To Be Argued By:
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

EPAC TECHNOLOGIES LTD,

Plaintiff-Appellant-Respondent,

—against—

INTERFORUM S.A., EDITIS S.A.,

Defendants-Respondents-Appellants,

VIVENDI S.E.,

Defendant-Respondent,

—and—

BOLLORE S.E.,

Defendant-Respondent.

CASE NOS.
2022-03478
2022-03480

BRIEF FOR PLAINTIFF-APPELLANT-RESPONDENT EPAC TECHNOLOGIES LTD

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PRELIMINARY STATEMENT

This case arises from a Master Facility Development and Services Agreement ("the Agreement") between Plaintiff EPAC Technologies Ltd, a Maltese company ("EPAC"), on the one hand, and Interforum S.A. ("Interforum") and Editis S.A. ("Editis") (collectively "the Editis Defendants"), on the other. The Agreement is governed by New York law and contains a valid forum selection clause choosing New York courts as the exclusive forum for disputes.

Pursuant to the Agreement, EPAC provided printing services for the Editis Defendants at a facility in France. After contractual disputes arose between the parties, EPAC filed suit against the Editis Defendants in Supreme Court for New York County. There is no dispute that Supreme Court is a proper venue for the case under CPLR 327(b), and that it has jurisdiction over the contractual signatories pursuant to Section 5-1402 of the General Obligations law.

In addition to the signatories, EPAC also brought claims against Editis' parent, Vivendi S.E. ("Vivendi"), and Vivendi's major shareholder, Bolloré S.E. ("Bolloré"), for their intentional interference with the Editis Defendants' performance of the Agreement. Vivendi and Bolloré moved to dismiss EPAC's tort claims for lack of personal jurisdiction and for failure to state a claim. Supreme Court heard the motions on June 16, 2022.

With regard to personal jurisdiction, New York law provides that the Agreement's forum selection clause applies to Vivendi and Bolloré because they are "closely related" to their affiliates – the Editis Defendants. Nevertheless, even though personal jurisdiction is a "threshold issue" that courts should resolve first, Supreme Court declined to reach the jurisdictional dispute. The court stated that it would not "touch jurisdictional issues [ ] with a ten-foot pole[.]" This was error.

Without first deciding jurisdiction, Supreme Court granted Vivendi's and Bolloré's motions to dismiss for failure to state a claim. The court held that, as the corporate parent and major shareholder of the Editis Defendants, Vivendi and Bolloré had an economic interest in the Editis Defendants and a privilege to interfere in their performance of the Agreement. On this too, the court erred.

Vivendi cannot rely on the economic interest defense. Vivendi took over operational control of the Agreement once it purchased Editis, and then engaged in a campaign to undermine the Agreement. Vivendi instructed Editis to fabricate complaints about EPAC's performance, pressured EPAC to offer better pricing terms than the Agreement required, and tried to convince EPAC that – if EPAC agreed to Vivendi's pricing proposals – Vivendi would provide additional printing business to EPAC from other publishing companies that Vivendi planned to acquire. To put even more pressure on EPAC, Vivendi's lawyers also concocted a spurious excuse for the Editis Defendants to withhold payments to EPAC based on

French tax law. When taking these actions, by its own admission, Vivendi was acting in its own direct interests, not merely to protect its interests in Editis. Because Vivendi sought to further its own interests, and because it acted deceptively and maliciously, the economic interest doctrine does not apply.

Bolloré cannot avail itself of the economic interest defense either. Bolloré owned 30% of Vivendi, so its economic interest in Editis was more attenuated. But it still played a major role in interfering with the Editis Defendants' performance of the Agreement. With a possible exception relating to the sham French tax law issue (on which Vivendi appears to have acted alone), Bolloré acted in concert with Vivendi to deceive and stymie EPAC, and to undercut the Agreement. Indeed, the entire Vivendi/ Bolloré campaign was led by Michele Sibony, an executive at both companies. Mr. Sibony repeatedly emphasized to EPAC that he had very close ties to Bolloré's CEO and Chairman Vincent Bolloré, and had direct involvement in the corporate acquisitions that Vivendi and Bolloré contemplated. Bolloré thus too sought to further its own interests, and used fraudulent and malicious means to interfere in the Agreement.

On these alleged facts, Supreme Court erred when it held that the economic interest doctrine applied. The court misconstrued the doctrine as a legal matter, failed to accord EPAC's pleading – and the evidence it submitted – the benefit of every favorable inference, and did not accept as true all the facts that EPAC

pleaded. Under the proper CPLR 3211(a)(7) standard, EPAC stated a claim for tortious interference.

In this appeal, the Court should first address personal jurisdiction. If this Court agrees with EPAC that Vivendi and Bolloré are subject to jurisdiction, it can hold accordingly and then consider – and reverse – Supreme Court's erroneous grant of Defendants' motion to dismiss for failure to state a claim. On the other hand, if this Court believes Vivendi and Bolloré are not subject to jurisdiction, it should vacate the decision below and affirm on that alternative ground. Finally, if the Court believes that the trial court should address the disputed jurisdictional issue before it does so, the Court should vacate the decision below and remand so that Supreme Court can rule on the threshold jurisdictional question.

QUESTIONS PRESENTED

1. Are Vivendi and Bolloré subject to personal jurisdiction in this litigation?

Answer of Supreme Court: Supreme Court erred by failing to answer this question.

2. Did EPAC fail to state a claim for tortious interference against Vivendi and Bolloré because the economic interest doctrine insulates Vivendi and Bolloré from any liability?

Answer of Supreme Court: Supreme Court erroneously answered "yes."

NATURE OF THE CASE AND FACTUAL BACKGROUND

I. The EPAC/Editis-Interforum Agreement

EPAC and the Editis Defendants entered the Agreement on July 23, 2015, effective as of January 1, 2016. EPAC installed at its own expense a digital printing system at a facility in Malesherbes, France so that EPAC could print and deliver books to the Editis Defendants. The Agreement provided for EPAC to recover its multi-million-dollar investment in the facility through the Editis Defendants' purchase of books over the term of the Agreement, which was ten years from a Commencement Date defined in the Agreement. R.103 (¶ 14); R.331 (¶ 12).

The Editis Defendants had trouble performing from the start. The Editis Defendants initially failed to disclose a leaking asbestos roof at the facility, which required replacement. R.103 (FAC ¶ 15). The parties had to adjust dates in the Agreement, and add an Addendum to it, due to this issue. *Id*. The Editis Defendants then failed to install a working conveyor at the facility, and had to replace the contractor they had engaged to install the conveyor (among other things). R.104 (¶ 17). This too led to delays and increased EPAC's costs. *Id*. The Editis Defendants also repeatedly failed to provide EPAC with properly formatted electronic files. These and other problems led EPAC and the Editis Defendants to amend the Agreement, effective as of December 14, 2018. R.104 (¶ 18). In stark

contrast to the problems that the Editis Defendants had, EPAC fully performed its obligations under the Agreement. R.110 (¶ 38).

