

Travelsavers Enters., Inc. v Analog Analytics, Inc.

2016 NY Slip Op 32735(U)

February 9, 2016

Supreme Court, Nassau County

Docket Number: 602696-13

Judge: Timothy S. Driscoll

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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**TRAVELSAVERS ENTERPRISES, INC. d/b/a
TRAVELSAVERS PARTNER SERVICES,**

Plaintiff,

-against-

**ANALOG ANALYTICS, INC., KENNETH KALB,
BARCLAYCARD UK, BARCLAYS BANK
DELAWARE, and BARCLAYS PLC,**

Defendants.

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**TRIAL/IAS PART: 12
NASSAU COUNTY**

**Index No. 602696-13
Motion Seq. No. 6
Submission Date: 12/18/15**

Papers Read on this motion:

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- CPLR § 3212(f) Affidavit of M. Bowen and Exhibits.....X**
- Affidavit in Opposition of A. Moebes.....X**
- Affirmation in opposition and Exhibits.....X**
- Memorandum of Law in Opposition.....X**
- Reply Affirmation in Further Support and Exhibits.....X**
- Reply Memorandum of Law in Further Support.....X**

This matter is before the court on the motion filed by Defendants Analog Analytics, Inc. (“AA”), Barclays Bank Delaware (“Barclays Delaware”) and Barclays PLC (“Defendants”) on October 29, 2015 and submitted on December 18, 2015, following oral argument before the Court. For the reasons set forth below, the Court grants the motion and dismisses the two remaining causes of action in the Complaint.

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR § 3212, dismissing the two remaining causes of action in the Complaint.

Plaintiff Travelsavers Enterprises, Inc. d/b/a Travelsavers Partner Services (“Travelsavers” or “Plaintiff”) opposes the motion.

B. The Parties’ History

The parties’ history, including an outline of the allegations in the Complaint, is set forth in a prior Order (“Prior Order”) of the Court dated April 16, 2014, a prior decision of the Court dated July 18, 2014 (“2014 Decision”) and a prior decision of the Court dated November 30, 2015 (“2015 Decision”) and the Court incorporates the Prior Order and prior decisions (“Prior Decisions”) by reference as if set forth in full herein. In the Prior Order, the Court dismissed the eighth cause of action in the Complaint, seeking punitive damages and attorney’s fees, and directed that the remaining causes of action in the Complaint would be the subject of oral argument which the Court conducted. In the 2014 Decision, the Court 1) granted the motion by Defendant Kenneth Kalb (“Kalb”) and dismissed the Complaint as asserted against him; and 2) granted the motion by Defendants AA, Barclays Bank Delaware and Barclays PLC to dismiss the second, fourth, fifth, sixth and seventh causes of action in the Complaint, and held that, with respect to the first cause of action alleging breach of the applicable Agreement, Plaintiff’s claim for damages is limited, pursuant to the Agreement’s limitation of liability clause, to what AA was actually paid under the Agreement, and otherwise denied the motion.¹ In the 2015 Decision, the Court granted Defendants’ motion seeking *inter alia* to compel Plaintiff to produce certain documents and denied Plaintiff’s cross motion to compel the production of documents by Defendants.

As noted in the Prior Order and Prior Decisions, the Complaint alleges that in January 2012 Travelsavers entered into an exclusive ten-year contract with AA (“Agreement”), pursuant to which the parties agreed to work together to advertise and market brand-named travel deals, including luxury ocean cruises and vacation resorts, through electronic and other media directly to consumers. Plaintiff alleges that AA and Kalb, its founder and chief executive, breached the

¹ By decision dated October 7, 2014, the Court denied Plaintiff’s motion to reargue the 2014 Decision.

Agreement and, instead of performing, misappropriated Travelsavers' know-how and technology to launch a rival electronic travel offer service through Barclaycard UK which competes with, and undermines the value of, the Travelsavers contract and benefits Barclaycard UK, Barclays Bank Delaware and Barclays PLC (collectively "Barclays"). The Complaint alleges that Defendant Barclaycard UK is a wholly-owned subsidiary of Barclays PLC and is organized under the laws of England with its principal place of business in London, England.

