

**UNITED STATES DISTRICT COURT  
FOR THE  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION**

AMZCO SURGICAL DEVICES, U.S.A.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 03-574-A
	)	Judge T.S.Ellis, III
NEW TRANSCENTURY FOUNDATION and	)	
JOHN SNOW, INC.	)	
	)	
Defendants.	)	
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**DEFENDANT JOHN SNOW'S  
MOTION FOR JUDGMENT ON THE PLEADINGS**

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, Defendant John Snow, Inc. (“John Snow”), by and through counsel, moves the Court for judgment on the pleadings because Plaintiff Amzco Surgical Devices, U.S.A. (“Amzco”) fails to state a claim upon which relief can be granted.

Amzco alleges causes of action for: one, tortious interference with contracts or contract expectancies; two, conspiracy to commit those torts; and three, conspiracy to injure Amzco’s business. As a matter of law, John Snow cannot tortiously interfere with its own contracts. As a matter of law, Amzco does not have a cognizable contract expectancy in bids it submitted with the hope of being awarded more John Snow contracts. And finally, Amzco’s conspiracy claims fail as a matter of law because: there is no underlying tort so there is no conspiracy to commit the tort; a principal and an agent cannot conspire, let alone conspire to tortiously interfere with their own contracts; and, the findings of this Court, the findings of the United States Food and Drug Administration, and Amzco’s admissions in a prior action against John Snow, show as a matter of

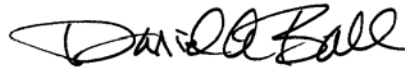
law that the allegations that certain warehouse reports were falsified are unfounded.

For the foregoing reasons, the points and authorities in the accompanying memorandum in support of this motion, any reply brief, and the hearing on this matter, Defendant John Snow, Inc. respectfully requests that its Motion for Judgment on the Pleadings be granted and this action dismissed with prejudice.

Dated: May 16, 2003

Respectfully submitted,

GOLDBERG BALL, PC

A handwritten signature in black ink, appearing to read "Dan A. Ball", written in a cursive style.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 16<sup>th</sup> day of May, 2003, a copy of Defendant John Snow's Motion for Judgment on the Pleadings, memorandum in support thereof with exhibits, and proposed order were sent via first class mail to the following persons:

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\_\_\_\_\_  
/s/  
Michael D. Hutchinson

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Plaintiff,	)	
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v.	)	Case No. 03-574-A
	)	Judge T.S. Ellis, III
NEW TRANSCENTURY FOUNDATION and	)	
JOHN SNOW, INC.	)	
	)	
Defendants.	)	
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**MEMORANDUM IN SUPPORT OF JOHN SNOW’S  
MOTION FOR JUDGMENT ON THE PLEADINGS**

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure Defendant John Snow, Inc. (“John Snow”), by and through counsel, has moved for judgment on the pleadings. In support thereof, John Snow states the following:

**I. SUMMARY**

Despite having filed three complaints against John Snow between April 2000 and April 2002, this case remains a stale bid protest that has been perverted into an action at law by conjuring allegations of false warehouse reports. Having failed in 1995, 1996 or 1997 to avail itself of available remedies under bid protest procedures, Plaintiff Amzco Surgical Devices, U.S.A. (“Amzco”) instead alleges that in those years John Snow, who is not a competitor of Amzco, tortiously interfered with contracts between Amzco and John Snow; that John Snow wrongfully refused to award Amzco more John Snow contracts; and, that John Snow accomplished these acts by conspiring with others to falsify warehouse reports to show: one, that Amzco shipped Presto® Pressure Canners and Cookers when Amzco had represented that it would supply, and that it had

shipped, Amzco Surgical Devices U.S.A.'s medical steam sterilizers; and, two, that Amzco shipped medical devices that were branded with the word "Pakistan" when it was required to ship only goods made in the United States.

