

**IN THE CIRCUIT COURT FOR HARRISON COUNTY, MISSISSIPPI  
FIRST JUDICIAL DISTRICT**

**REX DISTRIBUTING COMPANY, INC.**

**PLAINTIFF**

**V.**

**CIVIL ACTION NO. 24CI1:17-cv-33**

**ANHEUSER-BUSCH, LLC, MITCHELL  
BEVERAGE, LLC, MITCHELL-REX  
DISTRIBUTING, LLC, MITCHELL  
DISTRIBUTING COMPANY, INC. and  
D.G. YUENGLING AND SON, INCORPORATED  
d/b/a D.G. YUENGLING & SON, INC.**

**DEFENDANTS**

**ORDER ON MOTION TO DISMISS [#47]**

CAME ON FOR HEARING the Motion to Dismiss Plaintiff's Complaint [#47] pursuant to **Mississippi Rule of Civil Procedure 12(b)(6)** filed by Defendants Mitchell Beverage, LLC [Mitchell Beverage] and Mitchell Rex Distributing, LLC [Mitchell Rex] [collectively Mitchell Beverage<sup>1</sup>]. The Court having heard the arguments of the parties, and having considered the premises grants the motion.

Rex Distributing Company [Rex] operated as the exclusive wholesale distributor for Anheuser Busch products in South Mississippi for more than forty years pursuant to an equity agreement or distribution contract. Rex also distributed Yuengling products. In 2016 Rex announced its intent to sell its business. The "highest and best" offer for the sale was from Adams Beverages, Inc. [Adams] Rex and Adams entered into an Asset Purchase Agreement [APA] which required, in part, that Rex deliver "Consents" from brewers, including AB and Yuengling, prior to closing the sale.

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<sup>1</sup>For purposes of this motion to dismiss the two LLC's are referred to collectively, in part because of the intermixing of allegations against each of them the fact that their defenses are the same for the purposes of this motion.

In addition Rex and AB had a wholesaler Equity Agreement which contained a provision allowing AB to “match and redirect” the sale by giving AB the right and option to purchase Rex’s ownership interest. The agreement also allowed AB to redirect by assignment to any third party it selected. In August of 2016, before the sale from Rex to Adams could close, AB stepped in and “redirected” the sale to Mitchell Beverage. Thereafter, Yuengling refused to consent to the transfer of its distribution rights to Mitchell Beverage causing a reduction of the purchase prices by \$3.1 million. Aggrieved, Rex filed its complaint against Anheuser-Busch, LLC, Mitchell Beverage LLC, Mitchell-Rex Distributing LLC, Mitchell Distributing Company, Inc. and D.G. Yuengling and Son, Incorporated d/b/a D.G. Yuengling and Son, Inc. on February 21, 2017. Rex seeks to recoup the \$3.1 million from Mitchell Beverage for the Yuengling brand rights that Rex could not deliver and Mitchell Beverage did not acquire. Rex alleges two tort claims against Mitchell: (1) tortious interference with contract and (2) civil conspiracy. There is no claim that Mitchell breached a contractual duty to pay Rex or any other contractual duty.

The elements of tortious interference with contract are (1) the acts of the alleged tortfeasor were intentional and willful; (2) the acts were calculated to cause damage to the plaintiff in his lawful business; (3) they were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant, constituting malice; and (4) actual damage or loss resulted. *Springer v. Ausbern Cost. Co. Inc.*, 2016 WL 4684628 (Miss. Ct. App. Aug. 2, 2016), *aff’d* 2017 WL 4684628 (Oct. 19, 2017) [not yet released for publication] (citing *Reeves v. Midcontinent Exp. Pipeline, LLC*, 119 So.3d 1097, 1102 (Miss. Ct. App. 2013)). Generally, an action for tortious interference arises “when a party maliciously interferes with a valid and enforceable contract, causing one party not to perform and resulting in injury to the other contracting party.” *Id.* This complaint alleges that Rex and Adams had a valid



and enforceable contract, that AB and Mitchell Beverage intentionally interfered with that contract by redirecting the sale from Adams to Mitchell Beverage, that they were aware that the redirect would harm Rex and that this proximately caused a \$3.1 million loss to Rex.