II. Vivendi and Bolloré Enter the Scene

At the time the parties entered the Agreement, Editis and Interforum were owned by the Spanish company Planeta Corporacion S.R.L. R.329 (¶ 5). On January 31, 2019, Vivendi announced the closing of a purchase of 100% of the shares of Editis (which owns Interforum) based on an agreement entered in 2018. R.329 (¶ 6); R.105 (¶ 21). Bolloré in turn owns 27% of Vivendi's shares, including 30% of its voting shares. R.102 (¶ 9); R. 297.

After the acquisition, Vivendi and Bolloré took over operational control of the Agreement for the Editis Defendants. Editis could not take any actions without Vivendi's and Bolloré's consent. R.329-330 (¶ 6). From Fall 2019, Vivendi's and Bolloré's control of the Editis Defendants was managed by Bolloré and Vivendi employee Michele Sibony. *Id*. The parties' relationship then got worse.

III. Vivendi and Bolloré Undermine and Interfere With the Agreement

Once they took over, Bolloré and Vivendi sidelined the manager in charge of the Editis Defendants' performance and replaced him with a figurehead who answered to Mr. Sibony. *Id*. (¶¶ 6-7); R.332-333 (¶ 14). The displaced manager told EPAC that Vivendi and Bolloré wanted him to fabricate complaints so that

Vivendi and Bolloré could get out of the Agreement. Another Editis manager later confirmed this. R.330 (¶ 7); R.332-333 (¶ 14).

Mr. Sibony tried to convince EPAC to revise the Agreement by claiming that Vivendi and/or Bolloré would soon increase their portfolio in European publishing, which would provide EPAC with a massive increase in printing work in France and throughout Europe – *if* EPAC agreed to price concessions. R.330-331 (¶ 8). Sibony emphasized that he was personally involved in these other acquisitions for Vivendi and Bolloré. When EPAC declined to make the concessions, Sibony on behalf of Vivendi and Bolloré began a campaign to break the contract with EPAC and force EPAC to enter a different contract with unfavorable terms to EPAC. R.331 (¶ 10).

Lacking any breaches by EPAC on which he could rely, Sibony amplified complaints about EPAC's costs. R.331 (¶ 11). The Agreement calculates pricing for books using a formula based on EPAC's actual costs during applicable periods with adjustments plus a share of a pre-defined "cost savings" amount, as well as additional compensation based on the benefits the Editis Defendants recognize in cost savings. R.331-332 (¶ 13). If EPAC's actual costs exceed a reference amount in the Agreement, the parties would share the extra costs equally; if EPAC's costs were lower than the reference amount, the parties would share the benefits. (*Id*.)

EPAC tried to initiate discussions with the Editis Defendants regarding 2020 pricing in or around January 2020, but was unable to engage with them for months due to the Editis Defendants' failure to appoint a new member of the Executive Oversight Committee ("EOC") established by the Agreement. R.332-333 (¶ 14). Among the EOC's roles was to address pricing. (*Id*.). After EPAC tried for months to revive the EOC, Vivendi tried to appoint Sibony as one of three EOC representatives even though Sibony was not an employee of the Editis Defendants, the actual parties to the Agreement. (*Id*.) When EPAC requested compliance with the Agreement, Vivendi appointed an Editis figurehead as EOC representative, but Sibony still led EOC meetings, was copied on EOC correspondence, and made all significant EOC decisions. (*Id*.)

The parties finally had an EOC meeting on April 28, 2020, led for Defendants by Sibony. Then, on May 5th, EPAC submitted a pricing proposal based on EPAC's actual costs as provided for in the Agreement with certain accommodations to Editis, copying Sibony as requested. Editis' representative responded by email on May 26th, copying Sibony, and questioned EPAC's costs and proposed a fundamental restructuring of the Agreement's pricing formulas. EPAC called out the request as repudiating the Agreement, and requested that Editis and Interforum commit to go forward based upon the Agreement. R.333 (¶ 15).

The EOC continued to meet from Summer to Fall of 2020, led by Sibony. R.333-334 (¶¶ 16-17). During this period, the Defendants repeatedly demanded an audit to which EPAC agreed, but which Editis never undertook. Then, after EPAC provided notice of a breach in September 2020, Editis began withholding payments on invoices for work done by EPAC. (*Id*.)

IV. Vivendi Concocts a French Tax Scheme

Vivendi then began in October 2020 to raise purported tax concerns as a pretext for instructing the Editis Defendants not to pay EPAC's invoices. R.334 (¶ 18). Vivendi's Bernard Bacci initiated these communications, claiming that Vivendi needed information regarding EPAC's structure for tax purposes before Vivendi could authorize payments to EPAC. (*Id*.) Bacci made this inquiry even though the Editis Defendants had paid EPAC for years before this, and even though Vivendi had full information regarding EPAC's structure already. (*Id*.).

Vivendi then turned the issue over to its European counsel. EPAC explained that the Agreement did not allow the Editis Defendants to withhold any amounts from duly issued invoices. R.335-336 (¶ 22). In response, Vivendi's counsel stated that they represented the interests of Vivendi only – not those of the Editis Defendants – and that they were making the tax demands on Vivendi's behalf:

> First and foremost, it is worth nothing once again that, contrary to what has been repeatedly suggested, we are not advising EDITIS with regard to the commercial terms or the validity of the agreement they concluded with EPAC. We are representing

> VIVENDI's tax department regarding tax issues this same entity might be exposed to with regard to its subsidiaries, EDITIS and INTERFORUM being two of them.

Id.; R.355. Vivendi's lawyers repeated this on February 9, 2021, when they stated: "We are obliged to remind you once again that it is not EDITIS but rather VIVENDI that we represent," and that their advice to Vivendi would ignore "other legal considerations" such as whether the withholdings would cause Editis and Interforum to breach the Agreement and subjected those parties to legal risks. R.335-336 (¶ 22); R.352.

V. EPAC Reaches the Breaking Point

Over EPAC's objections, Vivendi continued to instruct the Editis Defendants to withhold their payments and the Editis Defendants have, in fact, not paid the withheld amounts to EPAC. Vivendi claims that it remitted those amounts to the French Tax Authority. R.336 (¶ 23).

Due to the non-payments induced by Vivendi and Bolloré, along with other breaches by the Editis Defendants, EPAC sent the Editis Defendants a Notice of Termination of the Agreement on March 26, 2021. R.110 (¶ 35). EPAC filed its initial complaint in Supreme Court on that day, alleging breach of contract against the Editis Defendants. EPAC amended the complaint on July 20, 2021 to add a claim of for interference with contract against Vivendi and Bolloré.

VI. The Proceedings Below

Vivendi and Bolloré filed motions to dismiss on September 30, 2021. Vivendi and Bolloré moved under CPLR 3211(a)(8) for lack of personal jurisdiction, and under CPLR 3211(a)(7) for failure to state a claim. Supreme Court heard the motions on June 16, 2022.

Although the parties had briefed the jurisdictional issue extensively (*see* R.133-137; R.186-191; R.270-276; R.371-378; R.417-424; R.437-444), the court declined to rule on that dispute. The court instead went straight to the merits of EPAC's tortious interference claims, and stated that it would not "touch jurisdictional issues [ ] with a ten-foot pole[.]" R.27 (10:13-15).

