants IDJ final authority over all “recording elements,” and reserves none to plaintiffs, IDJ cannot be found to have breached the agreement by failing to seek plaintiffs approval over any “recording elements.” Accordingly, the court finds that the portion of IDJ and Berry’s motion that seeks dismissal of plaintiffs’ third cause of action should be granted.⁷

Plaintiffs’ fourth cause of action alleges that IDJ aided and abetted Christtte’s breach of the Four Kings recording agreement. *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶¶ 119-129. Defendants’ only argument against this cause of action is that “New York courts have construed claims for aiding and abetting a breach of contract as [] tortious interference with contract claim[s],” and that the instant cause of action should therefore be dismissed for the same reasons as plaintiffs’ tortious interference claims. *See* Memorandum of Law in Support of Motion (motion sequence number 002), at 18. However, defendants offer no authority to support the proposition that a court *must* construe every aiding and abetting a breach of contract claim that comes before it as a tortious interference with contract claim.⁸ Indeed, in the previous section of this decision, the court upheld plaintiffs’ similar causes of action against the Paynes on the ground that there might be liability pursuant to a theory of aiding and abetting a breach of fiduciary duty. Because this is a CPLR 3211 motion to dismiss, the court elects to uphold plaintiffs’ claim against IDJ on the same ground, although it

⁷ The court here notes that IDJ has also raised arguments against the sufficiency of the damages element of plaintiffs’ breach of contract claims. However, because the court finds that those causes of action are barred by the plain contractual language, it need not reach those arguments at this juncture.

⁸ Justice Fried’s decision in *Gotham Boxing v Finkel* (18 Misc 3d 1114 [A], 2008 NY Slip Op 50020 [u][Sup Ct, NY County 2008]) to treat the claims for aiding and abetting a breach of contract therein as tortious interference with contract claims was clearly a discretionary act, for he specifically delineated it as such.

is by no means certain that the two parties stand in a fiduciary relationship towards each other. Nevertheless, the court believes that the proper course is to deny that portion of IDJ and Berry's motion that seeks dismissal of plaintiffs' fourth cause of action.

Plaintiffs' fifth and sixth causes of action allege that IDJ tortiously interfered, respectively, with the Four Kings recording agreement and the Four Kings management agreement. As previously discussed, the proponent of a claim for tortious interference with preexisting contractual relations must allege "(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.'" *Snyder v Sony Music Entertainment, Inc.*, 252 AD2d at 299, quoting *Lama Holding Co. v Smith Barney*, 88 NY2d at 424. In the fifth cause of action, the complaint alleges that IDJ "took intentional and unjustified action to interfere with [Christtc]'s performance under the [Four Kings] recording agreement when they arranged for [Christtc] to render recording services that were not exclusively to [Four Kings]." See Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶ 133. IDJ argues that the breach element of this claim must fail pursuant to the plain contractual language of the IDJ recording agreement, to which Ellison is a party. See Memorandum of Law in Support of Motion (motion sequence number 002), at 19-22. Paragraph 10.01 (b) of that agreement acknowledges that "[t]here is in existence between Grantor and Artist a valid and enforceable agreement pursuant to which Artist is required to perform exclusively for Grantor during the Term," but provides that "Grantor ... shall take all steps necessary or desirable to keep same in full force and effect so that IDJ shall have the full benefit of Artist's exclusive services as if Artist

had contracted hereunder directly with IDJ.” *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1-C. “[T]he burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it.” *Eden Temporary Services, Inc. v House of Excellence Inc.*, 270 AD2d 66, 67 (1st Dept 2000), quoting *Paz v Singer Co.*, 151 AD2d 234, 235 (1st Dept 1989). Here, the terms of the contract specifically contradict plaintiffs’ allegation of breach because they plainly permit the behavior complained of. Accordingly, the court finds that plaintiffs’ fifth cause of action must fail as a matter of law, and further finds that the portion of IDJ and Berry’s motion that seeks dismissal of said cause of action should be granted.

