No. 24-

IN THE

Supreme Court of the United States

BOLLORÉ SE; VIVENDI SE,

Petitioners,

v.

EPAC TECHNOLOGIES LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

BRADLEY R. BOBROFF
MARK D. HARRIS
SHILOH A. RAINWATER
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036

Counsel for Petitioner Bolloré SE

VINCENT LEVY
Counsel of Record
KEVIN D. BENISH
JACK L. MILLMAN
CHARLOTTE BAIGENT
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Avenue, 14th Floor
New York, NY 10017
(646) 837-5120
vlevy@hsgllp.com

Counsel for Petitioner Vivendi SE

September 23, 2024

329930

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does the Fourteenth Amendment's Due Process Clause permit the exercise of personal jurisdiction over a nonresident defendant lacking any contacts with the forum state, on the sole basis that the defendant's "close relationship" with a third-party signatory to a contractual forum-selection clause renders litigation in that forum foreseeable, given that this Court has repeatedly held that foreseeability alone is inadequate for jurisdiction?

PARTIES TO THE PROCEEDING

Petitioner Vivendi SE was defendant in the trial court and appellee below.

Petitioner Bolloré SE was defendant in the trial court and appellee below.

Respondent EPAC Technologies Ltd. was plaintiff in the trial court and appellant below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Bolloré SE is a publicly traded entity. Compagnie de l'Odet, a publicly traded entity, owns 10% or more of its equity. No other publicly traded entity owns 10% or more of Bolloré SE's equity. Vivendi SE is a publicly traded entity. Bolloré SE owns more than 10% of Vivendi SE's equity. No other publicly traded entity owns 10% or more of Vivendi SE's equity.

RELATED PROCEEDINGS

- *EPAC Technologies Ltd* v. *Interforum S.A. et al.,* No. 652032/2021, Supreme Court of the State of New York, County of New York. Judgment entered July 21, 2022.

- *EPAC Technologies Ltd.* v. *Interforum S.A. et al.*, Nos. 2022-03478, 2022-03480, 217 A.D.3d 623, Supreme Court, Appellate Division, First Department, New York. Judgment entered June 29, 2023.

- *EPAC Technologies Ltd.* v. *Interforum S.A. et al.*, No. 2023-843, 41 N.Y.3d 975, Court of Appeals of New York. Court denied motion for leave to appeal on April 25, 2024.

There are no other proceedings in state or federal courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14(b)(1).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the New York Supreme Court, Appellate Division.

INTRODUCTION

For decades, lower federal and state courts, including the appellate courts of the State of New York, have defied this Court's teachings by subjecting nonresident defendants to personal jurisdiction under the "closely related" doctrine. According to that doctrine, the nonresident defendant need not have any contacts with the forum or consent to jurisdiction there. Instead, jurisdiction is based exclusively on the defendant's "close relationship" with a third party as to whom jurisdiction is proper, on the theory that this close relationship renders litigation in the forum foreseeable. In this case, New York's Appellate Division found Petitioners—a foreign company and its foreign non-controlling shareholder—subject to jurisdiction solely based on their alleged "close relationship" with a third party that years prior had consented to a forum-selection clause choosing New York courts. The Appellate Division did not find that Petitioners were bound to the agreement containing the clause or had any relevant contacts with New York, just that litigation in New York was foreseeable.

The "closely related" doctrine violates bedrock principles of due process. It is settled law that the exercise of personal jurisdiction over a nonresident

defendant entity comports with due process *only* when the defendant has minimum contacts with the forum state or consents to jurisdiction. A long line of cases has rejected efforts to dilute those requirements. In the context of minimum contacts, this Court has emphasized that relationships between *parties* cannot substitute for contacts with the *forum*. The Court also stressed that the mere "foreseeability" of suit is an insufficient basis for personal jurisdiction. But in this case, the Appellate Division based its reasoning on the claimed foreseeability of litigation in New York and nothing else.

The facts of this case illustrate the extent to which the closely related doctrine violates this Court's precedents. Petitioner Vivendi was the French parent corporation of an entity that was contractually bound to litigate certain disputes in New York, under a contract that did not bind that petitioner. Petitioner Bolloré is a French non-controlling *shareholder* of Vivendi, and therefore even further removed. Neither has any relevant business operations in the United States, let alone New York. Neither has any relevant contacts with the United States, let alone New York. Neither signed the agreement to litigate in New York, and (as Respondent concedes) neither is bound by the agreement containing the forum-selection clause. Indeed, Petitioners did not develop a relationship with the contractual party until years *after* the agreement was signed. Principles of fundamental fairness and due process do not allow a plaintiff to drag such distant parties before a far-flung tribunal on the flimsy

rationale that litigation there is foreseeable by virtue of their relationship with a contractual signatory.

Unfortunately, the Appellate Division's embrace of the "closely related" doctrine is not an isolated phenomenon. Many state and federal courts apply the doctrine despite recognizing that it conflicts with this Court's instructions on personal jurisdiction. As one circuit has observed, the most common rationale given for applying the doctrine is that "everyone else is doing it." Left unchecked, the "closely related" doctrine will persist as it has for years—despite its patent unconstitutionality. This Court's intervention is sorely needed.

OPINIONS BELOW

The New York Court of Appeals' decision denying Petitioners' motion for leave to appeal is unreported but available at 41 N.Y.3d 975, and reproduced at Appendix ("Pet. App.") 1a. The decision of the New York Appellate Division, First Department, is reported at 217 A.D.3d 623, and reproduced at Pet. App. 2a. The decision of the Supreme Court of the State of New York, County of New York, Commercial Division is unreported and reproduced at Pet. App. 19a–20a.

STATEMENT OF JURISDICTION

The Appellate Division issued its published decision finding personal jurisdiction on June 29, 2023. Pet. App. 5a. Petitioners timely moved before the Appellate Division for leave to appeal to the Court of Appeals. The Appellate Division denied leave on

November 9, 2023. On December 12, 2023, Petitioners timely moved before the Court of Appeals for leave to appeal to that court. On April 25, 2024, the Court of Appeals dismissed Petitioners' motion. Pet. App. 1a.

On May 22, 2024, Justice Sotomayor granted Petitioners' application for an extension of time to file until September 23, 2024. This petition is timely.

The Court has jurisdiction under 28 U.S.C. § 1257(a), because the First Department is the highest court in which review could be had, and because its ruling upholding the assertion of jurisdiction counts as final under this Court's interpretation of § 1257(a). See, *e.g., Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 921–23 (2011) (reviewing ruling of intermediate state court affirming assertion of personal jurisdiction following denial of motion for leave to appeal to North Carolina Supreme Court, despite that decision not finally concluding proceedings in trial court); see also *Bristol-Myers Squibb Co.* v. *Superior Ct. of California, San Francisco Cnty.*, 582 U.S. 255 (2017) (reviewing state-court decision finding personal jurisdiction despite that decision not finally concluding proceedings in trial court); *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873 (2011) (same); *Shaffer* v. *Heitner*, 433 U.S. 186, 195 n.12 (1977) (same).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Legal Background

A. State courts must comply with the Fourteenth Amendment's Due Process Clause when they exercise *in personam* jurisdiction over out-of-state defendants. *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). So, too, must federal courts in most circumstances. See Fed. R. Civ. P. 4(k)(1)(A).

The Due Process Clause "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations,'" *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 471–72 (1985) (quoting *Int'l Shoe*, 326 U.S. at 319). By ensuring a degree of predictability in the legal system, those protections also enable nonresident defendants to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980).

Consistent with those protections, personal jurisdiction may be exercised over a nonresident corporate defendant only in two situations. First, where the

defendant has "minimum contacts" with the forum state. See *Ford Motor Co.* v. *Montana Eighth Judicial Dist. Ct.*, 592 U.S. 351, 358 (2021); see also *Burger King*, 471 U.S. at 472 (the "fair warning" requirement of due process requires that the defendant has "purposefully directed" his activities at the forum (citation omitted)). And second, where the defendant has given its "consent" to be sued in the forum. *Mallory* v. *Norfolk Southern Railway Co.*, 600 U.S. 122, 138 (2023) (plurality op.); *id.* at 153 (Alito, J., concurring).

B. In spite of those fundamental precepts, a number of lower federal courts and state courts, including the court below, have relied on an expansive theory of jurisdiction that is unsupported by either minimum contacts or consent. Those courts allow plaintiffs to hale foreign defendants into court on the basis that the latter are "closely related" to a third party that signed a forum-selection clause, without requiring a showing of minimum contacts or consent by the defendant itself. See John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 Notre Dame L. Rev. 187, 198–200 (2021); *Firexo, Inc.* v. *Firexo Group Ltd.*, 99 F.4th 304, 311–21 (6th Cir. 2024) (lead op. by Batchelder, J.) (describing history of the doctrine and critiquing it).

According to the "closely related" doctrine (or the "closely-related-and-foreseeable test"), "a party can enforce a contract's forum selection clause against a non-signatory [defendant] if the non-signatory is so *closely related* to one of the signatories 'that enforcement of the clause is *foreseeable* by virtue of the

relationship between them.'" Coyle & Effron, *supra,* at 198 (quoting *Freeford Ltd.* v. *Pendleton*, 857 N.Y.S.2d 62, 67 (N.Y. 1st Dep't 2008)). Even as this Court has reaffirmed important limits on personal jurisdiction over the last 15 years, the foreseeability-based closely related doctrine has continued to proliferate, and it has been applied where, as in this case, there is no basis to bind non-signatories to the contract under traditional principles of law or equity, such as contract, estoppel, or agency.[1]

II. Factual Background

A. On July 23, 2015, co-defendant Editis, a French publisher that is not among the petitioners, and plaintiff-respondent EPAC, a foreign-incorporated printer, entered into a Master Facility Development and Services Agreement (the "Agreement") in France, under which EPAC promised to provide state-of-the-art, on-demand printing services in a suburb of Paris. R. 159–60 ¶¶ 15–19.[2] The parties elected that the Agreement

---

[1] *E.g., Umlaut, Inc.* v. *P3 USA, Inc.*, 2020 WL 4016098, at *3 (E.D. Mich. Jul. 15, 2020); *Matthews Int'l Corp.* v. *Lombardi*, 2020 WL 1275692, at *6 (W.D. Pa. Mar. 17, 2020); *Southridge Partners II Ltd. P'ship* v. *SND Auto Grp., Inc.*, 2019 WL 6936727, at *5 (D. Conn. Dec. 19, 2019); *Diamond* v. *Calaway*, 2018 WL 4906256, at *4 (S.D.N.Y. Oct. 9, 2018); *Ninespot, Inc.* v. *Jupai Holdings Ltd.*, 2018 WL 3626325, at *4 (D. Del. Jul. 30, 2018); *Power UP Lending Grp., Ltd.* v. *Murphy*, 2016 WL 6088332, at *6–7 (E.D.N.Y. Oct. 18, 2016); *AAMCO Transmissions, Inc.* v. *Romano*, 42 F. Supp. 3d 700, 708–09 (E.D. Pa. 2014); *Synthes, Inc.* v. *Emerge Med., Inc.*, 887 F. Supp. 2d 598, 607–08 (E.D. Pa. 2012).

[2] Citations to "R." are citations to the record before the First Department.

should be governed by New York law and included a forum-selection clause designating New York courts for resolving disputes between them under the Agreement. See, *e.g.*, R. 102 ¶ 11. Neither the parties, nor the contract, nor the facts leading to the instant dispute are alleged to have any connection to the United States, let alone New York. See R. 99–110 ¶¶ 1–35.

B. In January 2019, three and a half years after the Agreement's execution, Petitioner Vivendi, a French corporation, acquired Editis. R. 291. (Vivendi has since divested its stake in Editis, and the two are now unaffiliated.) Petitioner Bolloré was—and remains—one of Vivendi's non-controlling (French) shareholders. R. 127.

EPAC does not allege that Vivendi and Bolloré signed the Agreement, that they were involved in its negotiation or execution, or that they were affiliated with the signatories when the Agreement was signed. Moreover, the Agreement did not refer to or purport to bind Vivendi or Bolloré, or any predecessor or affiliate.

C. Following Vivendi's acquisition of Editis but before this suit commenced, EPAC issued multiple invoices to Editis in France that included dramatic and unexplained price increases, prompting Editis to seek an audit under the Agreement. R. 163–64 ¶¶ 33–34. Editis also raised concerns about EPAC's tax compliance with French law (given EPAC's incorporation in Malta). After EPAC refused to provide tax-related information, Editis withheld a portion of funds invoiced by EPAC and paid that money directly to the French

Treasury as taxes to avoid violating French and European law. R. 166 ¶¶ 41–42. This led EPAC to repudiate the Agreement and commence this suit.

III. Procedural History

A. EPAC commenced this action by filing a complaint against Editis in New York Supreme Court, Commercial Division, in March 2021, alleging breach of contract and invoking the Agreement's forum-selection clause to support jurisdiction. R. 54–66. Editis answered and counterclaimed. R. 67–88.

A few months later, EPAC amended its complaint to add claims against Petitioners Vivendi and Bolloré for tortious interference with the Agreement. R. 99–114 (the "Amended Complaint"). EPAC's only basis for jurisdiction over Vivendi and Bolloré was that they were alleged to be closely related to Editis, which had signed the Agreement containing the forum-selection clause. R. 102 ¶ 12. The Amended Complaint alleges no connection to New York, nor any contact or conduct in New York (nor even the United States) by any defendant. Nor does it allege that Vivendi and Bolloré consented to jurisdiction in New York, or was otherwise bound by the Agreement. To the contrary, given that EPAC alleges Vivendi and Bolloré tortiously interfered with the Agreement, what follows is that EPAC claims Petitioners are *not* bound to it.

B. Vivendi and Bolloré filed separate motions to dismiss the Amended Complaint for want of personal jurisdiction and failure to state a claim. R. 178–96; R. 120–47. Regarding jurisdiction, the motions argued

that there was no allegation of any relevant contact in New York, and that there was no basis to bind non-signatories Vivendi or Bolloré to the Agreement or to its forum-selection clause under traditional principles such as agency or veil-piercing. The motions further argued that the alleged "close relationship" between Vivendi and Bolloré, on the one hand, and Editis, on the other, was insufficient to bind them to the forum-selection clause or permit the exercise of personal jurisdiction consistent with the United States Constitution.

In opposition, EPAC did not contest the absence of minimal contacts by Vivendi and Bolloré with New York, and it also expressly disclaimed the application of common-law or equitable principles (like agency, veil-piercing, and successor liability) that can make a non-signatory bound to an affiliate's contract. R. 261–87, 361–87, 375. EPAC argued, however, that jurisdiction was permissible under New York and federal law under the "closely related" doctrine, because Vivendi was closely related to Editis and "not a passive bystander" to this dispute. R. 373. As to Bolloré, which stands another step removed, EPAC argued that it had "effective control" over Vivendi and was not a "casual observer," either. R. 271, 273.

The trial court granted the motions to dismiss for failure to state a claim without addressing jurisdiction. Pet. App. 19a–20a; *see also id.* at 4a.