Amzco asserted the identical claims against John Snow in a suit filed on April 13, 2000 in the Circuit Court of Arlington County, Virginia and it filed a first amended complaint in that action on August 23, 2000. Amzco voluntarily dismissed the prior action in October 2001. However, shortly before nonsuiting the prior action Amzco's president, Javaid Ratcher ("Mr. Ratcher"), conceded that the alleged false warehouse reports were not false.<sup>1</sup>

Mr. Ratcher admitted that the report that Amzco shipped pressure canners was not false because Amzco did in fact ship Presto® Pressure Canner Cookers. Mr. Ratcher also admitted that the warehouse report that Amzco devices were stamped "Pakistan" was not false because many Amzco's devices were stamped "Pakistan." And, Mr. Ratcher admitted that he received a call and a certified letter from the United States Attorney's Office that the government was going to seize the misbranded goods and Amzco decided not to respond.<sup>2</sup> Notwithstanding Amzco's fatal admissions of fact, Plaintiff yet again pursues the same claims in the instant action. The claims remain legally and factually groundless.

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<sup>1</sup> The Court may consider matters outside the pleadings and treat the motion for judgment on the pleadings as one for summary judgment. *Fed. R. Civ.P.* 12(c).

<sup>2</sup> After the United States Food and Drug Administration examined Amzco's goods, the government filed a Complaint for Forfeiture in this Court. *See, United States of America v. 10 cases, more or less, of surgical steel Instruments, et al.*, Case No. 97-2088, attached at Tab 16. The United States demanded seizure and condemnation of Plaintiff's goods on grounds that they were "adulterated" and "misbranded." *Id.* ("some of the devices have the word 'Pakistan' etched into them.") This Court entered a Default Decree ordering condemnation, forfeiture, and destruction of Plaintiff's adulterated and misbranded goods on April 24, 1998. Tab 18.

As a matter of law, John Snow cannot tortiously interfere with its own contracts. Amzco's claim of tortious interference with contract expectancies also fails as a matter of law. The claim is based on bids Amzco submitted for other John Snow contracts, that it allegedly was the "lowest bidder," and that Defendants wrongfully awarded the contracts to other vendors. Notwithstanding Amzco's efforts to convert a stale bid protest into a tort and its waiver of any such claim by having failed to file any formal bid protest, Amzco's belief that it should receive every contract upon which it bids is insufficient to create a contract expectancy as a matter of law. The very nature of the bidding process informs a bidder that it does not have a cognizable contract expectancy when it bids for a contract. And finally, Plaintiff's conspiracy claims fail as a matter of law for three reasons: one, without an underlying tort, there can be no conspiracy to commit the tort; two, agents and principals are legally incapable of conspiring with each other; and three, the conspiracy claim relies on allegedly false warehouse reports which Amzco admitted were not false.

Plaintiff has wasted a tremendous amount of John Snow's time and resources and should not be permitted to also continue wasting judicial time and resources with these allegations. It has been nine (9) years from the first date of the alleged wrongful conduct. Plaintiff has never pursued a formal bid protest, but has instead filed three (3) complaints against John Snow arising out of alleged false warehouse reports that Plaintiff admits were not false. It is beyond all doubt that Amzco's claims are legally baseless and that it could not prove any facts to support a recovery in this case. Accordingly, Defendant John Snow respectfully requests that this Court grant its Motion for Judgment on the Pleadings.

## II. BACKGROUND

### A. **The Parties**

As a prime contractor for the United States Agency for International Development (“USAID”), Defendant John Snow works with foreign ministries of health and manages projects that enhance health care and human services in developing countries. One such project, The Morocco Family Planning/Maternal and Child Health V Project (the “Morocco Project”) provided medical and surgical care to women and children. The Morocco Project is at the heart of this litigation. Motion for Judgment (“MFJ”) at ¶¶10-14, attached hereto at Tab 1.

For the Morocco Project John Snow contracted with the Defendant New TransCentury Foundation (“NTF”) to serve as its Procurement Services Agent (“PSA”), *i.e.*, to procure and deliver medical equipment to clinics in Morocco. MFJ, Tab 1 at ¶7. As John Snow’s agent, NTF, which is defunct, issued several Invitations for Bids (“IFB”) to potential vendors to procure medical equipment in accordance with specifications set forth by USAID, John Snow and Morocco’s Ministry of Health. *Id.* at ¶8. NTF, in turn, contracted with a freight forwarder, Matrix Logistics International, a/k/a GeoLogistics Services, Inc. (“Matrix”), to receive and inventory the goods and then forward them to their foreign destination.

Plaintiff Amzco was one of many vendors who submitted bids in response to IFBs issued by NTF with the hope that it would be awarded contracts to supply medical devices for the Morocco Project. MFJ, Tab 1 at ¶¶8-9. Amzco was awarded some contracts, or purchase orders, but was not awarded every contract upon which it bid because NTF determined that Amzco was not always the lowest responsive responsible bidder.

