SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

PREFERRED BEVERAGE DISTRIBUTORS, INC.,

Plaintiff,

-against-

KING JUICE COMPANY, INC. and BIG GEYSER, INC.,

Defendant.

Index No. 702766/2021

(Motion Sequence No. 001)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT

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Defendants King Juice Company, Inc. ("**King Juice**") and Big Geyser, Inc. ("**Big Geyser**") (together, "**Defendants**") respectfully submit this memorandum of law in support of their motion to dismiss the July 15, 2021 complaint (the "**Complaint**") of plaintiff Preferred Beverage Distributors, Inc. ("**Plaintiff**") pursuant to CPLR § 3211(a)(5) and (7). For the reasons set forth below, Defendants' motion should be granted, and the Complaint should be dismissed, with prejudice.

PRELIMINARY STATEMENT

The Complaint in this action alleges that King Juice breached an oral beverage distribution agreement with Plaintiff by failing to pay Plaintiff an allegedly agreed upon "termination fee" following King Juice's lawful election to terminate that arrangement. The Complaint specifically alleges that Plaintiff is due a termination fee equal to twice the gross margin for each case of King Juice product sold in the preceding twelve (12) month period, and that King Juice did not pay such fee to Plaintiff following termination of the arrangement in or about 2020. Plaintiff asserts four causes of action against King Juice relating to the termination fee it alleges it is owed, namely (1) breach of contract, (2) promissory estoppel, (3) unjust enrichment and (4) fraud in the inducement. Plaintiff also alleges, in vague and non-specific terms and without any supporting facts, that Big Geyser committed "tortious interference" vis-à-vis Plaintiff's agreement with King Juice. As set forth below, Plaintiff does not state a cause of action against King Juice or Big Geyser, and the Complaint should be dismissed, with prejudice.

First, Plaintiff does not state a cause of action for breach of its alleged oral contract with King Juice because that alleged contract is unenforceable under New York's Statute of Frauds found at N.Y. Gen. Oblig. Law § 5-701(a). By Plaintiff's own pleading, the alleged distribution agreement—which is concededly not in writing—would require at least one year to complete and

is therefore unenforceable as an agreement which "[b]y its terms is not to be performed within one year from the making thereof."

Second, Plaintiff's claim for promissory estoppel is barred, as a matter of law, because a promissory estoppel cause of action cannot be stated where the alleged contract is barred by the statute of frauds except in the rare circumstances where an "unconscionable injury" would result. No such injury is alleged, nor could be alleged, here.

Third, Plaintiff also cannot state a cause of action for unjust enrichment because, like promissory estoppel, unjust enrichment cannot be used to circumvent the lack of a signed writing required by the Statute of Frauds. This claim also fails because Plaintiff does not allege, as it must, that King Juice is in possession of money or property that belongs to Plaintiff and that must be returned to Plaintiff as a matter of equity.

Fourth, Plaintiff's fraud claim alleges at most only a lack of sincerity with respect to a promise of future performance under a contract, and does not, by contrast, allege the intentional misrepresentation of any present, existing fact. Well-established law holds that a cause of action for fraud is not stated under these circumstances, and that Plaintiff's attempt to transform an alleged breach of contract into a fraud claim must be rejected. This claim also fails because Plaintiff does not allege that King Juice made any misrepresentation with scienter.

Finally, the sole claim asserted against Big Geyser, alleging tortious interference with contract, must also be dismissed for failure to state a cause of action. To state such a cause of action, a party must allege that the party sued intentionally procured a breach of an enforceable contract with a third party, and that the contract would not have been breached but for that conduct. However, the Complaint fails sufficiently to plead several of these elements—

including the existence of an enforceable contract between Plaintiff and King Juice, and Big Geyser's intentional procurement of a breach thereof—mandating dismissal of this claim as well.

For these reasons, as discussed in more detail below, Plaintiff's Complaint is lacking in numerous respects and fails to state any cause of action. The Complaint should therefore be dismissed pursuant to CPLR § 3211(a)(5) and (7). In addition, because any amendment would be futile, Plaintiffs should not be granted leave to amend following dismissal.

