IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ENCITE LLC, Plaintiff, v. ROB SONI, JAMES DOW, RICK D. HESS, FRANKLIN WEIGOLD, ECHELON VENTURES, L.P., a Delaware limited partnership, ECHELON VENTURES SPECIAL LIMITED PARTNERS I, L.P., a Delaware limited partnership, and ECHELON VENTURES II, L.P., a Delaware limited partnership, Defendants, and ECHELON VENTURES, L.P., a Delaware limited partnership, ECHELON VENTURES SPECIAL LIMITED PARTNERS I, L.P., a Delaware limited partnership, and ECHELON VENTURES II, L.P., a Delaware limited partnership, Defendants/Third Party Plaintiffs, v. STEPHEN MARSH, AARON KLEINER and JEFFREY SETRIN, Third Party Defendants.	)	C.A. No. 2476-CC

MEMORANDUM OPINION

Date Submitted: April 7, 2008
Date Decided: August 1, 2008

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CHANDLER, Chancellor

I. BACKGROUND

A. Nature and Stage of Proceedings

This case arises from the failure of Integrated Fuel Cell Technologies, Inc. ("IFCT" or the "Company"), a start up company headquartered in Massachusetts and incorporated under the laws of Delaware. IFCT focused on development of fuel cell technology. Though it had received financing from venture capitalists and other investors, IFCT ultimately failed and filed for bankruptcy protection in 2006. Plaintiff Encite LLC ("Encite") purchased IFCT's assets from IFCT's bankruptcy estate. Encite then filed suit against former IFCT directors and former IFCT investors Echelon Ventures, L.P., Echelon Ventures Special Limited Partners I, L.P., and Echelon Ventures II, L.P. (collectively, "Echelon" or "Third Party Plaintiffs"). The director defendants and Echelon moved to dismiss the amended complaint pursuant to Rule 12(b)(6). On September 4, 2007, this Court dismissed Encite's claim for breach of the covenant of good faith and fair dealing against Echelon, but denied the motion as to the breach of fiduciary duty claim against the director defendants and the aiding and abetting claim against Echelon.

Echelon later amended its answer to include a third party complaint against Stephen Marsh ("Marsh"), Aaron Kleiner ("Kleiner"), and Jeffrey Setrin ("Setrin" and, together, "Third Party Defendants"). Echelon asserts claims against Marsh

for breach of the implied covenant of good faith and fair dealing; against Marsh and Setrin for tortious interference with a prospective business relationship; and against all Third Party Defendants for civil conspiracy and contribution.

Now before me are the motions to dismiss the third party complaint pursuant to Rule 12(b)(6) filed by Third Party Defendants; Marsh and Kleiner move together and Setrin moves separately.

B. Facts[1]

Echelon's story of IFCT's ultimate demise features Marsh, the founder and former director and shareholder of IFCT, who is now the majority owner of Encite. Marsh allegedly conspired with Kleiner, a former director and shareholder of IFCT, and Setrin, a former IFCT shareholder. Together, Echelon alleges, they effected a scheme whereby Marsh, through Encite, purchased the assets of the Company in bankruptcy after Marsh destroyed the Company by putting his own interests ahead of those of the Company, thwarting the Company's efforts to hire a new CEO, obstructing the efforts of IFCT to obtain new equity financing, and conspiring with Kleiner and Setrin to prevent the sale of IFCT to Echelon and other investors.

[1] The facts recited here are alleged in Echelon's third party complaint.

1. IFCT Receives Capital: The Series B Financing

By May 2003, despite previous successful efforts to raise capital, IFCT was again in need of cash. At this time, Marsh was the Company's CEO and Kleiner was a director on its board. Echelon agreed to lead the next round of financing (the "Series B Financing"). Echelon and IFTC entered into a term sheet, which included as a key term the hiring of a new CEO. Echelon alleges that it would not have participated in the Series B Financing without this term because Echelon, along with the other investors participating in the Series B Financing ("Series B Investors") thought Marsh lacked the skills and experience necessary to grow IFCT into a prosperous business. Echelon contends that Marsh was so adverse to relinquishing control of the Company that, in early July 2003, he even attempted to abandon the financing. Despite these purported tribulations, the Series B Financing eventually closed.

Among other terms and in addition to the term providing for the hiring of a new CEO, the Series B Financing also provided a liquidation preference of the Series B stock (equal to twice the original investment plus accrued dividends, the "2X Preference"). This 2X Preference would be reduced if the Company replaced Marsh with a qualified CEO within one year of closing (*i.e.*, by July 10, 2004).

2. IFCT Hires a New CEO

Echelon next asserts that Marsh allegedly frustrated, interfered with, blocked, and resisted the search for the new CEO. In February 2004, Marsh signed a letter that Echelon characterizes as Marsh's confirmation that he would not interfere with the search for and hiring of a replacement CEO. Not until Marsh signed this letter, Echelon contends, was the process for selecting a new CEO finally able to get underway. By that time, the July 10, 2004 deadline—the date by which a new CEO must have been in place or else the 2X Preference would not be reduced to 1X—was fast approaching. Echelon alleges that Marsh and Kleiner concocted a scheme to appoint Kleiner's friend as a "puppet CEO" whom Marsh would control. Despite Marsh's alleged machinations, such as apparently calling the meeting on short notice so that opposing directors would be unable to vote their opposition, the so-called scheme was thwarted when no majority vote to approve was obtained.

Thus, though IFCT failed to hire a new CEO by the July 10, 2004 deadline, Echelon contends that Marsh nevertheless continued to frustrate the hiring of a replacement CEO. Marsh's alleged attempt to remove a director to deadlock the board, and further impede the search for a CEO, ultimately failed. Echelon insists that Marsh's behavior became what it describes as increasingly erratic and

disruptive to IFCT to the extent that it caused concern that Marsh's behavior was harming the Company. Sometime in 2004, Echelon alleges that Marsh's actions demonstrated that he, along with Kleiner and "possibly others," decided that if Marsh could not control the Company as its CEO, he would drive the Company into the ground and obtain the assets for himself. Finally, in October 2004, IFCT hired a new CEO, Rick Hess ("Hess").

3. IFCT Searches for Operational Financing

Echelon alleges that Marsh also frustrated IFCT's search for operational financing. In 2005, IFCT began to suffer liquidity problems, which Echelon attributes at least in part to the delay in hiring a qualified CEO that was allegedly caused by Marsh and Kleiner. In response, Echelon and other investors loaned IFCT $1.1 million.

During the first half of 2005, IFCT was unable to obtain financing from any additional investors because, Echelon contends, Marsh insisted that the pre-money valuation of IFCT was no less than $18 million. Echelon alleges that Marsh insisted on this valuation because any lesser valuation would dilute the value of his equity ownership.