On the merits, Supreme Court did not find that EPAC had failed to plead any element of an interference with contract claim. However, the court held that, given Vivendi's and Bolloré's ownership interests in the Editis Defendants, the economic interest doctrine allowed Vivendi and Bolloré to instruct the Editis Defendants to breach the Agreement. Supreme Court granted the motions on that ground. R.12. The court rejected EPAC's arguments that Vivendi and Bolloré could not rely on the economic interest defense because they had acted to further their *own interests* (not their interests *in the Editis Defendants*), and because they had acted maliciously and employed fraudulent means. R.24-31 (7:12-14:21).

The court entered judgment on these claims on July 21, 2022. R.51-52.

ARGUMENT

There are two issues in this appeal. The first is personal jurisdiction. Although Supreme Court passed on that question, this Court should address it.

If the Court agrees with EPAC that Vivendi and Bolloré are subject to jurisdiction because the Agreement's forum selection clause binds them – and only if the Court agrees – the Court should address the second question: whether the economic interest doctrine bars EPAC's interference claims at the pleading stage. Because EPAC's amended complaint alleges that Vivendi and Bolloré acted to further their own interests, and that they acted maliciously and by fraudulent means, the economic interest doctrine does not apply. This Court should reverse.

I. Supreme Court Had Personal Jurisdiction Over Vivendi and Bolloré

Supreme Court erred by not addressing Vivendi's and Bolloré's contention that the court had no jurisdiction over them. Under binding precedent, the trial court should have addressed personal jurisdiction first. Supreme Court also should have found that it had jurisdiction.

A. Supreme Court Erred by Not Ruling on Personal Jurisdiction

"Lack of personal jurisdiction … is a 'threshold issue[.]'" *A.H. Physical Therapy, P.C. v. 21st Century Advantage Ins. Co*., 74 Misc. 3d 41, 42, 161 N.Y.S.3d 622 (N.Y. App. Term. 2d Dep't. 2021) (citation omitted). Accordingly, when a defendant moves to dismiss based on an alleged lack of personal

jurisdiction, a trial court should resolve the jurisdictional dispute before turning to the merits of any other defenses asserted. *See DelGrosso v. Carroll*, 185 A.D.3d 901, 903-04, 128 N.Y.S.3d 269 (2d Dep't. 2020) ("the court should not have addressed … the respondents' motion … to dismiss the complaint … on forum non conveniens grounds without first determining whether the court had acquired jurisdiction over th[e] defendant"); *Avis Rent A Car Sys., LLC v. Scaramellino*, 161 A.D.3d 572, 573, 78 N.Y.S.3d 11 (1st Dep't. 2018) ("on remand, the court should determine the issue of personal jurisdiction before reaching defendant's alternative argument that he had a reasonable excuse for his default based on improper service"); *Wells Fargo Bank, N.A. v. Jones*, 139 A.D.3d 520, 522, 32 N.Y.S.3d 95 (1st Dep't. 2016) ("the motion court should have addressed Jones's claim of lack of personal jurisdiction over him before reaching any of the other relief he sought"); *342 E. 67 Realty LLC v. Jacobs*, 106 A.D.3d 610, 611, 966 N.Y.S.2d 46 (1st Dep't. 2013); *Elm Mgmt. Corp. v. Sprung*, 33 A.D.3d 753, 754-55, 823 N.Y.S.2d 187 (2d Dep't. 2006); *Kingstown Capital Mgmt. L.P. v. CPI Prop. Grp., S.A.*, 2021 WL 1267285, *3 (N.Y. Sup. Ct. Apr. 06, 2021).

The basis on which a trial court dismisses a plaintiff's claim is not academic. It has real ramifications. For example, ruling on the merits of a claim may give rise to res judicata in subsequent proceedings. By contrast, a dismissal based on a lack of personal jurisdiction is "not on the merits, and cannot [later] be relied upon

by defendant for res judicata purposes." *Kokoletsos v. Semon*, 176 A.D.2d 786, 787, 575 N.Y.S.2d 116 (2d Dep't. 1991*); see also Sumar v. Fox*, 90 A.D.3d 577, 577, 934 N.Y.S.2d 805 (1st Dep't. 2011) (where "prior action [was dismissed] for lack of personal jurisdiction[,] … the doctrine of res judicata does not apply"); *Lamar Outdoor Advert., Inc. v. City Plan. Comm'n of Syracuse*, 296 A.D.2d 841, 842, 744 N.Y.S.2d 283 (4th Dep't. 2002). The failure to address jurisdiction also has procedural ramifications, as it would force the parties to go through an entire proceeding without an answer regarding the basic power of the court to conduct the proceeding.

Supreme Court should thus not have reached the merits of Vivendi's and Bolloré's motion to dismiss under CPLR 3211(a)(7) until it resolved jurisdiction. Staying away from the jurisdictional issue with "a ten-foot pole" was a mistake.

B. Vivendi and Bolloré Are Subject to Jurisdiction Under the "Closely Related" Doctrine

Although Supreme Court did not rule on personal jurisdiction, given the parties' extensive briefing, this Court can do so. *See DelGrosso*, 185 A.D.3d at 904. The courts in New York County have jurisdiction over Vivendi and Bolloré because they are so "closely related" to the Editis Defendants – and to this dispute – that they are bound by the forum selection clause in their subsidiaries' agreement.

1. Forum Selection Clauses Bind Non-Signatories Who Are "Closely Related" To Signatory Affiliates or the Underlying Dispute

New York courts hold that contractual forum selection clauses can bind non-signatories. Specifically, "a valid forum selection clause may be enforced against a non-signatory who is so closely-related to the actual signatories or the dispute that enforcement of the forum selection clause against it is reasonably foreseeable." *Power Up Lending Grp., Ltd. v. Nugene Int'l, Inc*., 2019 WL 2119844, *7 (E.D.N.Y. Jan. 10, 2019) (citation omitted); *see also Westaub II LLC v. Westermann*, 200 A.D.3d 550, 550-51, 160 N.Y.S.3d 214, (1st Dep't. 2021); *Highland Crusader Offshore Partners, L.P. v. Targeted Delivery Techs. Holdings, Ltd*., 184 A.D.3d 116, 122-23, 124 N.Y.S.3d 346 (1st Dep't. 2020); *Tate & Lyle Ingredients Americas, Inc. v. Whitefox Techs. USA, Inc*., 98 A.D.3d 401, 402, 949 N.Y.S.2d 375 (1st Dep't. 2012); *LaRoss Partners, LLC v. Contact 911 Inc*., 874 F. Supp. 2d 147, 160-61 (E.D.N.Y. 2012).

"If the nonsignatory party has an ownership interest or a direct or indirect controlling interest in the signing party[,] or, the entities or individuals consulted with each other regarding decisions and were intimately involved in the decision-making process[,] then, a finding of personal jurisdiction based on a forum selection clause may be proper, as it achieves the 'rationale behind binding closely related entities to the forum selection clause [which] is to 'promote stable and

dependable trade relations'[.]" *Universal Inv. Advisory SA v. Bakrie Telecom Pte., Ltd*., 154 A.D.3d 171, 179, 62 N.Y.S.3d 1 (1st Dep't 2017) (citations omitted). "[I]t would be contrary to public policy to allow [closely related] non-signatory entities through which a party acts to evade [a] forum selection clause." *Highland*, 184 A.D.3d at 122 (citing *Tate & Lyle*, 98 A.D.3d at 402).