FACTS ALLEGED IN THE COMPLAINT[1]

Plaintiff is a marketer and distributor of beverage products in the New York metropolitan area and Long Island. (Compl. ¶ 4.) King Juice manufactures certain non-alcoholic beverage products, including the Calypso brand of lemonade drinks. (*Id.* ¶ 5.) Big Geyser is a beverage distributor that services accounts in New York City. (*Id.* ¶ 6.)

In or about 2014, representatives of King Juice approached Plaintiff to induce Plaintiff into taking on the marketing and distribution of King Juice beverages in New York City and Long Island. (*Id.* ¶ 12.) King Juice promised that Plaintiff would have the exclusive rights to distribute King Juice beverages in New York City and Long Island in specified trade classes, including convenience stores, gas stations, drug stores and certain concession/recreation establishments. (*Id.* ¶ 13.) King Juice promised Plaintiff it would pay an "invasion fee" of fifty cents per case for every case of King Juice beverages sold by third parties in Plaintiff's exclusive territory. (*Id.* ¶ 14.)

[1] To the extent any statement herein has been taken from the Complaint, it is assumed true only for purposes of this motion, and any such recitation shall not constitute or be construed as a concession by Defendants that such fact is true. (A true and accurate copy of the Complaint is annexed as **Exhibit A** to the accompanying Affirmation of Bradley P. Pollina, dated August 31, 2021.)

King Juice promised Plaintiff a "long term" commitment and "specifically that it would pay Plaintiff a termination fee in the event of a 'no cause' termination of Plaintiff's services" as distributor of King Juice beverages in New York City and Long Island. (Compl. ¶ 15.) The "promised and agreed upon termination fee" was to be "calculated based upon two (2) times the gross margin for each case sole in the preceding twelve (12) month period (the 'measuring period')." (*Id.*) "For example, if Plaintiff's gross margin were $4.50 a case during the measuring period, it would be entitled to a 'no cause' termination fee of $9.00 per case." (*Id.*) The Complaint alleges that Plaintiff agreed to become the distributor of King Juice beverages in New York City and Long Island based on these terms, and King Juice "promised a written distribution agreement containing" these terms. (*Id.* ¶¶ 16-17.) King Juice "sent several forms of written agreements to Plaintiff over the years" but "continually delayed final execution of same." (*Id.* ¶ 19.)

From in or about May 2014 through in or about 2020, Plaintiff "invested substantial time, money and labor in establishing and [sic] budling up the distribution" of King Juice beverages in New York City and Long Island. (*Id.* ¶ 18.) Plaintiff did so "in reliance upon the promises of" King Juice. (*Id.*) Plaintiff agreed to become and continue as a distributor of King Juice beverages "in reliance upon" King Juice's "representations and promises" and would not have become and/or continued as a distributor in the absence of same. (*Id.* ¶ 22.)

King Juice "breached its obligations to Plaintiff" by declaring a "no cause" termination of Plaintiff as distributor of King Juice beverages "and refusing to pay Plaintiff the agreed upon termination fee." (Compl. ¶ 23.) Plaintiff "sustained monetary damages on account of the 'no cause' termination of its distribution rights declared by" King Juice in that King Juice has not compensated Plaintiff "in the agreed upon sum (i.e., Termination Fee)." (*Id.* ¶ 29.)

Although Plaintiff also purports to assert a cause of action for tortious interference against Big Geyser, the Complaint makes no substantive factual allegations against Big Geyser whatsoever. Instead, the Complaint contains a scant few boilerplate assertions that merely track the elements of a tortious interference claim, without alleging any substantive, concrete facts as to any involvement of Big Geyser in events that could give rise to a cause of action. (*See* Compl. ¶¶ 63-70.)

LEGAL ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION.