In September 2005, the board considered a financing proposal from OnPoint Technologies ("OnPoint"), one of the Series B Investors. Given OnPoint's

investments in energy companies and its experience in the area, OnPoint's proposal was, Echelon contends, a good market indicator of IFCT's value. OnPoint's pre-money valuation of the Company was $5 million and its proposal required Marsh's resignation from the board. Echelon alleges that Marsh, who controlled 30% of IFCT's voting interest, vocalized his intention to vote against the proposal if it was submitted to the shareholders and that, because Marsh allegedly also influenced at least another 20% of the voting interest, the board concluded that it was unlikely that the OnPoint proposal would obtain shareholder approval. Therefore, the board rejected OnPoint's financing proposal and instead authorized Hess to wind-down IFCT's business affairs and sell the assets of the Company. Soon after Hess was authorized to wind-down IFCT, he terminated Marsh's employment.

4. IFCT Attempts to Obtain Wind-Down Financing

IFCT sought financing to fund the wind-down through the end of 2005 while searching for a buyer of its assets. Echelon, with other Series B Investors and other stockholders (collectively, the "Investor Group"), proposed a loan to IFCT to cover operations in exchange for a note, secured by IFCT's intellectual property, which would require a repayment of twice the principal amount. In October 2005, Marsh, on behalf of Kleiner and a group of potential outside investors

(collectively, the "Marsh Group"), submitted a competing bid with terms almost identical to those of the Investor Group's financing; Marsh's proposal did not include the twice principal repayment term. The Investor Group then amended its proposal and eliminated the security interest in IFCT's assets. In addition, IFCT would not be required to satisfy the twice principal repayment term if the Investor Group's note was used in a bid to purchase IFCT's assets. Echelon contends that Marsh refused to amend the Marsh Group's proposal to eliminate the security interest in IFCT's assets because this would undermine his goal of maintaining control. The board ultimately approved the Investor Group's amended financing proposal.

5. The IFCT Assets Purchase Proposals

IFCT, assisted by all Series B Investors (including Echelon) and all board members (except Marsh), conducted a search for potential buyers of IFCT's assets, which Echelon avers was derailed by Marsh, Kleiner, and Setrin. In September 2005, Marsh made an offer to purchase IFCT's assets on behalf of a not-yet-formed company (the "Marsh Group Bid"). The bid proposed to acquire substantially all of IFCT's assets and certain liabilities in exchange for a cash payment of $215,000, the cancellation of certain debts (including a disputed severance payment allegedly owed to Marsh), and a 1% royalty on the future sales

up to $25 million. Echelon states that the value of the potential royalty was speculative, at best, and that Marsh's own advisors later valued a similar royalty at less than $100,000. Echelon contends that the Marsh Group Bid was far inferior to OnPoint's financial proposal that valued FICT at $5 million, which Marsh rejected in 2005. Under the terms of the Marsh Group Bid, IFCT's common and Series A shareholders would receive money from potential royalty payments not until and only if the Series B Investors first received approximately $13 million in royalties plus accrued dividends pursuant to the twice principal preference. Thus, Echelon concludes, if the Marsh Group Bid were accepted, the common and Series A shareholder likely would never receive any money from royalty payments. By February 2006, the board had rejected the Marsh Group Bid and all other bids made to that date.

In March 2006, Echelon and the other Series B Investors submitted a proposal for IFCT's assets. The terms of this proposal (the "Series B Bid") provided: (1) the Series B Investors would waive their right to the 2X Preference; (2) the Series B Investors would form a new corporation and exchange the Investor Group note[2] for stock in the new corporation; and (3) all IFCT stockholders, on an as-if converted to common stock basis, would receive royalty payments of 3% on

[2] Pursuant to the terms of the wind-down Investor Group financing, because the Investor Group note was being used in a bid for IFCT's assets, the twice principal payment term in the Investor Group note was also waived.

all revenue generated by the purchased assets over $10 million, with a cap of $7 million. The Series B Bid was later amended to include an additional cash payment.

Marsh then submitted a new bid (the "Second Marsh Group Bid"). This revised bid included $500,000 in cash, which continued to include the allegedly dubious debt asserted by Marsh and his disputed severance payment, and a royalty payment of 2% on all revenue generated by the purchased assets up to $20 million to commence four years after closing. Echelon insists that the Second Marsh Group Bid's refusal to waive the 2X Preference, which was a component of the Series B Bid, was crucial to IFCT's common and Series A shareholders. The Series B Bid proposed to distribute revenue on future royalties to all IFCT stockholders on an equal basis. In contrast, under the Second Marsh Group bid, common and Series A shareholders would not receive any money from future royalties until those royalties exceeded the 2X Preference, which, with accrued dividends, approached $13 million.

In any event, on March 31, 2006, the board voted to approve the Series B Bid. The board considered and reviewed a draft solicitation to IFCT stockholders requesting shareholder approval of the sale of IFCT's assets (the "Draft Solicitation"). The Draft Solicitation, which was designated "IFCT Confidential,"

was distributed to the board for review. Though the Draft Solicitation disclosed that certain board members had a financial interest in the Series B Bid, it did not identify the members by name. The Draft Solicitation was later revised to include specific names before it was distributed to the IFCT shareholders (the "Final Solicitation").

6. The Setrin Lawsuit

As a member of the board, Marsh was given a copy of the Draft Solicitation. Marsh then, Echelon alleges, misappropriated the Draft Solicitation by giving it to Setrin without the permission of IFCT or the board. Echelon alleges that Marsh's purpose in doing so was clear: Echelon contends that Marsh was furious that his bid was rejected and so Marsh intended to disrupt the sale of assets to the Series B Investors and seize the assets for himself.

Echelon concludes that Setrin, by accepting the Draft Solicitation, acted in concert with Marsh. Setrin filed suit to enjoin the sale of IFCT's assets pursuant to the Series B Bid (the "Setrin Lawsuit"). Echelon alleges that the Setrin Lawsuit contained a number of other omissions: first, that Setrin had filed suit "at Marsh's behest;" second, that Setrin had received the "stolen" Draft Solicitation from Marsh, an IFCT board member and bidder for IFCT's assets; and, third, that the Series B Bid waived the 2X Preference, which was a key element of the bid.

On or about the same day that Setrin filed suit, Marsh sent a letter to all IFCT shareholders urging them to reject the Series B Bid and approve the Second Marsh Group Bid instead. Echelon contends that, on this same day, the IFCT board sent the Final Solicitation, which disclosed the identities of the board members who had a financial interest in the Series B Bid.

Later, when they learned of the lawsuit, director defendants Soni, Weigold, Hess, and Dow resigned from the board. Echelon contends that, though the Setrin Lawsuit was baseless, the director defendants resigned because IFCT had no funds with which to defend the lawsuit and IFCT's director and officer insurance policy was soon to expire.