2. Vivendi and Bolloré Qualify as "Closely Related"

Vivendi and Bolloré here are closely related to Editis, and to its dispute with EPAC. Given their tight relationship with Editis, and given their intimate involvement in the Editis/EPAC dispute – and especially given the combination of these ties – Vivendi and Bolloré are subject to jurisdiction in the courts of New York County under the forum selection clause from the Agreement.

a. Vivendi and Bolloré Vivendi Are "Closely Related" To Editis

Vivendi bought Editis in January 2019 and owns 100% of Editis stock. When it acquired Editis, Vivendi's CEO became the Chairman of Editis. R.291. Vivendi also began reporting Editis' revenues in its own disclosures. R.292.

Bolloré in turn has effective control of Vivendi. Bolloré owns 27% of Vivendi's shares, including 30% of its voting shares. The entities have significant overlap. Vincent Bolloré was the CEO and Chairman of Bolloré from 2007 to March 2019 (R.301-302), and Mr. Bolloré's family currently controls the Bolloré board. R.307-308. Mr. Bolloré is also the Censor of Vivendi, was Vivendi's

Chairman from June 2014 to April 2018, and led Vivendi's recent corporate acquisition strategy. R.298-299; R.309; R.310-311; R.312-318. Bolloré CEO Cyrille Bolloré is on Vivendi's Supervisory Board, and Bolloré Vice Chairman Yannick Bolloré chairs that Board. R.298-299; R.319.

Accordingly, Bolloré, Vivendi, and Editis are inextricably connected. Bolloré's own website identifies Vivendi's acquisition of Editis as a significant event in Bolloré's history. R.325. Bolloré and Vivendi also purchased Editis, at least in part, because of the EPAC/Editis relationship. R.330-331 (¶ 8). These three entities are so "closely related" that the Agreement's forum selection clause binds Bolloré and Vivendi.

The facts here are very close to another case that held Vivendi-related entities bound by a forum selection clause in an affiliate's agreement. In *Metro-Goldwyn-Mayer Studios Inc. v. Canal & Distribution S.A.S.*, 2010 WL 537583 (S.D.N.Y. Feb. 9, 2010), plaintiff MGM sued Canal & Distribution for breaching a 1996 licensing agreement between MGM and Canal & Distribution's predecessor-in-interest. *Id*. at *1, *4. The dispute arose when, in 2006, the predecessor merged with a competitor to form Canal & Distribution. *Id*. at *3. MGM alleged that, post-merger, Canal & Distribution failed to honor its obligations under the agreement. *Id*. at *4. Because the agreement had a New York forum selection

clause, *id*. at *2, MGM filed suit in 2007 in the Southern District of New York. But MGM did not only sue Canal & Distribution.

MGM also asserted claims for tortious interference against Canal & France, which owned 100% of Canal & Distribution, and Groupe Canal &, which owned 65% of Canal & France. *Id*. at *4. MGM averred that both Canal & France and Groupe Canal & – who were Vivendi affiliates – intentionally induced Canal & Distribution to breach the 1996 agreement once they became Canal & Distribution's owners. *Id*. at *1. Canal & France and Groupe Canal & both moved to dismiss for lack of personal jurisdiction. Like Vivendi and Bolloré, Canal & France and Groupe Canal & argued that, as non-signatories to the 1996 agreement, the agreement's forum selection clause did not bind them. *Id*. at *4-5.

The *MGM* court disagreed. The court noted that "[u]nder New York law, a signatory to a contract may invoke a forum selection clause against a non-signatory if the non-signatory is 'closely related' to one of the signatories," and that "[a] non-party is 'closely related' to a dispute if its interests are 'completely derivative' of and 'directly related to, if not predicated upon' the signatory party's interests or conduct.'" *Id*. at *5 (citations omitted).

The court then held that Canal & France easily met this test. Because Canal & France owned 100% of signatory Canal & Distribution, "MGM may invoke the forum selection clause in its Agreement … against [Canal & France] as [an]

entit[y] that [is] 'closely related' to [the breaching party] under New York law." *Id*. (citation omitted); *see also Tate & Lyle*, 98 A.D.3d at 402-03 (parent was "closely related" to wholly-owned subsidiary). With regard to Vivendi, the *MGM* case is on all fours with this one. As the 100% owner of Editis, Vivendi is subject to jurisdiction in New York County.

MGM also dictates that the Agreement's forum selection clause binds Bolloré. *MGM* held that Groupe Canal & met the "closely related" test. Because Groupe Canal & had an indirect controlling interest in the signatory defendant – just like Bolloré here – it too was subject to jurisdiction. The primary difference between the Canal & Distribution/Canal & France/Groupe Canal & relationship in *MGM*, and the Editis/Vivendi/ Bolloré relationship here, is that Groupe Canal & owned 65% of Canal & France (which owned 100% of Canal & Distribution), while Bolloré here owns 30% of Vivendi (which owns 100% of Editis). But courts do not require a parent to have a majority stake in the signatory. Minority stakes can suffice. *See Universal*, 154 A.D.3d at 179-80 (39.6% owner of signatory was "closely related"); *Firefly Equities, LLC v. Ultimate Combustion Co*. *Inc*., 736 F. Supp. 2d 797, 799-800 (S.D.N.Y. 2010) (17% owner of signatory was "closely related"). As a result, Bollore is subject to jurisdiction in New York County.

b. Vivendi and Bolloré Are "Closely Related" To This Dispute

Putting aside their ownership stakes in Editis, Vivendi and Bolloré are much closer to this case than Canal & France and Groupe Canal & were to *MGM*. Vivendi and Bolloré were directly involved in the performance of the Agreement, and to the disputes that arose between EPAC and the Editis Defendants.

Vivendi announced the closing of its purchase of Editis on January 31, 2019. From at least that time, Vivendi and Bolloré took over operational control of the Agreement. Michele Sibony, a Vivendi and Bolloré employee (R.326; R.327), managed this control. Mr. Sibony used a Bolloré business card, and wrote to EPAC from his Vivendi and Bolloré email accounts. R.331 (¶ 9). And, once he took over, Sibony was intimately involved.

It appears that, from Fall 2019, Sibony made all significant operational decisions regarding the Editis Defendants' relationship with EPAC, and regarding their performance of the Agreement. R.329-331 (¶¶ 6, 8). He complained about EPAC's costs (a factor in the Agreement's pricing) (R.331 (¶ 11)), led EOC meetings between EPAC and the Editis Defendants, and was copied on EOC correspondence. R.332-334 (¶¶ 14, 16-17). Editis even instructed EPAC to consult with Sibony regarding efforts to resolve the parties' disputes. R.336 (¶ 26).

In addition, throughout EPAC's interactions with him, Sibony played up his and Vivendi's/Bolloré's ability to help EPAC. Sibony sought to induce EPAC to

revise the Agreement by saying that he was involved in other acquisitions of publishers for Bolloré, and that Bolloré wished to expand the EPAC relationship to serve those additional customers (if EPAC agreed to price concessions). R.330-331 (¶ 8). Sibony told EPAC that his office was next door to Vincent Bolloré himself. *Id*.