A complaint must be dismissed where it is barred by the statute of frauds. CPLR § 3211(a)(5); *see generally SCE Assoc., Inc. v. Coglianese*, 179 A.D.3d 730, 730 (2d Dep't 2020). A complaint must also be dismissed where it fails to state a cause of action. *See* CPLR § 3211(a)(7). While the allegations in the complaint are to be "accepted as true" when considering a motion to dismiss, "allegations consisting of bare legal conclusions . . . are not entitled to any such consideration." *David v. Hack*, 97 A.D.3d 437, 438 (1st Dep't 2012) (quoting *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 (1999) (quotation marks omitted)).

The Complaint asserts four causes of action against King Juice, namely (1) breach of contract, (2) fraud, (3) unjust enrichment and (4) promissory estoppel. The Complaint also asserts a single cause of action, for tortious interference with contract, against Big Geyser. For the reasons discussed below, the Complaint must be dismissed with prejudice

A. Breach of Contract.

Plaintiff's breach of contract claim fails because, based on Plaintiff's own pleading, it is barred by the Statute of Frauds. Under New York law, a contract that "[b]y its terms is not to be performed within one year from the making thereof" is unenforceable unless memorialized in

writing "and subscribed by the party to be charged therewith." N.Y. Gen. Oblig. Law § 5-701(a)(1); *accord Multi-Juice, S.A. v. Snapple Beverage Corp.*, 2006 WL 1519981, at *10 (S.D.N.Y. June 1, 2006) ("[T]he Statute of Frauds forbids the imposition of a performance obligation on a defendant necessarily extending beyond one year, in the absence of a writing(s) which sets forth all of the essential terms of the agreement imposing that performance obligation.").

As an initial matter, it is undisputed that the alleged distribution agreement that Plaintiff seeks to enforce in this action was an oral one, and was not set forth in a writing signed by King Juice. (*See generally* Compl. ¶¶ 16, 19.) It is equally clear based upon Plaintiff's own pleading that the distribution agreement was not to be performed within one year of its making. The gravamen of the Complaint is the contention that King Juice did not pay a "termination fee" in an amount equivalent to "two (2) times the gross margin for each case sold ***in the preceding twelve (12) month period*** . . . ." (Compl. ¶ 15) (emphasis added). Thus, the very termination provision that Plaintiff seeks to enforce clearly indicates that the **agreement required more than one year to complete**, as there would be no way to calculate the "termination fee" Plaintiff claims to be owed were the agreement shorter. Indeed, the entirety of the damages Plaintiff seeks is the "termination fee" which would not be available, as a matter of law, unless the distribution agreement required more than one year to complete.

The facts and reasoning of *Boschan v. Steinmetz*, 2020 WL 2475848 (S.D.N.Y. May 13, 2020) are instructive. There, the alleged oral contract provided for distributions "several times a year." The court held the contract barred by the Statute of Frauds because an agreement that "contemplate[s] payment obligations extending beyond one year" is a contract that requires at least one year to complete and must be in writing under N.Y. Gen. Oblig. Law § 5-701. *Id.* at

*3. Similarly, in *Morgenweck v. Vision Capital Advisors, LLC*, 410 F. App'x 400 (2d Cir. 2011), the plaintiff sued under an alleged contract seeking some percentage of "annual profits." The agreement was held barred by N.Y. Gen. Oblig. Law § 5-701 because it is "impossible that annual profits could be earned and distributed within one year of the alleged agreement." *Id.* at 402. Here, as in *Boschan* and *Morgenweck,* it is **impossible** that Plaintiff could collect a termination fee based upon a **twelve-month measuring period** within one year of the making of the alleged agreement, and the agreement alleged in the Complaint therefore clearly contemplates payment obligations extending beyond one year. Because there was no signed document here that sets forth all of the essential terms of the agreement, the oral distribution agreement Plaintiff asserts is not enforceable, pursuant to N.Y. Gen. Oblig. Law § 5-701(a)(1), and Plaintiff's breach of contract claim must be dismissed.