C. EPAC appealed to the Appellate Division, First Department, which held that EPAC "alleged a sufficiently close relationship between Vivendi and

[Editis] to justify subjecting it to personal jurisdiction in New York and that its allegations with respect to Bollor[é] were sufficient to warrant jurisdictional discovery." Pet. App. 5a. In finding jurisdiction, the court relied only on the "closely related" doctrine, ignoring that neither company had any relevant contacts with New York. *Id.* at 4a–5a. The court rejected the defendants' objection that "wholesale application of this doctrine allow[ed] for the circumvention of federal due process requirements insofar as it dispenses with the need to perform an analysis of the defendant's contacts with the forum state." *Id.*

More specifically, the First Department held that "plaintiff alleged a sufficiently close relationship between Vivendi and the Editis Defendants to justify subjecting it to personal jurisdiction in New York" in view of the forum-selection clause. *Id.* at 5a. Addressing Petitioner's constitutional argument, the court ruled that "no separate due process analysis [was] necessary because 'the concept of foreseeability is built into the closely-related doctrine, which explicitly requires that the relationship between the parties be such that it is foreseeable that the non-signatory will be bound by the forum selection clause.'" *Id.* (quoting *Highland Crusader Offshore Partners, L.P.* v. *Targeted Delivery Techs. Holdings, Ltd.*, 184 A.D.3d 116, 123 (N.Y. 1st Dep't 2020)). With respect to Bolloré, the court held that plaintiff's allegations of Bolloré's effective control over Editis via Vivendi "may be sufficient to establish a close relationship." *Id.* at 5a–6a.

Finally, the court also reversed the merits-based dismissal of the tortious-interference claims. *Id.* at 3a.

D. Petitioners twice sought leave to appeal to the New York Court of Appeals, New York's highest court, but both its requests—to the First Department and the Court of Appeals—were rejected, leaving the First Department's decision in place.

REASONS FOR GRANTING THE PETITION

The decision below continues a pervasive and longstanding trend of New York courts, and state and federal courts generally, deploying the closely related doctrine to significantly and unconstitutionally expand personal jurisdiction. That doctrine subjects foreign defendants to the significant costs and inconvenience of litigating in a forum where they have zero connection, and where they have not consented to litigate.

Given the patent conflict between the closely related doctrine and this Court's precedents, the confusion caused by the doctrine below, and the importance of the question presented, this Court should grant review. Rule 10; see also Robert L. Stern, Eugene Gressman, et al., Supreme Court Practice § 4.3 (11th ed. 2019) ("A well-established ground for granting certiorari, reflected in Rule 10(a), is the existence of a conflict between the decision as to which review is sought and one rendered by the Supreme Court or some lower court whose judgment is final in the absence of Supreme Court review."); *Bristol-Myers*, 582 U.S. at 264 (rejecting California's "sliding scale approach");

Goodyear, 564 U.S. at 919–20 (rejecting North Carolina's "general jurisdiction" test).

I. The Decision Below Flouts This Court's Precedents.

A. The decision below conflicts with "minimum contacts" precedents.

The premise of the decision below is that "[a] non-signatory may . . . be bound by a forum selection clause where the non-signatory and a party to the agreement have such a 'close relationship' that it is foreseeable that the forum selection clause will be enforced against the non-signatory." Pet. App. 4a (quoting *Highland Crusader*, 184 A.D.3d at 122). That is consistent with due process, according to the court, because "'the concept of foreseeability is built into the closely-related doctrine, which explicitly requires that the relationship between the parties be such that it is foreseeable that the non-signatory will be bound by the forum selection clause.'" *Id.*[3]

That ruling plainly conflicts with this Court's precedents. To begin, the Court repeatedly has instructed that "foreseeability" alone—*i.e.*, the sole

[3] New York's Appellate Division has offered the same justification for the doctrine in other cases. *Highland Crusader*, 184 A.D.3d at 123 (declining to "undertake a separate minimum-contacts analysis" because "the concept of foreseeability is built into the closely-related doctrine"); see also *P.S. Fin., LLC* v. *Eureka Woodworks, Inc.*, 214 A.D.3d 1, 23–24 (N.Y. 2d Dep't 2023) (expressing "concern that application of the closely related doctrine in some cases may not comport with due process" but applying it anyway); *Sutton* v. *Houllou*, 191 A.D.3d 1031, 1034 (N.Y. 2d Dep't 2021) (same).

element the First Department relied upon in rejecting Petitioners' due process argument—is *insufficient* to satisfy due process. In *World-Wide Volkswagen*, the Court held that "'foreseeability' alone has *never* been a sufficient benchmark for personal jurisdiction under the Due Process Clause." 446 U.S. at 297 (emphasis added). The Court reiterated that holding in *Burger King*, 471 U.S. at 474. And in *McIntyre*, a plurality of the Court emphasized that "a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power." *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 U.S. 873, 883 (2011) (plurality op.). The plurality explained "that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment." *Id.* For that reason, the only foreseeability that is "critical to due process" is a foreseeable risk of litigation created by a defendant's "conduct and connection with the forum State." *World-Wide Volkswagen*, 444 U.S. at 297. No such contacts are alleged here.

Second, the Court has also expressly rejected efforts to justify personal jurisdiction based on a defendant's relationship with *other parties* (as opposed to the forum). As explained in *Walden*, "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Walden* v. *Fiore*, 571 U.S. 277, 286 (2014). Instead, the Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Id.* at 284 (collecting cases); *accord Burger King*, 471 U.S. at 475; *Rush* v. *Savchuk*,

444 U.S. 320, 332 (1980). Another party's "unilateral activity"—such as its selection of a forum to resolve its contractual disputes—simply "cannot satisfy the requirement of contact with the forum" by the nonresident defendant itself. *Hansen* v. *Denckla*, 357 U.S. 235, 253 (1958).

When, as here, a court finds personal jurisdiction on the basis of foreseeability alone—in the absence of minimum contacts or consent—it is doing exactly what this Court said is not permitted in *World-Wide Volkswagen*, *Burger King*, and *Bristol-Myers*. See also *Mallory*, 600 U.S. 122, 138–40 (2023) (plurality op.) (collecting cases and concluding that, absent consent, jurisdiction must be predicated on defendant's "minimum contacts" with the forum). Rather than attempt to reconcile its decision with these precedents, the First Department's decision simply defied them.

B. "Consent" does not save the closely related doctrine.

In opposing leave to appeal to the New York Court of Appeals, Respondent did not attempt to justify the Appellate Division's reasoning on its own terms, but rather argued for the first time that "consent" provides an alternate basis to sustain jurisdiction. Similarly, some lower courts have described the closely related doctrine as rooted in "consent." *E.g.*, *Fitness Together Franchise, L.L.C.* v. *EM Fitness, L.L.C.*, 2020 WL 6119470, at *5 (D. Colo. Oct. 16, 2020) (describing the closely related test as "a consent-based jurisdictional doctrine"). But see *Franlink Inc.* v. *BACE*

Servs., Inc., 50 F.4th 432, 441 (5th Cir. 2022) ("The absence of the non-signatory's consent presents a due process problem by forcing a party to litigate in a forum that would otherwise lack personal jurisdiction." (citing Coyle & Effron, *supra*)).

That argument fails. To demonstrate "consent," a plaintiff must show actions of the defendant that "amount to a legal submission to the jurisdiction of a court," *Mallory*, 600 U.S. at 146 (plurality op.) (quoting *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704–05 (1982)), such as "contract, stipulation, [or] an[] in-court appearance," *id.* at 167 (Barrett, J., dissenting) (citing *Insurance Corp. of Ireland*, 456 U.S. at 703–04). In *Burger King*, for example, the Court noted that a forum-selection clause could satisfy due process if it was "freely negotiated." 471 U.S. at 472 n.14. And in *Mallory*, the Court held that the act of registering to do business in a state, where that state has a statute conditioning such registration on the corporation's consent to being sued, counted as "consent" for jurisdictional purposes. 600 U.S. at 144 (plurality op.).

The foreseeability-based "closely related" doctrine endorsed by the court below, however, does not require any act consenting to jurisdiction, and none exists here. Again, Petitioners did not sign the Agreement or its forum-selection clause, and never agreed to be bound by either. *Firexo*, 99 F.4th at 318 (lead op. by Batchelder, J.) ("When a signatory defendant invokes the clause against a non-signatory plaintiff, enforcement of the clause presents a consent problem—

the plaintiff *did not expressly consent* to that forum inasmuch as it never signed the contract.").

Moreover, EPAC expressly disclaimed that Vivendi and Bolloré *could* be bound to the Agreement or its forum-selection clause under ordinary principles of law or equity generally applicable to contracts, R. 261–87, 361–86, 375, and there is no suggestion that such ordinary principles of law could have bound them. *Cf. Barbosa* v. *Midland Credit Mgmt., Inc*, 981 F.3d 82, 88 (1st Cir. 2020) (discussing how while a contract normally cannot bind a non-party, "a non-signatory may be bound by or acquire rights under an arbitration agreement under ordinary state-law principles of agency or contract" (cleaned up)). Indeed, recall that EPAC is suing Petitioners not for breach of the Agreement containing the forum-selection clause, but for tortious interference with that contract—a cause of action that does not lie if Petitioners are bound by any part of the Agreement. *Bradbury* v. *Israel*, 204 A.D.3d 563, 564 (N.Y. 1st Dep't 2022) ("It is well established that only a stranger to a contract, such as a third party, can be liable for tortious interference with a contract." (cleaned up)). Meanwhile, the New York courts (like others) have expressly held that the doctrine applies to bind non-signatories to forum-selection clauses even when it cannot be said that those non-signatories are bound to the contract itself. *Highland Crusader*, 184 A.D.3d at 122.

Nor could jurisdiction here be based on any other sort of conduct or theory of "consent" that has been endorsed by this Court. The court below did not rely

on litigation-related conduct to bind Petitioners to the forum-selection clause, and there was no such conduct. And Petitioners did not engage in any sort of bargain in which it may be said that they agreed to jurisdiction. See *Mallory*, 600 U.S. at 144 (plurality op.).

* * *

In sum, the ruling below and the closely related doctrine more generally contravene settled precedent of this Court and cannot justify the exercise of jurisdiction against a foreign defendant. The court below did not rely upon the contacts of the defendant with the forum state, or consent. It relied only on foreseeability, which, this Court instructed, has never been enough to justify jurisdiction, and neither can a plaintiff rely on the conduct of a third party. And, given that the "closely related" doctrine is not rooted in general principles that would bind a non-signatory to a contract, it cannot be justified on a consent theory.

II. Federal And State Courts Regularly Apply The Closely Related Doctrine Despite Its Unconstitutionality.

This Court's review is needed because the decision below is no outlier. Rather, federal and state courts regularly sustain and apply the doctrine despite its patent unconstitutionality—and despite some jurists recognizing the conflict with this Court's jurisprudence—because "everyone else is doing it." *Firexo*, 99 F.4th at 312–21 (lead op. by Batchelder, J.) (tracing the origins of the doctrine). And there is no prospect

of the state and lower courts putting a stop to their unconstitutional jurisdictional power grab on their own.

The circuits have indeed largely followed each other in endorsing the doctrine. The Fifth Circuit has held that forum-selection clauses are enforceable against non-signatory, closely-related defendants if enforcement is foreseeable, following similar decisions by the Ninth and Eleventh Circuits. *Franlink*, 50 F.4th at 441–42; *Xena Invs., Ltd.* v. *Magnum Fund Mgmt. Ltd.*, 726 F.3d 1278, 1285 (11th Cir. 2013); *Manetti-Farrow, Inc.* v. *Gucci Am., Inc.*, 858 F.2d 509, 514 n.5 (9th Cir. 1988). In *Franlink*, the Fifth Circuit described the doctrine as "particularly troubling given its tension with the Supreme Court's approach in the related minimum-contacts context," but it adopted the doctrine anyway. 50 F.4th at 441 (cleaned up). Only the Sixth Circuit has declined to adopt that approach, with one judge stating that enforcing a forum-selection clause against a closely related non-signatory defendant "implicates a constitutional due process problem by circumventing the minimum-contacts requirement" of personal jurisdiction. *Firexo*, 99 F.4th at 312 (lead op. by Batchelder, J.); see also *id.* at 330 (Larsen, J., concurring) (agreeing that Sixth Circuit has not adopted doctrine, without criticizing it).[4]

[4] Other circuits have recognized an inverse formulation of the doctrine, enforcing forum-selection clauses against non-signatory *plaintiffs,* but they have not yet applied the doctrine to assert personal jurisdiction over non-signatory defendants. *In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 63 (3d Cir. 2018); *Magi XXI, Inc.* v. *Stato della Citta del Vaticano*, 714 F.3d

State courts have also generally adopted the doctrine—usually with minimal analysis, as the decision below illustrates, Pet. App. 4a–5a. State-court decisions have tended to reach for a combination of minimum contacts and consent, often simply relying on prior state and federal decisions adopting the doctrine (which, as noted, they did with minimal analysis of the doctrine's soundness or constitutionality). *E.g.*, *Meribear Prods., Inc.* v. *Frank*, 340 Conn. 711, 728 (2021); *Solargenix Energy, LLC* v. *Acciona, S.A.*, 384 Ill.Dec. 598, 610–12 (2014). Just like the circuit courts, state courts have largely and uncritically followed each other, particularly as the doctrine increases the scope of their jurisdiction in a manner seen as beneficial to public policy (which is unsurprising given the jurisdictional expansion).

New York's justification is emblematic. In the line of cases leading to the decision below, the appellate court with oversight over Manhattan state courts (the First Department) justified enforcing a forum-selection clause against a non-signatory defendant on the basis that some "federal courts" had done so. *Tate & Lyle Ingredients Ams., Inc.* v. *Whitefox Tech. USA, Inc.*, 98 A.D.3d 401, 402 (N.Y. 1st Dep't 2012). The doctrine is now entrenched in New York, justified on

---

714, 723 (2d Cir. 2013); *Marano Enterprises of Kansas* v. *Z-Teca Restaurants, L.P.*, 254 F.3d 753, 757–58 (8th Cir. 2001); *Lipcon* v. *Underwriters at Lloyd's, London*, 148 F.3d 1285, 1299 (11th Cir. 1998); *Hugel* v. *Corp. of Lloyd's*, 999 F.2d 206, 209–10 (7th Cir. 1993). That formulation does not present the same due-process concerns as enforcement against foreign non-signatory *defendants*. *Firexo*, 318 F.4th at 318 (lead op. by Batchelder, J.).

the basis that even though non-parties are generally not bound to contracts they did not sign, applying forum-selection clauses to non-parties who are "closely related" to signatories supposedly "promote[s] stable and dependable trade relations" and "public policy." *Highland Crusader*, 84 A.D.3d at 121–22. Never mind that the doctrine is justified solely on a notion of foreseeability, *id.*—which, this Court repeatedly has held, is insufficient.

The "closely related" doctrine is now mainstream in courts across the country. Only this Court's intervention can invalidate the doctrine once and for all, and reestablish the necessity of minimum contacts or consent for personal jurisdiction.

III. The Question Presented Is Exceedingly Important.

The interests protected by the Fourteenth Amendment's Due Process Clause are extremely important. They "protect[] interstate federalism" by "ensur[ing] that States with little legitimate interest in a suit do not encroach on States more affected by the controversy." *Ford*, 592 U.S. at 360 (cleaned up). They permit persons to organize their primary conduct and affairs, *World-Wide Volkswagen*, 444 U.S. at 297, and avoid arbitrary exercises of judicial power, *Burger King*, 471 U.S. at 471–72. And they protect foreign defendants from being haled into a forum to which they did not consent, and where they have "no meaningful 'contacts, ties, or relations." *Id.* at 472 (quoting *Int'l Shoe*, 326 U.S. at 319).