Vivendi further inserted itself by taking the lead on the specious French tax issue discussed above. *See* R.334-336 (¶¶ 18-23). Vivendi's tax lawyers analyzed the tax issue (*see* R.348-349; R.359-360), instructed Editis to withhold payments based on its frivolous theory (*see* R.349), and communicated directly with EPAC about it (*see* R.341-345). Vivendi's attorneys also stated that, with respect to the tax issue, they spoke for Vivendi only – not Editis. *See* R.335-336 (¶ 22); R.352.

New York courts hold that this kind of direct involvement in the signatories' relationship – and dispute – means a non-signatory is "closely related" to its affiliate and bound by a forum selection clause. *See Tate & Lyle*, 98 A.D.3d at 403 (non-signatory parent and affiliate "both were intimately involved in the decision-making process from the inception of the licensing agreement through this litigation"); *Power Up*, 2019 WL 2119844 at *9 ("[non-signatory] was exercising a substantial amount of control over [signatory] during the time period preceding and encompassing [signatory's] default on the Notes and breach of the Agreements"); *LaRoss*, 874 F. Supp. 2d at 161 (non-signatory affiliate was "intimately connected

to both Defendant Contact and to this lawsuit"); *Project Cricket Acquisition, Inc. v. Florida Capital Partners, Inc*., 2017 WL 2797468, *4 (N.Y. Sup. Ct. June 28, 2017) ("Johnson's intimate involvement from the inception of the deal … , to the execution of the deal, to his alleged post-deal obfuscation demonstrates that he is far more than an executive signing an agreement"). Given their direct involvement in this dispute and their awareness of the Agreement (R.337 (¶ 27); R.345), Vivendi and Bolloré have no room to argue that they are not "closely related" to the Editis Defendants and this case.

For these reasons, this Court should find that Vivendi and Bolloré are subject to jurisdiction before assessing Supreme Court's ruling on the economic interest defense. At a minimum, if the Court has any question about this, the Court should vacate the decision below and remand to Supreme Court with instructions that the court should consider and rule on jurisdiction.

II. Supreme Court Erred By Holding That EPAC Failed To State A Claim For Tortious Interference With Contract

Supreme Court also erred in granting Vivendi's and Bolloré's motions to dismiss for failure to state a claim. The trial court misconstrued the economic interest defense in several ways, and did not apply the proper standard that governs CPLR 3211(a)(7) motions. If the Court reaches this issue, it should reverse.[1]

[1] The Court's "standard of review" in this posture "is well established[.]" *Ingutti v. Rochester Gen. Hosp*., 145 A.D.3d 1423, 1424, 44 N.Y.S.3d 274 (4th Dep't.

A. EPAC Alleged That Vivendi and Bolloré Acted to Further Their Own Interests, Not Those of the Editis Defendants

"New York law 'allows a defendant to avoid liability for tortious interference with contract if the defendant act[s] to protect its own legal or financial stake *in the breaching party's business*.'" *Hudson Bay Master Fund Ltd. v. Patriot Nat'l, Inc*., 2019 WL 1649983, *16 (S.D.N.Y. Mar. 28, 2019) (emphasis added) (quoting *Bausch & Lomb Inc. v. Mimetogen Pharms., Inc*., 2016 WL 2622013, *11 (W.D.N.Y. May 5, 2016)). In other words, "'an interferer acting to protect its *own* direct interests, rather than its interests in the breaching party, may not raise the economic interest defense.'" *Hudson Bay*, 2019 WL 1649983 at *16 (emphasis in original) (quoting *Bausch & Lomb*, 2016 WL 2622013 at *11); *see also Foster v. Churchill*, 87 N.Y.2d 744, 751, 642 N.Y.S.2d 583 (1996); *UMG Recordings, Inc. v. Escape Media Grp., Inc*., 37 Misc. 3d 208, 224, 948 N.Y.S.2d 881 (Sup. Ct., N.Y. County 2012).

EPAC alleged here that "the acts of Vivendi and Bolloré to interfere with the Agreement were not done in the economic interest of the Editis Defendants but

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2016). "'[O]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction' (*Leon v. Martinez*, 84 N.Y.2d 83, 87 [1994], citing CPLR 3026[1994]). Courts must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory[.]'" *Ingutti*, 145 A.D.3d at 1424; *see also BMW Grp. LLC v. Castle Oil Corp.*, 139 A.D.3d 78, 80, 29 N.Y.S.3d 253 (1st Dep't. 2016).

instead to serve other unrelated purposes of Vivendi and Bolloré." R.109 (¶ 31). EPAC did not merely allege this in conclusory fashion. EPAC spelled out multiple ways in which Bolloré and Vivendi acted to further their own interests, not merely their interests in the Editis Defendants, and explained where their roles differed. Supreme Court should not have granted the Vivendi/Bolloré motions to dismiss.

1. Vivendi and Bolloré Focused on Deals for Other Publishers and Vivendi's Own Tax Liability

EPAC alleged that Vivendi and Bolloré told "EPAC that they planned to expand their relationship with EPAC to *additional publishers* to be acquired by Bolloré and/or Vivendi." R.105 (¶ 21) (emphasis added). Vivendi's and Bolloré's interest in securing better terms for these future affiliates motivated it "to induce Editis to refuse to perform its obligations under the Agreement[.]" R.101 (¶ 3).[2] Doing so would enable Vivendi and Bolloré to "put improper economic pressure on EPAC to change the pricing and other material terms" not only for this Agreement, but also for future contracts that they contemplated entering into with EPAC. *Id*.

EPAC backed these allegations up with evidence, which courts can consider when ruling on a motion to dismiss under CPLR 3211(a)(7). *See Carr v. Wegmans*

[2] It is of course possible that Bolloré and Vivendi were lying when they made these statements. But that would mean, as explained below, that Vivendi and Bolloré acted with such malice that the economic interest defense would not apply.

Food Markets, Inc., 182 A.D.3d 667, 668-69, 122 N.Y.S.3d 391 (3rd Dep't. 2020); *Schmidt & Schmidt, Inc. v. Town of Charlton*, 68 A.D.3d 1314, 1315, 890 N.Y.S.2d 693 (3rd Dep't. 2009). EPAC Director Sasha Dobrovolsky, who negotiated the Agreement (as well as the Addendum and Amendment to it) and has been EPAC's primary participant in the Agreement's performance (R.329 (¶ 4)), submitted an affirmation below. Mr. Dobrovolsky explained there what Bolloré and Vivendi said to demonstrate that they were looking to further their own corporate interests. Mr. Dobrovolsky testified that:

> Mr. Sibony sought to induce me to revise EPAC Malta's contract with Editis and Interforum by telling me that Vivendi and/or Bolloré would be increasing their portfolio in European publishing, which he said would provide a massive increase in printing work for EPAC Malta. Mr. Sibony emphasized in these discussions that he was involved in *other acquisitions* for Bolloré of publishers and that *Bolloré wished to expand the EPAC relationship to serve those future customers* resulting in the massive increase in printing volume….