**B. The Prior State Court Action -- *Amzco I*.**

On April 13, 2000, Amzco filed an action against John Snow, NTF and Matrix in the Circuit Court for Arlington County, Virginia, *Amzco Surgical Devices, U.S.A. v. New TransCentury Foundation, et al.*, At Law No. 00-289 (“*Amzco I*”). The state court later granted Amzco leave to amend its complaint and Amzco filed its First Amended Motion for Judgment on August 23, 2000. A true and correct copy of Plaintiff’s First Amended Motion for Judgment in *Amzco I* is attached hereto at Tab 2.

The claims in *Amzco I* were labeled: Count I, “Tortious Interference with Existing or Potential Economic Relationship;” Count II, “Conspiracy to Tortuously [*sic*] Interfere with Existing or Potential Economic Relationship;” and Count III, “Statutory Conspiracy to Injure Another in His Trade or Business Va. Code Section 18.2-499.” Tab 2 at pp. 5-7. Amzco alleged that John Snow, NTF and Matrix conspired to make false statements about medical equipment that, pursuant to contracts with John Snow, Amzco was to supply for maternity and child health care clinics in Morocco. *Id.* at ¶¶8-14. Plaintiff voluntarily dismissed *Amzco I* by way of a nonsuit filed on October 19, 2001. Plaintiff’s Motion for Nonsuit is attached hereto at Tab 3.

Plaintiff filed the present action on April 22, 2002. MFJ, Tab 1. Amzco waited almost one year before serving John Snow on about April 21, 2003. Tab 4. John Snow filed a Notice of Removal in this Court on May 6, 2003. The present action includes the identical allegations and causes of action that were asserted in *Amzco I* which Amzco nonsuited; however, in the present case Matrix is “a co-conspirator, but not a defendant.” Compare MFJ, Tab 1 at ¶4 with Tab 2 at ¶4.

### **III. ARGUMENT**

A motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure is governed by the same standard for motions made pursuant to Rule 12(b)(6). *Burbach Broadcasting Company of Delaware v. Elkins Radio Corporation*, 278 F.3d 401, 405-06 (4<sup>th</sup> Cir. 2002). The Court then can grant John Snow’s Motion for Judgment on the Pleadings if “it appears to a certainty that the plaintiff cannot prove any set of facts in support of its claim which would entitle the plaintiff to relief.” *Michigan Mutual Insurance Company v. Smoot*, 128 F.Supp.2d 917, 920 (E.D.Va. 2000). As demonstrated below, it is beyond all doubt that Amzco cannot prove any set of facts in support of its claim that would entitle Amzco to relief.

#### **A. Count I: Tortious Interference with Existing or Potential Economic Relationship.**

##### **1. John Snow Cannot Tortiously Interfere With Its Own Contract As a Matter of Law.**

In order to pursue a successful claim for tortious interference of a contract under Virginia law, four elements must be met. Plaintiff must prove that [1] a valid contract exists, [2] that there was knowledge of the contract on the part of the interferor, [3] that there was intentional interference inducing a breach of the contract, and [4] that the disrupted party was damaged by this breach. *See Commerce Funding Corp. v. Worldwide Security Services*, 249 F.3d 204, 210 (4<sup>th</sup> Cir.2001), *citing Chaves v. Johnson*, 230 Va. 112, 335 S.E.2d 97, 102 (1985). All four of these factors are necessary in order for a tortious interference of contract action to be sustainable.

*Mona Elec. Group, Inc. v. Truland Service Corp.*, 193 F.Supp.2d 874, 875 (E.D.Va. 2002); *see also, Peterson v. Cooley*, 142 F.3d 181, 186 (4<sup>th</sup> Cir. 1998). It is beyond doubt that Plaintiff cannot establish the third element of this claim because John Snow cannot interfere with its own contracts as a matter of law.