On April 6, 2006, CEO Hess informed IFCT shareholders that IFCT was withdrawing the Final Solicitation to approve the Series B Bid.

7. The Bankruptcy Process and Purchase of the IFCT Assets

After the director defendants resigned, Marsh was left as the sole director of the Company. In April 2006, Marsh caused IFCT to file for relief under Chapter 11 of the Bankruptcy Code.[3] Counsel for IFTC and its chief restructuring officer, both of whom were selected by Marsh, conducted the bankruptcy auction. Marsh participated in the bankruptcy process as a director and lender of IFCT, and also as

[3] Echelon alleges that Marsh caused IFCT to enter into a debtor-in-possession loan with a new entity established by Marsh, though, Echelon contends, the loan had no other purpose than to pay the administrative costs of the bankruptcy.

the leader of one group bidding for IFCT's assets (the "March Bankruptcy Bid"). This conflict of interest apparently was sufficiently serious that the United States Trustee filed a motion to convert the case to a Chapter 7 and appoint a Chapter 7 trustee. The Series B Investors also submitted a bid (the "Series B Bankruptcy Bid") with cash components similar to those of the March Bankruptcy Bid. Ultimately, the Marsh Bankruptcy Bid was accepted as the higher offer.

Echelon alleges that filing for bankruptcy would not have been necessary had Marsh not interfered with the Series B Bid or intended to use the bankruptcy process to acquire IFCT's assets for himself at a discount.

II. LEGAL STANDARDS

On a motion to dismiss for failure to state a claim,[4] a complaint will be dismissed only if it appears with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, a plaintiff would not be entitled to the relief sought.[5] In considering this motion, the Court must assume the truthfulness of all well-pleaded facts in the third party complaint and must draw all reasonable inferences that may logically flow from the face of the complaint in

[4] *See* Ct. Ch. R. 12(b)(6).
[5] *E.g.*, *Sample v. Morgan*, 914 A.2d 647, 662 (Del. Ch. 2007) (citing *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 610–11 (Del. 2003)); *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985).

favor of the nonmovant, Echelon.[6] Though vague allegations may be well-pleaded so long as they give the opposing party notice of the claim,[7] the Court need not accept as true conclusory statements unsupported by fact.[8] In addition, the Court is also permitted to consider the unambiguous terms of documents incorporated by reference in the complaint when the documents are integral to the plaintiff's claims.[9]

III. ANALYSIS

A. Count I: Tortious Interference with a Prospective Business Relationship

Echelon alleges that Marsh and Setrin tortiously interfered with Echelon's potential business relationship with IFCT, which was Echelon's attempt to acquire IFCT's assets.[10] As a threshold matter, the parties dispute whether Massachusetts or Delaware law applies to this claim. Echelon contends that, because Marsh's alleged conduct substantially occurred in Massachusetts, Massachusetts law applies. Marsh agrees to assume that, only for the purpose of this motion and only for this claim, Massachusetts law applies, whereas Setrin insists that Delaware law

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[6] *See, e.g.*, *Sample*, 914 A.2d at 662 (citing *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001)).
[7] *E.g.*, *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).
[8] *E.g.*, *id.*; *see also Sample*, 914 A.2d at 662 (citing *Grobow v. Perot*, 539 A.2d 180, 187 n.6 (Del. 1988)).
[9] *E.g.*, *Sample*, 914 A.2d at 662; *Trenwick Am. Litig. Trust v. Ernst & Young, LLP*, 906 A.2d 168, 188 n.55 (Del. Ch. 2006) (citing cases).
[10] Though it appeared that Echelon also asserted this claim against Kleiner, *see* Third Party Compl. at ¶ 3, Echelon acknowledges that it does not assert a claim against Kleiner at this time, Echelon's Opp'n Br. at 21 n.10.

should apply to him because the Setrin Lawsuit was filed in Delaware.[11] Setrin, however, concedes that the "result would be the same" under either Massachusetts or Delaware law.[12] Because Setrin so concedes and Marsh so assumes, this Court will, for the limited purpose of resolving this motion to dismiss, also assume that Massachusetts law applies to the tortious interference claims asserted against Marsh and Setrin.

Under Massachusetts law, to establish a claim for tortious interference with a prospective business relationship, Echelon must establish: (1) Echelon had a business relationship for economic benefit with a third party; (2) Marsh and Setrin knew of that relationship; (3) Marsh and Setrin interfered with that relationship through improper motive or means; and (4) Echelon's loss of the economic advantage was directly caused by Marsh and Setrin's conduct.[13]

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[11] Under the Restatement's "significant relationship" test utilized in a conflicts of law analysis, *see Travelers Indemn. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991) (citing RESTATEMENT (SECOND) OF CONFLICTS §§ 6, 145(1) (1971)), Echelon contends that Massachusetts law would apply to its claim against Setrin because the alleged injury to Echelon occurred in Massachusetts, all parties except Setrin are domiciled in Massachusetts, no party is domiciled in Delaware, and both Echelon and IFCT are headquartered in Massachusetts. In any event, however, both states have adopted section 766B of the Second Restatement of Torts, *see Empire Fin. Servs. Inc. v. The Bank of New York*, 900 A.2d 92, 98 n.20 (Del. 2006); *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20, 23 (Mass. 1990), and both Massachusetts and Delaware require the same elements to be pleaded to state a claim for tortious interference with a prospective business relationship, *compare Driscoll v. MacLean*, No. 044453, 2005 WL 2527199, at *3 (Mass. Super. Ct. Sept. 13, 2005), *with Enzo Life Scis., Inc. v. Digene Corp.*, 295 F. Supp. 2d 424, 429 (D. Del. 2003), so there is no distinction that also makes a difference.

[12] Setrin Opening Br. at n.20.

[13] *See Cavicchi v. Koski*, 855 N.E.2d 1137, 1142 (Mass. App. Ct. 2006); *Kurker v. Hill*, 689 N.E.2d 833, 838 (Mass. App. Ct. 1998).

1. Echelon's Prospective Relationship with IFCT

Tortious interference first requires a relationship between the plaintiff and a third party; one who is party to the contract cannot be held liable for intentional interference.[14] Echelon alleges that Marsh and Setrin impermissibly interfered with its proposed contractual relationship with IFCT, as set forth in the Series B Bid, which the IFCT board of directors had approved. Echelon further alleges that it would have economically benefitted from the transaction because Echelon, along with the other Series B investors, intended to purchase IFCT's assets and, utilizing IFCT's intellectual property, continue to develop the fuel cell technology.