In many industries, those limitations play a crucial role in protecting defendants against costly, harassing litigation. For example, private-equity firms commonly create funds that operate separately, with the funds holding equity in the businesses they invest in. See, *e.g.*, *Sun Capital Partners III, LP* v. *New England Teamsters & Trucking Industry Pension Fund*, 943 F.3d 49, 53 (1st Cir. 2019) ("[A] private equity firm . . . pools investors' capital in limited partnerships, assists these limited partnerships in finding and acquiring portfolio companies, and then provides management services to those portfolio companies").

The closely related doctrine, however, uproots the reasonable expectation of economic actors who structured their affairs on longstanding federal law, by permitting the exercise of jurisdiction over corporate affiliates that never consented to being sued, and that have no connection to the state asserting jurisdiction; under the rule of decision below, private-equity firms and their holdings could be subject to jurisdiction in far-afield states based on contracts they never signed, and loose notions of foreseeability and fairness.

And, as this case illustrates, the closely related doctrine has international implications (in addition to protecting federalism interests), because it applies to foreign entities. Thus, multinational conglomerates, despite lacking any contact or connection with a far-flung forum, could be dragged into court simply because that result was alleged to be "foreseeable" after the fact—which is easy enough to plead given hindsight bias, and easy enough to find where the court

believes that it "promote[s] stable and dependable trade relations." *Highland Crusader*, 84 A.D.3d at 121–22. Subjecting entities to jurisdiction in the United States based on forum-selection clauses in affiliates' contracts raises clear and substantial concerns; "exorbitant assertions of judicial jurisdiction [over foreign entities] by United States courts" can cause friction and "frustrate diplomatic initiatives . . . particularly in the private international law field." Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 29 (1987).

The "closely related" doctrine admits of no limiting principle. If ex-post foreseeability is the test, *any* affiliation with a signatory to a forum-selection clause—no matter how attenuated—raises the specter of being forced to litigate in a distant forum simply by virtue of awareness that litigation could arise in that forum, and indeed there is no principle that could limit application of this doctrine to forum-selection clauses. This case—where the court below applied a forum-selection clause to the foreign non-controlling shareholder (Bolloré) of the foreign public-company parent (Vivendi) of the parent-guarantor (Editis) of the principal contractual signatory (Interforum)—illustrates the point. It is difficult to overstate the profoundly destabilizing implications of a rule subjecting a twice-removed non-controlling shareholder affiliate of a contractual signatory to jurisdiction in the selected forum. And, if the doctrine does reach such a distant relative, it is difficult to know where it will stop.

IV. This Case Presents An Ideal Vehicle To Decide The Question Presented.

This petition cleanly presents the question presented. The case arises at the motion-to-dismiss stage, so the plaintiff's allegations are assumed to be true, and the issue is purely one of law. Moreover, the question presented is outcome-determinative and cleanly presented: the plaintiff expressly stated it was alleging no contacts in the United States (let alone New York), and that it was not relying on traditional principles of law or equity for binding non-signatories to contracts, but only on the "close relationship" between Petitioners, a corporate affiliate that had signed a forum-selection clause, and the dispute. In line with the arguments, the First Department's decision rested specifically and solely on its conclusion that the closely related doctrine applies to Petitioners and does not violate due process, squarely and wrongly holding that the federal Constitution is satisfied because the exercise of jurisdiction is foreseeable. Pet. App. 3a. There is no impediment to evaluating this ruling against this Court's longstanding precedents holding that foreseeability alone is inadequate. Supra at 13–14.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

BRADLEY R. BOBROFF
MARK D. HARRIS
SHILOH A. RAINWATER
PROSKAUER ROSE LLP
Eleven Times Square
New York, New York

Counsel for Petitioner Bolloré SE

VINCENT LEVY
Counsel of Record
KEVIN D. BENISH
JACK L. MILLMAN
CHARLOTTE BAIGENT
HOLWELL SHUSTER & GOLDBERG LLP
425 LEXINGTON AVENUE
14th Floor
New York, NY 10017
(646) 837-5120
vlevy@hsgllp.com

Counsel for Petitioner Vivendi SE

September 23, 2024

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A —OPINION OF THE COURT OF APPEALS OF NEW YORK, FILED APRIL 25, 2024

COURT OF APPEALS OF NEW YORK

Motion No: 2023-843

EPAC TECHNOLOGIES LTD.,

Respondent,

v

INTERFORUM S.A. *et al.*,

Defendants,

VIVENDI S.E. *et al.*,

Appellants.

Decided April 25, 2024

OPINION

Motion for leave to appeal dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

APPENDIX B — OPINION OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, FILED JUNE 29, 2023

SUPREME COURT OF NEW YORK,
APPELLATE DIVISION, FIRST DEPARTMENT

Index No. 652032/21, Appeal No. 588-589,
Case No. 2022-03478, 2022-03480

EPAC TECHNOLOGIES LTD.,

Plaintiff-Appellant-Respondent,

v

INTERFORUM S.A., *et al.*,

Defendants-Respondents-Appellants,

VIVENDI S.E., *et al.*,

Defendants-Respondents.

JOHN COYLE, WILLIAM DODGE
AND ROBIN EFFRON,

Amici Curiae.

Decided June 29, 2023 Entered June 29, 2023

Before: KERN, J.P., MOULTON, MENDEZ, SHULMAN, RODRIGUEZ, JJ.

Appendix B

OPINION

Judgment, Supreme Court, New York County (Jennifer Schecter, J.), entered July 21, 2022, dismissing the complaint as against defendants BollorÉ S.E. and Vivendi S.E. with prejudice, unanimously reversed, on the law, without costs, the judgment vacated, the tortious interference with contract claim against them reinstated, and the matter remanded for further proceedings.

Order, same court and Justice, entered June 16, 2022, which, inter alia, granted plaintiff's motion to dismiss defendants Interforum S.A. and Editis S.A.'s fraudulent inducement counterclaim, unanimously affirmed, and thye appeal is otherwise dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff stated a valid claim against BollorÉ S.E. (BollorÉ) and Vivendi S.E. (Vivendi) for tortious interference with a contract between plaintiff and Interforum S.A. (Interforum) and Editis S.A. (Editis and collectively, the Editis Defendants) (*see Burrowes v Combs*, 25 AD3d 370, 373, 808 N.Y.S.2d 50 [1st Dept 2006], *lv denied* 7 NY3d 704 [2006]). Although plaintiff's own allegations established that Vivendi and BollorÉ "acted to protect [their] own legal or financial stake in the breaching part[ies'] business," thereby invoking the economic interest defense (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426, 867 N.E.2d 381, 835 N.Y.S.2d 530 [2007]), it also alleged facts sufficient to overcome this defense — i.e., that Vivendi and BollorÉ instructed the breaching parties to employ fraudulent

or illegal renegotiation tactics — including lying about their desire to acquire additional publishers, fabricating complaints about plaintiff's performance, and feigning concern about inapplicable French tax withholding requirements — and demonstrated malice by instructing nonpayment of monies duly owed (*see UMG Recs., Inc. v Escape Media Group, Inc.*, 37 Misc 3d 208, 225, 948 N.Y.S.2d 881 [Sup Ct, NY County 2012], *revd on other grounds by* 107 AD3d 51, 964 N.Y.S.2d 106 [1st Dept 2013]; *Green Star Energy Solutions, LLC v Edison Props., LLC*, 2022 US Dist LEXIS 196738, *48-49, 2022 WL 16540835, *16 [SD NY Oct. 28, 2022]). Plaintiff's allegations of interference and causation with respect to BollorÉ were likewise sufficient.

Because we reinstate the tortious interference claim against Vivendi and BollorÉ, necessitating an analysis of their personal jurisdiction challenge, we need not address the question of whether the motion court was required to address the jurisdictional issue as a threshold matter.

Plaintiff relies on the "closely related" doctrine — i.e., that "[a] non-signatory may also be bound by a forum selection clause where the non-signatory and a party to the agreement have such a 'close relationship' that it is foreseeable that the forum selection clause will be enforced against the non-signatory" (*Highland Crusader Offshore Partners, L.P. v Targeted Delivery Tech. Holdings, Ltd.*, 184 AD3d 116, 122, 124 N.Y.S.3d 346 [1st Dept 2020]). BollorÉ, Vivendi, and amici curiae object that wholesale application of this doctrine allows for the circumvention of federal due process requirements insofar as it dispenses

with the need to perform an analysis of the defendant's contacts with the forum state. However, this Court has already held that no separate due process analysis is necessary because "the concept of foreseeability is built into the closely-related doctrine, which explicitly requires that the relationship between the parties be such that it is foreseeable that the non-signatory will be bound by the forum selection clause" (*id.* at 123; *see Oberon Sec., LLC v Titanic Entertainment Holdings LLC*, 198 AD3d 602, 603, 153 N.Y.S.3d 838 [1st Dept 2021]).

We find that plaintiff alleged a sufficiently close relationship between Vivendi and the Editis Defendants to justify subjecting it to personal jurisdiction in New York and that its allegations with respect to BollorÉ were sufficient to warrant jurisdictional discovery (*see Highland*, 184 AD3d at 124-125; *Universal Inv. Advisory SA v Bakrie Telecom Pte., Ltd.*, 154 AD3d 171, 179-180, 62 N.Y.S.3d 1 [1st Dept 2017]). Plaintiff alleged that Editis (which owned Interforum) was a wholly-owned subsidiary of Vivendi, that Vivendi's CEO was also the Chairman of Editis, and that Vivendi managed the Editis Defendants' performance of the subject agreement (*see Tate & Lyle Ingredients Ams., Inc. v Whitefox Tech. USA, Inc.*, 98 AD3d 401, 402-403, 949 N.Y.S.2d 375 [1st Dept 2012]). It is not dispositive that Vivendi did not acquire Editis until after the agreement was executed (*see Metro-Goldwyn-Mayer Studios Inc. v Canal+ Distrib. S.A.S.*, 2010 US Dist LEXIS 12765, *15-16, 2010 WL 537583, *5 [SD NY Feb. 5, 2010]). Although BollorÉ had only a 27% minority stake in Vivendi, including 30% of its voting shares, an indirect controlling interest may be sufficient to establish

a close relationship, as may a minority stake — at least where, as here, the plaintiff alleged effective control over the signatories (the Editis Defendants) via the parent (Vivendi), citing an overlap in management, directors, and officers (*see Universal*, 154 AD3d at 179; *Power Up Lending Group, Ltd. v Nugene Int'l., Inc.*, 2019 US Dist LEXIS 5720, *23-29, 2019 WL 2119844, *8-10 [ED NY Jan. 10, 2019], *adopted by* 2019 US LEXIS 33094, 2019 WL 989750 [ED NY Mar. 1, 2019]; *LaRoss Partners, LLC v Contact 911 Inc.*, 874 F Supp2d 147, 161 [ED NY 2012]; *Firefly Equities LLC v Ultimate Combustion Co.*, 736 F Supp2d 797, 800 [SD NY 2010]; *Metro-Goldwyn-Mayer*, 2010 US Dist LEXIS 12765, at *15, 2010 WL 537583, at *5).

Determination of BollorÉ's forum non conveniens argument must await completion of jurisdictional discovery because, if BollorÉ is found to be bound by the forum selection clause, then dismissal would not be proper on forum non conveniens grounds (*see* General Obligations Law § 5-1402; *AIG Fin. Prods. Corp. v Penncara Energy, LLC*, 83 AD3d 495, 496-497, 922 N.Y.S.2d 288 [1st Dept 2011]; *Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 447, 912 N.Y.S.2d 13 [1st Dept 2010]).

The fraudulent inducement counterclaim was properly dismissed for failure to sufficiently allege facts from which it may be reasonably inferred that plaintiff knew its representations regarding its projected costs were inaccurate when made (*see generally Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 71-72, 64 N.Y.S.3d 182 [1st Dept 2017]). The Editis Defendants' argument that these facts are peculiarly within the knowledge of plaintiff

is unavailing in view of the absence of any allegations that they undertook any due diligence to verify the cost projections (or took other steps to protect themselves) — thereby negating any claim of justifiable reliance (*see MMCT, LLC v JTR Coll. Point, LLC*, 122 AD3d 497, 498, 997 N.Y.S.2d 374 [1st Dept 2014]; *Abrahami v UPC Constr. Co.*, 224 AD2d 231, 234, 638 N.Y.S.2d 11 [1st Dept 1996]).

In view of the foregoing, we need not reach the parties' arguments with respect to whether the fraudulent inducement counterclaim was duplicative of the breach of contract counterclaim and/or was barred by the agreement's merger clause.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: June 29, 2023

APPENDIX C — TRANSCRIPT OF THE SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK, CIVIL TERM, PART 54, FILED JULY 12, 2022

SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF NEW YORK -
CIVIL TERM - PART 54

Index No. 652032/21

EAPC TECHNOLOGIES, LTD.,

Plaintiff,

-against-

INTERFORUM S.A., EDITIS S.A., VIVIENDI, S.E.,
AND BOLLORE S.E.,

Defendants.

60 Centre Street
New York, New York
June 16, 2022

BEFORE:

HONORABLE JENNIFER G. SCHECTER,
JUSTICE

[3]**PROCEEDINGS**

MR. KAHN: Sherman Kahn from Mauriel Kapouytian Woods on behalf of plaintiff EPAC.

MR. BOBROFF: Brad Bobroff from Proskauer on behalf of defendant Bollore.

MR. LEVY: Vincent Levy from Holwell Shuster & Goldberg for defendants Editis, Interforum, and Viviendi.

THE COURT: Let's get started. I've read the papers on the motion; and, so, before I get into asking you questions or hearing from, you, as necessary, I want to go through a little bit of the story here, and I'm going to cite certain sections of pleadings and affidavits, as I know that they're important.

This dispute relates to a contract that's stemming from on-demand book printing, and the plaintiff, EPAC, was to build a facility and did build a facility in France that would serve Editis. I'm going to talk about the Editis defendants together because that's how you all do it, so it makes it easy for me.

The theory was that this would be cost saving for the Editis defendants, and the contract was entered into in July of 2015, but there were going to be different stages of the contract through the building of the system and then ultimate implementation.

[4]Their commencement date -- I think that's what CD means in my notes -- kept getting pushed off and that's a defined term in the contract; but, ultimately, I think it was July 1, 2019.

Meanwhile, earlier in 2019, the defendant, Viviendi, announced the purchase of 100 percent of, Editis, and Bollore owns 20 percent of Viviendi.

Now, according to plaintiff, Viviendi and Bollore -- and this is pretty much a quote from plaintiff's brief -- "took over operational control of the agreement for the Editis defendants and Editis could not take any actions without Viviendi and Bollore's consent. This is docket 30 at 8.

Bollore wanted out of the agreement, and agents of Bollore and Viviendi sought to induce EPAC to revise the pricing claiming that Viviendi and Bollore would be increasing their portfolios in European publishing that would provide a massive increase in printing work for EPAC in France and in Europe. This is docket 30 at 8 again.