R.330-331 (¶ 8) (emphasis added).

This was not idle chatter. Evidence submitted by EPAC shows that, led by Bolloré's former CEO and Chairman Vincent Bolloré, Vivendi was in fact taking steps – recently completed – to acquire control of France's largest publishing house (Hachette), which competes with Editis. R.293-296. This gave Vivendi and Bolloré an incentive to induce Editis to breach the contract, and put additional pressure on EPAC, regardless of any benefit to Editis and Interforum.

The evidence submitted by EPAC also showed that, when Vivendi raised tax concerns as a pretext for instructing Editis and Interforum not to pay EPAC, Vivendi acted for its own interest – not on Editis' behalf – and completely disregarded the legal risks to which it might expose Editis. In particular, when EPAC cautioned Vivendi's attorneys that they were inducing the Editis Defendants to breach, counsel responded that they were "not advising EDITIS" but were instead "representing VIVENDI's tax department regarding tax issues this same entity might be exposed to…." R.335 (¶ 22); R.355. Vivendi's lawyers made this point repeatedly, and stated that they were only concerned with Vivendi's alleged tax liability "regardless of any other legal considerations" such as whether the Editis Defendants might become subject to liability and a lawsuit. R.352.

These facts and this evidence bring Vivendi's and Bolloré's conduct outside of the economic interest doctrine. They also parallel a case that Supreme Court discounted. In *Bausch & Lomb*, 2016 WL 2622013, Bausch & Lomb (B+L) and MPI had an agreement to commercialize an ophthalmic solution created by MPI for the treatment of dry eye syndrome. 2016 WL 2622013 at *1. The agreement required B+L to make a $20 million payment to MPI after the Phase III clinical trials for the product. *Id*. However, if the clinical trials were unsuccessful, the agreement allowed B+L to walk away without making the payment. *Id*. at *1-2.

Valeant acquired B+L shortly after B+L and MPI entered into their agreement. *Id*. at *2. Valeant announced nine months later that it was also trying to acquire Allergan – an MPI competitor. At that point, B+L's attitude towards MPI changed. *Id*. B+L told MPI that it considered the clinical trials to have been unsuccessful, and that it would not pay the $20 million fee called for in the agreement. *Id*. at *4-5. As is true in this case, some of the communications came directly from the parent Valeant, not the subsidiary B+L. *Id*. at *5.

MPI sued B+L for breach of contract and Valeant for tortious interference. MPI alleged that B+L and Valeant knowingly and falsely contended that MPI's clinical trials were unsuccessful, and that they were "motivated by the fact that Valeant was in the process of acquiring Allergan." *Id*. at *5-6. In allegations that parallel those here, *i.e*., that Vivendi and Bolloré were motivated by their potential acquisition of other publishers (like Hachette), MPI alleged that Valeant sought "to protect its expected interest in Allergan," by "direct[ing] B+L to falsely contend that the [clinical trial] results were [un]successful and to breach the agreement by refusing to pay the $20 million[.]" *Id*. at *12.

Valeant filed a motion invoking the economic interest defense, which the court denied. The court acknowledged that, as B+L's parent, "Valeant had a financial stake in the [a]greement" at issue. *Id*. However, "dismissal on the basis of the economic interest defense would only be appropriate if it was clear from the

face of MPI's own allegations that Valeant actually did act to protect its interest in B+L." *Id*. But, like EPAC here, MPI alleged the opposite, *i.e*., "that Valeant's reason for inducing a breach of the [a]greement was to protect *its own expected interest in Allergan*, not to protect its interest in B+L." *Id*. (emphasis in original); *see also Hudson Bay*, 2019 WL 1649983 at *16-17; *UMG*, 37 Misc. 3d at 224.

That applies here too. Based on EPAC's allegations and supporting evidence, Vivendi and Bolloré induced the Editis Defendants to breach the Agreement for their own benefit – not to protect their interests in Editis. Because of this, Supreme Court should have denied the Vivendi/Bolloré motions.

2. Supreme Court Applied a Mistaken Interpretation of the Economic Interest Doctrine

Supreme Court got this wrong because it interpreted the economic interest doctrine too broadly. The court first noted that, even if Vivendi and Bolloré were interested in "expand[ing] their relationship with other publishers" (R.25 (8:5-7)), their conduct was "still consistent with the economic interests of Editis [ ] every step of the way[.]" *Id*. (8:8-9). The trial judge then remarked that, even if pressuring EPAC to change its terms "would enure to [the benefit of] other potential publishers" (R.29 (12:14-20)), it would also have benefited Editis, which is "consistent with [the] economic interest" defense. *Id*. (12:21-22).

Supreme Court misunderstood the test. Even if a defendant's interference advances the breaching entity's interests, a cause of action for interference still lies

if the defendant acted with the intent to further *its own* interests. Interference claims would almost never survive if this were not the case. After all, a contractual party rarely decides to breach a contract when the breach confers no benefit on it.

For example, in *Bausch & Lomb*, 2016 WL 2622013, that Valeant's interference would also save B+L money – and thereby benefit B+L – did not matter. Valeant's motive at least in part was to protect its interest in another company that it hoped to acquire. That is true here too, which prevents Vivendi and Bolloré – like Valeant – from relying on the economic interest defense. *See id.* at *12.

North Shore Window & Door, Inc. v. Andersen Corp., 2021 WL 4205196 (E.D.N.Y. Aug. 3, 2021), also illustrates this distinction. The window-seller plaintiff there was the exclusive distributor for windows made by defendant FMQ. *Id*. at *1. Plaintiff alleged that, after defendant Andersen acquired FMQ and became FMQ's parent (like Vivendi did here with Editis), Andersen "injected [itself] into and wholly controlled the operations and relationship with [plaintiff]" (like Vivendi and Bolloré did here). *Id*. at *3. Plaintiff also alleged that Andersen undermined its relationship with FMQ (like Vivendi and Bolloré) and, through several acts of deception and bad faith, induced FMQ to breach the distribution agreement. *Id*. at *3, 11. In particular, plaintiff alleged that Andersen induced

FMQ to breach the agreement by failing to pay commissions at the required rates. *Id*. at *3, 9.

Defendants moved to dismiss the interference claim against Andersen on the ground that the economic interest doctrine insulated FMQ's parent Andersen. *Id*. at *11. The court denied the motion because plaintiff alleged that "Andersen did not want to continue the exclusive distributorship model and preferred to rely on *its own* network of sales employees and service subcontractors to sell and service FMQ products." *Id*. (emphasis added). Andersen's alleged intention to advance its *own interests* – independent of its interest in FMQ – negated its economic interest defense. It did not matter that Andersen's interference also allowed FMQ to save money by withholding required commissions from plaintiff.

Similarly, in *UMG Recordings*, 37 Misc. 3d 208, non-party HP reaped a benefit by cancelling its $325,000 advertising agreement with defendant Escape. That did not mean Escape could not maintain an interference claim against plaintiff UMG for causing HP's breach. *Id*. at 224. Because Escape alleged that UMG's goal was to "achieve a direct benefit to itself," the court denied UMG's motion to dismiss. *Id*.; *see also Dell's Maraschino Cherries Co. v. Shoreline Fruit Growers, Inc*., 887 F. Supp. 2d 459, 467, 484 (E.D.N.Y. 2012) (immaterial that interference allowed breaching party to save money).