Marsh contends that he cannot be liable for the alleged tortious interference with Echelon's business relationship with IFCT because, as a director of IFTC, he was a party to the proposed Echelon-IFCT transaction. Marsh, relying on *Harrison v. NetCentric Corp.*,[15] concludes that, as a director and major stockholder of IFCT, he is regarded a party to the proposed relationship and, therefore, Echelon has failed to allege that Marsh interfered with Echelon's relationship with a third party.

[14] *Harrison v. NetCentric Corp.*, 744 N.E.2d 622, 632 (Mass. 2001) (citing *Appley v. Locke*, 487 N.E.2d 501, 503 (Mass. 1986) (employer cannot be liable for interference with employee's contract with employer); *Mailhiot v. Liberty Bank & Trust Co.*, 510 N.E.2d 773, 777 (Mass. App. Ct. 1987) (same)).
[15] 744 N.E.2d 622 (Mass. 2001).

In *Harrison*, the plaintiff filed suit against, among others, the CEO of a close corporation for tortious interference, alleging that the CEO interfered with plaintiff's employment contract.[16] The court first observed that, to maintain a tortious interference claim that defendants tortiously interfered with his contractual relations by terminating his employment to repurchase his unvested shares, plaintiff had to demonstrate that the CEO was not a party to plaintiff's at-will employment contract.[17] The court recognized that there are certain situations in which the defendant and the corporation are "indistinguishable" and so the former cannot be liable for tortious interference with plaintiff's relationship with the latter.[18] The court in *Harrison* then specifically noted that, on the summary judgment record before it, whether the CEO—who was also the founder of the company, the chairman of the board, and a large shareholder of the closely held corporation—and the close corporation itself were indistinguishable presented a question of material fact.[19] In addition, the record indicated that the CEO alone made the decision to fire the plaintiff.[20] Even collectively, however, these facts did not enable the *Harrison* Court to conclude, as a matter of law, that the CEO

[16] *See Harrison v. NetCentric Corp.*, 744 N.E.2d 622, 625 (Mass. 2001).
[17] *See id.* at 625, 631.
[18] *See id.* at 632 (discussing that director could not be sued in tort for tortious interference where director was sole stockholder of corporation so that corporation and director were indistinguishable).
[19] *Id.* at 633.
[20] *Id.*

"controlled the operation of the corporation to the degree that he should be viewed as its alter ego."[21]

Against the backdrop of *Harrison* and drawing all reasonable inferences in favor of Echelon, I can conclude on the record before me that Echelon has alleged sufficient facts to show that Marsh and IFCT are distinguishable. Though Echelon has alleged certain facts that may support a determination that Marsh and IFCT were indistinguishable—that Marsh was founder, director, stockholder, and former CEO of IFCT—Echelon also notes that Marsh was on the outside of the proposed Echelon-IFCT transaction.[22] Because he was considered an interested director with respect to the Marsh Group bid, he was not permitted to participate in any

[21] *Id.*

[22] Echelon Opp'n Br. at 26 (citing Am. Compl. at ¶ 46 ("[B]ecause Marsh was considered an interested director with respect to the Marsh Group's offers, he was excluded from any board meetings at which these offers were discussed.")). A motion to dismiss is typically converted into a motion for summary judgment when the trial court considers matters outside of the complaint. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d at 168 (citing *Malpiede v. Townson*, 780 A.2d at 1090). "Nevertheless, in some instances and for carefully limited purposes, it may be proper for a trial court to decide a motion to dismiss by considering documents referred to in a complaint." *Id.* (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995)). Here, I may consider only that this assertion was made, and not the truth of the assertion. *See Vanderbilt Income and Growth Associates, L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996). Also mindful that, on a motion to dismiss, I must assume the truth of all well-pleaded allegations in Echelon's third party complaint, I do not find that Echelon's reference to Encite's amended complaint is an improper attempt to amend any perceived pleading deficiency and therefore conclude that I may properly consider this reference in deciding the motion to dismiss. *See Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 155 (Del. Ch. 2003) ("Parties may not amend the pleadings through briefing on a motion to dismiss") (internal citations omitted).

board evaluation of bids submitted by other parties.[23] In addition, Marsh alone did not decide to withdraw the Final Solicitation to approve the Series B Bid; the board, on behalf of IFCT, did. Thus, I can conclude that Echelon has alleged facts that either themselves are sufficient (or from which a reasonable inference may be drawn) that Marsh and IFCT were distinguishable when, even on the record before it, the *Harrison* court was unable to determine, as a matter of law, that the CEO and close corporation in that case were one and the same for purposes of the tortious interference claim.

Setrin also contends that he was party to the proposed transaction. Setrin argues that, because he was an IFCT stockholder, he was a party to the potential Echelon-IFCT transaction and, therefore, cannot be liable for tortious interference. Because I find, below, that Setrin was privileged in filing the Setrin Lawsuit, I need neither address nor resolve Setrin's argument that he was party to a transaction between the company in which he owned stock and a third entity that had a prospective business relationship with that company.

[23] Echelon Opp'n Br. at 26 (citing Am. Compl. at ¶ 46). *See supra* n.24.

2. Interference Through Improper, or Malicious, Motive or Means

a. Improper Motive or Means

To state a claim of tortious interference, Echelon next must allege either an improper motive or means,[24] beyond the interfering act or conduct itself.[25] The Restatement sets forth several factors that Massachusetts courts have relied upon in analyzing whether interference is improper.[26] Though motivation of personal gain, including personal financial gain, is by itself generally not enough to satisfy the improper interference requirement, if sufficient facts are alleged that the "real"

[24] *Cf. Kurker*, 689 N.E.2d at 838 ("The standard, however, is interference accompanied by improper motive *or* improper means; the plaintiff need not prove both.") (emphasis in original) (citing *Draghetti v. Chmielewski*, 626 N.E.2d 862, 869 n.11 (Mass. 1994)).

[25] *Hunneman Real Estate Corp. v. Norwood Realty, Inc.*, 765 N.E.2d 800, 808 (2002) ("[I]mproper conduct, beyond the interference itself, is 'an element both in the proof of intentional interference with performance of a contract . . . and in the proof of intentional interference with a prospective contractual relationship.'"). *See also United Truck Leasing Corp.*, 551 N.E.2d at 23 (noting that more than "intentional interference must be established" for proof of intentional interference with performance of a contract or with a prospective contractual relationship) (citing RESTATEMENT (SECOND) OF TORTS §§ 766, 766B (1979)).