In the sixth cause of action, the complaint alleges that IDJ “took intentional and unjustified action to interfere with [Chrisette]’s performance under the [Four Kings] management agreement when they:” 1) met with Chrisette in February of 2006 out of Ellison’s presence; 2) included a bonus track that Ellison objected to on Chrisette’s album; and 3) set up concert appearances for Chrisette. *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶¶ 143, 147-148. IDJ once again argues that this claim must fail because the “actionable breach” element of the tortious interference claim is not met. *See* Memorandum of Law in Support of Motion (motion sequence number 002), at 23. Plaintiffs do not specifically address this argument in their opposition papers. However, after reviewing the operative contractual language, the court finds that IDJ’s argument has merit. Chrisette’s purportedly objectionable conduct, as identified in the sixth cause of action, is all permitted by paragraph 10.01 (b) of the IDJ recording agreement. Accordingly, for the same reasons as were discussed above, the court finds that plaintiffs’ sixth cause of action must fail as a matter of law,

and further finds that the portion of IDJ and Berry's motion that seeks dismissal of said cause of action should be granted.

Plaintiffs' seventh cause of action alleges that IDJ breached the implied covenant of good faith and fair dealing that is contained in the Four Kings management agreement. "Implicit in every contract is a promise of good faith and fair dealing, which is breached when a party 'acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement'." *O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 282 (1st Dept 2007), quoting *Jaffe v Paramount Communications*, 222 AD2d 17, 22-23 (1st Dept 1996). Here, the complaint specifically states that:

Defendants have acted in bad faith in their obligations and duties consistent with the terms of the [IDJ recording] agreement, including but not limited to, by subversively having Berry and the Paynes circumvent plaintiff to schedule recording sessions, rehearsals and otherwise assist [Chrisette] in getting out of all her obligations under the agreements and disregarding their contracted obligations [sic].

See Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint),

¶ 153. Defendants cite the holding in *Keifer v Sony Music Entertainment, Inc.* (8 AD3d 107, 107 [1st Dept 2004]) that:

[T]he record [does not] reveal a violation of the implied covenant of good faith and fair dealing in connection with defendant [music company]'s decision not to release the album. Plaintiff [artist]'s claim of bad faith would imply an obligation inconsistent with other terms of the contractual relationship. Not only did the contract give defendant unilateral control over release of an album, but defendant also retained the right to accept or reject plaintiffs' songs for inclusion in the album [internal citations omitted].

Defendants then argue that this cause of action will not lie because the IDJ recording agreement specifically granted them "absolute, unilateral control over the recording" of Chrisette's album.

See Memorandum of Law in Support of Motion (motion sequence number 002), at 24. Plaintiffs recount a number of instances of what they term “interference” by defendants and argue that the claim should stand because defendants’ actions were all in derogation of the Four Kings management agreement. *See* Memorandum of Law in Opposition to Motions, at 74-80. Defendants’ reply papers point out that the case law cited in plaintiffs’ memorandum is inapposite. *See* Defendants’ Reply Memorandum of Law (motion sequence number 002), at 16-17. Be that as it may, the court nonetheless finds in favor of plaintiffs. In *Keifer v Sony Music Entertainment, Inc.* (8 Ad3d at 107), the Appellate Division, First Department, based its holding, in part, on the finding that “[p]laintiff[s] claim of bad faith would imply an obligation inconsistent with other terms of the contractual relationship.” Here, the court cannot make a similar finding. Paragraph 10.01 (b) of the IDJ recording agreement specifically acknowledges that “[t]here is in existence ... a valid and enforceable agreement pursuant to which Artist is required to perform exclusively for Grantor during the Term” and that “Grantor will waive none of its rights under such contract and shall take all steps necessary or desirable to keep same in full force and effect so that IDJ shall have the full benefit of Artist’s exclusive services as if Artist had contracted hereunder directly with IDJ.” *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1-C. Because the IDJ recording agreement specifically acknowledges the existence and validity of the Four Kings management agreement and Ellison’s interest in keeping it in full force and effect, the court must deem defendants’ alleged bad faith actions (i.e., attempts to have Chrisette cancel that contract) as inconsistent with their contractual obligations toward plaintiffs. The court also finds that it is fair to characterize this activity as that which “would deprive the other party of the right to receive the benefits under their agreement”