The Complaint contains eight (8) causes of action. As a result of the Prior Order and 2014 Decision, the sole remaining causes of action are 1) the first cause of action, asserted against AA for breach of the Agreement by virtue, *inter alia*, of its failure to cooperate to develop direct reservation capability, delay in launching the Agreement and failure to promote and distribute travel offers submitted to the Syndication Network online portal by Travelsavers, and 2) the third cause of action, asserted against Barclays for tortious interference with contract by causing AA to divert its resources and personnel away from implementation and execution of the Agreement to develop Bespoke Offers, a competing platform.

In support of their motion, Defendants provide numerous exhibits, including the Agreement (Ex. 2 to Gottridge Aff. in Supp.), the Certificate of Merger of Ocean Merger Sub, Inc. into Analog Analytics Inc. dated May 22, 2012 reflecting the acquisition of Analog by Barclays Delaware (Ex. 3 to Gottridge Aff. in Supp.), the cover page and Exhibit 8.1 of the Form 20-F filed with the United States Securities and Exchange Commission by Barclays PLC, dated March 13, 2013, which lists the subsidiaries of Barclays PLC, including Analog and Barclays Delaware (Ex. 4 to Gottridge Aff. in Supp.), transcripts of depositions of numerous witnesses (Exs. 5-13 to Gottridge Aff. in Supp.), and numerous documents produced by the parties in this action (Exs. 14-63 to Gottridge Aff. in Supp.). Plaintiff provides numerous exhibits in opposition to the motion, including but not limited to emails and deposition transcripts (*see* exhibits annexed to Bowen CPLR § 3212(f) Affidavit and Bowen Aff. in Opp.).

In opposition to the motion, Anne Marie Moebes ("Moebes"), an Executive Vice President of Travelsavers, affirms that she was part of the Travelsavers team that negotiated the Agreement and she was the main point of contact at Travelsavers during the implementation and performance of the Agreement. Moebes affirms that she had meetings, phone calls and email

communication with Kalb and Oliver Gratry (“Gratry”), the Chief Executive Officer and Chief Financial Officer of AA respectively, with Christina Liao (“Liao”), AA’s head account manager, and with Michael Tracy (“Tracy”), AA’s head of sales. Moebes affirms that these individuals assured Travelsavers that AA had over 850 publishers in the AA network, that over 300 of these publishers were committed to publishing travel offers to their customers and that the offers would be promoted by email blasts to 50 million consumers. In preparing a joint release with AA, an AA representative advised Moebes that Kalb changed the description in the press release of the number of consumers reached daily by AA from 30 million to 40-50 million.

Moebes affirms that after the Agreement was signed, and as the parties were working towards launching Travelsavers travel offers on the AA network, Liao assured Moebes in email communications that the offers would be carried by over 300 publishers who were already committed and that the offers would be promoted by email blasts to 50 million consumers. In addition, during this period and in the summer of 2012, Moebes received at least two requests from Liao for Travelsavers’ permission to permit a third-party to source a travel offer on the AA network. The Agreement had an exclusivity provision that prohibited AA from publishing travel offers on the AA network from a third-party. From the beginning of the contract negotiations, Rich Mazza (“Mazza”), the Chief Executive Officer of Travelsavers, and Moebes made it clear to AA that this exclusivity was critical to Travelsavers, and to the success of the Agreement. Moebes affirms that “[n]o one from [AA], either before or after the [Agreement] was signed, ever voiced any contrary understanding about the scope of the exclusivity right of Travelsavers embodied in the [Agreement]” (Moebes Aff. in Opp. at ¶ 4).

Moebes affirms that the launch of the Agreement was continually delayed by AA. The parties originally agreed on a launch date in February 2012, but AA asked to postpone it to March, and then again to April. As April approached, AA postponed the launch date to June 2012. Each time, Travelsavers had obtained offers and was ready to perform. When Moebes asked Kalb for a reason for the delays, he stated that the delays were attributable to the fact that AA had to divert resources to Barclays.

Moebes affirms that AA representatives advised her about AA’s deal with Barclays Bank and Barclaycard (“Barclays”). Prior to signing the Agreement, Gratry advised Moebes that AA

had a “large transaction” (Moebes Aff. in Opp. at ¶ 7) related to the United Kingdom (“UK”). Kalb subsequently advised Moebes that Barclays had purchased AA, that the Agreement was an “important selling point” to Barclays (*id.*), and that Travelsavers needed to be patient while AA finalized the Barclays transaction. Kalb assured Moebes that the Barclays’ acquisition would benefit Travelsavers and assist AA in promoting offers over the AA network. In May 2012, AA publicly announced its merger with Barclays. Kalb advised Moebes that Barclays was committed to the success of AA’s business and the AA network, that Barclays would become a publisher on the AA network, and that, once the integration of systems was complete, the offers would be distributed over the AA network to millions of Barclaycard customers in the UK and the U.S. Kalb also stated that Travelsavers would have the opportunity to take on the Bank’s U.S. rewards credit card program based in Delaware.