[26] *See United Truck Leasing Corp.*, 551 N.E.2d at 24 n.10 (citing RESTATEMENT (SECOND) OF TORTS § 766 and noting that the factors set forth therein "may be helpful in determining whether an act of interference was committed with an improper motive or by improper means"). To determine whether conduct interfering with a prospective contractual relation of another is improper, the Restatement advises consideration of certain factors: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (6) the proximity or remoteness of the actor's conduct to the interference; and (7) the relations between the parties. RESTATEMENT (SECOND) OF TORTS § 766. It is in the application of this section that the most frequent and difficult problems of the tort of interference with a contract or prospective contractual relation arise. *Id.* cmt. a.

motive was to hurt or injure plaintiff,[27] or if other facts are alleged that indicate the interference was committed with an improper motive,[28] this requirement may be satisfied.

i. Echelon Has Alleged Marsh's Improper Motive

Echelon alleges that Marsh engaged in conduct sufficient to give rise to liability for tortious interference: enlisting Setrin to file the Setrin lawsuit against IFCT to enjoin the Company's efforts to obtain shareholder approval for the Series B Bid; misappropriating the Draft Solicitation; and providing the Draft Solicitation to Setrin for use in the Setrin Lawsuit to prevent the sale of IFCT's assets to the Series B Investors so that Marsh could acquire the assets for himself at a discount.

Echelon has sufficiently alleged that, in providing the Draft Solicitation to Setrin and purportedly enlisting him to file suit to prevent shareholder approval of the Series B Bid, Marsh was motivated by his improper desire to acquire IFCT's assets for himself. That Marsh is alleged to have been motivated by his own personal, financial gain may not, in and of itself, be sufficient allegation of

[27] *See United Truck Leasing Corp.*, 551 N.E.2d at 24 (affirming directed verdict in favor of defendant) ("[Defendant's] apparent motives were to benefit his customers and himself financially. There is not enough evidence to warrant a finding that his real motive in these matters was to hurt [plaintiff].").

[28] *See supra* n.26.

impropriety; there is tolerance for competition.[29] This is not, however, simply the situation in which one competitor is charged with tortious interference for luring a customer away from another competitor.[30] Here, Marsh, a director owing fiduciary duties to the shareholders of IFCT, is alleged to have engaged in conduct designed to enjoin shareholder approval of the Series B Bid—the superior bid—so that Marsh could later acquire IFCT's assets for himself at a discount after his own bid had been rejected.[31] Thus, Echelon has alleged that Marsh's conduct, in competing with the investors who submitted the Series B Bid, was motivated by his desire to benefit himself personally, despite his fiduciary obligations and the nature of his relationship to IFCT. On a motion to dismiss, drawing all reasonable inferences in its favor, I conclude that Echelon has adequately pleaded that Marsh acted with the improper motive necessary to state a claim for tortious interference.

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[29] *Melo-Tone Vending, Inc. v. Sherry, Inc.*, 656 N.E.2d 312, 315 (Mass. App. 1995) ("For competition and for the rough and tumble of the world of commerce, there is tolerance, even though the fallout of that rough and tumble is damage to one of the competitors.") (citing *W. Oliver Tripp Co. v. American Hoechst Corp.*, 616 N.E.2d 118, 124–25 (1993); *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 307 (Utah 1982)).

[30] *Id.* ("It is one thing to lure a customer away from someone with whom it has been doing business by means of better product, service, or prices but quite another to abet the repudiation of solemn contractual obligations of which the party interfering is well aware.").

[31] *See* Third Party Compl. ¶¶ 91, 66, 69, 71.

ii. Echelon Has Not Alleged Setrin's Bad Faith

The filing of a lawsuit is privileged and cannot itself form the basis of a claim for tortious interference.[32] Though Massachusetts law does extend a broad privilege to statements made in a complaint and to the complaint itself,[33] this privilege is not absolute. A party may still be liable for tortious interference "on the basis of the filing of a lawsuit if it is alleged that the suit was filed for the ulterior *purpose* of interfering with a prospective business relationship."[34] Thus, though no liability for tortious interference may lie if a party files a lawsuit in a good faith effort to assert legally protected rights,[35] if the lawsuit is filed in bad faith, then the litigation privilege provides no shield against liability.[36] In *G.S.*

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[32] *Int'l Floor Crafts, Inc. v. Adams*, 477 F. Supp. 2d 336, 340 (D. Mass. 2007) ("[T]he filing of a complaint is privileged and thus that act, alone, is insufficient to form the basis of a [claim] for tortious interference.").

[33] *Id.* Marsh argues that the privilege associated with the filing of the Setrin Lawsuit also extends to shield him from liability as if he had filed the action himself. Though I suspect this is not so, I need not resolve this particular issue because I find that Marsh's ulterior purpose in allegedly encouraging Setrin to file the lawsuit was his desire to obtain the assets for himself at a discount.

[34] *Id.* (emphasis in original).

[35] *G.S. Enters., Inc. v. Falmouth Marine, Inc.*, 571 N.E.2d 1363, 1370 (Mass. 1991) (citing RESTATEMENT (SECOND) OF TORTS § 773 (1979)). Section 773 provides:

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to . . . enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

RESTATEMENT (SECOND) OF TORTS § 773 (1979).

[36] *See G.S. Enters., Inc.*, 571 N.E.2d at 1370 ("A civil action is wrongful if its initiator does not have probable cause to believe the suit will succeed, and is acting primarily for a purpose other

Enterprises, much like in this case, plaintiff alleged that defendant intentionally interfered with its contract with a third party by filing suit against that third party.[37] In reversing the grant of summary judgment in defendant's favor on that claim, the court determined that the record demonstrated a genuine issue of material fact as to the propriety of the suit.[38] There was compelling evidence that defendant's primary motivation in filing suit was to prevent development of the land,[39] and that defendant filed suit against the third party "in bad faith and without probable cause to believe that the action would succeed, rather than to assert legitimate rights."[40]

Echelon insists that Setrin's bad faith is similarly demonstrated by the following allegations: that Setrin accepted from Marsh the Draft Solicitation; that Setrin attached it to the complaint filed in the Setrin Lawsuit even though its confidential nature was apparent on its face; and that Setrin "intentionally and grossly misrepresented" the terms of the Series B Bid to make it appear inferior to

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than that of properly adjudicating his claims.") (citing RESTATEMENT (SECOND) OF TORTS § 674(a) (1977)).

[37] *Id.* at 1369.

[38] *Id.* at 1369–70.

[39] *Id.* at 1370 ("Three [of defendant's principals admitted outright in a letter to the purchaser that the 'motivating factor' behind their interest in purchasing [the property] was fear of the developer's bulldozer.").