These cases show that Supreme Court misinterpreted the economic interest defense. A defendant cannot avoid liability for its interference simply because the affiliate it convinced to breach a contract might benefit economically from its breach.

3. Supreme Court Did Not Accord EPAC the Benefit of All Favorable Inferences

Supreme Court also ignored a bedrock procedural principle. When deciding a motion to dismiss for failure to state a claim, CPLR 3211(a)(7) requires courts to "give the [plaintiff's] pleading a liberal construction, accept all of the facts alleged in the pleading to be true, and accord the plaintiff the benefit of every possible favorable inference[.]" *Smith v. Meridian Techs., Inc*., 52 A.D.3d 685, 686, 861 N.Y.S.2d 687 (2d Dep't. 2008); *see also Carr*, 182 A.D.3d at 669; *Schmidt*, 68 A.D.3d at 1315. Supreme Court failed to do this.

As explained above, EPAC alleged with specificity that Vivendi and Bolloré acted to advance their own interests. EPAC provided evidence to support its allegations. However, instead of crediting EPAC's allegations and affording them the presumption of truth, the lower court questioned the allegations and assumed the opposite of what EPAC pleaded. Specifically, Supreme Court asked: "[i]sn't it as simple as … [Vivendi and Bolloré] wanted Editis to get the best deal, and they're the parents, and they're so involved in control of Editis, [and] that's what motivated them to say … 'don't pay. Let's get a better deal.'" R.26 (9:14-18).

The court essentially asked EPAC to, at the pleading stage, eliminate all possibility that Vivendi and Bolloré focused on their interests in the Editis Defendants, rather than their own interests, notwithstanding EPAC's allegations to the contrary. That was a mistake. While discovery might eventually resolve the issue, what truly motivated Vivendi and Bolloré poses a fact question that a court should not resolve on a motion to dismiss. *See Bank of N.Y. v. Berisford Int'l*, 190 A.D.2d 622, 623, 594 N.Y.S.2d 152 (1st Dep't. 1993) ("While Neumann claims that his conduct was legitimately based on economic self-interest, said claim merely creates a factual issue for trial[.]"); *UMG Recordings*, 37 Misc. 3d at 224 (denying motion to dismiss where "relationships would offer UMG a defense *only if* it had acted to protect its interest in those relationships, not if, *as the counterclaims allege*, it used those relationships to coerce HP and INgrooves to breach their contracts with Escape, merely to … achieve a direct benefit to itself") (emphasis added); *Bausch & Lomb*, 2016 WL 2622013 at *12 ("dismissal on the basis of the economic interest defense would only be appropriate if it was clear from the face of MPI's own allegations that Valeant actually did act to protect its interest in B+L").

For now, EPAC's well-pled allegations more than suffice. Supreme Court should not have assumed the opposite of what EPAC alleged.

B. EPAC Alleged That Vivendi and Bolloré Acted With Malice And Employed Fraudulent Means

Even if Bolloré and Vivendi had acted to protect their interests in the Editis Defendants, the economic interest doctrine would still not apply. "A parent corporation that is motivated by malice toward a plaintiff, or that uses fraudulent or illegal means, is not immune from liability." *Record Club of America, Inc. v. United Artists Records, Inc*., 611 F. Supp. 211, 217 (S.D.N.Y. 1985). Therefore, "an economic interest defense can be defeated if plaintiff demonstrates that the defendant acted with malice toward plaintiff, or used fraudulent or illegal means." *North Shore Window*, 2021 WL 4205196 at *11; *see also Ithaca Capital Invs. I S.A. v. Trump Panama Hotel Mgmt. LLC*, 450 F. Supp. 3d 358, 373 (S.D.N.Y. 2020) (doctrine does not apply when "there has been a showing of malice or illegality"); *Inn Chu Trading Co. v. Sara Lee Corp*., 810 F. Supp. 501, 506 (S.D.N.Y. 1992).

EPAC alleged several ways in which Vivendi and Bolloré acted maliciously and with fraudulent means. For instance, Vivendi and Bolloré instructed Editis to fabricate complaints so that they could get out of the Agreement. R.105-106 (¶ 22); R.330 (¶ 7); R.332-333 (¶ 14). Deception like that negates an economic interest defense. *See Bausch & Lomb*, 2016 WL 2622013 at *12 ("Valeant directed B+L to falsely contend that the Initial Phase III Trial results were Not Successful"); *Green Star Energy Sols., LLC v. Edison Props., LLC*, 2022 WL

16540835, *16 (S.D.N.Y. Oct. 28, 2022) (allegation "that the Edison Defendants instructed UA Builders not to pay Plaintiff 'despite knowing that [Plaintiff] was entitled to payment on its final requisition'" constituted malice).

Moreover, Vivendi and Bolloré told EPAC that they planned to give EPAC more business based on the additional publishers that they intended to acquire. R.105 (¶ 21). If Vivendi and Bolloré were lying about that to convince EPAC to agree to its proposals – and were not, in fact, considering giving EPAC further business – that would further evince malice. *See Vista Food Exch., Inc. v. Lawson Foods, LLC*, 2022 WL 2530796, *6 (S.D.N.Y. Mar. 14, 2022) ("Although Lawson arguably acted at least in part to advance its own economic interests, it acted dishonestly by misrepresenting its creation of Fortress Foods[.]"); *UMG Recordings*, 37 Misc. 3d at 225 ("purposeful misrepresentations" constituted malice); *Zinter Handling, Inc. v. Gen. Elec. Co*., 2005 WL 1843282, *5 (N.D.N.Y. Aug. 2, 2005) (same); *North Shore Window*, 2021 WL 4205196 at *11 (allegation "that Andersen willfully hid the bankruptcy of Palladio" constituted malice).[3]

[3] Supreme Court raised the possibility that there was no misrepresentation because Vivendi's acquisition of Hachette suggests "that the [Bolloré/Vivendi] statements weren't untrue when they were made[.]" R.30 (13:6-7). Discovery might show that to be true. But the trial court was required to assume the truth of EPAC's allegations at this stage. Further, as explained above, if the statements were true, this shows that Vivendi and Bolloré sought to advance their own interests.

Vivendi may argue that, given its more direct and substantial interest in Editis, the economic interest doctrine provided it with more latitude than Bolloré enjoyed. However, Vivendi took things even further and exhibited more culpability.

Specifically, Vivendi interfered with the Agreement by concocting a "concern about an inapplicable European tax disclosure requirement." R.108 (¶ 30); R.112 (¶ 47). Vivendi "instruct[ed] its French counsel to announce this purported French requirement to EPAC," which was a "specious argument" and "a pretext to avoid paying EPAC's legitimate invoiced charges." R.108 (¶ 30); R.112 (¶ 47). "Vivendi's improper invocation of French tax law to induce the Editis Defendants to withhold substantial funds from EPAC and divert them to the French Government on specious grounds was a wrongful act under French law." R.109 (¶ 31); R.112-113 (¶ 48); *see also* R.409 (¶ 15). This too precludes Vivendi from relying on the economic interest defense. *See Ithaca*, 450 F. Supp. 3d at 373 (no economic interest defense where interference was "through unlawful means such as forcible entry and burglary"); *Inn Chu*, 810 F. Supp. at 506 ("procurement of confidential records would not fall within the scope of the self-interest privilege").