It is undisputed that, “the contracts that were interfered with are P.O. 608-0223-124-A; P.O. 608-0223-167; and P.O. 608-0223-153.”<sup>3</sup> Amzco’s Supplemental Responses to John Snow’s Request for Production of Documents, attached at Tab 5. Copies of the purchase orders, hereinafter P.O. 124-A, P.O. 167 and P.O. 153, respectively, are attached at Tab 6. It is undisputed that the purchase orders are contracts with John Snow that were issued by its agent, NTF, for the Morocco Project. MFJ, Tab 1 at ¶¶7-12; *see also*, Tab 6. As a matter of well-established law, it is a legal impossibility for John Snow to tortiously interfere with its own contracts. *Fox v. Deese*, 234 Va. 412, 427, 362 S.E.2d 699, 708 (1987) (“A person cannot intentionally interfere with his own contract.”); *Chaves v. Johnson*, 230 Va. 112, 120, 335 S.E.2d 97, 102 (1985) (same); *Storey v. Patient First Corporation*, 207 F.Supp.2d 431, 448 (E.D.Va. 2002) (“In the jurisprudence of tortious interference, it is axiomatic that a party cannot interfere with his own contract.”); *Brown v. Loudoun Golf and Country Club, Inc.*, 573 F.Supp. 399, 404 (E.D.Va. 1983) (“only a third-party to the contract can be held liable for intentional interference.”); *Commercial Roofing and Sheet Metal Co., Inc. v. Gardner Engineering, Inc.*, 60 Va. Cir. 384 (Va.Cir.Ct. 2002) (same); *cf. Michigan Mutual Insurance Company v. Smoot*, 128 F.Supp.2d 917, 925 (E.D.Va. 2000) (“an agent cannot as a matter of law interfere with his principal’s contract.”); *Cleco Construction Co. v. Richmond Metropolitan Authority*, 2001 WL 20606 (Va. Cir. Ct., 2000) (same). Accordingly, Amzco’s claim against John Snow for tortious interference with contract is groundless as a matter of law.

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<sup>3</sup> The operative complaint, like Plaintiff’s First Amended Motion for Judgment in *Amzco I*, only identifies two purchase orders as the contracts at issue. MFJ, Tab 1 at ¶10 (“Purchase Order 608-0223-124A (Purchase Order #1)” and ¶12 (“Purchase Order 608-0223-157 (Purchase Order #2)”). In *Amzco I*, Plaintiff clarified that “P.O. 608-0223-157” was a typographical mistake (supposed to be “153”) and specifically identified the contracts at issue. Tab 5. Plaintiff neglected to correct this error when it filed again in April, 2002.

2. Amzco's Contract Expectancy Claim Is Meritless.

Plaintiff's additional claim for tortious interference with "potential economic relationship" in Count I of its Motion for Judgment is premised upon "bids" for John Snow contracts which were not awarded to Amzco. MFJ, Tab 1 at ¶¶9, 14-19. First, as a matter of law, Amzco does not have a contract expectancy in a bid. And second, Amzco waived its bid protest claims when it knowingly and intentionally decided not to follow any formal bid protest or dispute resolution procedures.

a. Amzco does not have a contract expectancy in a bid.

The elements of a cause of action for tortious interference with a business expectancy are:

(1) [plaintiff] had a contract expectancy; (2) [defendant] knew of the expectancy; (3) [defendant] intentionally interfered with the expectancy; (4) [defendant] used improper means or methods to interfere with the expectancy; and (5) [plaintiff] suffered a loss as a result of [defendant's] disruption of the contract expectancy.

*Maximus, Inc. v. Lockheed Info. Management Sys. Co.*, 254 Va. 408, 414, 493 S.E.2d 375, 378 (1997); *see also, Peterson, supra*, 142 F.3d at 186. As a matter of law, Plaintiff cannot establish the first element because it does not have a cognizable expectancy in a bid.

The first element of Plaintiff's claim requires that it have a contract expectancy. A contract expectancy is not a subjective hope or belief that one should get a contract; rather, a valid contract expectancy is one "with a probability of future economic benefit to plaintiff" that is measured by an "objective test." *Commercial Business Systems, Inc. v. Halifax Corporation*, 253 Va. 292, 300, 484 S.E.2d 892, 896 (1997). The alleged "potential economic relationships" are Amzco's "bids" to provide medical supplies and medical kits pursuant to John Snow contracts. MFJ, Tab 1 at ¶¶9, 14, 15 ("JSI and NTF wrongfully failed to award contracts to Amzco."), 16 ("JSI and NTF wrongfully rejected the Amzco bids.") & 17-19; *see also, Deposition of Javaid Ratcher*, October 6, 2001, ("Ratcher Depo.") Tab 7 at 465:17-19; 507:2-18. It is beyond a doubt that Plaintiff cannot

objectively establish the probability of a future economic benefit in a bid.