In fall 2019, Viviendi and Bollore allegedly commenced -- and this is a quote -- "efforts to replace the agreement with another form of agreement with more favorable economics" for the [5]Editis parties. After economics the quote end, but it was conceived for the Editis parties and less favorable to EPAC and this is docket 46 paragraph 8. It's an affirmation from Dobrovolsky.

Looking at plaintiff's submissions here, there was a former Editis manager. I think his name happens to be Levy but he was pushed out and he maintains that Viviendi and Bollore wanted to get out of the agreement in February 2020; but, significantly, by the way, there's radio silence on what the reason that they wanted to

get out of the agreement was, but, in any event, there was a campaign to breach the contract with EPAC or to force EPAC to enter into a different contract that was unfavorable to EPAC, and the allegations, again, are due to nonpayment induced by Bollore and Viviendi and other breaches by the Editis defendants.

On March 26, 2021, EPAC delivered a termination notice and, in this case, the plaintiff maintains that Editis, Viviendi, and Bollore are inextricably connected, and Dobrovolsky asserts that Editis management was sidelined and Viviendi and Bollore reviewed and controlled all the decisions. Essentially, they were in the driver's seat.

Now, before we get to the end of the July motions, I want to tell you what today's theme is going [6]to be, what my takeaway was reading only the papers here -- and to be clear, surely, the briefs were very well done here but really just looking at the pleadings themselves here, the answers jump right out at you.

So, today's theme is going to be that it's not good enough to just recite words without alleging facts demonstrating appropriate use of those words; and, to be clear, I'm not looking at the truth of the matter asserted here because the pleaders, whether it's Editis in terms of its fraudulent inducement counterclaim or whether it's the plaintiffs in terms of their tortious interference with contract claims, the pleaders get the benefit of every inference in terms of truth.

The problem is, again, very often I have invocation of words like malice or knowing misrepresentation and I can't just take those words for what they are. I need to see the facts that show me that the use of those words are appropriate, and I have lots of problems here in terms of I'll tell you right now, malice and scienter in the respective claims.

So, motion sequence number 2 and motion sequence number 3 are related. These motions are by Bollore as motion sequence 2, Viviendi is motion sequence 3. Those parties are asserting, among many [7]other things, but the focus today for me really is whether or not the economic interest defense could apply at the pleading stage, based on the facts alleged.

I just see constantly, by looking at plaintiff's papers alone -- and who's arguing on behalf of plaintiff today?

MR. KAHN: That would be me, Sherman Kahn. I'm arguing the Bollore motion and the Viviendi motion; and, the EPAC motion will be argued by my colleague, Ms. Liu.

THE COURT: Very good. Let's talk about the Bollore and Viviendi motions because the law is very clear that when you have affiliates, right, the economic interest doctrine, certainly, or defense is something that comes into play and is applicable and I'm very mindful that there's a difference when the third party, the outsider to the contract, the affiliate that's not -- whether we talk about it as the parent. We're here, a

minority interest in the parent but, certainly, there are allegations of heavy involvement but, certainly, these are parties that have an economic interest; and, while I appreciate that if they're acting for themselves distinctly, then you can have an issue as to whether or not the economic [8]interest defense applies, but I look here at the plaintiff's submissions and the constant invocation of, that the actions of Viviendi and Bollore were -- they were involved in managing the Editis defendants every step of the way, and I see quotes saying that they did this to expand their relationship with other publishers, okay, but my problem is, why is that not still consistent with the economic interests of Editis here every step of the way?

I just don't understand.

MR. KAHN: Thank you, your Honor, for raising the question. It can be, to some extent, that it is also in the economic interest of Editis for the prices to be reduced or the contract to be changed.

The issue here is that the defendants were working in their own interests that were different than and not necessarily favorable to the interests of Editis and that would particularly apply -- it would apply in a couple of ways.

One is the testimony that you mentioned about Mr. Levy, who was instructed to interfere with the contract and make up false allegations against EPAC by --

THE COURT: Why did they want to do that? Let's talk about it. Why did they want to do that? [9]They wanted more favorable terms for Editis. They didn't want Editis to have to pay. I mean, if they had additional -- you know, if they wanted to get a better deal with other hypothetical people that they were going to do business with in the future, whether it's Hachette -- I'm probably not pronouncing these names very well and I'm sorry.

I don't know. Hachette, but anyway, it's H-a-c-h-e-t-t-e, but whether they did it for the hypothetical benefit in the future, it's crystal clear that they didn't want Editis to pay EPAC.

EPAC alleges that they didn't want Editis to pay what was owed and they were controlling Editis. Isn't it as simple as, you know, they wanted Editis to get the best deal, and they're the parents, and they're so involved in control of Editis, that's what motivated them to say, you know, don't pay. Let's get a better deal.

MR. KAHN: Well, even if that was true, if, and I think you mentioned this, then if there was malice or improper intent then the economic interest doctrine doesn't apply, and we think the evidence from Mr. Levy does support that.

We also, with respect to Viviendi, put in evidence about arguments made by Viviendi's tax [10]personnel that they very clearly stated we are not acting in the interest of Editis. We are acting in the interest of its

parent Viviendi only and we're not interested in whether Editis is harmed or helped by what we're doing.

We've also put in evidence from a French attorney that the tax behavior that they hedged was wrongful in France. So, that is definitely, we think, a sufficient amount of evidence at the pleading stage to at least get us to jurisdictional discovery or discovery on the issue of whether the economic interest should apply.

THE COURT: Okay, because I don't think I'm going to have to touch jurisdictional issues here with a ten foot pole today. At least, that's not how I see things. Maybe argument will convince me otherwise but so far, no.

Let's talk about malice then, because absolutely the law is clear, and again, I don't think the parties use the law here that in terms of if the economic interest defense applies, then in order to get around it for purposes of continuing with the claim, there would have to be some type of malice or illegality or fraud. I just don't see how here.

First of all, I found the First Department [11]case -- give me one moment -- to be very enlightening and applicable. Ruha v. Guior, 277 AD2d 116, First Department 2000 and it says that if their allegation of malice is insufficient, particularly where such assertions are contradicted by plaintiff's own claims that defendant's conduct was financially motivated and, again, I look here at the submissions and Dobrovolsky.

MR. KAHN: It's Dobrovolsky.

THE COURT: Thank you. Dobrovolsky's affirmation was very telling here to me too because when you read it, you get this constant theme and I appreciate it. I think he cites to the e-mails that deals with the taxes that says Viviendi's doing this for Viviendi, but I see its derivative in terms of we have to do this because we're the 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. Certainly, that's not inconsistent with the economic applicability of the economic interest doctrine; but, in terms of malice too, I don't see how a wrongful interpretation of the tax law in paying money to a tax authority instead of paying it to EPAC is malicious.

I might understand if they kept all the money [12]or hid all the money or if they did something to serve themselves financially with their interests or did something with a particular eye in terms of harm but I just -- again, I hear the word malice, but I don't see allegations that would rise to the level of being malicious; and, everything that I see, in fact, is consistent with financial motive in terms of saving money.

We're so involved with the management of Editis and the allegations are clear that they were heavily, heavily involved in the management, very much hands on and, you know, whether, again, it would have a side benefit for other -- whether they wanted a great deal

from EPAC and said to EPAC, EPAC, you know, give us a great deal because we also are going to bring other business to you and so you have that opportunity to change your prices and be beneficial and that it wouldn't just help Editis but it would enure to other potential publishers too, that it may or may not sign in the future.

That's all consistent with economic interest and continued economic interest, and the other thing that jumped out at me too, in terms of, you know, the argument was well, what if they're making a misrepresentation and they didn't intend -- they really [13]didn't intend to bring other business, which is a little inconsistent with saying they had the interest, a separate interest, aside from Editis being these other companies but, you know, the fact -- first of all, that they ended up purchasing H-a-c-h-e-t-t-e.

Hachette makes it appear, first of all, that the statements weren't untrue when they were made but certainly there's no indication. There's no allegation that would rise to any actual misrepresentation here or that shows that when they made that statement and they were trying to negotiate a better deal and to be clear, whether it's right or it's wrong, the parties had a contract in place and the breach of contract claims that are being asserted by both parties here are going all of -- they're not getting out of the case today.

They're going everywhere and you're going to go the distance -- well, hopefully not. We'll talk about that in a few minutes but, you know, those will remain in the case

but I just don't see how, in terms of, you know, there's any allegation of malice here or fraud or illegality that would take it out of the economic interest defense at the dismissal stage and the case law is clear as well that this is a defense that can be used at the pleading stage, and I really can't even see a better case for that than this one in [14]terms of just reviewing the plaintiff's submissions alone, certainly with a critical eye in terms of when I see the word misrepresentation, I have to look to see well, what are the facts that show it was a misrepresentation.

There really is nothing there that would make it wrongful sufficient to survive pleadings. So, in light of the fact the dismissal is appropriate, if you have an economic interest, absent malice or fraudulent or illegal means, the case that establishes that dismissal is appropriate under such circumstances is Hirsch v. Food Resources, Inc., 24 AD3d 293 at pages 296 to 297, a First Department case from 2005 and because of their allegation of malice is insufficient where such assertions are contradicted by plaintiff's own claims that defendant's conduct was financially motivated in Ruha v. Guior which was cited earlier; and, another case that establishes that their allegations of malice are insufficient is Rather v. CBS Corp., 68 AD3d 49, 60 First Department case from 2009; and, I find the Bausch & Lomb case distinguishable.

That was cited in the opposing brief. In terms of, again, the component of the competition, right, there were actual competitors there between the claimant and the third party, between AllerGen and the [15]claimant

in that case, such that there was this individual incentive to breach the contract that didn't have to do with Bausch & Lomb. So, that case was just clearly distinguishable to me too.

So, on that basis, I am going to grant motion sequence number 2 and motion sequence number 3, the dismissal based on the economic interest doctrine or defense.

So, let's talk about motion sequence number 4. Who is opposing that motion?

MR. LEVY: I am, your Honor. Vincent Levy on behalf of defendants.

THE COURT: Okay, Mr. Levy. So, Mr. Levy, let's talk about it, because you heard me just go through my problems with misrepresentation and that just because someone is alleged to make a statement doesn't -- you know, you have to show me that they knowingly made misrepresentation and here, I've read the counterclaim itself, and the counterclaim itself says that -- the theory on the counterclaim is that there was a misrepresentation of the ability to perform that induced entry, induced EPAC -- induced entry into the contract. I'm sorry. I got it wrong.

That EPAC misrepresented its ability to perform and that EPAC knowingly provided baseless cost

* * *

[24]the later stage of discovery in the event the facts do show that there was an intent at the time of contracting to make a misrepresentation of the then present fact, which, in our view, is actionable.

As your Honor said, the contract claims between these parties Editis and EPAC will proceed.

THE COURT: It sure will but, to be clear, fraud will not be part of what you're claiming, and I'm not going to grant leave now because there's no basis from which I could glean. If there was any inference I could think of, then I wouldn't be dismissing the claim but there's just no basis.

If you do somehow uncover facts, it's a 3016(b) dismissal. It's based on the pleading. So, you can always make an appropriate motion, but I just don't see any basis here. So, the fraud counterclaim is dismissed.

Let me be clear, too, because I got the sequence wrong when I went through the motions. I don't know why but I think one was Bollore's motion, two was Viviendi's motion, and three -- I'm sorry. Three was the motion related to the counterclaim.

So, I'll be clear that I am granting all three motions. So, it makes it that easy. The movants are to share in the cost of the transcript and are to [25]e-file the transcript within 45 days and immediately after this proceeding, please jointly e-mail Mr. Rand.

You haven't had a preliminary conference yet, correct?

MR. LEVY: I believe we had one before Justice Borrok before he recused himself but we haven't had one in front of your Honor.

THE COURT: I see you've had a preliminary conference but you're due to have a conference with me.

MR. LEVY: And we've not had a discussion about it or anything. So we need a scheduling conference.

THE COURT: So, it's essentially a preliminary conference. We can call it a compliance conference, whatever it is. E-mail Mr. Rand as soon as we're done here to schedule a conference and we'll take it from there.

Everyone stay well. One more thing. This is very important, too. There are breach of contract claims that are going forward and you all know litigation is costly. Now that you know the landscape of this case, I really want you to think about mediation.

Have you considered it in the past and where are you in terms of -- what do you think about the

* * *

APPENDIX D — VIVENDI'S MOTION TO DISMISS MEMORANDUM OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK: COMMERCIAL DIVISION, FILED SEPTEMBER, 30, 2021

SUPREME COURT OF THE STATE
OF NEW YORK, COUNTY OF NEW YORK:
COMMERCIAL DIVISION

EPAC TECHNOLOGIES LTD

Plaintiff,

-against-

INTERFORUM S.A., EDITIS S.A.,
VIVENDI S.E., AND BOLLORÉ S.E.

Defendants.

Index No. 652032/2021

Justice Andrew S. Borrok
Part 53
Motion Seq. No. __

DEFENDANT VIVENDI S.E.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Appendix D

TABLES INTENTIONALLY OMITED

Defendant Vivendi S.E. respectfully submits this Memorandum of Law in support of its Motion to Dismiss plaintiff EPAC Technologies LTD's First Amended Complaint under CPLR § 3211(a)(7) and (a)(8), for want of personal jurisdiction and failure to state a claim.

PRELIMINARY STATEMENT

In this contract dispute between a French book publisher (Editis and Interforum) and its former Malta-incorporated printer (EPAC), the printer has filed an amended complaint seeking to bring into the case the publisher's French parent (Vivendi) and one of the parent's shareholders (Bolloré). This misguided effort to bring in additional defendants fails.

First, there is no basis to assert personal jurisdiction over Vivendi consistent with New York law and the federal Due Process Clause. The case concerns no conduct or activity in New York, and Vivendi is not alleged to have any contacts with New York. EPAC seeks to justify exercising jurisdiction over Vivendi based upon a forum-selection clause in the publisher's contract with EPAC. But Vivendi is not a party to that contract and never agreed to litigate any disputes with EPAC in New York. The contract was signed in 2015, four years before Vivendi became Editis's owner (in 2019). Vivendi obviously had no role in negotiating or executing the agreement, is not referenced in the agreement, has no rights or obligations under the agreement, and is not a successor to any entity

that did. To our knowledge, no New York court has ever found jurisdiction on such facts, and to do so would offend the federal Due Process Clause.

Second, even if the Court could exercise personal jurisdiction over Vivendi, EPAC fails to plead a claim for intentional interference with contract, the sole claim sought to be advanced against Vivendi. EPAC alleges only that Vivendi is liable because it maliciously "instructed" Editis to engage in allegedly breaching conduct, without ever pleading facts to overcome Vivendi's defense that, as a matter of law, a corporate parent cannot tortiously "interfere" with the contracts of its subsidiary when doing so is in the parent's economic interest. To the contrary, EPAC expressly alleges that Vivendi was trying to save money—defeating liability. If EPAC is correct that there was a breach of contract, EPAC's sole recourse is against its contracting counterparties, not those counterparties' parent and indirect shareholder.

BACKGROUND[1]

This is a lawsuit brought by a non-New Yorker book printer against non-New Yorkers regarding events that took place entirely in France. Plaintiff EPAC is a Malta-incorporated company involved in the book-printing business in France. It sued Editis and Interforum, French book publishers, when EPAC's on-demand book-printing

1. The facts stated herein are taken from the Complaint and First Amended Complaint and presumed to be true solely for the purpose of this motion.

system stuttered and a dispute arose over EPAC invoices rejected by Editis and Interforum. (Am. Compl. ¶¶ 5-7, 17, 30, 32-35).