[40] *Id.*

the Marsh Group Bid.[41] Echelon concludes that it has thus adequately alleged Setrin's bad faith.[42]

Setrin argues that the filing of the derivative action, the Setrin Lawsuit, was privileged because he filed it in good faith to protect his interests as a stockholder. Though Echelon is entitled, at this procedural stage, to all reasonable inferences in its favor, I cannot reasonably infer from the conclusory assertions in the third party complaint that Setrin has acted in bad faith or was otherwise motivated by something other than his desire to protect his interest as a stockholder. Though Echelon concludes that Setrin's Lawsuit "fundamentally misrepresented the difference—*i.e.*, the Series B Bid's waiver of the 2X Preference—between the Series B Bid and Marsh Group Bid"[43] it also acknowledges that the lawsuit "was based on a fundamental misapprehension of the difference between" the two bids.[44] An allegation of misapprehension or misunderstanding is not sufficient to

[41] Third Party Compl. ¶ 93. That the Series B Bid waived the 2X Preference was, Echelon avers, "one of the elements of the Series B Bid that rendered it superior to the Second Marsh Group Bid." Echelon Opp'n Br. at 24; *see also* Third Party Compl. ¶ 77.
[42] Echelon, in its opposition to this motion, appears to argue that Setrin shared with Marsh the ulterior motive of filing the Setrin Lawsuit to enable Marsh to obtain the assets for himself at a discount. Echelon Opp'n Br. at 24. Though Echelon states that this ulterior motive was alleged in the third party complaint, the Court can find no such allegation as to Setrin's motivations in filing the Setrin Lawsuit. At most, Echelon conclusorily alleges in stating its civil conspiracy claim that "Marsh and Setrin conceived of and executed a plan intended to disrupt the sale of IFCT's assets to the Series B Investors so that Marsh could purchase IFCT's assets for himself at a discount." Third Party Compl. ¶ 99.
[43] Third Party Compl. ¶ 78.
[44] *Id.* ¶ 77.

state that Setrin acted in bad faith and I do not find such an inference reasonable. Particularly when, as here, Setrin owned Series A-1 shares and common stock,[45] it is not reasonable to infer from the facts alleged that Setrin, in bad faith, misrepresented the terms of the Series B Bid when that bid would benefit him, as a stockholder, more than the terms of the Marsh Group Bid [46] and did so in bad faith.[47] At best, Echelon has alleged that Setrin's misrepresentations of the bids resulted from a misunderstanding of the bid terms themselves.[48]

As to the purported ulterior purpose that motivated Setrin to file suit, Echelon alleges only that Setrin sought to enjoin the sale of IFCT's assets pursuant

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[45] *Id.* ¶ 9.

[46] *Compare* Third Party Compl. ¶ 9 ("Marsh, Setrin and Kleiner own Series A-1 shares and common stock of IFCT"), *and id.* ¶ 32 ("Kleiner, who was a Series A-1 investor . . . ."), *with id.* ¶ 37 ("Eliminating the 2X Preference in the Series B stock was clearly in the self-interest of both Kleiner and Marsh, whose Series A and common stock would then enjoy a greater return in any liquidation or subsequent revaluation."). In fact, Echelon contends that the difference between the two bids would be a not insignificant issue to both Series A and common stockholders, who would be poised to receive greater payments under the Series B Bid plan and would receive them sooner. *Id.* ¶ 77.

[47] Echelon argues that the relief sought in Setrin's Lawsuit, coupled with the alleged fact that Setrin stood to benefit more under the Series B Bid than the Marsh Group Bid, demonstrates that Setrin's motive in filing suit was to assist Marsh in "grabbing IFCT's assets for himself." Echelon Opp'n Br. at 30 n.14. Even if I were to consider this argument, which was raised only in Echelon's opposition to this motion and was not well-pleaded in its third party complaint, I certainly do not find it reasonable to infer that Setrin filed suit with some ulterior purpose—much less that such purpose was his primary motivation—from the fact that Setrin, a stockholder, filed a derivative action to enjoin a sale pursuant to a bid, which Setrin alleged suffered from disclosure and process deficiencies, even though he would have benefitted more under that bid than another one that the board had already rejected (the Marsh Group Bid).

[48] Indeed, Echelon alleges that "[o]n information and belief, the differences between the two bids . . . were explained to Setrin's counsel by IFCT's counsel following initiation of the Setrin Lawsuit." Third Party Compl. ¶ 78.

to the Series B Bid.[49] This allegation is wholly insufficient to state an ulterior purpose, much less that such purpose was Setrin's primary motivation. I am required only to draw reasonable inferences from well-pleaded allegations. No such allegations compel me to conclude that Echelon has stated that Setrin filed the Setrin Lawsuit for an ulterior purpose such that he may be liable for tortious interference. Because Echelon has also failed to allege that Setrin filed the Setrin Lawsuit in bad faith, Count I is dismissed as to Setrin.

b. Echelon Need Not Allege that Marsh Acted Maliciously

Marsh further retorts that, even if Echelon has alleged improper means, he, as a director and stockholder of IFCT, enjoys a privilege against liability for a third party's contract with the corporation.[50] To overcome this privilege, Marsh contends that it is Echelon's burden to allege, not that Marsh acted with improper means or motive, but that he acted with "actual malice unrelated to [a] legitimate corporate interest."[51]

[49] Third Party Compl. ¶ 75.

[50] *See Steranko v. Inforex, Inc.*, 362 N.E.2d 222, 272–273 (Mass. App. Ct. 1977) (corporate officer "enjoy[s] a qualified privilege against liability for interference with [third party's] contractual relationship with the corporation" so long as interference was part of officer's employment responsibilities and officer did not act with actual malevolence or malice).

[51] *See Blackstone v. Cashman*, 860 N.E.2d 7, 18 (Mass. 2007). *See also id.* at 13 n.10 ("We now state explicitly what has been implicit in our prior cases: the 'actual malice' standard for proving improper motive or means on the part of a corporate official is a heightened burden placed on the plaintiff, not a defense that must be proved by a defendant.").

Echelon argues that the actual malice standard applies only in an employment context. Certainly, in considering a tortious interference claim before it, the Massachusetts Supreme Judicial Court specifically observed that it has often had occasion to consider intentional interference with advantageous relationships in the context of employment, and explicitly noted that, when the defendant is an official of the employer, the employment "context affects how a plaintiff employee must prove the element of 'improper motive or means.'"[52] The *Blackstone* Court also, however, noted the narrow scope of this so-called privilege:

> The factual circumstances to which the actual malice standard applies are constrained. *Company officials do not qualify for the standard with respect to all actions taken on behalf of the company.* It is applicable only where the relationship allegedly interfered with is with the company itself: *e.g.*, whom to hire, whom to discipline, whom to fire, with whom to do business.[53]

Thus, Marsh argues, it is entitled to demand that Echelon plead actual malice because this heightened standard applies where the relationship Marsh allegedly interfered with is, as here, between the Company and one with whom the Company would do business. The *Blackstone* Court was careful to limit the protection of the heightened pleading of actual malice; it does not apply to all actions taken on behalf of the company.[54] Thus, if the actual malice standard applies to some, but

[52] *Blackstone*, 860 N.E.2d at 13.
[53] *Id*. at 16 n.14 (emphasis added).
[54] *Id.*

not all, actions taken on behalf of the company, then it cannot apply if the action taken on behalf of the company, but instead on behalf of an individual or any other entity. Here, there appears to be no dispute that Marsh's actions were not taken "on behalf of" IFCT. Indeed, Echelon specifically alleges that Marsh acted for his own personal benefit: to prevent the sale of IFCT assets so that he could purchase them himself at a discount. I therefore need not address whether Echelon's allegations are sufficient to satisfy the heightened standard of actual malice because I conclude that Echelon has clearly alleged that Marsh's allegedly tortious actions were taken on his own personal behalf, as an independent competing bidder, and not on behalf of IFCT.