The very premise of the bidding process informs a vendor such as Amzco that it does not have a contract expectancy in a bid, *i.e.*, a bid is an offer to contract which may or may not be accepted. To hold the contrary would mean that every disappointed bidder has a cause of action for tortious interference with a contract expectancy, and that is not the law. For example, the plaintiff in *Commercial Business Systems, Inc.*, *supra*, 253 Va. at 298, had more than a bid, it had a contract with Bell South with the possibility of renewal. The plaintiff was assured by Bell South's contract administrator that renewal would not be a problem and that plaintiff was a successful "incumbent." *Id.* A new contract administrator took over and "refused to allow [plaintiff] to bid 'or even be part of the competition' for a new contract, and the expired contract was not renewed." *Id.* at 299. It was determined that the new administrator awarded the contract to one of plaintiff's competitors for "a kickback or bribe." *Id.* at 300.

The Virginia Supreme Court held that regardless of the contract administrator's wrongful conduct, the plaintiff had no cause of action because a jury could not properly find a valid contract expectancy. *Id.* at 301-02. Even though plaintiff was the incumbent and had verbal assurances of renewal from the prior contract administrator (something Amzco does not have or even allege), the plaintiff had nothing more than a subjective expectation that the contract would be renewed. *Id.* Similarly, in *Commercial Roofing and Sheet Metal Co, Inc.*, *supra*, 60 Va.Cir. 384, 2002 WL 31802991 at \*2, the defendants' demurrer was sustained because:

Plaintiff's expectation that it would be allowed to bid on a project does not rise to the level of a reasonable expectation of further contractual relations, even in the face of Plaintiff's prior work for Skyline.

As in *Commercial Business Systems, Inc.* and *Commercial Roofing and Sheet Metal Co*,

*Inc.*, Amzco had, and alleges, nothing more than a subjective hope that its bids would result in more contracts. Plaintiff believes it was entitled to more John Snow contracts because it allegedly was the “lowest bidder” on “other IFBs” issued by NTF. MFJ, Tab 1 at ¶15. Of course, whether Plaintiff was the lowest bidder on “other IFBs” is irrelevant to whether it had a valid contract expectancy. As Plaintiff’s allegations admit, the standard is whether a vendor is the “lowest responsive responsible bidder,” not whether it is the lowest bidder. MFJ, Tab 1 at ¶10; *see also*, IFB 3, Tab 8, at pp. 4-5; IFB 8, Tab 9 at p. 4-5. Even then, a vendor’s bid could not reasonably be the basis of a valid expectancy because the IFBs instructed vendors that NTF reserved the right “to reject all Bids.” *See, e.g.*, Tab 8 at p. 5; Tab 9 at p. 5. Amzco’s claim for tortious interference with potential business relationships fails as a matter of law because Amzco does not have, nor does it allege, any objective probability of a future economic benefit in a bid.

b. Amzco waived its right to file a bid protest and cannot revive its claims by alleging a tort.

In *Amzco I*, Amzco admitted that it knew of its right to file a bid protest. Ratcher Depo, Tab 7 at 360:16-18 (“Q: But you knew that you had the right to file a bid protest? A: Yes, we did.”) and 466:1-3 (“They - - in the bid - - invitation in the bid, they say I have a right to appeal to the prime contractor for any kind of, you know, complaint or dispute I have.”) Amzco admitted that it made a deliberate decision not to file a bid protest because it believed it would be a “waste of time.” *Id.* at 360:23-361:1 (“Q: So you made a decision not to file a bid protest? A. Not to file, yeah.”); 465:21-22 (“Q: Have you ever filed a formal bid protest? A: No.”); 467:3 (“I am saying there was no use to do that.”); and, 469:7-8 (“I don’t see any use of it. It’s a dragging and waste of time.”) Like the baseless claim for interference with contract, Amzco cannot state a tort claim against John Snow for

not awarding Amzco a John Snow contract; rather, Amzco's claims that "[John Snow] and NTF wrongfully failed to award contracts to Amzco" (MFJ at ¶15) are properly the subject of a bid protest. *See, e.g., Maximus, Inc., supra*, 254 Va. at 410 (defendant Lockheed was disappointed bidder who "filed a formal protest" after the decision to award the contract to its competitor.) Accordingly, when Amzco deliberately decided not to follow any formal bid protest or dispute resolution procedures it knowingly waived its claim that John Snow wrongfully denied it contracts and Amzco cannot now revive its stale protest by perverting such claims into a tort. *See, e.g., Smith v. Nonken*, 54 Va. Cir. 259, 2000 WL 33179850 (Va. Cir. Ct. 2000) (the essential elements of waiver are, "knowledge of the facts basic to the exercise of the right and the intent to relinquish that right.")