[citation omitted].” *O’Neill v Warburg, Pincus & Co.*, 39 AD3d at 282. Accordingly, the court finds that the portion of defendants’ motion that seeks dismissal of plaintiffs’ seventh cause of action should be denied..

Plaintiffs’ eighth cause of action alleges that IDJ and Berry, individually, aided and abetted Chrisette’s breach of the Four Kings management agreement. *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit 1 (complaint), ¶¶ 157-166. Because this claim duplicates plaintiffs’ fourth cause of action against IDJ, the motion to dismiss is denied with respect to IDJ for the reasons set forth in the previous portion of this decision. With respect to Berry, the complaint alleges that, in November of 2006, he and IDJ made phone calls, held meetings and conducted recording sessions in order to cause Chrisette to render her services to IDJ in derogation of the Four Kings management agreement. *Id.* Defendants argue that Berry was merely acting within the scope of his employment with IDJ. *See* Memorandum of Law in Support of Motion (motion sequence number 002), at 25-26. Plaintiffs dispute this. *See* Memorandum of Law in Opposition to Motions, at 48-50. The court finds that both of these arguments miss the point. As previously discussed, the court chooses to treat the instant cause of action as an “aiding and abetting a breach of fiduciary duty claim,” rather than as a “tortious interference claim,” in order to preserve it for more complete review at trial. As such, if IDJ were eventually found to stand in a fiduciary or agency relationship with plaintiffs, then a “scope of employment” issue might exist with respect to Berry’s actions as IDJ’s employee. Accordingly, the court believes that, at this juncture, the better course is to deny the motion to dismiss plaintiffs’ eighth cause of action as against Berry as well.

Plaintiffs’ ninth cause of action alleges that IDJ and Berry, individually, tortiously

interfered with the Four Kings management agreement. Because this claim duplicates plaintiffs' sixth cause of action against IDJ, the motion to dismiss this cause of action is also granted with respect to IDJ for the reasons set forth in the previous portion of this decision. With respect to Berry, the complaint further alleges that he "encouraged" Christtte to see a lawyer about getting out of the Four Kings management agreement, and "provided her with the contact information" for such a lawyer. *See* Notice of Motion (motion sequence number 002), Siegal Affirmation, Exhibit I (complaint), ¶¶ 175-176. Defendants again raise the argument that Berry was merely acting within the scope of his employment with IDJ. *See* Memorandum of Law in Support of Motion (motion sequence number 002), at 25-26. Plaintiffs again dispute this. *See* Memorandum of Law in Opposition to Motions, at 48-50. However, the court need not reach this scope of employment argument in connection with this tortious interference claim since the operative point here, as was discussed earlier, is that - by virtue of paragraph 10.01 (b) of the IDJ recording agreement - Christtte did *not* breach the Four Kings management agreement by delivering services for IDJ. Without such breach, no claim for tortious interference with contract will lie, as a matter of law. Accordingly, the court finds that the portion of IDJ and Berry's motion that seeks dismissal of plaintiffs' ninth cause of action as against Berry should be granted.