B. Promissory Estoppel.

Next, Plaintiff's cause of action for promissory estoppel must be dismissed because (1) it is based upon an alleged contract that is barred by the Statute of Frauds, and (2) Plaintiff has not even remotely alleged the required "unconscionable injury" required to state a cause of action for promissory estoppel under such circumstances. Critically, "[i]f a contract is barred by the statute of frauds, a promissory estoppel claim is viable in the limited set of circumstances where unconscionable injury results from the reliance placed on the alleged promise." *Castellotti v. Free*, 138 A.D.3d 198, 204 (1st Dep't 2016). An "unconscionable injury" is "injury beyond that which flows naturally . . . from the non-performance of the unenforceable agreement." *Bent v. St. John's Univ., New York*, 189 A.D.3d 973, 976 (2d Dep't 2020) (citation and quotation marks omitted). In order to state a cause of action for promissory estoppel where the contract is barred by the Statute of Frauds, the complaint must **affirmatively allege** an unconscionable injury in reliance on the alleged promise. *Martin Greenfield Clothiers, Ltd. v. Brooks Bros. Grp., Inc.*,

175 A.D.3d 636, 638 (2d Dep't 2019); *accord Streit v. Bombart*, 187 A.D.3d 529, 531 (1st Dep't 2020) (same); *Melwani v. Jain*, 281 A.D.2d 276, 277 (1st Dep't 2001) (same).

In this case, Plaintiff sues under an alleged contract that is unenforceable pursuant to the Statute of Frauds, for the reasons discussed above. As a result, Plaintiff's promissory estoppel cause of action is unenforceable in the absence of factual allegations that Plaintiff has suffered an "unconscionable injury" in reliance on King Juice's alleged promises. There are, however, no such allegations of unconscionable injury in the Complaint. Rather, Plaintiff simply alleges that it is owed the same "termination fee" sought in relation to Plaintiff's breach of contract claim (Compl. ¶ 55), further demonstrating the absence of any alleged unconscionable injury. *See, e.g., Preferred Constr., Inc. v. Patriot Org. Inc.*, 64 Misc.3d 1222(A), at *4 (Sup. Ct. Suffolk Cty. 2019) ("An unconscionable injury must be one beyond that which flows naturally from the non-performance of the unenforceable agreement . . . . The plaintiff does not allege any such injury and, in fact, alleges the ***same damages*** as for breach of the joint-venture agreement.") (emphasis added). For these reasons, Plaintiff has not stated a cause of action against King Juice for promissory estoppel.

C. Unjust Enrichment.

Plaintiff likewise does not state a cause of action for unjust enrichment. "To state a cause of action to recover damages for unjust enrichment, a plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." *AHA Sales, Inc. v. Creative Bath Prod., Inc*., 58 A.D.3d 6, 19 (2d Dep't 2008) (citation and quotation marks omitted). "The essence of such a cause of action is that one party is in possession of money or property that rightly belongs to another." *Maple Medical, LLP v. Scott*, 191 A.D.3d 81, 99 (2d Dep't 2020) (citation omitted). "Generally, courts will look to see if a benefit has been conferred on the

defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent." *Goel v. Ramachandran*, 111 A.D.3d 783, 791 (2d Dep't 2013) (citation and quotation marks omitted).

The Complaint does not allege facts constituting circumstances in which the doctrine of unjust enrichment permits recovery. As discussed, the only manner in which Plaintiff claims that it is owed money by King Juice is in relation to King Juice's alleged failure to pay Plaintiff a "termination fee." (*See generally* Compl. ¶¶ 24, 29.) Plaintiff does **not** allege, in relation to that "termination fee" or otherwise, that it conferred a benefit on King Juice "under mistake of fact or law"; that King Juice "is in possession of money or property that rightly belongs to" Plaintiff; or that King Juice engaged in "tortious or fraudulent conduct." Thus, Plaintiff has failed in several ways to allege the facts necessary to state a cause of action for unjust enrichment. *Cf. Goel*, 111 A.D.3d at 792 (unjust enrichment claim dismissed where complaint pleaded only "bare legal conclusion[s]" instead of specific facts constituting unjust enrichment); *Oshy v. Koufa Realty Corp.*, 35 Misc.3d 1207(A), at *5 (Queens Cty. Sup. Ct. 2012) (dismissing unjust enrichment where plaintiff "failed to set forth any mistake of fact or law" permitting a ruling that defendants were "unjustly enriched").