**B. Count II: Conspiracy to Tortiously Interfere with Existing or Potential Economic Relationship**

1. As a matter of law, Amzco's conspiracy claim fails because there is no proof of the underlying tort.

A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.

*Hechler Chevrolet, Inc. v. General Motors Corporation*, 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985). However, "without proof of the underlying tort, there can be no conspiracy to commit the tort." *Commercial Business Systems, Inc., supra*, 253 Va. at 300; *see also, Board of Directors of the Lesner Pointe Condominium v. Harbour Point Building Corp.*, 2002 WL 32072394 at \*8 ("In order to state a cause of action for civil conspiracy, a plaintiff must first prove the existence of the underlying cause of action."); *Citizens for Fauquier Co. v. SPR Corp.*, 37 Va.Cir. 44, 1995 WL 1055819 at \*5 (Va.Cir.Ct. 1995) ("Where there is no actionable claim for the underlying alleged wrong, there can be no action for civil conspiracy based on that wrong." (citing, *Gallop v. Sharp*,

179 Va. 335, 338, 19 S.E.2d 84, 86 (1942)). As demonstrated above, Plaintiff's allegations of tortious interference are meritless. Accordingly, because there is no underlying tort, Amzco's conspiracy claim fails as a matter of law.

2. Amzco's conspiracy claim fails because Amzco admitted that the allegedly false warehouse reports were not false.

Notwithstanding the foregoing, the basis of Amzco's alleged conspiracy is that, "[John Snow] and NTF directed Matrix to falsify warehouse inspection report problems with Amzco shipments that were in the Matrix warehouse." MFJ at ¶14; Ratcher Depo. at 499:18 - 502:23. Allegedly "John Snow and NTF" then used the false reports to deny Amzco a John Snow contract and injure Plaintiff's business. MFJ, Tab at ¶14. As principal and agent, John Snow and NTF cannot conspire as a matter of law. *Charles E. Brauer Co. v. Nations Bank of Va.*, 251 Va. 28, 36, 466 S.E.2d 382, 387 (1996) (a principal and an agent are not separate persons and "a single entity cannot conspire with itself."); *Fox v. Deese, supra*, 234 Va. at 428 (same); *Commercial Roofing and Sheet Metal Co., Inc., supra*, 60 Va.Cir. 384 (same); *Michigan Mutual Insurance Company, supra*, 128 F.Supp.2d at 925 (same). Plaintiff's conspiracy claims thus hinge on allegations that non-Defendant Matrix falsified warehouse reports at the direction of John Snow and NTF. MFJ at ¶¶14, 25-29 and 30-32. It is beyond doubt that Amzco cannot prove that Matrix falsified warehouse reports because in *Amzco I* Plaintiff specifically identified the allegedly false reports and admitted that they were not false.

a. Amzco identified the allegedly false warehouse reports in *Amzco I*.

As noted above, Amzco alleges that John Snow and NTF directed Matrix "to falsify warehouse inspection report problems with Amzco shipments that were in the Matrix warehouse." MFJ at ¶14. In *Amzco I*, Mr. Ratcher specifically identified four warehouse reports as the allegedly

false reports referenced in the Motion for Judgment: three warehouse reports from Matrix to NTF about P.O. 124-A, P.O. 167 and P.O. 153; and, a fourth report from Matrix to AMEG which also related to P.O. 153. Ratcher Depo., Tab 7 at 496:6-14; 499:18 - 502:23. Copies of the reports are attached hereto at Tab 10.