EPAC's original complaint alleged breach-of-contract claims against Editis and Interforum under a June 23, 2015 Master Facility Development and Services Agreement ("Agreement") between EPAC, Editis, and Interforum (twice amended, in 2016 and 2018). (Compl. ¶¶ 10-11, 14). Under this Agreement, EPAC was required to build a state-of-the-art on-demand printing system in France in order to print and deliver books to Editis and Interforum (also in France).

The complaint originally alleged that: Editis and Interforum delayed and impeded EPAC's performance under the Agreement (Compl. ¶¶ 11, 13-14); EPAC failed to issue four months of invoices (Compl. ¶ 18); and ultimately EPAC issued invoices at a new (and higher) pricing schedule, which Editis and Interforum refused to pay without further explanation from EPAC (Compl. ¶¶ 19-20). EPAC, Editis, and Interforum attempted to negotiate this dispute when, starting in October 2020, Editis and Interforum brought a European tax withholding concern to EPAC's attention and withheld taxes owed from EPAC's payment. (Compl. ¶¶ 19-20, 25). EPAC issued a formal notice of breach to Editis and Interforum in December 2020. (Compl. ¶ 26). On March 26, 2021, EPAC sued Editis and Interforum for breach of contract in this Court, invoking the Agreement's forum-selection clause. Dkt. No. 2.

Appendix D

Following Editis and Interforum's Answer and Counterclaims (including, *inter alia*, that EPAC breached the Agreement by failing to provide the on-demand printing services that formed the entire basis for the Agreement), EPAC amended the complaint to try to rope Vivendi (Editis's parent) and Bolloré (a large Vivendi shareholder) into this suit. Vivendi is a French conglomerate that acquired Editis in January 2019, four years after the Agreement was signed. (Am. Compl. ¶¶ 8, 21). Bolloré owns less than 30% of Vivendi's stock. (Am. Compl. ¶ 9). The First Amended Complaint, without changing any of the breach allegations against Editis and Interforum, added the vague, conclusory, and unsubstantiated charge that Vivendi (and Bolloré) maliciously induced Editis and Interforum to breach the Agreement. (Am. Compl. ¶ 3).

In particular, EPAC alleges that Vivendi, working through an executive who used a Bolloré email address, instructed or induced Editis and Interforum to negotiate better terms under the Agreement in order to reduce costs (Am. Compl. ¶¶ 3, 22, 24); to look for problems in EPAC's performance (Am. Compl. ¶ 22); and to withhold taxes from payments to EPAC (Am. Compl. ¶ 30). According to EPAC, Vivendi and its (unnamed) French tax counsel fabricated the European tax withholding requirements that resulted in EPAC's reduced payments (and the payment of the funds by Editis and Interforum to French tax authorities). (Am. Compl. ¶¶ 30-31).

EPAC makes no allegations that Vivendi has any ties to New York or engaged in any conduct here (it did not).

Vivendi is not a party to the Agreement (or its forum-selection clause), has no rights or obligations under the Agreement, and is not referenced in it. Vivendi now moves to dismiss the First Amended Complaint for lack of personal jurisdiction and failure to state a claim.

ARGUMENT

I. EPAC Does Not Plead Personal Jurisdiction

On a motion to dismiss under CPLR 3211(a)(8), "the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction." *Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 485, 486 (1st Dep't 2017). Moreover, on a CPLR 3211 motion, this Court should reject "vague, conclusory and unsubstantiated allegations" as insufficient to meet plaintiff's burden of establishing jurisdiction. *Id.* at 487; *see Cotia (USA) Ltd. v. Lynn Steel Corp.*, 134 A.D.3d 483, 484 (1st Dep't 2015) (rejecting "conclusory allegations" as insufficient to support jurisdiction). In this case, EPAC completely fails to allege a legitimate basis for exercising personal jurisdiction over Vivendi.

A. EPAC Cannot Invoke The Forum-Selection Clause Against Vivendi

The sole basis for jurisdiction over Vivendi alleged by EPAC is the Agreement's forum-selection clause. (Am. Compl. ¶ 12). But only Editis and Interforum are parties to the Agreement. Vivendi is not, and the First Amended Complaint nowhere alleges (nor could it) that Vivendi can

be bound to the Agreement (or its forum-selection clause) under traditional principles of contract law.

In New York, there is a "presumption of separateness between a corporation and its owners." *Miller v. Mercuria Energy Trading, Inc.*, 291 F. Supp. 3d 509, 525 (S.D.N.Y. 2018) (quoting *Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988)). Thus, a corporate parent is not generally bound to its subsidiary's contracts, *Oxbow Calcining USA Inc. v. Am. Indus. Partners*, 96 A.D.3d 646, 649 (1st Dep't 2012), nor a subsidiary to its parent's contracts, *Alexander & Alexander of N.Y., Inc.*, 114 A.D.2d 814, 815 (1st Dep't 1985), nor an affiliate to its sibling's contracts, *Gulf & W. Corp. v. New York Times Co.*, 81 A.D.2d 772, 773 (1st Dep't 1981).

Against this presumption, EPAC alleges no facts justifying application of any of the Agreement's contractual terms (including its forum-selection clause) to non-signatory Vivendi. *See, e.g.*, *Arcadia Biosciences, Inc. v. Vilmorin & Cie*, 356 F. Supp. 3d 379, 393-94 (S.D.N.Y. 2019) (collecting cases for the "narrow proposition that a non-signatory can be bound by forum selection provisions to the same extent that it can otherwise be bound to a contract under standard principles of contract law"); *Miller*, 291 F. Supp. 3d at 523 (same).

Thus, EPAC has not alleged the corporate forms were used to deceive, or that Vivendi assumed Editis's contractual obligations, or that Vivendi is a third-party beneficiary under the Agreement. *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless*

USA, LLC, 140 S. Ct. 1637, 1643 (2020) ("traditional principles of state law . . . that authorize the enforcement of a contract by a nonsignatory" include "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel") (internal quotation marks and citation omitted)). Nor does EPAC allege Vivendi is a successor-in-interest to anyone bound by the Agreement, that the Agreement binds any affiliates, that it references Vivendi or Vivendi's potential acquisition of Editis, or that entities other than EPAC, Editis, and Interforum are bound by the Agreement. *See Highland Crusader Offshore Partners, L.P. v. Targeted Delivery Techs. Holdings, Ltd.*, 184 A.D.3d 116, 126-7 (1st Dep't 2020) (allegations of successor liability, absent here, can justify jurisdictional discovery). Quite simply, there is no basis to infer that Vivendi has any right or obligation under the Agreement—defeating application of the Agreement's forum-selection clause.

To be sure, some cases suggest that, in narrow circumstances, a forum-selection clause may be enforced against a non-signatory that is "closely related" to a signatory. As an initial matter, those cases should not be read to permit enforcement of a forum-selection clause where the general law of contracts would bar enforcement of contractual provisions against non-parties. *See Arcadia*, 356 F. Supp. 3d at 394-95 (declining to enforce forum-selection clauses where not permitted under general law of contracts). But regardless, even if the cases are read more broadly, they consistently require the non-signatory to have been involved in the formation of, or referenced in, the contract—such that it can be said the third-party

foresaw being bound by the forum-selection clause and thus implicitly consented to its application. *See Highland*, 184 A.D.3d at 122-24 (discussing cases). There is nothing like that here.

Instead, Vivendi is much in the same position as the defendant in *Arcadia*, which, as the First Department described it in *Highland*, concerned a plaintiff that "was attempting to hold a non-signatory future affiliate of the defendant to a forum selection clause." *Id.* at 123. "It was not reasonably foreseeable," the First Department explained, "that the future affiliate—formed eight years after the contract had been executed—would be bound by the forum selection clause." *Id.* And there was no other basis in the general law of contracts to bind the future parent to the contract, either. *Arcadia*, 356 F. Supp. 3d at 393. So too here.

Vivendi acquired its stake in Editis years after the Agreement was signed (and after the last amendment was executed). The Agreement neither incorporates other contracts with Vivendi nor refers to any part of the relationships between Editis or Interforum and Vivendi (or a predecessor). *See Highland*, 184 A.D.3d at 124. Neither Vivendi nor any other affiliate executed the Agreement (or any other contracts) on behalf of the signatories; Vivendi is not obligated to perform services with respect to the Agreement; and Vivendi is not a future affiliate bound by the Agreement under its terms or the operation of law. *Id.* Indeed, EPAC fails even to allege that Vivendi "was informed of [the Agreement's] forum selection clause" at any point. *Dragon State Int'l Ltd. v.*

Keyuan Petrochems., Inc., No. 14 Civ. 8591 (PAC), 2016 WL 439022, at *3 (S.D.N.Y. Feb. 2, 2016). In sum, EPAC has no basis to invoke the forum-selection clause against Vivendi.

B. Exercising Jurisdiction Over Vivendi Would Violate Due Process[2]

"The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant." *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1024 (2021). Where, as here, the defendant is not alleged to be generally at home in New York, the plaintiff must allege "some act by which [the defendant] purposefully avail[ed] itself of the privilege of conducting activities within the forum State," and "[t]he plaintiff's claims . . . must arise out of or relate to the defendant's contacts' with the forum." *Id.* at 1024-25 (internal quotation marks and citations omitted). "Or put just a bit differently, there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.* at 1025 (internal quotation marks and citation omitted). This is a matter of both "fairness" to the defendant and a "State's sovereign power to try a suit." *Id.* (internal quotation marks and citation omitted); 1025 n.2.

---

2. In light of the lack of connection between Vivendi, this dispute and this forum, the claims against Vivendi also warrant dismissal under the doctrine of *forum non conveniens*, for the same reasons articulated by Bolloré in its motion to dismiss.

In this case, EPAC does not make a single allegation of conduct by Vivendi (or anyone else) taking place in New York, nor does it allege, even generically, that jurisdiction over Vivendi is proper because Vivendi purposefully availed itself of the privilege of conducting business here. Vivendi is a French company. EPAC seeks to plead a tort based on communications between Vivendi and its French subsidiary, in France, doing business in France, about books printed by a Maltese company entirely in France, for the French subsidiary. The Agreement is not alleged to have any substantive ties whatsoever to New York specifically or to the United States generally.

Unsurprisingly, then, EPAC's only hook for jurisdiction here is the forum-selection clause in the Agreement. But this is not enough: a forum-selection clause, in an agreement Vivendi did not sign, could not obviate the constitutional requirement to allege that Vivendi engaged in "minimum contacts with the forum state." *Arcadia*, 356 F. Supp. at 395 (internal quotation marks and citation omitted). Absent Vivendi's consent to suit here—and Vivendi never consented—EPAC can bring only claims based upon or related to "'contacts that the defendant himself creates with the forum State,' not 'contacts between the plaintiff (or third parties) and the forum State.'" *Id.* (quoting *Walden v. Fiore*, 571 U.S. 277, 284 (2014)) (emphasis in original); *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1781 (2017) ("[A] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.") (internal quotation marks and citation omitted); *HSM Holdings, LLC v. Mantu I.M. Mobile Ltd.*, No. 20-cv-00967 (LJL),

2021 WL 918556, *8-10 (S.D.N.Y. Mar. 10, 2021) ("[I]n the absence of consent, a court may exercise jurisdiction over an individual only after ensuring that exercise is consistent with the personal jurisdiction granted to the courts of the forum state by its legislature and consistent with federal due process principles.").

In sum, EPAC has utterly failed to allege that Vivendi purposefully availed itself of the privilege of doing business in New York—let alone that EPAC brings claims related to such activity. Vivendi never consented to suit here. The claims against Vivendi should be dismissed for lack of jurisdiction under the U.S. Constitution and New York's long-arm statute.[3]

II. The Complaint Fails to State a Tortious-Interference Claim against Vivendi.

To state a claim for tortious interference with contract, the sole claim EPAC seeks to advance against Vivendi, a plaintiff must plead: (1) the existence of a valid contract between itself and a third party; (2) defendant's knowledge of the contract; (3) a breach of contract; (4) defendant's intentional and improper procurement of that contract breach without justification; and (5) resulting damages. *See Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996). As is also settled, a defendant's "[e]conomic

3. New York's long-arm statute, CPLR 302, is stingier than the federal Due Process Clause. *Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 381 (2014) ("New York's long-arm statute 'does not confer jurisdiction in every case where it is constitutionally permissible.'") (quoting *Kreutter v McFadden Oil Corp.*, 71 N.Y.2d 460, 471 (1988)).

interest" (even in willfully causing a breach by a third-party) "precludes a claim for tortious interference with a contract unless there is a showing of malice or illegality." *Collins v. E-Magine, LLC*, 291 A.D.2d 350, 351 (1st Dep't 2002). EPAC's claim should be dismissed because it fails to overcome Vivendi's economic-interest defense and fails to allege facts on which to base an intentional-interference claim.

A. Vivendi's Economic Interest Bars Any Claim for Tortious Interference

Under New York law, a defendant has an "economic interest" defense defeating a claim for tortious interference if it "acted to protect its own legal or financial stake in the breaching party's business." *White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007). Courts regularly apply this defense at the pleading stage. *Rather v. CBS Corp.*, 68 A.D.3d 49, 60 (1st Dep't 2009) ("the court correctly applied the economic interest doctrine to dismiss" tortious-interference claim against allegedly breaching party's parent company); *Hirsch v. Food Resources, Inc.*, 24 A.D.3d 293, 297 (1st Dep't. 2005) (affirming dismissal of tortious interference with contract claim where defendant, "as holder of 83 1/3% of [the allegedly breaching company's] shares," was "acting as an owner with an economic interest").

Vivendi plainly has an economic-interest defense. As the Court of Appeals instructed, the economic-interest defense applies "where defendant and the breaching party had a parent-subsidiary relationship." *Cintas Corp.*,

8 N.Y.3d at 426. EPAC alleges not only that Vivendi is the 100% owner of Editis—and that there is a "parent-subsidiary relationship," *id.*—but also that Vivendi pursued "renegotiation" to "reduce the prices." (Am. Compl. ¶¶ 21-22, 24). The First Amended Complaint thus affirmatively pleads the essential facts of the economic-interest defense, because a "corporate parent[] ha[s] a right to interfere with the contract of its subsidiary in order to protect its economic interests." *Koret, Inc. v. Christian Dior, S.A.*, 161 A.D.2d 156, 157 (1st Dep't 1990) (cited by *Cintas Corp.*, 8 N.Y.3d at 426 n.8); *Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 63 (2d Cir. 1988) ("Plaintiff failed to establish a *prima facie* case of tortious interference with contractual relations because the evidence showed only that Volvo executives on the board of Beijer, Inc. endorsed terminating Beijer, Inc.'s contract with plaintiff for the legitimate business reason that it was losing money"); *see Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp.*, 72 Misc. 3d 1218(A), 2021 N.Y. Slip Op. 50794(U), *11 (Sup Ct, NY County 2021) (collecting authorities).