In any event, Plaintiff's unjust enrichment claim must be dismissed for the additional, independent reason that such a claim cannot be used to circumvent the lack of an enforceable contract, as "litigants may not use such a claim to evade New York's statute of frauds." *Kocourek v. Booz Allen Hamilton Inc.*, 71 A.D.3d 511, 512 (1st Dep't 2010). That is, where an alleged agreement must be in writing pursuant to the Statute of Frauds, "the necessity of a writing may not be circumvented by the simple expedience of recasting the action as one seeking

damages for unjust enrichment." *J.E. Capital, Inc. v. Karp Family Assocs.*, 285 A.D.2d 361, 362 (1st Dep't 2001). As discussed above, the alleged beverage distribution contract under which Plaintiff sues is barred by the Statute of Frauds. Plaintiff's cause of action denominated as one for unjust enrichment therefore should be dismissed pursuant to well-established authority. *Cf. Berhman v. Red Flower, Inc.*, 61 Misc.3d 1217(A), at *5 (Sup. Ct. N.Y. Cty. 2018) ("[T]he oral agreement is barred by the statute of frauds, which plaintiffs may not circumvent by invoking quantum meruit or unjust enrichment."). For these reasons, Plaintiff does not state a cause of action against King Juice for unjust enrichment.

D. Fraud in the Inducement.

The final cause of action Plaintiff asserts against King Juice is one alleging "fraud in the inducement." The purported basis for this claim is that King Juice represented to Plaintiff that "it would pay Plaintiff a termination fee in the event of a 'no cause' termination of Plaintiff's services as a distributor" of King Juice beverages, but that Plaintiff "has been denied its promised termination fee despite the 'no cause' termination of its services by King Juice." (Compl. ¶¶ 31, 42.) This cause of action fails because it alleges, at most, a lack of sincerity to perform under a contract, and does not allege the misrepresentation of any present, existing fact on which to premise a claim of fraud. The Complaint also fails to allege that King Juice made any misrepresentation with scienter.

A claim denominated as one for "fraudulent inducement" has the "same elements" as a claim alleging fraud. *See, e.g., Hong Leong Finance Ltd. (Singapore) v. Morgan Stanley*, 44 Misc.3d 1231(A), at *6 (Sup. Ct. N.Y. Cty. 2014). "The required elements of a common-law fraud claim are 'a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.'"

Ambac Assurance Corp. v. Countrywide Home Loans, Inc., 31 N.Y.3d 569, 578-79 (2018) (quoting *Pasternack v. Laboratory Corp. of Am. Holdings*, 27 N.Y.3d 817, 827 (2016) (brackets omitted)). A complaint alleging common law fraud must also satisfy the "heightened pleading requirements" set forth in CPLR § 3016(b). *Electron Trading, LLC v. Morgan Stanley & Co. LLC*, 157 A.D.3d 579, 581 (1st Dep't 2018). CPLR § 3016(b), in turn, provides: "Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." Plaintiff falls far short of stating a cause of action for fraud against King Juice under this standard.

As relevant here, in order to establish fraud, a plaintiff must show "a material misrepresentation of an ***existing fact***, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages." *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 293 (1st Dep't 2011) (emphasis added); *see also William Doyle Galleries, In. v. Stettner*, 167 A.D.3d 501, 509 (1st Dep't 2018) (fraud claim requires "false representation of an existing fact"). By contrast, a fraud claim is not stated when, as is the case here, "the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract." *First Bank of Americas v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 291 (1st Dep't 1999). That is, an allegation of an "insincere promise of future performance under . . . [a] contract" does not support a fraud claim. *Castellotti*, 138 A.D.3d at 211. Thus, to state a cause of action for fraud, "the pleadings must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract." *Wyle Inc. v. ITT Corp.*, 130 A.D.3d 438, 439 (1st Dep't 2015).