At the outset, Plaintiff admitted it was not damaged by either the report to AMEG or the report about P.O. 167. Ratcher Depo., Tab 7 at 504:8 - 505:3 (Amzco did not suffer any harm from report to AMEG and Amzco was satisfactorily paid.) and 505:10-13 (Amzco satisfactorily paid for P.O. 167). As a matter of law then, neither report can serve as the basis for Amzco's conspiracy claim because there was no damage. *See, e.g., Citizens for Fauquier Co., supra*, 1995 WL 1055819 at \*5 ("the gist of the civil action of conspiracy is the damage caused by the acts committed in pursuance of the formed conspiracy."(quoting, *Gallop v. Sharp, supra*, 179 Va. at 335)). Similarly, the remaining two reports, P.O. 124-A and P.O. 153, also cannot support Plaintiff's claims.

b. Matrix correctly reported that Amzco shipped Presto Pressure Canners.

Plaintiff alleges that it was fully paid for P.O. 124-A by July 25, 1996, but that NTF "wrongfully" delayed payment on the contract as a result of a false Matrix warehouse report.<sup>4</sup> MFJ at ¶¶13-14; Ratcher Depo., Tab 7 at 505:4-9. In addition to being fully paid, Amzco has admitted that the report was not false. *Id.* at 510:2 - 512:20 ("That's not a false statement."). The evidence adduced in discovery in *Amzco I* also shows that the report was not false.

P.O. 124-A was awarded to Amzco under IFB 608-0223-03 ("IFB 3"). MFJ at ¶10; *see also*, Tab 6. Amzco's bid for item 56 of IFB 3, represented that Plaintiff would supply "Amzco Surgical

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<sup>4</sup> If Amzco had a dispute with NTF about payment for P.O. 124-A it was bound by the conditions of the contract to arbitrate any such dispute. IFB 3, Tab 8 at JSI 0013-14.

Devices, U.S.A.'s Sterilizer Fuel Heated Nursing Bottles," a "pressure sterilizer. Complete with rack, accommodates syringes and needles." Tab 11. Amzco was awarded P.O. 124-A on November 8, 1995. MFJ, Tab 1 at ¶10. On its face, P.O. 124-A states that the items were "Needed by: November 23, 1995." Tab 6. Amzco shipped the items on March 19, 1996, four months late. Tab 12.

Amzco's packing slip for P.O. 124-A represents that it shipped item 56, "Steam Sterilizer with accessory [*sic*]" including "1 Syringe bawl [*sic*]." Tab 12. Matrix inventoried the shipment and described the goods it received as "M# 01780, Presto 22-qt Pressure Canner Sterilizer." Warehouse Receipt 32072 at Tab 10. That was not a false report. Ratcher Depo., Tab 7 at 512:6-14. In fact, in response to NTF's concerns about whether a canner cooker met the bid specifications for a medical sterilizer, Amzco's agent, Frank Francois, admitted, "[t]he medical sterilizer which was shipped by Amzco is a Presto, Pressure canner and cooker."<sup>5</sup> Tab 13. It is therefore undisputed and beyond doubt that the warehouse report was not false and Amzco's conspiracy claim fails as a matter of law.

c. Matrix correctly reported that Amzco shipped goods marked "Pakistan."

P.O. 153 was issued to Amzco under IFB 8. MFJ, Tab 1 at ¶12; *see, supra* at n.3. Plaintiff alleges that NTF paid for some of the shipment, but wrongfully failed to pay for all of the goods Amzco shipped because Matrix falsely reported "the alleged non-United States source of manufacture for the shipment."<sup>6</sup> MFJ, Tab 1 at ¶14. Matrix did report that goods shipped by

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<sup>5</sup> When a third party determined that the canner cooker met the bid specifications for a medical sterilizer, Amzco was paid in full. MFJ, Tab 1 at ¶13; Ratcher Depo., Tab 7 at 505:4-8.

<sup>6</sup> As with IFB 3, *supra* at n. 5, if Amzco had a dispute with NTF about P.O. 153, it was bound by the conditions of the contract to arbitrate that dispute. IFB 8, Tab 9 at AMZ 00386-87.

Amzco were marked “Pakistan.” Warehouse Receipt 36353 at Tab 10. In his deposition in *Amzco I*, Mr. Ratcher initially asserted that Amzco’s goods “were not marked Pakistan.” Ratcher Depo., Tab 7 at 515:7 - 516:13. Mr. Ratcher quickly recanted and admitted that the word “Pakistan” did in fact appear on Amzco’s goods. *Id.* at 517 - 518. The evidence adduced in *Amzco I* further demonstrates that Matrix did not falsely report that Amzco shipped goods marked “Pakistan.”