Moebes affirms that when the Agreement finally launched in June 2012, Travelsavers had several offers distributed on the AA network. By that time, Plaintiff’s travel partners were “wary” of the project given its repeated delays (Moebes Aff. in Opp. at ¶ 9). Only one trip was sold in connection with one of the several offers distributed on the AA network. Travelsavers requested that AA provide it with data regarding how many, and which, publishers promoted the offers and how many email blasts were sent. AA did not provide this information as requested, leading Moebes to question the reliability of the information provided by AA regarding its performance under the Agreement. In light of that concern, and because Kalb had not responded to Travelsavers’ inquiries, Moebes directed AA to hold off on distributing any more offers, and asked to speak directly with AA’s publishers, including Barclays.

As Travelsavers was interested in maintaining its business relationship with AA, Moebes did not voice her concerns to AA and, instead, asked AA to assist Travelsavers in understanding the issues that had arisen with the launch. To that end, Moebes participated in a teleconference, arranged by AA, with representatives of the Freedom Interactive Group (“FIG”), one of the publishers on the AA network. The comments by the FIG representatives regarding the Travelsavers offers that had been on the AA network in June 2012 led Moebes to conclude that those individuals did not understand how to market travel, and that AA had not promoted the Travelsavers’ offers as promised. In July 2012, Moebes advised Kalb that she wanted to speak with Barclays representatives directly, in light of the fact that Barclays was the new owner of

AA. Kalb assured Moebes that he would arrange that call but never did.

In October 2012, at AA's request, Moebes arranged a telephone call between Kalb and Mazza, to whom Moebes reported directly. Moebes was present during that call, which was conducted on speakerphone. She affirms that Kalb advised Mazza that it was necessary to renegotiate the Agreement to eliminate Travelsavers' exclusivity. Mazza rejected that suggestion and explained why exclusivity was crucial to Travelers. Kalb stated that the decision was "out of his hands" (Moebes Aff. in Opp. at ¶ 14) and that he would arrange for Travelsavers to speak directly to Barclays. Kalb stated that he would be able to convince Barclays to distribute Travelsavers offers over the AA network to Barclaycard customers, but only on a nonexclusive basis.

Moebes subsequently spoke with David Herrick ("Herrick") of Barclays. In November 2012, Herrick advised Moebes that he and Mike Saunders ("Saunders"), the individual in charge of offers at Barclaycard, had experience with American Express and were knowledgeable about the travel industry. Herrick and Saunders advised Moebes that Valerie Soranno Keating ("Keating"), the Chief Executive Officer of Barclaycard and Herrick's boss, also had experience with American Express. Moebes advised Herrick that Travelsavers was interested in continuing the Agreement with Barclays, but that exclusivity was of paramount importance to Travelsavers. Herrick advised Moebes that he had not seen the Agreement and would get back to Moebes after reviewing it, but did not do so. Moebes attempted for two months, without success, to resume her contact with Barclays. Kalb subsequently arranged to visit Travelsavers at their Long Island office.

Moebes affirms that Travelsavers' meeting with Kalb occurred in January 2013. Kalb reiterated that the matter was out of his hands, that Barclays was in control of the Agreement, and that Travelsavers' only option was to change the Agreement to a nonexclusive one. In March 2013, Moebes met with Herrick and Saunders at Barclaycard's offices in London. At that meeting, Moebes reiterated Travelsavers' need for exclusivity and Herrick advised Moebes that Barclays could not ensure that exclusivity because Barclays had already established relationships with certain travel providers, including major cruise lines. Herrick and Saunders explained that Barclaycard intended to source its own travel offers for distribution on the AA network to Barclaycard UK customers (the Bespoke system). Moebes learned at the meeting, or shortly thereafter, that Barclays/AA had advised Travelsavers that Barclays prohibited Travelsavers from

obtaining travel offers from the cruise lines, and had purported to limit Travelsavers to obtaining offers only from boutique hotels and minor hotel chains, which would not provide sufficient profits to Travelsavers to be viable. Moebes suggested a compromise whereby Barclays would agree that Travelsavers had exclusive rights over specified travel categories that would be profitable for all parties, including Travelsavers. Herrick suggested that counsel for the participants should discuss the issue but Moebes was never contacted by Barclays or AA after that meeting.