As noted above, Plaintiff's fraud claim is premised on the alleged statement by King Juice that, in the event of a "no cause" termination, King Juice would pay Plaintiff a "termination fee." (Compl. ¶¶ 31, 42.) That statement cannot form the basis for a fraud claim because at most, if the statement was not in fact true, it represents only a "misrepresentation[ ] of future intent to perform under the contract." *Wyle*, 130 A.D.3d at 439. Simply put, the Complaint fails to allege a misrepresentation of any ***existing fact*** as is required to state a claim for fraud. In fact, the relevant portion of Plaintiff's own pleading underscores the lack of any alleged misstatement of an **existing** fact and instead, repeatedly reinforces that the only representation at issue concerned the **future intent to perform** under the alleged distribution agreement. (*See* Compl. ¶ 31) (King Juice allegedly represented that it ***would*** pay Plaintiff a termination fee in the event of a "no cause" termination) (emphasis added).

This claim also fails, and must be dismissed, because the Complaint does not allege any facts that would permit the Court to draw the required inference of scienter on the part of King Juice. "A fraud claim is not actionable without evidence that the misrepresentations were made with the intent to deceive." *Friedman v. Anderson*, 23 A.D.3d 163, 167 (1st Dep't 2005). And it is not sufficient to "merely assert[ ] that [a defendant] knew his representations were false." *Id.* at 166; *see also Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Robert Christopher Assocs.*, 257 A.D.2d 1, 9 (1st Dep't 1999) ("[A] mere recitation of the elements of fraud is insufficient to state a cause of action . . . .").

The Complaint here makes only the boilerplate and conclusory allegation that King Juice made a misrepresentation "with full knowledge" of its "false nature and/or complete disregard" for its "truth or falsity." (Compl. ¶ 37.) But that terse, non-specific pleading of a critical element of this cause of action clearly does not support a reasonable inference that King Juice made any

statements with the intent to defraud Plaintiff under the CPLR's heightened pleading standard. *Cf. Phoenix Life Ins. Co. v. Town of Oyster Bay*, 186 A.D.3d 763, 767 (2d Dep't 2020) (fraud cause of action not stated where complaint "alleges fraudulent intent in a bare and conclusory manner"); *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495-96 (1st Dep't 2005) ("conclusory statement of intent" deemed not adequate to "plead sufficient details of scienter"); *Giant Group v. Arthur Andersen LLP*, 2 A.D.3d 189, 190 (1st Dep't 2003) (affirming dismissal of fraud claim where "allegations of scienter [were] not pleaded with the requisite particularity, but [were] conclusory, failing to set forth facts from which scienter may be inferred"); *Zutty v. Rye Select Broad Mkt. Prime Fund, L.P.*, 33 Misc. 3d 1226(A), at *11 (Sup. Ct. N.Y. Cty. 2011) (dismissing fraud claim where "plaintiffs merely conclusorily assert[ed], with no supporting factual allegations, that '[a]t the time of making these misrepresentations, the Funds knew such representations were false or made them recklessly without knowing whether they were true or false,'" reasoning that "[s]uch boilerplate allegation is insufficient to plead scienter"). Thus, Plaintiff fails to state a cause of action for fraud against King Juice for this reason as well.

E. <u>Tortious Interference.</u>

Lastly, Plaintiff asserts a claim for "tortious interference" against Big Geyser, only. Plaintiff fails here, too, to state a cause of action. Indeed, as discussed above, the Complaint makes only barebones, conclusory allegations as to Big Geyser without making any substantive factual allegations about any involvement of Big Geyser in events that could give rise to a cause of action. (*See* Compl. ¶¶ 63-70.)

"The elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages." *Nagan Constr., Inc. v Monsignor*

McClancy Mem. High Sch., 117 A.D.3d 1005, 1006 (2d Dep't 2004). "Further, the plaintiff 'must specifically allege that the contract would not have been breached but for the defendant's conduct.'" *Barry's Auto Body of NY, LLC v. Allstate Fire & Cas. Ins. Co.*, 190 A.D.3d 807, 810 (2d Dep't 2021) (quoting *Ferrandino & Son, Inc. v. Wheaton Bldrs., Inc.*, LLC, 82 A.D.3d 1035, 1036 (2d Dep't 2011)).