Plaintiffs' 10th cause of action alleges that IDJ and Berry, individually, tortiously interfered with plaintiffs' prospective business relations. As previously discussed, the elements of this cause of action are: (a) business relations with a third party; (b) the defendant's interference with those business relations; (c) the defendant acting with the sole purpose of harming the plaintiff or using wrongful means; and (d) injury to the business relationship. *See*

Guard-Life Corp. v S. Parker Hardware Mfg. Corp., 50 NY2d 183, *supra*. “Wrongful means” include “physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract.” *Id.* at 191. The complaint recites its earlier allegations that IDJ and Berry held meetings with Chrisette outside of Ellison’s presence at which they counseled her to speak to a lawyer about getting out of the Four Kings management agreement and eventually furnished her with the contact information of a lawyer to help her do so. *See* Notice of Motion (motion sequence number 002), Sicgal Affirmation, Exhibit 1 (complaint), ¶¶ 181-193. Defendants first argue that the claim should be dismissed because the alleged interference pertained to an existing contract (i.e., the extant Four Kings management agreement), rather than to prospective business relations. *See* Memorandum of Law in Support of Motion (motion sequence number 002), at 26. Plaintiffs do not address this argument in their opposition papers. Nonetheless, the court rejects it because the complaint makes clear that the “prospective business relations” at issue were the renewal option periods specified in the Four Kings management agreement, and these options represented mere expectations rather than contractual terms. Defendants next argue that the claim must fail because they did not employ “wrongful means” to induce Chrisette’s actions. *Id.* at 27-28. They attempt to distinguish between non-actionable economic pressure that is merely persuasive, and actionable economic pressure that is “extreme and unfair.” *Id.* As the Appellate Division, First Department, recently noted in *Lawrence v Union of Orthodox Jewish Congregations of America* (32 AD3d 304, 304 [1st Dept 2006]):

In order to recover damages for interference with existing economic relations in a

non binding relationship, a “defendant’s conduct must amount to a crime or an independent tort.” A sole exception to this general rule has been recognized where a defendant has engaged in conduct “for the sole purpose of inflicting intentional harm on plaintiff” [internal citations omitted].

Here, the complaint does not allege that IDJ or Berry engaged in conduct that could be fairly interpreted as criminal, tortious or intended solely to inflict emotional harm on plaintiffs. Rather, as was the case in *Lawrence v Union of Orthodox Jewish Congregations of America* (32 AD3d at 305), “the record provides no ground to infer that [defendants were] not motivated by legitimate economic self-interest” when they met with Chrisette. Therefore, the court concludes that defendants did not employ any “wrongful means,” and that plaintiffs’ claim for tortious interference with prospective business relations must fail. Accordingly, the court finds that the portion of IDJ and Berry’s motion that seeks dismissal of plaintiffs’ 10th cause of action as against Berry should be granted.

Plaintiffs’ Cross Motion

Plaintiffs’ cross motion states, on the cover page, that plaintiffs seek: 1) partial summary judgment on their first cause of action for breach of contract by IDJ; 2) an order pursuant to CPLR 3212 (g) to limit the issues of fact at trial; 3) an order pursuant to CPLR 3025 (b) for leave to amend the complaint “to the extent the court deems any cause of action improperly pled”; and 4) an order to lift the stay of disclosure and discovery. However, none of plaintiffs’ papers contains any further reference to this requested relief, and plaintiffs’ memoranda of law do not advance any arguments as to why they should be entitled to it. Accordingly, the court deems these requests to be abandoned, and therefore denies them.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of defendants Lynette Payne and Lemuel Payne is granted solely to the extent that the 14th, 15th and 23rd causes of action in the complaint are dismissed, but is in all other respects denied; and it is further

ORDERED that defendants Lynette Payne and Lemuel Payne are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the motion, pursuant to CPLR 3211, of the defendants the Island Def Jam Music Group and Shalik Berry is granted solely to the extent that the first, second, third, fifth, sixth, ninth and 10th causes of action in the complaint are dismissed, but is in all other respects denied; and it is further

ORDERED that the defendants the Island Def Jam Music Group and Shalik Berry are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the cross motion of plaintiffs Douglas Ellison and Four Kings Productions, Inc. is in all respects denied.

Dated: New York, New York
January 13, 2009

FILED
JAN 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

MARILYN SHAFER

Hon. Marilyn Shafer, J.S.C.