An independent third party auditor inspected the items supplied by Plaintiff under P.O. 153 and found that they were of poor quality and that “Pakistan is plainly stamped on some of the items.” Tab 14. The FDA also conducted an independent investigation of Amzco’s goods. Tab 15. After examining and analyzing the medical devices, the FDA found that Amzco’s equipment was adulterated and misbranded in that:

their labeling is false and misleading since the labeling states the devices are USA made, whereas the word Pakistan is etched into some of the instruments.

*Id.*

The FDA recommended seizure of Amzco’s shipment because of the goods’ poor quality, misbranding, and to prevent NTF from returning the goods to Amzco. Tab 15 (“Justification”). The FDA’s investigation and recommendation led the United States Attorney’s Office to file a Complaint for Forfeiture in the U.S. District Court for the Eastern District of Virginia, Alexandria Division, on the grounds that Amzco’s goods were “adulterated” and “misbranded.” Tab 16. A copy of the Complaint was sent to Amzco via certified mail. Tab 17; *see also*, Ratcher Depo., Tab 7 at 392:22-23. On April 24, 1998, this Court entered a Default Decree ordering condemnation, forfeiture, and destruction of Plaintiff’s adulterated and misbranded goods. Tab 18 (“some of the devices had the word “Pakistan” etched into them.”)

Once again, Plaintiff admitted that it was not false to report that it shipped goods marked “Pakistan;” and, the additional evidence and public records adduced in *Amzco I* also show that the warehouse report regarding P.O. 153 was not false. It is beyond doubt that Amzco cannot prove any set of facts to the contrary that would entitle Amzco to relief.

**C. Count III: Statutory Conspiracy to Injure Another in His Trade or Business Va. Code §18.2-499**

Amzura alleges that John Snow committed the crime of conspiracy to injure another in trade, business or profession under Va. Code §18.2-499.<sup>7</sup>

In order to sustain a claim for statutory conspiracy under Code §§ 18.2-499 and -500, the plaintiff must prove by clear and convincing evidence that the conspirators acted with legal malice, that is, proof that the defendant acted intentionally, purposefully, and without lawful justification.<sup>[8]</sup>

*Simmons v. Miller*, 261 Va. 561, 578, 544 S.E.2d 666, 676-77 (2001); *see also, Peterson v. Cooley*, *supra*, 142 F.3d. at 187-88.

Plaintiff alleges that John Snow and NTF “acting with Matrix” willfully and maliciously injured Amzco’s reputation and business by falsifying the warehouse reports. MFJ, Tab 1 at ¶¶30-32. Matrix is again necessary for Amzco’s conspiracy claim because it is a “legal impossibility” for John Snow and NTF to conspire “because a principal and an agent are not separate persons for

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<sup>7</sup> Va. Code §18.2-500 provides civil damages for violation of Va. Code §18.2-499. In pertinent part, Va. Code §18.2-499 makes it a Class 1 misdemeanor for, “Any two or more persons who combine, associate, agree, mutually to undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever.”

<sup>8</sup> As to the final element of the cause of action, the following provide a “lawful justification” for terminating P.O. 153: the FDA determined that Amzco’s goods were in fact adulterated and misbranded; the FDA recommended seizure to prevent NTF from returning the goods to Amzco; and, this Court Order of April 24, 1998 states that Amzco’s goods were adulterated and misbranded.

purposes of the conspiracy statute.” *Charles E. Brauer, supra*, 251 Va. at 36; *see also, Michigan Mutual Insurance Company, supra*, 128 F.Supp.2d at 925 (same). In addition, as demonstrated above, it is beyond doubt that Plaintiff cannot show, let alone show by the requisite clear and convincing standard, that the Defendants and Matrix acted together to falsify reports “with legal malice” because there are no false reports. Plaintiff’s claim for statutory conspiracy to injure its business is meritless.

### **III. CONCLUSION**

For the foregoing reasons, and such other reasons as may be presented in a reply brief and at the hearing on this matter, Defendant John Snow, Inc. respectfully requests that this Court grant John Snow’s Motion for Judgment on the Pleadings.

Dated: May 16, 2003

Respectfully submitted,

GOLDBERG BALL, PC



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