Supreme Court acknowledged that "malice or illegality or fraud" would preclude Vivendi and Bolloré from relying on the economic interest defense. R.27

(10:18-24). But the court refused to credit EPAC's allegations based on propositions that lack support in the case law.

The trial court focused on its belief that Vivendi's and Bolloré's actions could not be malicious because they were "consistent with [having a] financial motive in terms of saving money." R.29 (12:4-8). The court cited no authority for its view that "saving money" is a get-out-of-jail-free card. The cases say no such thing. *See Schmidt*, 68 A.D.3d at 1316 (defendant acted maliciously even though its interference could result in receipt of $250,000); *Exportaciones Del Futuro S.A. de C.V. v. Iconix Brand Grp. Inc*., 636 F. Supp. 2d 223, 231-32 (S.D.N.Y. 2009) (defendants employed improper means even though they would "receive[ ] nearly twice as much up front royalty payment[s]" due to interference); *North Shore Window*, 2021 WL 4205196 at *11; *Bausch & Lomb*, 2016 WL 2622013 at *12 (finding malice even though B+L saved money by withholding $20 million fee).

Supreme Court also absolved Vivendi for its tax scheme with reasoning that would undermine the malice-fraud-illegality exception in one of the scenarios in which it is most frequently invoked: the parent/subsidiary context. The trial court suggested that Vivendi directed Editis to withhold payments because Vivendi thought, "we have to do this because we're the [corporate] parent and we could have consequences. We have to make sure that Editis, our affiliate, does the right thing or we're going to be in trouble too." R.28 (11:12-19).

The problem with this approach is that the point of the malice-illegality-fraud exception is to prevent an interfering defendant from invoking the economic interest defense – even when acting to protect its own interest – if it employed malicious or fraudulent tactics. That is why corporate parents can be liable for interfering with their subsidiaries' contracts when they act maliciously or fraudulently. *See Exportaciones*, 636 F. Supp. 2d at 231-32 (refusing to dismiss claim against parent for interfering in wholly-owned subsidiary's contract where, even though parent "had an economic interest" in the agreement, parent "acted with the requisite [malicious] intent"); *Jones Lang Lasalle Brokerage, Inc. v. Epix Ent. LLC*, 61 Misc. 3d 1226(A), *1, *3, *6, 111 N.Y.S.3d 806 (Sup. Ct., N.Y. County 2018) (denying motion to dismiss against parent where, even though it was acting to protect its own financial interest, plaintiff had made "showing of malice or illegality"); *North Shore Window*, 2021 WL 4205196 at *2-3, *11 (plaintiff stated claim against parent who acted with malice); *Bausch & Lomb*, 2016 WL 2622013 at *2, *12 (same). Supreme Court's analysis would eviscerate the exception.

The lower court was also skeptical that the Vivendi/Editis tax withholdings could qualify as "malicious" given that Editis sent the withheld fees to the French authorities instead of "ke[eping] all the money[.]" R.28-29 (11:25-12:3). That misses the point. Vivendi concocted a sham argument that caused the Editis

Defendants to improperly withhold sums they owed to EPAC. The goal was to put pressure on EPAC so that EPAC would accede to the Vivendi/Bolloré demands to provide better terms. The scheme's logic did not depend on Defendants "keeping the money." Intentionally and wrongfully depriving EPAC of its funds would suffice.

Supreme Court relied on a few cases on the malice/fraud exception, but they are inapposite. The court cited *Ruha v. Guior*, 277 A.D.2d 116, 717 N.Y.S.2d 35 (2000), and called it "very enlightening and applicable." R.28 (11:1-3). *Ruha* contains one sentence on interference with contract and says nothing about the "bare allegations" of malice the plaintiff made. There is no basis for concluding that EPAC's specific allegations parallel what the plaintiff pleaded in *Ruha*.

Likewise, the court should not have relied on *Hirsch v. Food Res., Inc*., 24 A.D.3d 293, 297, 808 N.Y.S.2d 618 (1st Dep't. 2005). R.31 (14:10-14). In *Hirsch*, this Court found that plaintiff pleaded *no* "allegations of malice or fraudulent or illegal means[.]" 24 A.D.3d at 297. In *Rather v. CBS Corp*., 68 A.D.3d 49, 60, 886 N.Y.S.2d 121 (1st Dep't. 2009), too, plaintiff made only conclusory allegations of malice. EPAC pleaded much more.

CONCLUSION

Supreme Court's order should be reversed. The court had jurisdiction over Vivendi and Bolloré, and the economic interest defense does not apply.

Dated: February 6, 2023
New York, New York

Respectfully submitted,

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Dated: February 6, 2023
New York, New York.

STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

EPAC TECHNOLOGIES LTD,

Plaintiff-Appellant-Respondent,

—against—

INTERFORUM S.A., EDITIS S.A.,

Defendants-Respondents-Appellants,

VIVENDI S.E.,

Defendant-Respondent,

—and—

BOLLORE S.E.,

Defendant-Respondent.

New York County
Clerk's Index
No. 652032/21

Appellate Division
Case Nos.
2022-03478
2022-03480

1. The index number of the case is 652032/21.

2. The full names of the original parties are Plaintiff EPAC Technologies Ltd. ("EPAC"), and Defendants Interforum S.A. and Editis S.A. (collectively, "the Editis Defendants"). EPAC later added Vivendi S.E. ("Vivendi") and Bolloré S.E. ("Bolloré") to this action.

3. The action was commenced in Supreme Court, New York County.

4. EPAC commenced this action on March 26, 2021 by filing a complaint against the Editis Defendants. EPAC served the complaint on April 15, 2021. The Editis Defendants answered the complaint, and filed counterclaims against EPAC, on May 17, 2021. EPAC filed a first amended complaint against Vivendi and Bolloré on July 20, 2021. Service of the first amended complaint was waived by Stipulation filed on August 26, 2021.

5. This case arises from a Master Facility Development and Services Agreement between EPAC and the Editis Defendants. Pursuant to the agreement, EPAC provided printing services for the Editis Defendants at a facility in France. EPAC's claims are for breach of the contract against the Editis Defendants, and for tortious interference with the contract against Vivendi (Editis' parent) and Bolloré (Vivendi's major shareholder). EPAC seeks damages against all of the Defendants.

6. EPAC appeals from the decision and order of the Honorable Jennifer Schecter entered in favor of Defendants Vivendi and Bolloré on June 16, 2022 (and the related judgment of July 21, 2022), which granted Vivendi's and Bolloré's motions to dismiss EPAC's interference claims against them. The Editis Defendants have also filed a notice of cross-appeal of the June 16, 2022 decision and order, to the extent that it granted EPAC's motion to dismiss the Editis Defendants' first counterclaim for fraud.

7. The appeal is on a full reproduced record.