Rex's claims fail. When Mitchell Beverage assumed Adams's obligations under the APA, pursuant to AB's redirect of the sale, Mitchell Beverage was bound by all of its terms, including the obligation to purchase the distribution rights to Yuengling's brand, as long as Yuengling consented. As to Yuengling distribution rights, Mitchell Beverage could not cause the "nonperformance of a valid and enforceable contractual obligation." There was not one. Yuengling decided whether to consent to the transfer of its distribution rights. Nor did Rex have an enforceable right to be paid for the transfer of its Yuengling's distribution rights, since it was conditioned on Yuengling's consent to the transfer. To recover on tortious interference claims, Rex must be able to prove that an enforceable obligation existed between it and another party. *Par Indus., Inc. v. Target Container Co.*, 708 So.2d 44, 48 (Miss. 1998). The obligation must be one that would have been performed but for the alleged interference. *Austin v. Carpenter*, 3 So.3d 147, 150 (Miss. Ct. App. 2009) Yuengling's consent was a condition precedent that was not fulfilled and, therefore, there was no enforceable obligation. Without an enforceable obligation, there was nothing with which Mitchell Beverage could have interfered.

Although Rex alleges that the match and redirect was "intentional and willful" it does not contend that such action was unlawful. Acting intentionally and willfully pursuant to the execution of a valid contractual right does not support even an inference of malice. *See i.e. Dunston v. Miss. Dept. Of Marine Resources*, 892 So.2d 837, 842 (Miss. Ct. App. 2005). Whether Yuengling's refusal to transfer its distribution rights to Mitchell was without "good cause" is a fight for another day. AB had the right to match and redirect the sale of its

distribution rights, Mitchell Beverage had the right to accept and was a proper assignee. There are no allegations that would support finding Mitchell Beverage tortiously interfered with any enforceable agreement between Yuengling and Rex.

Rex also makes a conspiracy claim against Mitchell Beverage. A civil conspiracy claim requires “a combination of persons for the purpose of accomplishing an unlawful purpose or a lawful purpose unlawfully.” *Gallagher Basset Services, Inc. v. Jeffcoat*, 887 So.2d 777, 786 (Miss. 2004). It requires “(1) an agreement between two or more persons, (2) an unlawful purpose, (3) an overt act in furtherance of the conspiracy, and (4) resulting damages to the plaintiff.” Rex’s claim for tortious interference fails. As a result, the claim for civil conspiracy cannot rest on that tort and also fails. *See Wells v. Shelter General Ins. Co.*, 27 F. Supp 2d 744, 755 (S.D. Miss. 2002). Mitchell Beverage lawfully assumed Adams’s rights and obligations under the APA. The conclusory allegations do not support that any acts taken pursuant to the assignment or APA were done with an unlawful purpose. Given the failure of the tortious interference claim, there are insufficient allegations to support a conspiracy to tortiously interfere with Rex’s contract with Adams. The only overt act Mitchell Beverage committed is that it agreed to step into Adams’s position after AB exercised its right to reassign the contract to another wholesaler. This is not a sufficient allegation to support a claim of civil conspiracy.

Finally, the punitive damages claim fails. “Punitive damages are not an independent cause of action, they are a remedy.” *Cole v. Chevron USA, Inc.* 554 F.Supp.2d 655, 674 (S.D. Miss. 2007) Punitive damages “are awarded to the injured party as a reward for his public service in bringing the wrongdoer to account.” *Neal v. Newburger Co.*, 154 Miss. 691, 700, 123 So. 861 (1929). Without actual damages, punitive damages are not recoverable. *Hopewell v. Trustmark Nat’l Bank*, 680 So.2d 812, 820 (Miss.1996). “If there is no cause of action

independent of a supposed right to recover exemplary damages, there is no cause of action at all.

*Western Union Tel. Co. v. Jennings*, 110 Miss. 673, 675, 70 So. 830, (1916)” *Kaplan v.*

*Harco Nat. Ins. Co.*, 716 So. 2d 673, 679 (Miss. Ct. App. 1998). It is, therefore,

ORDERED AND ADJUDGED that the Motion to Dismiss [#47] filed by Defendants Mitchell Beverage, LLC [Mitchell Beverage] and Mitchell Rex Distributing, LLC [Mitchell Rex] is granted and the claims against it are dismissed with prejudice.

SO ORDERED AND ADJUDGED this the 14 day of December 2017.

**FILED**  
DEC 15 2017  
CONNIE LADNER  
CIRCUIT CLERK  
BY [Signature] D.C.

[Signature]  
ROGER T. CLARK  
CIRCUIT COURT JUDGE