Moebes affirms that between July 2012 and March 2013, AA never contacted Travelsavers to resume distribution of Travelsavers offers on the AA network. It was Moebes' understanding that AA had devoted almost all of its resources to Barclays. Kalb advised Moebes that AA was no longer in a position to distribute Travelsavers offers other than, with the permission of Barclays, to Barclaycard customers through Bespoke, and only on a nonexclusive basis. Moebes viewed this alternative as a violation of the Agreement.

C. The Parties' Positions

Defendants submit that dismissal of the first cause of action, alleging breach of contract, is warranted because Plaintiff has failed to adduce admissible evidence that AA breached any of its obligations under the Agreement. Defendants contend that 1) Plaintiff has failed to establish that AA failed to cooperate to develop direct reservation capability in light of the deposition testimony of Travelsavers' witnesses that AA did develop a direct reservation capability, and four offers from Royal Caribbean were distributed with this feature; 2) there is no merit to Plaintiff's allegation that AA delayed the launch of the Agreement in light of the fact that a) the Agreement did not specify a launch date, or define the term "launch;" b) nothing in the Agreement required offers to be distributed by any particular date; and c) AA distributed each deal sent to it in April through June 2012 within a day of its receipt from Travelsavers; 3) Plaintiff has failed to establish that AA failed to promote and distribute travel offers submitted to the Syndication Network online portal by Travelsavers in light of evidence establishing that, from April to June 2012, Travelsavers submitted offers from four travel providers to AA, and AA promoted and distributed those offers to the Syndication Network; 4) there is no merit to Plaintiff's allegation that AA failed to obtain contractual obligations from publishers to publish Travelsavers offers in light of the fact that the Agreement does not contain any provision requiring AA to obtain from publishers in the Syndication Network their contractual

commitments to publish any Travelsavers-sourced deals, and there were no guarantees that any particular publisher would publish any particular deal submitted to it; and 5) there is no merit to Plaintiff's allegation that AA failed to promote and distribute Travelsavers offers through email blasts, in part because the Agreement contains no provision regarding emails blasts, and does not obligate AA to distribute Travelsavers' offers in that manner.

Defendants contend, further, that the Court should dismiss the third cause of action, alleging tortious interference on the grounds that 1) the insufficiency of the breach of contract claim necessitates dismissal of this cause of action; 2) even assuming *arguendo* the sufficiency of the breach of contract claim, the tortious interference claim cannot survive because Travelsavers has offered no admissible evidence that the Barclays Defendants procured the alleged breach and the evidence establishes that, at the time of the alleged breach, the Barclays Defendants never communicated with AA regarding, or induced AA to do anything with respect to, AA's conduct that forms the basis for Plaintiff's breach of contract claim, as evidenced, *e.g.*, by deposition testimony establishing that AA was not prevented from distributing Travelsavers' offers or developing the direct reservation system and that AA personnel worked on the Travelsavers project through June 2012; and 3) there is no evidence, either documentary or testimonial, that the Barclays Defendants intended that AA breach the Agreement.

Defendants submit, further, that even if Travelsavers otherwise had a valid tortious interference claim, it cannot overcome the Barclay Defendants' economic justification defense. Barclays Delaware is the parent company of AA, and Barclays is the parent of both Barclays Delaware and Analog. The economic interest defense applies from March 23, 2012, the date on which Barclays Delaware entered into the agreement to acquire AA. Defendants contend that Travelsavers has failed to overcome that defense by virtue of its failure to adduce proof establishing that the Barclays Defendants used malice, or fraudulent or illegal means. Travelsavers cannot make that showing because discovery has confirmed that the Barclays Defendants were motivated by their economic self interest to develop a successful new offers program in the UK. Moreover, there is no admissible evidence demonstrating that any diversion by the Barclays Defendants of software engineering resources from AA's daily deals business to the Bespoke Offers platform in the UK was accomplished through fraudulent or illegal means. Under these circumstances, Travelsavers cannot defeat the economic justification defense.