No doubt recognizing that Vivendi's economic interest will bar relief, EPAC seeks to get around it by claiming that Vivendi acted with "malice." (EPAC never claims illegality.) Malice is an "exception to the economic interest rule" but, the First Department instructs, "bare allegations of malice do not suffice." *Rather*, 68 A.D.3d at 60. Instead, EPAC must plead facts substantiating that Vivendi induced a breach "for the sole purpose of harming the plaintiff." *Huggins v. Povitch*, No. 131164/94, 1996 WL 515498, at *9 (N.Y. Sup. Ct. N.Y. Cnty. Apr. 19, 1996)

(emphasis added); *U.S. Bank Nat. Ass'n v. Triaxx Asset Mgmt. LLC*, No. 18 Civ. 4044 (VM), 2019 WL 4744220, at *10 (S.D.N.Y. Aug. 26, 2019) (same). Claims of bad faith, without more, do not satisfy the malice requirement. *See Foster v. Churchill*, 87 N.Y.2d 744, 750-51 (1996). Nor does a defendant's knowledge that its actions may harm plaintiffs. *See E.F. Hutton Int'l Assocs. Ltd. v. Shearson Lehman Bros. Holdings, Inc.*, 281 A.D.2d 362, 362-63 (1st Dep't 2001).

EPAC's malice allegations are facially insufficient. EPAC includes only four generic adjectives ("morally culpable," "outrageous," "improper," "malicious") but no facts, while claiming that Vivendi took a position on French tax law that was "specious" and "wrongful." (Am. Compl. ¶¶ 22, 30-31, 34). This sort of "bare allegation[] of malice" is obviously inadequate. *Rather*, 68 A.D.3d at 60. That is particularly so because, elsewhere, EPAC affirmatively pleads that Vivendi did what it allegedly did to save money—an allegation defeating any possible claim that the "only" reason Vivendi acted was to "cause harm" to EPAC. *See U.S. Bank*, 2019 WL 4744220, at *10; *Ruha v. Guior*, 277 A.D.2d 116 (1st Dep't 2000) ("In asserting their tortious inference with contract claim, plaintiffs' bare allegations of malice do not suffice, particularly where such allegations are contradicted by plaintiffs' own claims that defendants' actions were financially motivated.").

B. EPAC's Allegations of Intentional Interference Are Deficient

EPAC's claim should also be dismissed because it does not adequately allege intentional interference by Vivendi. It is settled that the "[f]ailure to plead in nonconclusory language facts establishing all the elements of a wrongful and intentional interference in the contractual relationship requires dismissal of the action." *Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp.*, 296 A.D.2d 103, 109-110 (1st Dep't. 2002) (internal quotation marks and citation omitted). That happened here.

EPAC's First Amended Complaint broadly gestures at intentional interference, alleging generically and based on its belief that Vivendi "instructed" or "induced" Editis to do that which it accuses Editis of wrongfully doing. (Am. Compl. ¶¶ 22-25). But EPAC's descriptions of Vivendi's conduct leave out any facts regarding the circumstances of Vivendi's purportedly wrongful interference.[4] Comparing EPAC's Complaint with its First Amended Complaint highlights the conclusory flavor of EPAC's interference allegations (EPAC's additional allegations are in red):

4. EPAC alleges that "Vivendi and/or Bolloré" acted through Michel Sibony. (Am. Compl. ¶ 22). But EPAC fails to allege the time, place, manner, or content of Sibony's communications to Editis (as opposed to Sibony's communications to EPAC), who Sibony spoke to at Editis, or anything else about these alleged communications.

Appendix D

Complaint	First Amended Complaint
¶ 19: "However, instead of working with EPAC in good faith to fix the 2020 price according to the formula set out in the Agreement, Defendants tried to force a renegotiation of the Agreement's fundamental term."	¶ 24: "However, instead of working with EPAC in good faith to set the 2020 price according to the formula set out in the Agreement, Vivendi and Bolloré again induced the Editis Defendants to try to force a renegotiation of the Agreement's fundamental terms."
¶ 20: "Starting in October, Defendants failed to pay all amounts due and took unilateral credits."	¶ 25: "Starting in October, the Editis Defendants, under instruction from Vivendi and Bolloré, failed to pay all amounts due and took unilateral credits."
¶ 25: "Beginning in October 2020, Defendants stopped paying their invoices, claiming concern about an inapplicable European tax disclosure requirement."	¶ 30: Beginning in October 2020, at the instruction of Vivendi, the Editis Defendants stopped paying their invoices, claiming concern about an inapplicable European tax disclosure requirement.

Simply stated, a plaintiff with a breach claim cannot bring an interference claim against a third party merely by peppering, before each assertion of purported breach, that the third party "induced" the breach. *See, e.g.*,

Appendix D

Davis v. Scottish Re Grp., Ltd., 46 Misc. 3d 1206(A), 2014 N.Y. Slip Op. 51898(U), *14 (Sup Ct, NY County 2014) ("the allegations are conclusory and lack the required specificity" as they "assume[] that the [defendants] were involved with the complained of [conduct] without alleging facts that would support that assumption"), *aff'd as modified on other grounds*, 138 A.D.3d 230 (1st Dep't. 2016), *rev'd on other grounds*, 30 N.Y.3d 247 (2017); *Henneberry v. Sumitomo Corp. of Am.*, No. 04 Civ. 2128 (PKL), 2005 WL 1036260, at *2 (S.D.N.Y. May 3, 2005) (applying New York law). Indeed, allegations devoid of "specific conduct by the defendants intended to induce a breach" fail to state a claim for tortious interference. *Kimso Apartments LLC v. Rivera*, 180 A.D.3d 1033, 1035 (2d Dep't 2020).

CONCLUSION

For the foregoing reasons, defendant Vivendi respectfully requests the Court to dismiss all claims against it.

Dated: New York, New York
September 30, 2021

HOLWELL SHUSTER
GOLDBERG LLP

By: */s/ Vincent Levy*
Vincent Levy
Benjamin F. Heidlage
Nina Kanovitch Schiffer

Appendix D

425 Lexington Avenue
New York, New York 10017
T: (646) 837-5151
vlevy@hsgllp.com

Attorneys for Defendant Vivendi S.E.

APPENDIX E — BOLLORÉ'S MOTION TO DISMISS MEMORANDUM OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, COMMERCIAL DIVISION, FILED SEPTEMBER 30, 2021

SUPREME COURT OF THE STATE
OF NEW YORK COUNTY OF NEW YORK

EPAC TECHNOLOGIES LTD,

Plaintiff,

-against-

INTERFORUM S.A., EDITIS S.A.,
VIVENDI S.E., AND BOLLORÉ S.E.

Defendants.

Index No. 652032/2021
Motion Sequence No.__

Justice Andrew S. Borrok
Part 53

DEFENDANT BOLLORÉ SE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

Appendix E

Bradley R. Bobroff
Shiloh A. Rainwater
PROSKAUER ROSE LLP
Eleven Times Square
New York, New York 10036
(212) 969-3000
bbobroff@proskauer.com
srainwater@proskauer.com

Attorneys for Defendant Bolloré SE

[TABLES INTENTIONALLY OMITTED]

Defendant Bolloré SE ("Bolloré") respectfully submits this memorandum of law in support of its motion to dismiss the complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction, pursuant to CPLR 327(a) for forum non conveniens, and pursuant to CPLR 3211(a)(7) for failure to state a claim.

PRELIMINARY STATEMENT

This action stems from a contractual dispute between purely non-U.S. commercial entities concerning the installation and operation of a book-printing system in France. Other than its New York forum-selection clause, the contract at issue – and, indeed, the entire dispute – has no connection whatsoever to New York.

In its original complaint, Plaintiff EPAC Technologies Ltd. ("EPAC"), a Malta-based entity, claimed that its contractual counterparties, Defendants Interforum S.A.

("Interforum") and Editis S.A. ("Editis") – a French book distributor and its French parent company-guarantor (collectively, the "Editis Defendants") – failed to perform various obligations under the contract and owe several million euros in unpaid invoices. Through its amended complaint, EPAC improperly seeks to cast a wider net by adding a claim for tortious interference with contract against Defendants Vivendi SE ("Vivendi") – Editis' publicly traded French parent company – and Bolloré – one of Vivendi's minority French shareholders. As set forth below, EPAC's manufactured attempt to impose liability on Bolloré, a distant foreign party, should be rejected by this Court, as no articulable basis exists for maintaining this action against it.

First, this Court lacks personal jurisdiction over Bolloré, which is not a signatory to the contract at issue and has zero alleged contacts with New York.[1] EPAC's sole basis for seeking to hale Bolloré into this Court is its assertion that Bolloré is subject to the forum-selection clause in the parties' contract because it is supposedly "closely related" to the Editis Defendants. But that relationship – Bolloré is alleged to be a 27% shareholder in non-signatory Vivendi, which is the parent company of Editis, which in turn is the parent company of the principal contracting party Interforum – plainly lacks sufficient

1. Although EPAC's original attempt to serve the amended complaint on Bolloré in France was ineffective, Bolloré agreed to waive formal compliance with the Hague Convention's service-of-process requirements to streamline these proceedings and enable the Court to expeditiously address Bolloré's jurisdictional challenge.

indicia of closeness such that Bolloré could foresee being subject to litigation in New York. Indeed, Bolloré did not even have that very remote relationship with the Editis Defendants until ***four years after*** the contract at issue was executed, when the Editis Defendants were acquired by Vivendi, and therefore Bolloré could not possibly have foreseen being forced to litigate in the contract's selected forum. Absent such foreseeability, the exercise of jurisdiction over Bolloré contravenes constitutional due-process requirements.

Second, the forum is patently inconvenient for Bolloré, a French company with no relevant ties to the United States, let alone New York. Indeed, the entire dispute lacks any nexus to New York whatsoever. It exclusively involves Maltese and French companies and centers on events that occurred entirely in France. All witnesses, documents, and evidence are located nearly 4,000 miles away from New York. While the contracting parties may have selected this forum to resolve their contractual disputes, forcing Bolloré to appear and defend itself in a New York court under such circumstances would be massively inconvenient and patently unfair.[2] To be sure, if EPAC were to have a legitimate claim against Bolloré, that claim could be brought in France, where all the events at issue took place and where all the witnesses and documents likely reside – plainly a more convenient forum

2. That is true and, indeed, would be self-evident even under "normal" circumstances, but in the midst of a global pandemic, where travel to and from the United States and Europe has all but ground to a halt, the inconvenience to Bolloré is particularly palpable.

for Bolloré (and EPAC). But the contract's forum-selection clause cannot be applied to Bolloré, whose attenuated connection, if any, to the parties and the dispute does not warrant subjecting it to the far away forum selected by a contract to which it is not a party. Dismissal of the claim against Bolloré on forum non conveniens grounds – even if the Court maintains the remainder of the action – is eminently warranted.

Third, even if the Court could exercise personal jurisdiction over Bolloré and the forum is deemed convenient, EPAC nevertheless fails to state a claim for tortious interference against Bolloré. If – as EPAC alleges in its amended complaint – Bolloré is so "closely related" to the Editis Defendants that it can be subject to a forum-selection clause in a contract to which it is indisputably *not* a party, then Bolloré necessarily fits squarely within New York's well-established economic-justification defense to tortious interference, which forecloses such a claim made against a corporate family member under these precise circumstances. Indeed, EPAC itself expressly alleges that Bolloré acted out of an economic interest by purportedly interfering with the contract in an effort to save money and obtain more favorable pricing terms. But even setting aside economic justification, EPAC's claim against Bolloré fails because it offers only the most speculative, bare-bones allegations of interference, none of which are sufficient to withstand dismissal. It also fails to specifically allege, as it must, that the Editis Defendants would not have breached the contract but for Bolloré's actions.

Accordingly, the Court should dismiss the complaint against Bolloré.

Appendix E

BACKGROUND

EPAC is a Malta-based producer of a book-printing system. (Dkt. No. 13 (the "FAC") ¶¶ 1, 5.) On July 23, 2015, EPAC and Interforum, a French book distributor, entered into a Master Facility Development and Services Agreement, as amended (the "Agreement") under which EPAC agreed to install its printing system adjacent to an Interforum book-distribution facility in Malesherbes, France. (*Id.* ¶ 14.) Interforum, in turn, agreed to purchase books produced by the system. (*Id.*) To guaranty Interforum's obligations, Editis – Interforum's French parent company – also signed the Agreement. (*Id.* ¶¶ 1, 7.) Notwithstanding the lack of any nexus between the Agreement and New York, the parties selected New York as the forum for any disputes related to the Agreement. (*Id.* ¶ 12.) In January 2019, four years after the Agreement's execution, the publicly traded French media conglomerate Vivendi acquired Editis. (*Id.* ¶¶ 8, 21.)

EPAC claims that the Editis Defendants failed to perform several of their obligations under the Agreement, such as timely installing a conveyer system linking the EPAC system to the Interforum facility and integrating the system with Interforum's databases. (*Id.* ¶¶ 2, 16-17.) It further claims that the Editis Defendants failed to pay invoices totaling several million euros. (*Id.* ¶¶ 2, 25.) According to EPAC's amended complaint, that alleged non-payment was induced by Editis' parent company, Vivendi, as well as Bolloré, a "27% shareholder" of Vivendi (*id.* ¶ 9), in an attempt to "force a renegotiation" of the Agreement's terms (*id.* ¶ 24) and obtain more "favorable pricing." (*Id.* ¶ 22.)

Initially, unidentified "personnel" of all four defendants allegedly tried to induce EPAC to reduce the pricing by announcing plans to expand their relationship with EPAC. (*Id.* ¶ 21.) Vivendi and Bolloré then purportedly embarked on a "campaign" to exert "economic pressure" on EPAC to change the pricing and other unspecified terms of the Agreement. (*Id.* ¶ 3.) That effort was allegedly managed by an individual who sometimes used a Bolloré email address and purported to represent both Vivendi and Bolloré. (*Id.*) Specifically, EPAC alleges that "Vivendi and/or Bolloré" instructed the Editis Defendants "to renegotiate the Agreement to reduce the pricing." (*Id.* ¶ 22; *see also id.* ¶ 24.) As alleged "on information and belief," they also instructed the Editis Defendants to "look for" and "fabricate" evidence of "problems in EPAC's performance." (*Id.* ¶ 22.)

EPAC further alleges that, in an attempt to "work through" these issues, EPAC offered a pricing proposal as a "favorable accommodation" to the Editis Defendants, conditioned upon them making certain payments by specified dates. (*Id.* ¶ 25.) The Editis Defendants allegedly agreed to EPAC's proposed terms, paid an adjustment for 2019, and paid the agreed pricing for approximately two months of production in 2020. (*See id.*) They then allegedly stopped paying amounts due at Vivendi and Bolloré's direction. (*Id.* ¶¶ 25, 30, 34.)[3]

On March 26, 2021, EPAC commenced this action for breach of contract against the Editis Defendants,

3. The complaint incongruously alleges both that EPAC raised the issue of non-payment in a September 22, 2020 letter (FAC ¶ 26) and that the non-payment started in October 2020 at the direction of Vivendi and Bolloré. (*Id.* ¶ 25.)

invoking the Agreement's forum-selection clause as the sole basis for jurisdiction in this Court. (Dkt. No. 2 ¶ 7.) In its single-count complaint, EPAC alleged that the Editis Defendants had breached the Agreement by failing to pay invoices totaling over seven million euros and failing to perform various contractual obligations. (*Id.* ¶¶ 30-35.) The Editis Defendants filed an answer and counterclaim on May 17, 2021. (Dkt. No. 6.)