First and foremost, Plaintiff's sole claim against Big Geyser fails because the alleged contract between Plaintiff and King Juice is barred by the Statute of Frauds. Plaintiff thus cannot allege the "existence of a valid contract between the plaintiff and a third party." *Nagan Constr.*, 117 A.D.3d at 1006; *accord Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996) ("Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party . . . .").

This claim also fails because the Complaint here merely alleges—without any elaboration whatsoever—that Big Geyser knew of the alleged contract between Plaintiff and King Juice and "intentionally induced Defendant King Juice to breach its agreement with Plaintiff." (Compl. ¶ 65.) This boilerplate and conclusory allegation, devoid of any supporting facts, is insufficient to support a cause of action for tortious interference because, in order to state such a cause of action, a plaintiff must "allege ***specific conduct*** by [Defendant] intended to induce a breach" of the agreement at issue. *Klein v. Deutsch*, 193 A.D.3d 707, 710 (2d Dep't 2021) (emphasis added); *accord Kimso Apts., LLC v. Rivera*, 180 A.D.3d 1033, 1035 (2d Dep't 2020) (affirming dismissal of tortious interference claim where "the amended complaint failed to sufficiently allege specific conduct by the defendants intended to induce a breach of the underlying" contracts); *Schuckman Realty, Inc. v. Marine Midland Bank, N.A.*, 244 A.D.2d 400, 401 (2d Dep't 1997) (affirming dismissal of tortious interference claim where allegation of intentional

procurement of breach was "devoid of a factual basis" and was "vague and conclusory"). Likewise, this claim fails because Plaintiff has not alleged with any factual specificity that the underlying distribution agreement "would not have been breached but for" any conduct of Big Geyser. *See, e.g.*, *Barry's Auto Body*, 190 A.D.3d at 810 (affirming dismissal of tortious interference claim where "the complaint failed to sufficiently allege that the contracts . . . would not have been [breached] but for the . . . defendants' actions"); *Kimso*, 180 A.D.3d at 1035 (affirming dismissal of claim where complaint failed to sufficiently allege "contract would not have been breached but for the defendant's conduct"). For these reasons, Plaintiff has not stated a cause of action against Big Geyser for tortious interference with contract. *See also Bonanni v. Straight Arrow Publishers, Inc.*, 133 A.D.2d 585, 587 (1st Dep't 1987).

II. PLAINTIFF SHOULD NOT BE GRANTED LEAVE TO AMEND FOLLOWING DISMISSAL.

The Court should dismiss the Complaint, with prejudice, and Plaintiff should not be granted leave to amend. The Complaint is deficient as a matter of law, for the numerous reasons discussed above. Better pleading will not cure those deficiencies, and repleading would thus be futile. Leave to amend following dismissal should therefore be denied. *See, e.g.*, *Carroll v. McKinnell*, 19 Misc. 3d 1106(A), at *11 (N.Y. Sup. Ct. N.Y. Cty. 2008) ("[I]t is well-settled that a complaint should be dismissed with prejudice where the plaintiff is unable to adequately allege facts sufficient to support his or her claims" and thus "amendment of the complaint would be futile").

CONCLUSION

For the reasons set forth above, (1) Plaintiff's claims against King Juice for breach of contract, promissory estoppel, unjust enrichment and fraud should be dismissed, with prejudice;

and (2) Plaintiff's claim against Big Geyser for tortious interference with contract should be dismissed, with prejudice.

DATED: New York, New York
August 31, 2021

COLE SCHOTZ P.C.

By: */s/ Bradley P. Pollina*

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SUPREME COURT – NEW YORK – STATEMENT AS TO LENGTH OF PAPERS

I hereby certify that the foregoing memorandum was prepared on a computer using Microsoft Word.

The total number of words in this memorandum, inclusive of point headings and footnotes and exclusive of the caption, table of contents, table of authorities, signature block, and this Statement is 4,896.

Dated: New York, New York
August 31, 2021

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