3. Echelon Has Alleged Causation of the Loss of Its Economic Advantage

Echelon alleges that it has suffered lost opportunity cost, as a result of Third Party Defendants' successful efforts to "sabotage" Echelon's acquisition of IFCT's assets.[55] Echelon specifically alleges that Marsh and Setrin caused the loss of the economic advantage represented by the Series B Bid to purchase the IFCT assets that it, along with the other Series B Investors, submitted.[56] The Series B Bid had been approved by the board over other bids, including the Marsh Group Bid and

[55] Third Party Compl. ¶ 87.
[56] *Id.* ¶ 97.

the Second Marsh Group Bid, and as in the best interests of the shareholders.[57] Echelon alleges that, despite the board's acceptance of the Series B Bid and its request for shareholder approval, the board withdrew its solicitation for shareholder approval as a result of the Setrin Lawsuit.[58] Though I am not unmoved by the arguments of Marsh and Setrin, at this procedural stage of the proceeding, I conclude that Echelon has alleged the proximate causation necessary to survive this motion to dismiss.

B. Count II: Civil Conspiracy

As with the claim for tortious interference, I first must resolve a conflicts of law question. Echelon contends that Massachusetts law applies, and Marsh and Kleiner again assume, for purposes of this motion only, that Massachusetts law applies to Echelon's civil conspiracy claim against them.[59] Setrin, however, argues that Delaware law applies to this claim against him.[60] Under the law of either state,[61] however, I find that this claim against all Third Party Defendants must be dismissed.

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[57] *Id.* ¶¶ 66, 71.
[58] *Id.* ¶ 94.
[59] Marsh and Kleiner Opening Br. at 15 n.6.
[60] Setrin does not agree that Massachusetts law applies to the civil conspiracy claim but states that "the result is the same even if Delaware law applies." Setrin Reply Br. at 18 n.26.
[61] For purposes of resolving this motion, my conclusions are equally compelled under Delaware law as under Massachusetts law. *Compare Benihana of Tokyo, Inc. v. Benihana, Inc.*, No. 550-N, 2005 WL 583828, at *7 n.33 (Del. Ch. Feb. 4, 2005) (stating the elements of civil conspiracy: "(1) A confederation or combination of two or more persons; (2) An unlawful act done in

To be liable for civil conspiracy, there must be some agreement or confederation between two or more persons to commit a wrongful act and some tortious act done in furtherance of the agreement.[62] Even if one does not commit a tort, one may nevertheless be liable for conspiracy if, knowing that the conduct of another person constitutes a breach of duty, one gives substantial assistance or encouragement to the tortfeasor.[63]

Echelon alleges, in a wholly conclusory manner, that Marsh and Setrin "conceived of and executed a plan intended to disrupt the sale of IFCT's assets" to Echelon and the other Series B Investors so that Marsh could purchase the assets for himself at a discount.[64] Echelon repeats its allegation that, in furtherance of the alleged conspiracy, Marsh and Setrin misappropriated the Draft Solicitation, which was attached without the permission of IFCT to the complaint filed in the Setrin

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furtherance of the conspiracy; and (3) Actual damages" and noting that the combination must be "undertaken in furtherance of some unlawful purpose") (citing *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149–50 (Del. 1987); *Tristate Courier & Carriage, Inc. v. Berryman*, No. 20574-NC, 2004 WL 835886, at *13 n.143 (Del. Ch. Apr. 15, 2004)), *with Aetna Cas. Sur. Co. v. P&B Autobody*, 43 F.3d 1546, 1564 (1st. Cir. 1994) (citing RESTATEMENT (SECONDS) OF TORTS, § 876 cmt. b (1977) (civil conspiracy requires "first, a common design or an agreement . . . between two or more persons to do a wrongful act and, second, proof of some tortious act in furtherance of the agreement.")).

[62] *See supra* n.61.

[63] *See Kurker*, 689 N.E.2d at 837 (relying on RESTATEMENT (SECONDS) OF TORTS, § 876(b)(1977)). Though this section of the Restatement has not explicitly been adopted in Massachusetts, it has been cited in appellate decisions and has also provided a basis for recovery. *Id.* (citing *Nelson v. Nason*, 222, 177 N.E.2d 887 (1961) (recovery allowed under concerted action theory of section 876(b)). Because such assistance or encouragement is only alleged as to Kleiner, who assumes for the limited purpose of resolution of this motion that Massachusetts law applies to him, I need not also consider this allegation under Delaware law.

[64] Third Party Compl. ¶ 99.

Lawsuit.[65] Though Echelon, to state a claim for civil conspiracy, need not necessarily allege that Setrin himself committed a tortious act in furtherance of this plan[66] (and, indeed, I have already concluded that no such allegations have been adequately pleaded as to Setrin),[67] Echelon must assert facts, or facts from which reasonable inferences may be drawn, that an agreement existed between Marsh and Setrin. Simply alleging that Marsh and Setrin acted in concert to prevent the sale of IFCT's assets pursuant to the Series B Bid does not make it so. Thus, for failure to sufficiently plead the existence of a common design or agreement between Marsh and Setrin, this claim is dismissed as to Setrin. Before it may be dismissed as to Marsh, however, I must first consider whether Echelon has alleged a conspiracy between Kleiner and Marsh.

Kleiner specifically argues that, because Echelon has not alleged any conduct by him in furtherance of the alleged conspiracy, this claim against him must be dismissed. Though Echelon did not allege that Kleiner engaged in any tortious conduct, Echelon does assert that "[o]n information and belief, Kleiner knew of and encouraged" the actions of Marsh and Setrin to disrupt the sale of

[65] *Id.*
[66] As noted, under Massachusetts law, assistance or encouragement may be enough. *See Kurker*, 689 N.E.2d at 837 (relying on RESTATEMENT (SECONDS) OF TORTS, § 876(b) (1977)).
[67] *See supra* Section A.3.a.