On July 7, 2021, EPAC filed an amended complaint adding a claim for intentional interference with contract against both Vivendi and Bolloré, a minority shareholder in Vivendi whose supposed involvement in the dispute did not merit even a cursory reference in the original complaint. (*See* FAC ¶¶ 42-50.) In addition to allegations of inducement by Vivendi, EPAC weaves in a series of vague, wholly conclusory allegations about Bolloré's participation in that inducement. (*See, e.g.*, *id.* ¶¶ 3, 21-22, 24-25.) EPAC also, with no supporting factual allegations, baldly describes Vivendi's and Bolloré's alleged interference as intentional, wrongful, and malicious. (*See, e.g.*, *id.* ¶¶ 3, 22, 31.)

STANDARD

On a motion to dismiss for lack of personal jurisdiction under CPLR 3211(a)(8), "the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction." *Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 485, 486 (1st Dep't 2017); *see also Arroyo v. Mountain Sch.*, 68 A.D.3d 603, 604 (1st Dep't 2009). That demonstration requires satisfaction of both "statutory and due process

prerequisites." *72A Realty Assocs. v. N.Y.C. Envt'l Control Bd.*, 275 A.D.2d 284, 285-86 (1st Dep't 2000).

Even where the plaintiff demonstrates personal jurisdiction, a court may in its "sound discretion" dismiss the action pursuant to CPLR 327(a) on grounds of forum non conveniens. *Nguyen v. Banque Indosuez*, 19 A.D.3d 292, 294 (1st Dep't 2005). The defendant challenging the forum bears the burden to "demonstrate relevant private or public interest factors which militate against accepting the litigation." *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984).

In reviewing a motion to dismiss for failure to state a claim under CPLR 3211(a)(7), a court presumes the complaint's allegations as true and draws all favorable inferences therefrom. *Mamoon v. Dot Net Inc.*, 135 A.D.3d 656, 658 (1st Dep't 2016). But "vague, speculative, and conclusory" allegations are not entitled to a presumption of truth. *Kaplan v. Conway & Conway*, 173 A.D.3d 452, 452-53 (1st Dep't 2019); *see also DRMAK Realty LLC v. Progressive Credit Union*, 133 A.D.3d 401, 404 (1st Dep't 2015) ("[C]onclusory allegations will not serve to defeat a motion to dismiss.").

ARGUMENT

I. THIS COURT LACKS PERSONAL JURISDICTION OVER BOLLORÉ.

At the outset, Bolloré should be dismissed from this case for want of personal jurisdiction. To exercise

general jurisdiction over a foreign entity, the entity must be "essentially at home in the forum State." *Motorola v. Standard Bank*, 24 N.Y.3d 149, 160 n.4 (2014) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014)). And specific jurisdiction requires that the dispute arose from the entity's "purposeful activity" in the forum. *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508 (2007). To satisfy due-process standards, the entity's contacts with the forum must be such that it "should reasonably anticipate being haled into court there." *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 216 (2000) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

The complaint in this case is utterly devoid of allegations sufficient to demonstrate either form of jurisdiction. Bolloré is a French company with no alleged presence in New York. (*See* FAC ¶ 9.) And Bolloré has no alleged contacts with New York – whether related to the dispute or otherwise. Bolloré's only alleged involvement in this dispute – an action between Maltese and French companies concerning a contract negotiated, executed, performed, and purportedly breached entirely in France – is limited to conclusory allegations of a few scattered, vague communications between a French Bolloré employee and the foreign contracting parties. (*See id.* ¶¶ 3, 22, 24-25, 30, 34.) Thus, no basis exists for general or specific jurisdiction over Bolloré. *Cf. Magdalena v. Lins*, 123 A.D.3d 600, 601 (1st Dep't 2014) (no personal jurisdiction where foreign entity had no presence in New York and disputed transaction occurred entirely outside New York).

EPAC's sole attempt to link Bolloré (and the dispute) to New York is that the Agreement between EPAC and

the Editis Defendants contains a mandatory New York forum-selection clause. (FAC ¶ 12.) New York law indeed authorizes contracting parties to consent to jurisdiction in the state through a forum-selection clause. *Oak Rock Fin., LLC v. Rodriguez*, 148 A.D.3d 1036, 1038 (2d Dep't 2017). But Bolloré is not a party to the Agreement and "[i]t goes without saying that a contract cannot bind a nonparty" except under theories not alleged here. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002); *see also Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (noting that a contract is traditionally enforceable against a nonparty under "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel") (citation omitted).

Nevertheless, EPAC alleges that Bolloré is subject to the forum-selection clause because it is "closely related" to Editis. (*See* FAC ¶ 12.) To be sure, in certain limited circumstances, a contractual signatory may enforce a forum-selection clause against a non-signatory that has a "sufficiently close relationship with [a] signatory *and* the dispute." *Tate & Lyle Ingredients Ams., Inc. v. Whitefox Tech. USA, Inc.*, 98 A.D.3d 401, 402 (1st Dep't 2012). However, "[t]he case law makes clear that 'closely related' in this sense is a fairly strict standard." *Miller v. Mercuria Energy Trading, Inc.*, 291 F. Supp. 3d 509, 523 (S.D.N.Y. 2018), *aff'd*, 774 F. App'x 714 (2d Cir. 2019). The non-signatory must have a "substantial connection" with a signatory. *W-Sys. Corp. v. Mountain Am. Fed. Cred. Union*, 2021 WL 1578336, at *6-7 (Sup. Ct. N.Y. Cnty. Apr.

22, 2021).[4] And it must have been "intimately involved" and played an "active role" in the disputed transaction. *See Magna Equities II, LLC v. Writ Media Group Inc.*, 2017 WL 1232524, at *5 (Sup. Ct. N.Y. Cnty. Mar. 30, 2017) (quoting *SRT Cap. Ltd. v. Soleil Cap. Ltd.*, 2016 WL 1182111, at *4 (Sup. Ct. N.Y. Cnty. Mar. 25, 2016)).

Ultimately, the inquiry turns on whether the relationship is so close that "enforcement of the forum selection clause is foreseeable." *Universal Inv. Advisory SA v Bakrie Telecom Pte., Ltd.*, 154 A.D.3d 171, 179 (1st Dep't 2017) (citation omitted); *see also L-3 Comm'cns Corp. v. Channel Techs., Inc.*, 291 A.D.2d 276, 277 (1st Dep't 2002) (stating that the relationship must be such that the non-signatory was "foreseeably bound by and thus implicitly included within the . . . forum selection clause"). Absent a showing of foreseeability, the exercise of jurisdiction does not comport with due process. *Highland Crusader Offshore Partners, L.P. v. Targeted Delivery Tech. Holdings, Ltd.*, 184 A.D.3d 116, 123 (1st Dep't 2021) (explaining that foreseeability obviates the need for a "separate minimum-contacts analysis").[5]

---

4. A sufficient connection generally requires, at a bare minimum, a "parent-subsidiary or an employer-employee" type of relationship, often from the inception of the agreement. *See W-Sys. Corp.*, 2021 WL 1578336, at *6-7. Indeed, only "in some instances" do non-signatory alter egos, executives, and successors in interest satisfy that exacting standard. *Affiliated FM Ins. Co. v. Kuehne & Nagel, Inc.*, 328 F. Supp. 3d 329, 336 (S.D.N.Y. 2018) (citation omitted).

5. Notably, when it initially confronted the issue, the First Department expressed hesitance about enforcing forum-selection

Appendix E

EPAC attempts to bootstrap a sufficiently close relationship to a signatory with the purely conclusory allegation that Bolloré is a "parent organization[] of Editis." (FAC ¶ 12.) Setting aside that being a "parent organization" alone should not suffice to assert jurisdiction, Bolloré is plainly not even Editis' "parent company." Rather – as EPAC itself alleges – Bolloré is a minority shareholder of Vivendi, which is Editis' parent company. (*See id.* ¶¶ 9, 21.) Such a minority stake in the non-signatory publicly traded parent of a signatory, without more, can hardly be said to evidence a connection to the signatory so "substantial" that enforcement of a forum-selection clause in the signatory's contract is foreseeable. Nor does EPAC allege any facts suggesting that Bolloré maintains such a dominant

---

clauses against non-signatory defendants but ultimately elected to follow "the federal courts" in adopting the closely related doctrine. *See Tate & Lyle*, 98 A.D.3d at 402. However, federal courts in New York have more recently "caution[ed] against a liberalapplication of forum selection clauses to non-signatory defendants." *Arcadia Biosciences, Inc. v. Vilmorin & Cie*, 356 F. Supp. 3d 379, 395 (S.D.N.Y. 2019); *see also HSM Holdings, LLC v. Mantu I.M. Mobile Ltd.*, 2021 WL 918556, at *9 (S.D.N.Y. Mar. 10, 2021) (adopting a similar approach to *Arcadia*). In *Arcadia*, for example, the court emphasized the hornbook principle that, to satisfy due process, the defendant's relationship with the forum state "must arise out of contacts that the defendant himself creates with the forum" and not "contacts between the plaintiff (or third parties) and the forum" – such as the selection by third parties of New York courts to resolve their disputes. *See* 356 F. Supp. 3d at 395 (quoting *Walden v. Fiore*, 571 U.S. 277, 284 (2014)). The court thus declined to apply the closely related doctrine "without first determining whether the exercise of jurisdiction . . . comports with due process" according to an ordinary minimum-contacts analysis. *Id.* That analytical approach should be followed by this Court.

hold on Vivendi's internal management and operations that it could be said to control Vivendi's subsidiaries. Its conclusory assertion that Bolloré is a "major" shareholder of Vivendi by virtue of its less than 30% ownership interest (*id.* ¶ 3) does not suffice. *See L-3 Commc'ns*, 291 A.D.2d at 277 (affirming dismissal for lack of personal jurisdiction absent a "factual predicate" for assertion of a close relationship).

As to a close relationship with the dispute, EPAC offers only the equally conclusory allegation that Bolloré was "involved in the operation of the Agreement on a day-to-day basis." (FAC ¶ 12.) Again, the amended complaint is devoid of any facts substantiating (or even purporting to support) that allegation. *See L-3 Commc'ns*, 291 A.D.2d at 277. It alleges only a few stray instances in which a Bolloré employee purportedly claiming to represent Bolloré and Vivendi summarily "instructed" the Editis Defendants to take certain actions, including to renegotiate the Agreement and not pay invoices. (*See* FAC ¶¶ 3, 22, 25.) Such "general allegations of control are entirely insufficient to disregard the separate legal identities of these corporations." *Project Cricket Acquisition, Inc. v. Florida Cap. Partners, Inc.*, 2017 WL 2797468, at *5 (Sup. Ct. N.Y. Cnty. Jun. 28, 2017), *aff'd sub nom on other grounds by Project Cricket Acquisition, Inc. v. FCP Invs. VI, L.P.*, 159 A.D.3d 600 (1st Dep't 2018); *see also Array Biopharma, Inc. v. Astrazeneca PLC*, 2019 WL 3457262, at *4 (Sup. Ct. N.Y. Cnty. Jul. 30, 2019) (deeming insufficient to withstand dismissal the "bare allegation" that a signatory's owner controlled the disputed transaction) (quoting *Cuno, Inc. v. Hayward Indus. Prods., Inc.*, 2005 WL 1123877, at *6 (S.D.N.Y.

May 10, 2005)), *aff'd on other grounds by* 184 A.D.3d 463 (1st Dep't 2020). Substantially greater involvement in the decision-making process giving rise to the Editis Defendants' alleged repudiation of the Agreement is required than vague allusions to instructions by Bolloré. *See, e.g.*, *Universal Inv.*, 154 A.D.3d at 179 (parties found closely related where non-signatory parent company and principal shareholder of signatory subsidiary actively authorized, participated in, and promoted a public offering of notes on which the subsidiary defaulted); *Tate & Lyle*, 98 A.D.3d at 403 (same where entities consulted with each other and were intimately involved in decision-making process from the contract's execution through the initiation of litigation).

Moreover, there simply is no basis to conclude that Bolloré – a less than 30% shareholder of a public company that acquired the Editis Defendants ***four years after*** executing the Agreement – conceivably could have foreseen enforcement of the forum-selection clause against it. (*See* FAC ¶¶ 9, 21.) Neither Vivendi nor Bolloré had any alleged involvement in the negotiation or execution of the Agreement, nor were they otherwise affiliated with the signatories at the time. EPAC does not suggest that Bolloré was ever even *aware* of the forum-selection clause before this litigation. *See Arcadia*, 356 F. Supp. 3d at 395. It follows that, as a matter of due process, the clause is unenforceable against Bolloré. *Cf. Highland*, 184 A.D.3d at 123 (stating that it would be unforeseeable that a non-signatory future affiliate formed years after the contract's execution would be bound by a forum-selection clause); *Magna Equities*, 2017 WL 1232524, at *5 ("Pacific

was not involved when the transaction was consummated, and it was not reasonably foreseeable that Pacific would be bound by the forum selection clause.").

II. NEW YORK IS AN INCONVENIENT FORUM FOR ANY CLAIMS AGAINST BOLLORÉ.

Regardless of the foreseeability of litigating in New York, equity requires dismissal of the claims against Bolloré because the forum is patently inconvenient. It is settled law that New York courts "need not entertain causes of action lacking a substantial nexus with New York." *Martin v. Mieth*, 35 N.Y.2d 414, 418 (1974). The doctrine of forum non conveniens enshrines that principle, permitting dismissal of a claim where "in the interest of substantial justice the action should be heard in another forum." *Elmaliach v. Bank of China*, 110 A.D.3d 192, 208 (1st Dep't 2013) (quoting *Nat'l Bank & Trust Co. of N. Am. v. Banco De Vizcaya*, 72 N.Y.2d 1005, 1007 (1988)). Relevant factors include the burden on the courts, potential hardship to the defendant, the unavailability of an adequate alternative forum, the residence of the parties, and the location of the events underlying the dispute. *Id.* All those factors militate decisively in favor of dismissing the claim against Bolloré.

Indeed, not only does Bolloré lack any contacts with New York, but the nexus between this entire matter and New York is nonexistent. None of the parties are located in New York, nor have they ever engaged in any purported direct or indirect activities in the forum. The dispute centers on events occurring entirely in France, all relevant evidence and witnesses are located in France,

and relevant documents will be in French. Moreover, France plainly has an interest in regulating French business entities conducting transactions entirely within the country, and there is no indication that France is not a suitable alternative forum.[6] New York, meanwhile, has no articulable interest in the dispute. As a result, the doctrine of forum non conveniens necessitates dismissing the claim against Bolloré. *Cf. Nguyen v. Banque Indosuez*, 19 A.D.3d 292, 294-95 (1st Dep't 2005) (dismissing for inconvenience where New York had a "barely discernible" interest in dispute between French and Vietnamese parties over benefits from French banks).