Plaintiff opposes the motion submitting *inter alia* that AA breached the Agreement by 1) missing the launch dates on which the parties agreed, and on which Plaintiff relied in obtaining travel offers from major cruise lines for distribution on the AA network in February, March and then April 2012; 2) failing to make reasonable efforts to line up publishers to distribute the offers as evidenced, *e.g.*, by the fact that some Travelsavers offers were distributed by as few as one publisher, and the fact that offers were emailed to far fewer people than AA had represented would receive the offers; 3) breaching the exclusivity provision in the Agreement as evidenced by AA records reflecting that multiple non-Travelsavers travel offers were distributed on the AA network after the Agreement was launched; and 4) repudiating the Agreement when Travelsavers would not agree to the Agreement being nonexclusive.

Plaintiff also contends that it has a viable claim for tortious interference in light of evidence establishing that 1) Barclays took concrete steps to integrate its Barclaycard U.S. business with the AA network; 2) it was only after Travelsavers insisted on speaking with Barclays directly about distribution of Travelsavers offers that AA told Travelsavers that the Agreement had to be changed to a nonexclusive one; 3) AA's demand that the Agreement be changed to a nonexclusive one was made shortly after Herrick called Kalb to discuss AA's existing business, which included Travelsavers; 4) AA and Barclays concealed from Travelsavers Barclays' intention to source travel offers for distribution to Barclays customers over the AA-built network by using the Bespoke system to distribute offers in the UK and later in the U.S. using AA's network; and 5) Barclays restricted the types of travel offers that Travelsavers could distribute to Bespoke customers, because Barclays wanted to source offers on its own for its Bespoke customers, which "gutted" the value of the Agreement to AA and Travelsavers (P's Memo. of Law in Opp. at p. 11). Plaintiff also argues that AA repudiated the Agreement when it insisted that Travelsavers change the Agreement to a nonexclusive one and thereafter failed to perform its obligations under the Agreement, and developed a competing distribution system for Barclays' travel offers.

Plaintiff contends, further, that Barclays has not demonstrated economic justification because 1) Barclays has not demonstrated that the breach of the Agreement was undertaken due to its stake in AA, or otherwise was designed to protect its investment in AA's business; b) the breach did not protect Barclays' interest in AA but, rather, Barclays' own economic interest; and c) the defense of economic justification is fact intensive and not appropriate for summary

judgment.

In reply, Defendants submit *inter alia* that 1) any launch date delay was not a breach of the Agreement because no provision of the Agreement required a launch by a particular date; 2) there is no basis to conclude that AA's promotion efforts were insufficient because the Agreement does not provide any guidelines or criteria for measuring promotional efforts; and 3) Travelsavers has adduced no evidence that AA entered into an agreement in violation of the exclusivity provision in the Agreement as written (Agreement at § 1(g)) which provides that AA "will not enter into any agreement with any travel agency or individual or entity for the purpose of sourcing a supply of travel-related Deal(s) or Offer(s) substantially similar to those provided by" Travelsavers; and 4) the Court should reject Plaintiff's repudiation argument, both because anticipatory repudiation is a cause of action separate and distinct from a cause of action for breach of contract, and because there is no evidence of any express and absolute refusal by AA to perform, or any voluntary act rendering its performance impossible.

RULING OF THE COURT

A. Summary Judgment

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Breach of Contract

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v.*

Furia, 116 A.D.2d 694 (2d Dept. 1986).

When the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. *Henrich v. Phazar Antenna Corp.*, 33 A.D.3d 864 (2d Dept. 2006). A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002).

C. Tortious Interference with Contract

To establish a claim of tortious interference with contract, plaintiff must show the existence of a valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages. *White Plains Coat & Apron v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007). To be actionable, the interference must be intentional and not incidental to some other lawful purpose. *Dell's Maraschino Cherries Co., Inc. v. Shoreline Fruit Growers, Inc.*, 887 F. Supp. 2d 459, 482 (E.D.N.Y. 2012), quoting *Health-Chem Corp. v. Baker*, 915 F.2d 805, 809 (2d Cir. 1990), citing *Alvord & Swift v. Stewart M. Muller Constr. Co.*, 385 N.E. 2d 1238, 1241 (1978). An actual breach is required to sustain a cause of action for tortious interference with contract. *Ulysses I & Company, Inc. v. Feldstein*, 75 A.D.3d 990, 992 (3d Dept. 2010), *lv. app. and lv. den. in part*, 15 N.Y.3d 944 (2010) citing, *inter alia*, *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (1996).