IFCT's assets to the Series B Investors.[68] This conclusory assertion highlights Echelon's inability to allege any specific conduct by Kleiner, or conduct that could support a reasonable inference of assistance or encouragement to Marsh in executing the purported plan. Moreover, Echelon does not even attempt to establish the existence of such a plan between Kleiner and Marsh.[69] Thus, Echelon's allegations are woefully insufficient to support a claim of civil conspiracy against Kleiner. Therefore, as with the conspiracy claim against Setrin, this claim as to Kleiner is dismissed.

Because one cannot conspire with only oneself, this claim, in light of the foregoing, must also be dismissed as to Marsh.

C. Count III: Breach of the Implied Covenant of Good Faith and Fair Dealing

Echelon asserts that Marsh, by purportedly attempting to frustrate the board's search for a new CEO, breached the implied covenant of good faith and fair dealing allegedly inherent in the February 2004 letter he signed regarding the hiring of a new CEO. The implied covenant of good faith and fair dealing

[68] Third Party Compl. ¶ 100.

[69] Though Echelon does at least attempt, but fails, to make such an allegation as to Marsh and Setrin. *See* Third Party Compl. ¶ 99 ("Marsh and Setrin conceived of and executed a plan intended to disrupt the sale of IFCT's assets to the Series B Investors so that Marsh could purchase IFCT's assets for himself at a discount.").

"attaches to every contract."[70] That no such covenant can exist in the absence of a contract is the obvious, and logical, corollary to this fundamental proposition.

Echelon alleges that in the February 2004 letter, Marsh "confirmed his understanding that IFCT's Board of Directors would be responsible for hiring an individual to replace him as CEO of IFCT, and that he, acting as individual, would have no authority over that process."[71] Echelon alleges that Marsh breached the implied covenant because his actions—his continued efforts to frustrate the board's search for a new CEO, and his attempt to satisfy the CEO contingency—were motivated solely by his desire to remain CEO.[72]

Though Echelon asserts that the February 2004 letter "constituted a contract between Marsh and Echelon,"[73] even a cursory review of the letter compels me to reject this assertion. In resolving this motion, I may consider the unambiguous terms of the February 2004 letter, which Echelon reproduces in its entirety in its complaint,[74] because the letter is integral to this claim. After carefully considering the terms of the letter, I can make no other determination than the February 2004 letter is merely and only a declaration that it is the responsibility of the board, not of Marsh, to hire a new CEO. Though the impetus to secure such a declaration

[70] *See, e.g.*, *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005).
[71] Third Party Compl. ¶ 103.
[72] *Id.* ¶ 104.
[73] *Id.* ¶ 103.
[74] *Id.* ¶ 33.

from Marsh may well have been Marsh's alleged, or perceived, efforts to frustrate the CEO search,[75] the letter itself has no legal effect: it binds no party—Marsh or Echelon—because the letter contains no promise. At most, Marsh merely "confirms . . . [his] expectation" that the board will perform its preexisting duty, which was not designated or otherwise delegated to Marsh, to engage in a process for hiring a new CEO. With no exchange of promises, much less consideration to support those (non-existent) promises, there can be no enforceable agreement; without a contract, there can be no implied covenant of good faith and fair dealing for Marsh to have breached.

Because no underlying, enforceable agreement exists, Echelon's claim for breach of the implied covenant of good faith and fair dealing must necessarily fail. Count III is dismissed. I therefore need not address whether Echelon's claim is time-barred or whether Marsh's conduct operated to deprive the parties of the benefit of their bargain.

D. Count IV: Contribution

Echelon alleges it may pursue contribution from all Third Party Defendants, to the extent that Echelon is found liable to Encite. There is one last dispute among the parties as to whether Massachusetts or Delaware law applies to this contribution claim. No one disputes, however, that, under the law of either state,

[75] *See id.* ¶¶ 26–34.

contribution exists only among joint tortfeasors who are liable for the same injury.[76] Because I have already determined that Echelon has failed to state a claim for tortious interference against Setrin, and because Echelon did not assert such a claim against Kleiner,[77] I rule on this claim only with respect to Marsh. Marsh, for purposes of this motion only, again does not contest the applicability of Massachusetts law to this claim.

Marsh contends that Echelon has failed to allege that he caused the same injury to Encite that Encite has alleged was caused by Echelon. Encite has alleged that its injury has been caused by the tortious conduct of Echelon.[78] Echelon alleges that Marsh caused damages to Echelon through his interference with its prospective business relationship with IFCT. Echelon, however, also alleges that Marsh damaged IFCT by his obstruction of hiring a new CEO, his interference with the sale of IFCT's assets to the Series B Investors, and his exploitation of the

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[76] *Compare Wolfe v. Ford Motor Co.*, 434 N.E.2d 1008, 1011 (Mass. 1982) ("There is ample authority for the proposition that contribution is appropriate between persons who are *liable jointly in tort for the same injuries*, even if they are liable on different theories of tort liability.") (emphasis added), *with Builders and Managers, Inc. v. Dryvit Systems, Inc.*, No. 00C11111JEB, 2004 WL 304357, at *2 (Del. Super. Feb. 13, 2004) (noting that contribution is governed by the Contribution Among Tort-feasors Law and that it is an "inherent requirement . . . that the parties are *joint tortfeasors* who share a 'common liability'") (emphasis added), *and* 10 *Del. C.* § 6301 (defining joint tortfeasors as those who are "jointly or severally liable in tort for the *same injury* to person or property") (emphasis added).

[77] Echelon states that it reserves its right to amend its complaint to assert a tortious interference claim against Kleiner and Kleiner indicates that he will oppose any such amendment. If Echelon does so amend, it may assert a claim for contribution against Kleiner at that time, which Kleiner may also, at that time, oppose.

[78] Third Party Compl. ¶ 107.

bankruptcy process to acquire IFCT's assets for himself at a discount.[79] Thus, to the extent that Encite alleges that Echelon has injured IFCT, Echelon has alleged that Marsh has also injured IFCT—the same injury—and that this injury was caused, in whole or in part, by Marsh.[80] This is sufficient to state a claim for contribution against Marsh. Therefore, Marsh's motion to dismiss this claim is denied.

IV. CONCLUSION

For all the reasons stated above, Third Party Defendants' motion to dismiss Count I (tortious interference with a prospective business relationship) is granted as to Setrin, but denied as to Marsh. Count II (civil conspiracy) is dismissed as to all Third Party Defendants. Count III (breach of the implied covenant of good faith and fair dealing) is dismissed against Marsh. The motion to dismiss Count IV (contribution), which I consider here only with respect to Marsh, is denied.

IT IS SO ORDERED.

[79] *Id.* ¶ 109.
[80] *Id.*