It is irrelevant that the parties to the Agreement have consented to litigate their dispute in New York. (FAC ¶ 12.) Forum non conveniens is a flexible doctrine, taking into account "the facts and circumstances of each particular case." *Fox v. Fusco*, 4 A.D.3d 313, 313 (1st Dep't 2004). Consistent with that flexibility, a court "may dismiss part of a lawsuit while deciding the merits of other issues" – even though "deciding related questions in different courts may often be inconvenient and inefficient." *Scottish Air*

6. It goes without saying that courts in France, where Bolloré is amenable to process, are fully competent to adjudicate contract-related disputes. *See Shin-Etsu Chem. Co. v. ICICI Bank Ltd.*, 9 A.D.3d 171, 178 (1st Dep't 2004) (noting that an alternative forum exists if the defendant is "amenable to process" there) (citation omitted). In any case, an alternative forum is not required to dismiss on grounds of inconvenience where, as here, New York's connection to the dispute is at best "minimal" (and indeed nonexistent). *Fin. & Trading Ltd. v. Rhodia S.A.*, 28 A.D.3d 346, 347 (1st Dep't 2006) (dismissing under CPLR 327 where dispute centered on French transaction and involved mostly French entities).

Int'l v. British Caledonian Group, PLC, 81 F.3d 1224, 1234-35 (2d Cir. 1995). For example, the Second Circuit has maintained claims against a French bank where the disputed transaction had a sufficient connection to New York while dismissing claims against a French corporation implicating an "entirely . . . French controversy." *Olympic Corp. v. Societe Generale*, 462 F.2d 376, 378-79 (2d Cir. 1972); *see also id.* at 379 (stating that "this is exactly the type of case for which the *forum non conveniens* doctrine was designed"). Similarly, here, the Court may decide to entertain EPAC's contract claim against the Editis Defendants while dismissing its interference claim against Bolloré, which – as in *Olympic* – involves an entirely French controversy with zero connection to New York.

New York General Obligations Law § 5-1402 does not alter that result. That statute obligates courts to exercise jurisdiction in cases involving at least $1 million in controversy where, as here, a contract designates New York as the forum, "regardless of any inconvenience to the parties." *Nat'l Union Fire Ins. Co. v. Worley*, 257 A.D.2d 228, 230 (1st Dep't 1999). But by its plain terms, § 5-1402 prevents only "a *party that has agreed* to jurisdiction in New York from later asserting that the New York courts are inconvenient." *AIG Fin. Prods. Corp. v. Penncara Energy, LLC*, 83 A.D.3d 495, 497 (1st Dep't 2011) (emphasis added). Bolloré is not a party to the Agreement, nor, as explained above, is it so closely related to a contractual signatory that it conceivably could be barred from asserting inconvenience – an issue that New York courts apparently have not addressed in any event.[7]

7. To the extent the Court nevertheless finds Bolloré subject to the Agreement's forum-selection clause, the clause should be

That the contract claim against the Editis Defendants can proceed in the forum by operation of law does not justify maintaining the interference claim against Bolloré, especially where Bolloré lacks a sufficiently close relationship with the contracting parties or the dispute itself. Indeed, it would be manifestly unfair to maintain the claim against Bolloré simply because third parties with which it had no affiliation happened to enter into an Agreement selecting New York as the forum for their disputes four years before a public company in which Bolloré is a minority shareholder acquired one of those parties. In these circumstances, enforcing the forum-selection clause against Bolloré would be patently unreasonable and unjust.

---

ruled unenforceable as to Bolloré. Although prima facie valid, a forum-selection clause should be set aside if its enforcement would be "unreasonable or unjust" such that litigation in the forum would be "gravely difficult and inconvenient." *Sterling Nat'l Bank v. E. Shipping Worldwide, Inc.*, 35 A.D.3d 222, 222 (1st Dep't 2006) (citation omitted). Accordingly, courts have set aside as unreasonable a New York forum-selection clause and dismissed on grounds of forum non conveniens where, as here, the entire dispute occurred elsewhere, the defendant's business was located outside the state, and the defendant was a non- resident with no ties to New York. *See N. Leasing Sys., Inc. v. French*, 48 Misc. 3d 43, 45 (1st Dep't 2015); *see also U.S. Merch., Inc. v. L&R Distribs., Inc.*, 122 A.D.3d 613, 614 (2d Dep't 2014) (finding a "strong showing" of unreasonableness where all parties were located outside the chosen forum and the contract was executed and performed outside the forum). As the First Department emphasized in *Northern Leasing*, courts have no compulsion to accept jurisdiction of a claim lacking a "substantial nexus with New York." 48 Misc. 3d at 45 (citation omitted).

III. EPAC FAILS TO STATE A CLAIM FOR TORTIOUS INTEREFERENCE.

Even assuming the Court were to exercise personal jurisdiction and deem the forum convenient as to Bolloré, EPAC fails to state a viable claim against Bolloré for intentional (or tortious) interference with contract. Indeed, a finding of personal jurisdiction here actually *compels* a dismissal for failure to state a claim. That is because, if the Court were to credit EPAC's allegation that Bolloré's relationship with the Editis Defendants is so close that it is subject to jurisdiction based on a forum-selection clause in their contract, then Bolloré necessarily has a sufficiently strong interest in the Editis Defendants' business such that it has an economic justification to interfere with their contracts. New York law precludes tortious-interference liability in precisely these circumstances.

Under New York law, tortious interference requires (i) a valid contract between the plaintiff and a third party; (ii) the defendant's knowledge of that contract; (iii) the defendant's unjustified, intentional inducement of the third party's breach of the contract; (iv) actual breach; and (v) damages. *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (1996). Further, "the plaintiff must specifically allege that the contract would not have been breached but for the defendant's conduct." *Ferrandino & Son, Inc. v. Wheaton Bldrs., Inc., LLC*, 82 A.D.3d 1035, 1036 (2d Dep't 2011) (citation omitted). Moreover, to withstand dismissal, a tortious-interference claim requires "more than mere speculation" about interference. *Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dep't 2006).

Appendix E

EPAC claims that the Editis Defendants breached the Agreement by failing to pay several million euros in amounts due. (FAC ¶ 39.)[8] According to EPAC, Vivendi, along with Bolloré, induced that non-payment as part of a broader effort to exert economic pressure and force a renegotiation of the Agreement to obtain more favorable pricing terms. (*See id.* ¶ 46.) That effort purportedly consisted of instructions to the Editis Defendants, allegedly through an employee of Vivendi and Bolloré, to renegotiate the Agreement (*id.* ¶¶ 22, 24) and to look for and/or fabricate evidence of deficient performance by EPAC (*id.* ¶ 22), followed by instructions to cease paying amounts due. (*Id.* ¶ 25.)

EPAC's claim fails out of the gate because, as pleaded, it clearly and unambiguously demonstrates an economic justification for any purported interference in the Agreement. *See Foster v. Churchill*, 87 N.Y.2d 744, 750 (1996). Under New York law, a party is privileged to interfere with a contract – and no claim for tortious interference may lie against it – where it "acted to protect its own legal or financial stake in the breaching party's

8. EPAC also claims that the Editis Defendants breached the Agreement by failing to perform various obligations, such as installing a conveyor system and integrating EPAC's book-printing system with Interforum's databases. (FAC ¶ 39.) EPAC does not purport to attribute that non- performance to inducement by Bolloré or Vivendi, however. Read in context, EPAC's vague allegation that Vivendi and Bolloré "induce[d] Editis to refuse to perform its obligations" as part of its "campaign" to force a renegotiation of the Agreement (FAC ¶ 3) clearly refers to the asserted non-payment breach, not the asserted breach for failure to perform.

business." *White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007). A shareholder of the breaching party acting to safeguard its financial stake presents the paradigmatic example, but the defense is equally applicable to parent-subsidiary relationships and other corporate affiliations. *See, e.g.*, *Felsen v. Sol Café Mfg. Corp.*, 24 N.Y.2d 682, 687 (1969) (shareholder); *MTI/Image Group, Inc. v. Fox Studios E., Inc.*, 262 A.D.2d 20, 23 (1st Dep't 1999) (range of affiliated parent and sister entities). Indeed, the economic-justification defense does not even require a "strict ownership interest." *See E.F. Hutton Int'l Assocs. v. Shearson Lehman Bros. Holding, Inc.*, 281 A.D.2d 362, 362 (1st Dep't 2001).

Here, the complaint alleges that Bolloré is a "major" shareholder of Vivendi, the parent of Editis (which, in turn, is the parent of Interforum). (FAC ¶¶ 1, 3, 9, 21.) Vivendi indisputably has an economic interest in the business of its subsidiaries, and Bolloré, as a major shareholder of Vivendi, necessarily has a similar economic interest to protect in that business. (*See id.* ¶ 12.) Moreover, by EPAC's own account, Bolloré acted to protect its economic interest in the Editis Defendants when it purportedly interfered with the Agreement. EPAC explicitly alleges that Bolloré (and Vivendi) undertook an effort to force a renegotiation of the Agreement's "economics" (*id.* ¶ 34) in a bid to obtain "reduced" and "more favorable" pricing terms. (*See id.* ¶ 22.) Those allegations belie EPAC's wholly conclusory and unsubstantiated assertion that Bolloré acted not out of "economic interest" but rather "to serve other unrelated" – and unspecified – "purposes." (*Id.* ¶ 31.) Bolloré's economic interest thus precludes tortious-interference liability absent "a showing of malice or illegality." *See Collins v. E-Magine, LLC*, 291 A.D.2d 350, 351 (1st

Dep't 2002). Merely pleading that Bolloré ordered a breach of the Agreement does not suffice for that showing. *Natale v. Beth Israel Med. Ctr.*, 2014 WL 5374349, at *2 (S.D.N.Y. Oct. 10, 2014).

In anticipatory rebuttal of Bolloré's clear economic-justification defense, the amended complaint is laden with wholly conclusory assertions that Bolloré acted "maliciously" and "illegally" and is otherwise "morally culpable." (FAC ¶¶ 3, 22, 31, 46, 48-49.) Those cursory, unadorned buzzwords of improper motivation are plainly insufficient to defeat Bolloré's economic-justification defense and, in fact, are disproven by EPAC's own allegations that Bolloré acted to protect its economic interest. *See Rather v. CBS Corp.*, 68 A.D.3d 49, 60 (1st Dep't 2009) ("[B]are allegations of malice do not suffice . . . ."); *Ruha v. Guior*, 277 A.D.2d 116, 116 (1st Dep't 2000) (same, "particularly where such allegations are contradicted by plaintiffs' own claims that defendants' actions were financially motivated").

The sole support for EPAC's assertion of "illegality and malice" is that unnamed "personnel" of all four defendants purportedly falsely stated "that they planned to expand their relationship with EPAC to additional publishers to be acquired by Bolloré or Vivendi" in an attempt to induce EPAC to reduce the Agreement's pricing terms. (FAC ¶ 48.)[9] On its face, that rationale is self-refuting – it

9. EPAC also alleges that Vivendi acted illegally and maliciously by invoking French tax law to induce the Editis Defendants to withhold funds from their payments to EPAC. (FAC ¶ 48.) Bolloré is not alleged to have participated in those efforts.

shows that Bolloré acted, however deceptively, to obtain economic advantage, not that it acted with *ill will towards EPAC*. *Cf. Felsen*, 24 N.Y.2d at 687 ("Plaintiff could show no evidence that such interference was motivated by any 'malice' toward him."). Indeed, even if Bolloré's alleged deception rose to the level of bad faith, that fails to demonstrate malice. *See Foster*, 87 N.Y.2d at 750.

Importantly, EPAC's failure to allege facts sufficient to defeat Bolloré's economic-justification defense is fatal to its interference claim at the pleading stage. *See, e.g.*, *Hirsch v. Food Resources, Inc.*, 24 A.D.3d 293, 296-97 (1st Dep't 2005) (affirming dismissal of tortious-interference claim under CPLR 3211(a)(7) based on failure to plead facts defeating economic-interest defense).

EPAC's remaining allegations are equally deficient. Indeed, its entire theory of tortious interference is "vague and conclusory" and "devoid of a factual basis." *See Black Car & Livery Ins., Inc. v. H&W Brokerage, Inc.*, 28 A.D.3d 595, 595 (2d Dep't 2006) (citation omitted). EPAC's sole claim of interference by Bolloré is that, beginning in October 2020, the Editis Defendants, acting "under instruction from Vivendi and Bolloré, failed to pay all amounts due and took unilateral retroactive credits." (FAC ¶¶ 25, 46.) EPAC provides no supporting factual allegations regarding the nature of that "instruction," the extent of Bolloré's involvement, or even the decision-making process by which the Editis Defendants purportedly opted to follow the instruction. Those are glaring omissions, given that Bolloré is merely a minority shareholder of Vivendi and has no alleged direct interest

in or control of Interforum – the principal signatory to the Agreement – or Editis – Interforum's parent-guarantor. It is entirely unclear how a minority shareholder of the publicly traded parent of the parent of the principal contractual signatory could have engineered a decision to cease paying amounts due simply by issuing a shadowy "instruction" to cease payment. Even assuming Bolloré acted as EPAC nebulously describes, EPAC offers only speculation that its actions caused the Editis Defendants to breach the Agreement and therefore fails to state a claim for interference.

Ferrandino, 82 A.D.3d at 1036 (dismissing where "plaintiff merely asserted, in a conclusory manner and without the support of relevant factual allegations, that HE2's actions caused Wheaton to breach the subcontract").[10]

Finally, EPAC's claim fails because the complaint does not specifically allege that, but for Bolloré's actions, the Editis Defendants would have paid the amounts due.

---

10. Seeking to demonstrate even more pervasive actions to induce a breach, EPAC concocts a broader narrative about Bolloré (and Vivendi) pursuing a campaign to force a renegotiation of the Agreement by instructing the Editis Defendants to demand lower prices. (*See* FAC ¶¶ 3, 22, 24.) But bargaining over a contract's terms, whatever the motivation, plainly is not a breach of the contract (meaning Bolloré cannot be liable for "inducing" such negotiation). In fact, EPAC readily admits offering a pricing accommodation in response to the Editis Defendants' demands for lower pricing (*see* FAC ¶ 25), which belies its assertion of a "forced" negotiation.

Cantor Fitzgerald Assocs., L.P. v. Tradition N. Am., Inc., 299 A.D.2d 204, 204 (1st Dep't 2002) (describing the but-for requirement as an "essential element"). If anything, the complaint suggests the opposite: EPAC "raise[d] the non-payment issue" in a September 2020 letter to the Editis Defendants (FAC ¶ 26), yet Bolloré did not allegedly instruct the Editis Defendants to stop paying amounts due until the *following month*. (*Id.* ¶ 25 ("Starting in October, the Editis Defendants, under instruction from Vivendi and Bolloré, failed to pay all amounts due.").) Accepted as true, those allegations suggest that the Editis Defendants had already stopped making payments before receiving "instructions" not to pay from Vivendi and Bolloré. EPAC's failure to allege that Bolloré's actions specifically induced the non-payment is thus fatal to its claim. *Cf.*

Burrowes, 25 A.D.3d at 373 (dismissing for failure to state a claim where the plaintiff failed to allege but-for causation).

Appendix E

CONCLUSION

For the foregoing reasons, Bolloré respectfully requests that the Court dismiss all claims asserted against it.

Dated: September 30, 2021
New York, New York

Respectfully submitted,

PROSKAUER ROSE LLP
/s/ Bradley R. Bobroff
Bradley R. Bobroff
Shiloh A. Rainwater
Eleven Times Square
New York, New York 10036
(212) 969-3000
bbobroff@proskauer.com
srainwater@proskauer.com

Attorneys for Defendant Bolloré SE