Under the defense of economic justification, a party with an economic stake in the business of another may interfere with a contract that the other business has with a third person in order to further its own economic interests. *Hidden Brook Air, Inc. v. Thabet Aviation Int'l, Inc.*, 241 F. Supp. 2d 246, 280 (S.D.N.Y. 2002), quoting *Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 63 (2d Cir. 1988). Actions taken to protect an economic interest cannot give rise to a tortious interference with contract claim. *Dell's Maraschino Cherries Co., Inc. v. Shoreline Fruit Growers, Inc.*, 887 F. Supp. 2d at 482, citing *Foster v. Churchill*, 87 N.Y.2d 744, 750-51 (1996). The imposition of liability in spite of a defense of economic interest requires a showing of either malice or fraudulent or illegal means. *Hidden Brook Air, Inc. v. Thabet Aviation Int'l, Inc.*, 241 F. Supp. 2d at 280, quoting *WMW Mach. Co. v. Koerber AG*, 240 A.D.2d 400, 401 (2d Dept. 1997) (internal quotation marks and citations omitted). A plaintiff can overcome the economic justification affirmative defense by establishing that the defendant was motivated by malice or employed illegal means to safeguard its interest. *Dell's Maraschino Cherries Co., Inc. v.*

Shoreline Fruit Growers, Inc., 887 F. Supp. 2d at 482, quoting *Foster v. Churchill*, 87 N.Y.2d at 750.

D. Repudiation

Under the doctrine of anticipatory repudiation, where one party repudiates its contractual obligations prior to the time designated for performance, the nonrepudiating party may immediately claim damages for total breach and be absolved from its obligations of future performance. *QK Healthcare, Inc. v. InSource, Inc.*, 108 A.D.3d 56, 63 (2d Dept. 2013), citing *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 806-807 (2d Dept. 2011), quoting *Long Is. R.R. Co. v. Northville Indus. Corp.*, 41 N.Y.2d 455, 463 (1977).

To sustain a cause of action sounding in anticipatory repudiation, separate and distinct from a cause of action sounding in breach of contract, there must be, among other things, some express and absolute refusal to perform, or some voluntary act on the part of the individual which renders it impossible for him to perform. *QK Healthcare, Inc. v. InSource, Inc.*, 108 A.D.3d at 63, quoting *Ga Nun v. Palmer*, 202 N.Y. 483, 489 (1911) and citing, *inter alia*, *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d at 807.

E. Application of these Principles to the Instant Action

The Court grants the motion and dismisses the remaining causes of action in the Complaint. Plaintiff has failed to adduce evidence that AA breached the Agreement, and the Court declines to impose requirements not contained in the Agreement, such as launch dates or email blasts. The Court also concludes that the tortious interference cause of action is legally insufficient, both because the Court has determined that AA did not breach the Agreement and because, even assuming *arguendo* that there was such a breach, the Barclay Defendants have demonstrated the applicability of the economic justification defense because the undisputed evidence shows that the Barclay Defendants, following their acquisition of AA, were motivated by their economic self interest to develop a successful new offers program in the UK. Plaintiff cannot overcome that defense given the absence of evidence that the Barclay Defendants were motivated by malice or employed illegal means to safeguard their interest. The Court also concludes that there is no merit to Plaintiff's contention that AA repudiated the Agreement because there is no evidence of any express and absolute refusal by AA to perform, or any voluntary act rendering its performance impossible.

All matters not decided herein are hereby denied.

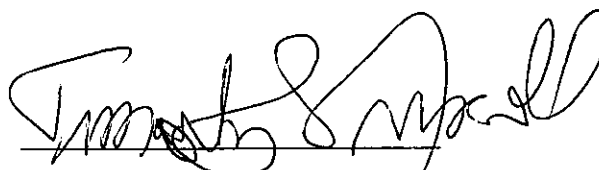
This constitutes the decision and order of the Court.

The Complaint is dismissed.

ENTER

DATED: Mineola, NY

February 9, 2016



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

FEB 24 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE