IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,872

ETHAN ALLEN, INC.,

Appellant,

vs.

GEORGETOWN MANOR, INC.,

Appellee.

_____/

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANSWER BRIEF OF APPELLEE GEORGETOWN MANOR, INC.

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I
STATEMENT OF THE CASE AND FACTS

A. Introduction and Summary of the Argument. It is almost incredible to observe that Ethan Allen has written a 26-page brief which never once addresses the single question certified to this Court by the United States Court of Appeals for the Eleventh Circuit. That question, by its plain language, concerns the measure of ***damages*** which are available to a plaintiff who has successfully proved tortious interference under Florida law. The first sentence of the opinion says that "we affirm the district court's ruling on several issues and certify to the Supreme Court of Florida one issue regarding damages recoverable under Florida law" (A. 3). The court defined its uncertainty as follows (A. 13): "Because we do not find the decisions of the Florida District Courts of Appeal determinative of whether a business may recover for the loss of its value, including goodwill, and we find no controlling precedent of the Florida Supreme Court on the scope of damages under the tortious interference cause of action, we consider it appropriate to certify to the Florida Supreme Court for resolution this potentially recurring question on whether loss of a business' goodwill with past customers is recoverable under the tortious interference cause of action." Thus the federal court certified to this Court the question of whether, "[u]nder Florida law, in a tortious interference with business relationships tort action, [a plaintiff may] recover damages for the loss of goodwill based upon future sales to past customers with whom the plaintiff has no understanding that they will continue to do business with the plaintiff, or is the plaintiff's recovery of damages limited to harm done to existing business relationships pursuant to which plaintiff has legal rights . . .?" (A. 13).

As the Court will note from the federal court's opinion, this question concerning the scope of damages was certified to this Court only after the federal court had rejected all of Ethan Allen's challenges to the jury's finding of ***liability*** for tortious interference, holding that the trial court had not erred in denying Ethan Allen's motion to dismiss the claim "based on the asserted common law privileges to complete and to protect legitimate economic interest" (A. 9); that

Ethan Allen had not timely asserted a First Amendment privilege (*id.*); that "the district court did not err in denying Ethan Allen's motion for a JNOV based on the argument that Georgetown failed to establish causation between the publication of the advertisement and the cancellation of Georgetown's existing orders" (A. 11); and that Georgetown had offered competent evidence that the immediate impact of Ethan Allen's wrongful conduct was to cause a wave of cancellations of existing orders, valued at $285,000.00 (A. 11). Having thus affirmed the jury's finding of liability for tortious interference, and a part of the damages, the federal court then turned to the single question of damages which it found to be unsettled in Florida--a question which the federal court explicitly distinguished from the issues of liability already resolved (A. 11-12):

> [B]ased on our review of the charge to the jury, we cannot say as a matter of law that Georgetown failed to establish intentional and unjustified interference with existing advantageous business relationships that caused some damages. Indeed, we have already held that Georgetown stated a valid tortious interference claim as it relates to the cancellation of existing orders. Thus, the issue before us is not simply whether Georgetown failed to establish a prima facie case for tortious interference with a business relationship under Florida law. The question before us is properly recast as whether the evidence supporting the jury's $7.38 million damage award is within the scope of damages under Florida law. It was on the issue of damages that the district court gave the jury instructions which countenanced both Georgetown's theory of lost profits on existing orders, and its theory that Florida law on tortious interference allows recovery of damages for interference with an existing business enterprise, including goodwill.

The federal court could not have been more clear in emphasizing that it had no trouble (and needed no assistance in) affirming Ethan Allen's liability for tortious interference; it was concerned only with the scope of Georgetown's available damages for that transgression.

Nevertheless, Ethan Allen has filed a brief which consists entirely of a review of Florida decisions on the issue of liability for tortious interference, and which fails to cite a single case

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on the certified question of damages. Apparently unable to rebut Georgetown's position on the question of damages, Ethan Allen has found it necessary to reformulate the question before this Court; and it has sought to justify that reformulation in a single footnote (brief at 11 n.11), which cites no authority. That footnote reads as follows:

> The Eleventh Circuit appears to cast this question as one concerning the scope of damages permitted under Florida law rather than as one involving the existence of liability. App. 11-12. But the question of damages is dependent on the question of liability: that is, damages are recoverable only with respect to those relationships that have been interfered with in violation of Florida's substantive tort law. Thus, the finding of liability with respect to customers who had existing orders for furniture entitled Georgetown to damages only for the harm caused by the interference with *those* relationships (*i.e.*, the $285,000 in lost profits for the pending orders). But Georgetown may recover damages for the alleged loss of future business from past customers only if it can establish liability with respect to such people.
>
> We therefore think it is inaccurate to suggest that the question of damages is somehow distinct from the question of liability. Regardless of how the question is phrased, however, the inquiry for this Court remains the same: whether Georgetown had legally cognizable "business relationships" with its past customers regarding future purchases.

It is not surprising that Ethan Allen has been unable to find any authority which could possibly justify its re-formulation of the question certified to this Court. As the Court is well aware, and as we will demonstrate below, it is commonplace that the allowable scope of damages in a tort action may extend beyond the immediate impact of the conduct which is found to be tortious. It extends to all of the natural and probable consequences of the defendant's conduct, whether those consequences themselves would be considered independently tortious, or independently compensable, or not. As Ethan Allen has acknowledged (brief at 7 n.8), that was the precise rationale of the trial court (Hon. Jacob Mishler, E.D.N.Y.) in allowing

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admission of Georgetown's damage evidence. As we will demonstrate, Judge Mishler was correct: when Georgetown successfully proved (as the federal appellate court has affirmed) that Ethan Allen's tortious conduct interfered with a substantial number of ***existing*** contracts valued at $285,000.00, Georgetown was then entitled to compensation for all of the harm which was the natural and probable result of Ethan Allen's wrongdoing, whether such harm would have been independently compensable or not.

In that context, Ethan Allen has posed a question which is not squarely presented by this case--the question of whether a Florida plaintiff can state a cause of action for tortious interference if he can allege no disruption of any existing business relationships, but only of prospective future relationships with former customers. Although we think (and will demonstrate at the end of this brief) that the answer to that question is "yes," it is a question not presented by this case. In this case, Georgetown proved, the jury found, and the appellate court has affirmed, that Ethan Allen's conduct caused the loss of $285,000.00 in profits on existing contracts between Georgetown and its customers, because Ethan Allen caused the cancellation of those contracts. That affirmance is now the law of this case, and the only remaining question is whether, in proper cases, a plaintiff may prove that conduct which undermined existing contractual or business relationships was so damaging that it also put the plaintiff out of business. As we will demonstrate, Florida law has long recognized that a plaintiff who proves tort liability is entitled to all damages which naturally resulted from the defendant's wrongful conduct, including the loss or destruction of the plaintiff's business (including its goodwill). That is the sole issue which was certified to this Court.

B. The Procedural History. Notwithstanding its obligation to state the facts in the

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light most favorable to the jury's verdict,[1] and notwithstanding that the appellate court has now affirmed the jury's finding of liability, Ethan Allen has persisted (brief at 2-9) in stating the case and facts in the light least favorable to the judgment, omitting volumes of contrary evidence which the jury clearly accepted. Because the federal court has now affirmed the jury's finding of liability, we will not revisit those facts at great length. In our brief in the federal action, which is part of the record transmitted to this Court, we provided detailed citation of the overwhelming evidence of the Ethan Allen's wrongdoing. We offer below a shorter summary of that evidence.

1. The Evidence of Liability. George Levin purchased Georgetown in the Spring of 1983, in reliance upon the repeated promise of Ethan Allen's chairman, Nathan Ancell, that Georgetown would be permitted significant expansion in the South Florida area (R32-172-74, 186; R34-14-16). After the purchase, however, Mr. Ancell almost immediately reneged on that promise (R32-186-96; R33-12-17; R34-16-18), telling one witness that "he did not really care what had been committed previously . . ." (R34-16). Mr. Ancell informed Mr. Levin that "under no circumstances would we be allowed to have any more stores" (R32-194-96), which "was contrary to everything we had discussed prior to that about our expansion" (R33-14).

It was only in that context that Mr. Levin responded to an overture from Thomasville in the Summer of 1984 (R30-18-19, 23; R34-32-33, 36; R35-45; Solomon Dep. (*see* R50-59) at 15-16, 26).[2] Although Ethan Allen has many dealers who sell more than one line of furniture

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[1] *See Hollywood Beach Hotel Co. v. City of Hollywood,* 329 So. 2d 10, 15 (Fla. 1976); *Crain & Crouse, Inc. v. Palm Bay Towers Corp.,* 326 So. 2d 182 (Fla. 1976); *Thompson v. State,* 588 So. 2d 687 (Fla. 1st DCA 1991).

[2] Several depositions were read in whole or in part to the jury during the trial, but were not transcribed by the court reporter at the time. They are found in the deposition folders in the record, and we will cite them by the name and page of the deposition, with a cite to the point in the transcript at which they were read.

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(R36-54; R71-46; R72-69; Rude Dep. (*see* R44-5) at 135, 139), Mr. Ancell flatly forbid the Thomasville expansion; said that "he did not see much future for [Mr. Levin] as an Ethan Allen dealer" (R33-24); and raised the possibility of purchasing Georgetown from Mr. Levin (R33-24-25). This was the first of several overtures by Mr. Ancell to purchase Georgetown--overtures which proved critical to the jury's consideration of Mr. Ancell's subsequent conduct--and it was not simply an arms-length offer. It was accompanied by Mr. Ancell's threat that "he could simply cut off the product flow to South Florida and simply ship to someone other than Georgetown" (R33-25-26); and he said "that he could at any time easily cut off Georgetown Manor from product and eliminate Georgetown Manor from the marketplace," or perhaps "buy out the stores at any time" (R34-16-17). To emphasize the point, Mr. Ancell said "that he could cut us off, cut off anybody at anytime and he did (indicating), across the neck" (R34-18). He also "put his thumb on the table and said that he could wipe out George Levin like this" (R34-21). Nevertheless, Mr. Levin opened a Thomasville store in West Palm Beach, and he planned to open more (R33-30-31; R34-28-29; R36-70).

In October of 1984, Georgetown's central warehouse developed a computer problem which significantly reduced Georgetown's shipments to its customers (R33-73; R34-36, 38-39, 41, 58, 146-49; R35-79; R36-37; R71-6-7, 26, 29); and Ethan Allen agreed in November that it would ship to Georgetown no more than two carloads of inventory a week (R33-33, 37-38, 49-50; R41-64; R72-7; Aceri Dep. (*see* R38-108) at 8-11). But Ethan Allen quickly broke that promise; between November 25 and December 2 of 1984 alone, Ethan Allen shipped eight carloads of furniture to Georgetown (R33-39-42, 50; R34-149-52, 187; R36-139; R49-66; Aceri Dep. (*see* R38-108) at 27-28, 32), knowing that the overshipment would cripple Georgetown's operation and halt its cash flow just before its annual Winter sale (R33-31-33, 42, 47; R34-38-46; R35-77-79; R41-62-63).

Nevertheless, Georgetown managed to keep its debt to Ethan Allen within historic limits

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(R33-63; R34-58, 176; R35-27-28; R41-78). Georgetown had been able to make regular monthly payments to Ethan Allen of approximately $400,000.00 during the Spring of 1983 (R34-57, 101; R71-28-29); and Georgetown's financial statement for the fiscal year ending May 31, 1984 showed $6.9 million in total assets, including $846,000.00 in cash, $293,000.00 in receivables, and $3.5 million in merchandise, for a total of $4.8 million in "current assets" immediately available; a net worth (net of the debt to Ethan Allen) of $2.6 million; and a cash surplus of $250,000.00-$500,000.00 (R33-72-73; R35-23-26; R58-93). This was the highest net worth in Georgetown's 17-year history (R33-72, 179-80, 182; R35-27).[3/]

Nevertheless, in early December of 1984, ignoring his standard practice of informing the outlet first (R47-15-16), Mr. Ancell instructed Ethan Allen's director of corporate credit services, Peg Lupton, to impose an unconditional credit hold upon Ethan Allen (R58-49; R70-20-21; 1SR-26-27).[4/] The credit hold was perfectly timed to destroy Georgetown financially, by cutting off the shipment of furniture immediately before its critical Winter sale (R33-64-65, 70-71, 78, 82, 83, 150-52; R34-47-48). And as Mr. Ancell acknowledged at trial, the credit hold was imposed precisely for that reason--not to induce negotiations for resolving the impasse--because Mr. Ancell already had written Mr. Levin off (R70-202-03):

> Q If Mr. Levin said, here is the $400,000 you asked, here is the financial statement you asked for, here is the security interest on my inventory, I will pay you so much a month so that your debt will be taken care in the next six months, where do I stand now, would you have then told him that you intended to get rid of him?

[3/] Compare the above-stated evidence to Ethan Allen's bare description of Georgetown's debt (brief at 2-3), ignoring all of the mitigating factors, and the evidence of Georgetown's basic financial strength, which the jury undoubtedly understood.

[4/] In light of the above-cited evidence--that Ethan Allen gave no warning before imposing the credit freeze--the contrary testimony cited by Ethan Allen (brief at 2) is irrelevant for purposes of this appeal.

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A I probably would have said we want new dealers, yes.

* * * *

A I had no idea to continue the arrangements of Ethan Allen and George Levin as a result of all the matters that took place prior to January 6, [1985].

During the entire course of negotiation about the credit hold--negotiation ostensibly to resolve the disputes between Ethan Allen and Georgetown--Mr. Ancell never had any intention of continuing to do business with Mr. Levin (R70-134, 153-57).[5/]

In that context, it is not surprising that Mr. Ancell summarily rejected every one of Mr. Levin's proposals for reducing Georgetown's debt to Ethan Allen, to secure new credit for further shipments of goods. Throughout those discussions, Mr. Ancell knew that a significant part of the debt was attributable to the computer problem, to Ethan Allen's breach of its promise to ship only two carloads a week, and to the delay in crediting almost $400,000.00 in payments which Georgetown already had sent to Ethan Allen (P.X. 618, Tab 1, at 11-13; Tab 2, at 4-5, 7; R33-52-61). Mr. Levin offered to immediately send Ethan Allen an additional $400,000.00 in cash, which would have reduced Georgetown's overall debt to the lowest level since 1984, with nothing due over 60 days (R33-62, 88; R34-63-64, 126, 195-97; R35-40-41, 83; R36-45); to send a messenger directly to Ethan Allen's warehouse, with a cashier's check for the full amount of every new shipment as loaded (R33-92; R34-72); to pay C.O.D. for each new shipment as it was received (R33-71, 82-83; R34-68-71, 198); to give outright to Ethan Allen Georgetown's Miami warehouse, which then stored $2.4 to $3 million in inventory (R33-75-76, 86, 93; R34-66-68, 191-94); and to give Ethan Allen a first lien on all Ethan Allen merchandise

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[5/] Compare the above-cited evidence to Ethan Allen's representation (brief at 3) that "Ethan Allen and Georgetown attempted to negotiate a settlement to Georgetown's debt problem and the credit hold." In light of Mr. Ancell's hidden agenda, there was no "negotiation" at all.

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in Georgetown's possession (R33-71, 91, 93; R34-68-69; R36-134-37; R50-33-34; R55-11-14).[6/]

But Mr. Ancell rejected every one of Georgetown's proposals, because he had no intention, under any circumstances, of continuing his relationship with Georgetown. It is not surprising, therefore, that as early as December of 1984, Ethan Allen contacted the man who ended up running Georgetown's subsequent replacement in South Florida, and asked him "if I would be interested in going back to work for Ethan Allen" (R38-28). It is not surprising that when Georgetown sent to Mr. Ancell its net-worth statement in December of 1984, he did not bother to read it (R70-55). It is not surprising that in a telephone conversation of January 6, 1985, which Mr. Ancell taped, he said: "I just want to get rid of George Levin"--"I'm just trying to get rid of him" (P.X. 618, Tab 4, at 4-6). It is not surprising that in another taped conversation, Mr. Ancell asked one of Mr. Levin's employees to spy on Mr. Levin, asking him "where's your loyalty, to him or to me, after 20 years" (P.X. 618, Tab 7, at 15).

Georgetown's expert testified to what the jury certainly knew already--that Mr. Ancell's imposition of the credit freeze was "totally irresponsible and unresponsive" (R49-12)--a clear violation of industry standards (R49-5-6, 12-15, 46-53). The credit freeze was intended to leave Georgetown only two options--to sell out to Mr. Ancell, or to go under. But in light of Mr. Levin's recently-established relationship with Thomasville, after receiving no response to a January 5 telegram (P.X. 33) repeating Georgetown's various offers to resolve the situation (R3-90-94), Mr. Levin telephoned Mr. Ancell on January 9, 1985, and told him "we'd like to switch over to Thomasville" (P.X. 618, Tab 10, at 25; *see* R33-96). Mr. Ancell responded (in a

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[6/] Compare the above-cited evidence to Ethan Allen's representation (brief at 3 n.2) that Mr. Levin refused to pay down the debt, and demanded release of the credit hold, a fixed line of credit, and C.O.D. shipments. In the light most favorable to Georgetown, the evidence proves otherwise.

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conversation he taped without telling Mr. Levin) by threatening "a major antitrust suit and a damage suit that will cost you, in my opinion, 5 or 10 million dollars"; "you're starting something you're not going to be able to finish, George"; "you're opening up the doors to something that you're going to be sorry you did, George"; and "It's perfectly all right if you go ahead and do it, but I'm just telling you that you're in deep, deep, deep trouble if you do" (P.X. 618, Tab 10, at 26, 31, 33, 34).

Nevertheless, Mr. Levin opened Thomasville Galleries at four of his five Georgetown locations (R49-93-95), and issued a press release on January 11, 1985 (P.X. 515, *see* R33-97) announcing the conversion while professing great admiration for Ethan Allen (R33-98). In response, Mr. Ancell moved on several fronts to make good on his many previous threats. He communicated a ridiculously-low offer to purchase Georgetown, which Mr. Levin summarily rejected (R33-108-09; R40-13-19; R70-98-105). He moved quickly to consummate his negotiations for Georgetown's replacement in the South Florida market (R38-28, 34-39, 85-91; R41-9-12, 17-22, 105-11, 116, 121-24; R72-49-53). He filed a lawsuit against Thomasville on January 22, 1985, charging Thomasville with tortious interference with Ethan Allen's advantageous business relationship with Georgetown (P.X. 628; R33-150-51, 185; R70-231-37; R72-53). And he sent a memo on January 24, 1985 to all of the 250 Ethan Allen dealers in the United States, Japan and Germany (P.X. 43; *see* R34-103-04)--and published the memo in *Furniture Today* (P.X. 642; *see* R34-111; R70-225-30; R72-53-54)--which made numerous false representations about the level of Georgetown's debt to Ethan Allen (R33-121; R34-102, 153-54); about Georgetown's efforts to pay the debt (R33-121; R34-102); about Georgetown's management (R34-100-01; *see* R32-174-76); and about Mr. Levin's financial affairs (R34-103).

No less than six separate witnesses testified, as Judge Mishler also observed (R25-868-7-8), that the obvious purpose and effect of the memo was to forbid other Ethan Allen dealers to sell merchandise to Georgetown to complete its existing orders--a practice which is otherwise

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common in the furniture business (R33-113, 123-25, 132-33; R39-4-5; R41-41, 46, 151-52; R46-16-29; R48-40-41, 48-49; R61-50-53). As one witness put it, the dealer memo carried with it an unmistakable threat of some punitive response from Ethan Allen if any of its dealers should help Georgetown (R46-18-19). Georgetown's expert testified that the memo was a violation of "ordinary standards of decency and business relationships as well [as] industry practice"; that it was "way out of line" and "[a]bsolutely" "violated industry standards"; and that it was "even worse" to re-publish the memo in a major trade publication, about which the expert was "shocked" (R49-17-19, 104).

About a week after sending the dealer memo, on February 3, 1985, Mr. Ancell published his advertisement in "several South Florida newspapers" (R72-54-55)--located immediately next to the school lunch menu, where all the parents would see it (R33-134-36; R48-65; R49-105)--stating falsely that Georgetown's "debt rose to a high level and we could no longer deliver merchandise to them until the debt was reduced"; that "[r]eluctantly, we then had to discontinue distribution of Ethan Allen by Georgetown completely"; and that Ethan Allen was "sorry about this disruption and we took great pains to avoid it." As the jury found--in a portion of the verdict now affirmed by the federal appellate court--all three statements were flat-out lies. Georgetown's expert had never seen so malicious an advertisement in 44 years in the business, nor had 15-20 of his colleagues (R46-32-37). In the expert's opinion, the ad was Georgetown's "obituary" (R46-41). A second expert was equally direct: "This is the most spiteful and vicious ad I have ever seen and it's obviously calculated to destroy the customer base of that store" (R49-21). Even Judge Mishler said at one point that "from what is already in the record, I think that the plaintiff has testimony that [it] was just, it was just pure malice. He wanted to destroy Mr. Levin and it was a personal vendetta . . ." (R70-17-18). Three separate witnesses testified that there was no valid business reason for such an ad--including the collection of a debt, the protection of Ethan Allen's name or trademarks, the interests of Ethan Allen's customers, or any

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other post-facto rationalization which Ethan Allen might manufacture (R46-41, 63, 99; R49-104; R61-48-49).[7/]

2. *The Damages.* Mr. Ancell's ad had a devastating short-term and long-term effect upon Georgetown's economic viability. According to Georgetown's experts, even a one-time publication of an ad as extraordinarly negative as Ethan Allen's would have an immediate devastating impact (R46-77; R48-45; R61-32-40). That opinion was borne out by the empirical evidence. On the first business day following the ad's publication, Georgetown's phones were ringing off the hook, with callers demanding their money back and calling Georgetown a crook; and long lines of people appeared at Georgetown's warehouse, demanding the return of their deposits on existing orders (R33-136-37; R34-93-94, 106-11; R46-55-56; R61-28-29). Many of those customers complained about Georgetown's financial status, which they could only have learned about from the ad (R34-245; *see* R38-96); many said that they had seen the ad, and that Georgetown was not an honest company (R39-8, 12); and all of them wanted to cancel their orders--even some orders for furniture other than Ethan Allen's (R39-5-15).[8/]

In light of the federal court's affirmance of Georgetown's evidence concerning the dollar losses occasioned by the avalanche of cancellations of its existing orders, we will not summarize Georgetown's evidence of causation and short-term damages. Important for present purposes

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[7/] Compare the above-cited evidence to Ethan Allen's representation (brief at 4) that Mr. Ancell published the ad because he was "concerned that Georgetown's conversion to Thomasville would make consumers think that Ethan Allen had abandoned the southern Florida market." The evidence in the light most favorable to the verdict--which of course Ethan Allen was obliged to state--overwhelmed Mr. Ancell's protestation of an innocent motive. That is the only evidence of relevance in this appeal.

[8/] Ethan Allen's challenge to admission of the above-stated evidence of Georgetown's customers' reactions to the ad was rejected by the federal appellate court (A. 8-9). Compare the above-stated evidence to Ethan Allen's assertion (brief at 6 n.6) that Georgetown failed to prove causation because it suffered some cancellations before the ad appeared. The evidence, in the light most favorable to Georgetown, overwhelmingly proved causation, and appellate court has affirmed the jury's finding on that question (A. 11).

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is the overwhelming evidence that the avalanche of cancellations, and the ad which caused those cancellations, had the demonstrable and foreseeable long-term effect of undermining Georgetown's goodwill, and destroying the company. Even assuming *arguendo* that Ethan Allen had the unilateral right to terminate Georgetown as its dealer, forcing Mr. Levin to become a Thomasville dealer, the experts testified that an established furniture company's transition from one brand to another typically has no significant effect upon its economic health; in a normal conversion, the company will retain 85-90% of its existing customer base (R46-42, 47, 93-94; R52-10; R53-44; R61-142-43).[9/] Thus, two experts testified flatly that Georgetown's demise was not caused by its loss of the Ethan Allen line (R46-23-31, 68-69; R53-44-45). To the contrary, according to the plaintiff's experts, it was the advertisement, and the sweeping loss of current orders caused by that advertisement, which destroyed Georgetown's customer base (R34-215-16; R46-23-31, 38-39, 46-54, 101-03; R48-45-46, 74-75; R61-32-46, 54, 142-43).

As those experts testified, a furniture company's past customers represent a core clientele which is capable of ascertainment, which is reasonably expected to patronize the company again in the future, which does so with statistical regularity, and without whom the company cannot survive. The experts explained that the purchase of furniture is a big investment, and a retail outlet's survival depends upon the establishment of trust in its customers, building up an inventory of orders, and securing their repeat business. That trust is especially critical if the outlet is changing brands, and from that perspective a public accusation during the transition is fatal (*see* R46-23-31, 52-54). Where a normal brand conversion will retain 85-90% of its

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[9/] Compare the above-cited evidence to Ethan Allen's suggestion (brief at 22 n.22) that Georgetown had no reasonable expectation of repeat business from its prior customers, who had purchased Ethan Allen furniture, because Georgetown was switching to the Thomasville line of furniture. The experts testified precisely to the contrary; theirs is the testimony in the light most favorable to the verdict; and the appellate court has rejected all of Ethan Allen's challenges to Georgetown's proof of damages, summarized *infra* pp. 14-15.

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customer base, Georgetown lost at least 30-50% of its existing customer base after Mr. Ancell's ad induced the wholesale cancellation of its existing orders, and that loss was too much to permit the company's survival (R46-47-52, 101-03).[10/] Even though Georgetown attempted to mitigate the damage by operating through a new company, and initiated telephone and direct-mail solicitations of its former customers, newspaper advertising, and sales incentives like free trips, discounts and cash rebates; and even though furniture sales in general were experiencing excellent growth in 1985 and 1986, none of this could overcome the effects of the ad (R46-59-63; R52-29-35).

Moreover, Georgetown's experts were able to quantify the long-term dollar loss--that is, the total destruction of Georgetown's goodwill. Georgetown's theory of damage--a theory well recognized in Florida and elsewhere, *see infra* p. 21-22, 27-28--did not depend on proof that the ad had cost Georgetown a specific number of repeat customers, whose orders would have produced a specific amount of profit. Its theory of long-term damage was that notwithstanding the transition to Thomasville, Georgetown would have retained 85-90% of its existing customer base in the absence of its devastating loss of existing orders and pre-existing customers; that instead Georgetown lost 30-50% of that customer base; and that this loss destroyed Georgetown as a viable economic entity.[11/] Because Georgetown had no value after the ad appeared, the expert's task was to quantify its value, as a viable economic entity, before the ad appeared. Dr. James Burrows testified that if the ad had not appeared, in the first year of Georgetown's

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[10/] One witness testified that the ad cost Georgetown 90% of its previous customer base (R52-25, 29).

[11/] Ethan Allen's statement (brief at 8)--that Georgetown's damages were "based on the alleged loss of sales that Georgetown expected to make sometime in the future to past customers"--is misleading. Georgetown sought recovery for the lost value of its business--including goodwill--to a prospective purchaser of the company. Obviously that value encompassed certain assumptions about future sales, but it also encompassed much more than that. *See infra* pp. 21-28. Moreover, the federal appellate court has affirmed the competence of Georgetown's proof.

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performance as a Thomasville dealer, it would have grossed $12,557,700.00 (R51-53; R53-45). That number assumed sales of only $180 per square foot of sales space, notwithstanding Georgetown's actual sales of $185-$200 in 1985-86, and was a "reliable yardstick in economics" (R51-53; *see* R46-62). The expert then calculated Georgetown's total cost of doing business, based upon its actual historical experience, and confirmed by industry-wide data (R51-55-58; R53-10-12, 78, 91-93); subtracted the costs from the total projected revenue; and came up with a net cash flow for the first year of $513,400.00 (R51-59, 62). The expert then assumed, very conservatively, that Georgetown would not have increased its constant-dollar (after inflation) net cash flow in any future year, but only would have increased its profits by 5% annually to keep pace with inflation (R51-54-55, 64). Utilizing the universally-accepted discounted cash-flow method of valuing a business (R51-62), and based on his study of the furniture industry, the expert concluded that an arms-length purchaser would be willing to buy a furniture business, and its owner would be willing to sell that business, for an amount which would give the buyer a current-dollar rate of return on his investment (that is, a nominal return before factoring in inflation) of about 13.5% to 15% (which computes to a constant-dollar return (after inflation) of about 8.5-10%). To achieve such a return, the expert testified, a purchaser would have paid $5.3 million to $6.2 million for Georgetown before the ad appeared (R51-60-65). That computation of damage was extremely conservative, according to the expert, because a willing buyer probably would have accepted a current-dollar return as low as 13% for the business, and thus would have paid more (R51-64-65). Having thus determined the value of the business at the time the ad appeared 4 1/2 years earlier, the expert applied the statutory pre-judgment interest rate of 12%, resulting in total damages of a minimum of $8,956,000.00 (R51-65, 68-69). Accepting the testimony of other witnesses that the ad had destroyed Georgetown as a viable economic entity, by causing the wholesale cancellation of its existing orders and undermining its goodwill, that was the expert's calculation of the amount of damage caused by

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the ad (R51-56-68).

On appeal, Ethan Allen argued not only that Georgetown's destruction as a viable economic entity was not compensable as a part of its damages, but also that Georgetown had failed to prove causation--to prove that the ad had initiated a natural sequence of effects which resulted in Georgetown's demise; and also that the expert's calculation of the damage was flawed in a variety of different respects. As we have noted, the federal appellate court rejected all of those arguments. It held that Georgetown had offered substantial competent evidence of causation--that the ad had created a sequence of events which destroyed Georgetown--and substantial competent evidence that the value of Georgetown, destroyed by the ad, was approximately $8.9 million. Those findings are now the law of this case. They must be accepted as the predicate for this Court's determination of the single issue certified by the federal court--whether a loss of goodwill is ever compensable under Florida law in a tortious-interference case, assuming (as the appellate court found here) that the plaintiff's evidence of such a loss is competent. As we have noted, Ethan Allen's brief offers no discussion of that question.

II
ISSUES ON APPEAL

> A. IF THE PLAINTIFF PROVES THAT THE DEFENDANT'S CONDUCT IS TORTIOUS, AND HAS INTERFERED WITH EXISTING CONTRACTS OR ECONOMIC RELATIONSHIPS, WHETHER THE PLAINTIFF MAY ALSO RECOVER, IN PROPER CASES, FOR THE DIMINISHED OR DESTROYED VALUE OF HIS BUSINESS, BY PROVING THAT THE DEFENDANT'S TORTIOUS CONDUCT, AND THE LOSS OF EXISTING CONTRACTS OR CUSTOMERS CAUSED BY THAT CONDUCT, WERE THE FORESEEABLE CAUSE OF THE LOSS OF HIS BUSINESS, INCLUDING ITS GOODWILL.[12/]

[12/] This is the question which is not addressed at all in Ethan Allen's brief.

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B. WHETHER FLORIDA LAW PERMITS A PLAINTIFF, IN PROPER CASES, TO RECOVER FOR TORTIOUS INTERFERENCE EVEN IF THE PLAINTIFF CANNOT PROVE THAT THE DEFENDANT'S CONDUCT INTERFERED WITH ANY EXISTING CONTRACTS OR BUSINESS RELATIONSHIPS, WHERE THE PLAINTIFF CAN PROVE THAT THE DEFENDANT'S CONDUCT DIMINISHED OR DESTROYED THE VALUE OF THE PLAINTIFF'S BUSINESS.[13/]

III
SUMMARY OF THE ARGUMENT

We have summarized our basic position at pages 1-4, *supra*. Ethan Allen's fundamental error was its failure to address the single question which troubled the United States Court of Appeals for the Eleventh Circuit--whether, in proper cases, a plaintiff who proves liability for tortious interference can recover not only for any lost profits which were the immediate consequence of the defendant's wrongdoing, but also for the loss or destruction of the plaintiff's business, including its goodwill, if that loss was the natural and probable consequence of the defendant's wrongdoing. As we will demonstrate, Florida law has long recognized that the plaintiff must be fully compensated for all of the natural and probable consequences of the defendant's wrongdoing, and the law of every other jurisdiction is in accord. For this reason, it is unnecessary for this Court to address the question re-formulated by Ethan Allen--whether liability for tortious interference may be predicated upon conduct which may not have interfered with any existing contract or relationship, but which did injure or destroy the plaintiff's business. Although we think, and will demonstrate, that the answer to that question also is "yes," it is a question which is not presented by this case, and which the Court need not address.

[13/] This is the only question addressed in Ethan Allen's brief--a question which the instant case does not squarely present.

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IV
ARGUMENT

A. IF THE PLAINTIFF PROVES THAT THE DEFENDANT'S CONDUCT IS TORTIOUS, AND HAS INTERFERED WITH EXISTING CONTRACTS OR ECONOMIC RELATIONSHIPS, THE PLAINTIFF MAY ALSO RECOVER, IN PROPER CASES, FOR THE DIMINISHED OR DESTROYED VALUE OF HIS BUSINESS, BY PROVING THAT THE DEFENDANT'S TORTIOUS CONDUCT, AND THE LOSS OF EXISTING CONTRACTS OR CUSTOMERS CAUSED BY THAT CONDUCT, WERE THE FORESEEABLE CAUSE OF THE LOSS OF HIS BUSINESS, INCLUDING ITS GOODWILL.

As we have emphasized, it must be accepted as true for the purpose of this proceeding not only that the newspaper ad published by Ethan Allen resulted in the loss of $285,000.00 in profits on Georgetown's existing orders for Ethan Allen furniture, but also that such a devastating short-term loss, and the reprehensible conduct which caused it, foreseeably resulted in Georgetown's destruction as a viable economic entity, notwithstanding its best efforts to mitigate the harm. On that assumption, which must be made for the purpose of this proceeding, there can be no question that Florida law permitted Georgetown's recovery of damages for the loss of its goodwill.

1. Defining Tort Damages Under Florida Law. Judge Mishler charged the jury, with all parties' agreement (*see* R63-211-14), that if it found for Georgetown it should award "damages that will compensate Georgetown for its loss. The expression usually is to make Georgetown whole, to place it in the same financial condition as it would have been if Ethan Allen did not tortiously interfere with Georgetown's business relationships with its customers" (R66-22). As the parties all agreed, that charge was an accurate characterization of Florida tort law: "In tort actions, the measure of damages seeks to restore the victim to the position he would be in had the wrong not been committed." *Ashland Oil, Inc. v. Pickard,* 269 So. 2d 714,

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723 (Fla. 3d DCA 1972), *cert. denied,* 285 So. 2d 18 (Fla. 1973). *Accord, Glades Oil Co. v. R.A.I. Management, Inc.,* 510 So. 2d 1193, 1195 (Fla. 4th DCA 1987). As a leading commentator has put it: "The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused by defendant's breach of duty"--"[t]he primary notion is that of repairing plaintiff's injury or of making him whole as nearly as that may be done by an award of money." F. Harper, F. James, Jr., O. Gray, 4 *The Law of Torts* § 25.1, at 490, 493 (2d ed. 1986). In defining the boundaries of such damages, this Court has stated repeatedly that the principle of compensation can be satisfied only if the plaintiff recovers in tort for all of the natural and probable consequences of the defendant's conduct. *See Mansfield v. Brigham,* 91 Fla. 109, 107 So. 336, 338 (1926); *Warfield v. Hepburn,* 62 Fla. 409, 57 So. 618, 621 (1912); *Taylor Imported Motors, Inc. v. Smiley,* 143 So. 2d 66, 68 (Fla. 2d DCA 1962).[14/]

[14/] This formulation, as Judge Mishler charged the jury (R66-22), does not require proof of any subjective appreciation of such consequences, but only that they were the type of consequences which typically result from such conduct. *See Florida East Coast R. Co. v. Peters,* 77 Fla. 411, 83 So. 559, 564 (1919); *Hall v. Western Union Telegraph Co.,* 59 Fla. 275, 51 So. 819, 821 (1910); *Western Union Telegraph Co. v. Merritt,* 55 Fla. 462, 46 So. 1024 (1908); *Briggs v. Brown,* 55 Fla. 417, 46 So. 325, 330 (1908); *Hamilton v. Walker Chemical & Exterminating Co.,* 233 So. 2d 440, 444 (Fla. 4th DCA 1970). *See generally* 1 R. Dunn, *Recovery of Damages for Lost Profits* § 1.5, at 17, § 1.18, at 61 (4th ed. 1992) (contract damages require subjective foreseeability; tort damages require objective probability). In any event, as we have noted, Ethan Allen stipulated to Judge Mishler's charge on the question of damages, and Judge Mishler's charge therefore represents the law of this case. A party's agreement to a jury charge not only precludes that party from challenging the charge itself under Rule 1.470(b), Fla. R. Civ. P.; it also constitutes a concession of the legal standard against which the jury's verdict must be measured. *See Bould v. Touchette,* 349 So. 2d 1181, 1186 (Fla. 1977); *Wagner v. Nottingham Associates,* 464 So. 2d 166, 169-70 (Fla. 3d DCA), *review denied,* 475 So. 2d 696 (Fla. 1985); *Johnson v. Lasher Milling Co.,* 379 So. 2d 1048, 1050 (Fla. 1st DCA), *cert. denied,* 388 So. 2d 1114 (Fla. 1980). As one federal court has put it: "[W]here no objections are made to instructions at trial, the substance of the instructions become part of the law of the case." *Firestone Tire & Rubber Co. v. Pearson,* 769 F. 2d 1471, 1477 (10th Cir. 1985). *Accord, Music Research, Inc. v. Vanguard Recording Society, Inc.,* 547 F. 2d 192, 194-95 (2d Cir. 1976); *Green v. American Tobacco Co.,* 325 F. 2d 673, 676 (5th Cir. 1963), *cert. denied,* 377 U.S. 943, 84 S. Ct. 1349, 1351, 12 L. Ed. 2d 306 (1964).

As a general proposition, such natural and probable consequences may include frustration of the plaintiff's objectively-reasonable economic expectations--where he would have been economically in the absence of the defendant's wrongdoing. As Professor Harper puts it: "With few exceptions, the 'expectancies' of economic advantage that the law protects are found in the business or industrial field where their loss is susceptible, at least, of rough measurement and where the causal relationship between defendant's acts and the alleged loss is traceable with a fair degree of certainty in the light of business experience generally. It may be no more difficult to estimate the loss of profits in an action for interference with business than it is in an action for breach of contract . . . ." F. Harper, J. Fleming, Jr., & O. Gray, 2 *The Law of Torts* § 6.11, at 345 (2d ed. 1986).[15/]

Florida tort law typically has compensated such lost expectancies through an award of lost profits. As the Court noted in *New Amsterdam Casualty Co. v. Utility Battery Mfg. Co.*, 122 Fla. 718, 166 So. 856, 860 (1936), "the loss of profit from the interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his actual loss was." And although Georgetown was an established business, with an established track record of profitability, the Court also has recognized that a "business can recover lost prospective profits regardless of whether it is established or has any 'track record.' The party must prove that 1) the defendant's action caused the damage and 2) there is some standard by which the amount of damages may be adequately determined." *W.W. Gay Mechanical Contractor, Inc. v. Warfside Two, Ltd.*, 545 So. 2d 1348, 1350 (Fla. 1989), *citing*

[15/] *See* W. Keeton, *Prosser and Keeton on the Law of Torts* § 130, at 1006 (5th ed. 1984) ("[S]ince a large part of what is most valuable in modern life depends upon 'probable expectancies,' as social and industrial life becomes more complex the courts must do more to discover, define and protect them from undue interference. . . . In such cases there is a background of business experience on the basis of which it is possible to estimate with some fair amount of success both the value of what has been lost and the likelihood that the plaintiff would have received it if the defendant had not interfered").

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Twyman v. Roell, 123 Fla. 2, 6-8, 166 So. 215, 217-18 (1936).[16]

It is equally well recognized in Florida that the plaintiff may calculate his deprived expectancies not only by projecting the profits which he would have made in the absence of the defendant's wrongdoing, but also by calculating the diminished value of his business, as a going economic enterprise, as a result of that wrongdoing. *See, e.g., Schryburt v. Olesen,* 475 So. 2d 715, 717 (Fla. 2d DCA 1985) (plaintiff's recovery for the lost value of his property or business "is analogous to loss of anticipated profits"). Indeed, when the value of the plaintiff's business is destroyed rather than merely diminished, several Florida courts have found the lost-value calculation more appropriate than lost profits. Just as loss of value is the appropriate measure if goods are lost in transit or destroyed by fire,[17] some cases hold that although "[l]ost profits and loss of use may be a proper item of damages if the property or business is not completely destroyed," "where the property or business is totally destroyed we hold the proper total measure of damages to be the market value on the date of the loss . . . ." *Aetna Life & Casualty Co. v. Little,* 384 So. 2d 213, 216 (Fla. 4th DCA 1980) (action against insurer for bad faith). *Accord, Polyglycoat Corp. v. Hirsch Distributors, Inc.,* 442 So. 2d 958, 960 (Fla. 4th DCA 1983), *review dismissed,* 451 So. 2d 848 (Fla. 1984) ("[I]f the business is completely destroyed, the proper total measure of damages is market value on date of loss"). *Compare Trailer Ranch, Inc. v. Levine,* 523 So. 2d 629 (Fla. 4th DCA 1988) ("recovery for loss of a business venture is to be measured by lost profits or loss of business value, but not both").

The rule--or at least the plaintiff's option--is no different in a tortious-interference case

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[16] *See PRN of Denver, Inc. v. Arthur J. Gallagher & Co.,* 531 So. 2d 1001, 1003 (Fla. 3d DCA 1988); *Jayess Investments, Ltd. v. Barbee Foods, Inc.,* 155 So. 2d 853 (Fla. 3d DCA 1963), *cert. denied,* 161 So. 2d 216 (Fla. 1964). *See also G.M. Brod & Co. v. U.S. Home Corp.,* 759 F. 2d 1526 (11th Cir. 1985) (Fla. law).

[17] *See Allied Van Lines, Inc. v. McKnab,* 331 So. 2d 319, 320 (Fla. 2d DCA 1976), *aff'd,* 351 So. 2d 344 (Fla. 1977); *Hillside Van Lines v. Matalon,* 297 So. 2d 848 (Fla. 3d DCA 1974).

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than in any other tort case. For example, in *Frank Coulson, Inc.-Buick v. General Motors Corp.*, 488 F. 2d 202, 206 (5th Cir. 1974) (Fla. law), the court ordered reinstatement of an automobile dealer's verdict against its distributor (General Motors), for conduct which had undermined the value of the dealership, forcing its sale at a price below its market value. And in a subsequent state action against a defendant who assertedly had made false statements to General Motors about the dealership, the court reversed a directed verdict against the tortious-interference claim, which alleged that the plaintiff "was forced to sell its Buick agency at a price substantially below the true value of the agency . . . ." *Frank Coulson, Inc.-Buick v. Trumbell,* 328 So. 2d 273 (Fla. 4th DCA), *cert. denied,* 336 So. 2d 604 (Fla. 1976). Without question, the plaintiff in proper cases may measure his loss by the diminished value of his business. As we note next, that includes the value of its goodwill.

2. *The Present Value of a Business Includes Its Goodwill.* As the Court has held in a variety of different contexts, the goodwill of any business is a current asset, even if such goodwill to some extent reflects expectations about future profitability. Goodwill is "an asset having value." *Mosler Acceptance Co. v. Martin,* 322 F. 2d 183, 185 (5th Cir. 1963) (Fla. law), *cert. denied,* 376 U.S. 921, 84 S. Ct. 679, 11 L. Ed. 2d 616 (1964). "Although intangible (and not easy to prove), goodwill is nonetheless real," *Westric Battery Co. v. Standard Electric Co.*, 522 F. 2d 986, 987 (10th Cir. 1975); and it is universally recognized as such in all jurisdictions.[18/]

As the Court also is aware, goodwill is much more than a "unilateral expectation of future business with some unspecified persons" (Ethan Allen's brief at 24). Goodwill typically

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[18/] *See generally Hanover Star Milling Co. v. Metcalf,* 240 U.S. 403, 412-13, 36 S. Ct. 357, 60 L. Ed. 713 (1916); *Levitt Corp. v. Levitt,* 593 F. 2d 463, 468 (2d Cir. 1979); *Lerner v. Stone,* 126 Colo. 589, 252 P. 2d 533, 536 (1952); *Bradford & Carson v. Montgomery Furniture Co.*, 115 Tenn. 610, 629, 92 S.W. 1104, 1109 (1905) ("The goodwill of a firm is a species of property, often very valuable and it may be sold and transferred").

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is defined as a company's ability to attain profit beyond the normal and customary rate of return on its capital,[19] which derives from the company's reputation in the community for quality and service,[20] and carries with it the reasonable expectation that "the old customers will resort to the old place." *Winn-Dixie Montgomery, Inc. v. United States,* 444 F. 2d 677, 681 (5th Cir. 1971), *quoted in Proulx v. United States,* 594 F. 2d 832, 841 (Ct. Cl. 1979) (Fla. law). As the court put it in *General Television, Inc. v. United States,* 449 F. Supp. 609, 612 (D. Minn. 1977), *aff'd,* 598 F. 2d 1148 (8th Cir. 1979), "the expectancy of continued patronage is the essence of goodwill . . . ." *Accord, Bradford v. Montgomery Furniture Co.*, 115 Tenn. at 630, 92 S.W. at 1109 (goodwill derives from the "general public patronage and encouragement which [the business]" enjoys); *Young v. Cooper,* 30 Tenn. App. 55, 74, 203 S.W. 2d 376, 384 (1949) ("The goodwill of a business is the reasonable expectation of its continued profitable operation"). Such an expectation derives from a number of factors, including "the length of time the business has been in existence; its average profits; its success; and the likelihood of its continuing business under the same name."); *Agricultural Services Association, Inc. v. Ferry-Morse Seed Co.,* 551 F. 2d 1057, 1070 (6th Cir. 1977). *See Bradford v. Montgomery Furniture Co.,* 115 Tenn. at 630, 92 S.W. at 1109 (goodwill derives from the company's "local position or common celebrity or reputation for skill, or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partiality or prejudices"); *Young v. Cooper,* 30 Tenn. App. at 74, 203 S.W. 2d at 384 ("Many factors are involved: the name of the firm, its reputation for doing business, the location, the number and character of its customers, the

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[19] *See North Clackamas Community Hospital v. Harris,* 664 F. 2d 701, 706 (9th Cir. 1980); *Bradford & Carson v. Montgomery Furniture Co.,* 115 Tenn. 610, 629-30, 92 S.W. 1104, 1109 (1905).

[20] *See North Clackamas Community Hospital v. Harris,* 664 F. 2d at 706; *Levitt Corp. v. Levitt,* 593 F. 2d at 468.

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former success of the business, and many other elements which would be advantageous in the operation of the business").

Nor can there be any question that a company's goodwill--when measured through competent evidence (which the federal court already has established in the instant case)--is an asset which the law of Florida recognizes and protects in a variety of different contexts. As the Court made clear in *Swann v. Mitchell,* 435 So. 2d 797, 799-801 (Fla. 1983), "goodwill should be recognized as an asset of a business . . . and taken into consideration in any sale or evaluation of assets"; "[c]ourts have frequently recognized goodwill as an asset subject to consideration on an accounting between partners," and "[i]t also appears to be a well established view in other jurisdictions to recognize goodwill as an accountable asset when the value of that goodwill survives the death of one of the partners." *Accord, Obel v. Henshaw,* 130 So. 2d 892, 894 (Fla. 3d DCA 1961); *Wiese v. Wiese,* 107 So. 2d 208 (Fla. 2d DCA 1958). The "goodwill of a professional practice has been held to be community property subject to division in a marriage dissolution proceeding," and "[i]t has also been found to be property for which corporate stock could be issued." *Swann v. Mitchell,* 435 So. 2d at 800. And goodwill has a value in tax law, because its compensation (in a sale or in a damage award) "represents a return of capital and, with certain limitations . . . is not taxable."[21/]

It necessarily follows that damage to goodwill is compensable in a variety of different civil actions. In contract law, for example, both at common law and under the Uniform Commercial Code, "[w]here a seller of goods reasonably knows that substantially impaired goods provided for resale could affect continued operations and established good will, the buyer's loss of good will caused by the seller's breach is properly recoverable as consequential

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[21/] *Raytheon Products Corp. v. Commissioner,* 144 F. 2d 110, 113 (1st Cir.), *cert. denied,* 323 U.S. 779, 65 S. Ct. 192, 89 L. Ed. 622 (1944). *Accord, Thomson v. Commissioner,* 406 F. 2d 1006 (9th Cir. 1969); *Durkee v. Commissioner,* 162 F. 2d 184 (6th Cir. 1947).

damages unless the loss could have been prevented by cover or otherwise." *Delano Growers' Cooperative Winery v. Supreme Wine Co.*, 393 Mass. 666, 683, 473 N.E. 2d 1066, 1077 (1985), *quoted in* 2 R. Dunn, *Recovery of Damages for Lost Profits* § 6.20, at 425 (4th ed. 1992).[22/] The same is true, in a variety of contexts, in tort law. For example, because goodwill is a part of the assets transferred in the sale of a business, the sale creates a right of action against the seller for soliciting any former customers away from the buyer.[23/] For the same reason--that goodwill necessarily is an inherent part of the sale of a business--it gives rise to a cause of action by the buyer for trademark infringement. *See Levitt Corp. v. Levitt,* 593 F. 2d 463, 469 (2d Cir. 1979); *Guth v. Guth Chocolate Co.*, 224 F. 932, 934 (4th Cir.), *cert. denied,* 239 U.S. 640, 36 S. Ct. 161, 60 L. Ed. 481 (1915). Goodwill may even be compensable in a trespass action, to the extent that the defendant's conduct not only caused physical damage, but harmed the plaintiff's business productivity. *See Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc.*, 473 N.W. 2d 612 (Iowa 1991) (sewage work

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[22/] *Accord, R.E.B., Inc. v. Ralston Purina Co.*, 525 F. 2d 749, 752-53 (10th Cir. 1975); *Westric Battery Co. v. Standard Electric Co.*, 522 F. 2d 986, 987 (10th Cir. 1975); *Texsun Feed Yards, Inc. v. Ralston Purina Co.*, 447 F. 2d 660, 672 (5th Cir. 1971); *Westric Battery Co. v. Standard Electric Co.*, 482 F. 2d 1307, 1317-18 (10th Cir. 1973); *Barrett Co. v. Panther Rubber Mfg. Co.*, 24 F. 2d 329 (1st Cir. 1928); *Hydraform Products Corp. v. American Steel & Aluminum Corp.*, 127 N.H. 187, 498 A. 2d 339 (1985); *Robert T. Donaldson, Inc. v. Aggregate Surfacing Corp.*, 47 A.D. 2d 852, 366 N.Y.S. 2d 194 (1975), *appeal dismissed,* 37 N.Y. 2d 793, 375 N.Y.S. 2d 106 (1975); *General Riveters, Inc. v. Morse Chain Co.*, 15 A.D. 2d 859, 224 N.Y.S. 2d 746 (1962); *Petty v. Weyerhaueuser Co.*, 288 S.C. 349, 342 S.E. 2d 611 (1986). *See generally Restatement (Second) of Contract* § 352, Illustration 4 (1981).

[23/] *See Proulx v. United States,* 594 F. 2d 832, 841 (Ct. Cl. 1979) (Fla. law) (transfer of goodwill implied in sale of business; necessarily covered by covenant not to compete); *West Shore Restaurant Corp. v. Turk,* 101 So. 2d 123, 128 (Fla. 1958) (upholding validity of covenant not to compete in the sale of a restaurant, because the sale necessarily encompassed a transfer of goodwill); *Wilson v. Pigue,* 151 Fla. 734, 10 So. 2d 561 (1942); *Yoo Hoo of Florida Corp. v. Catroneo,* 175 So. 2d 220, 222-23 (Fla. 3d DCA), *cert. denied,* 179 So. 2d 212 (Fla. 1965). *See generally Yost v. Patrick,* 245 Ala. 275, 17 So. 2d 240, 244 (1944); *Hyde Park Products Corp. v. Maximilian Lerner Corp.*, 65 N.Y. 2d 316, 491 N.Y.S. 2d 302 (1985).

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next door caused collapse of plaintiff's building, leading to a loss of profits and goodwill). As Ethan Allen itself has acknowledged (brief at 25), Florida law also protects goodwill in actions for defamation or trade libel, which Ethan Allen agrees is an "appropriate recourse for the type of reputational harm alleged by Georgetown."[24/]

It follows from the foregoing that Judge Mishler was correct in instructing the jury, under Florida law, that if it found that the destruction of Georgetown, as a viable economic entity, was the natural and probable result of Ethan Allen's tortious conduct, it should award Georgetown damages for that lost value, including the value of its goodwill. Even assuming *arguendo* that a Florida plaintiff would be precluded from redressing tortious conduct which did not interfere with any existing contracts or business relationships, but only undermined the value of his business, such damages are certainly compensable if they were the natural and probable result of tortious conduct which Ethan Allen admits to be actionable in Florida--conduct causing the disruption of existing contractual relationships. Under the settled law of damages in Florida, Judge Mishler was correct to submit to the jury the question of whether Ethan Allen's wrongful conduct, causing the wholesale cancellation of almost $300,000.00 in existing orders, predictably caused the company's downfall.[25/]

[24/] As we will note in Argument B, it is the recognized economic value of goodwill which compels the conclusion that tortious interference with a business is actionable even without proof of any disruption of an identifiable contract or business relationship. To Ethan Allen's repeated refrain (*see* brief at 9, 10, 12, 15, 17) that the tort redresses only the loss of property or relationships in which the plaintiff has legal rights, the obvious answer is that the owner of a business has numerous legal rights in its goodwill.

[25/] Although the competence of Georgetown's proof of damages has already been affirmed by the federal appellate court, we should note that the propriety of Georgetown's method of proof is universally recognized: "It is axiomatic that the measure of damage to business property, such as good will, is based on the measurement of the difference in value of the property before and after the injury." *Stewart & Stevenson Services, Inc. v. Pickard,* 749 F. 2d 635, 649 (11th Cir. 1984). *Accord, Westric Battery Co. v. Standard Electric Co.,* 482 F. 2d 1307, 1318 (10th Cir. 1973).

3. The Foregoing Conclusions are Universally Accepted Outside of Florida. As the citations in the previous sub-section make clear, goodwill is a recognized business asset not only in Florida, but everywhere else. Similarly, the lost-value measure of tort damage is universally recognized outside of Florida, in tortious-interference and all other tort cases.[26/] Many of the cases cited in footnote 26 are tortious-interference cases. For example, in *John A. Henry & Co. v. T.G. & Y. Stores,* 941 F. 2d 1068, 1071 (10th Cir. 1991), the plaintiff landlord successfully prosecuted an action against his repeatedly-defaulting tenant, for diminishing the value of his rental property. The defendant had interfered with an existing contract--the landlord's mortgage agreement with his lendor--and the consequential damages included the diminished value of his property as a business venture. In *Western Fireproofing Co. v. W.R. Grace & Co.,* 896 F. 2d 286, 291-92 (8th Cir. 1990), the licensee successfully prosecuted a tortious-interference claim

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[26/] *See, e.g., John A. Henry & Co. v. T.G. & Y. Stores Co.,* 941 F.2d 1068, 1071 (10th Cir. 1991); *Western Fireproofing Co. v. W.R. Grace & Co.,* 896 F.2d 286, 292 (8th Cir. 1990); *Gregg v. U.S. Industries, Inc.,* 887 F.2d 1462, 1469-70 (11th Cir. 1989); *Video International Production, Inc. v. Warner-Amex Cable Communications, Inc.,* 858 F.2d 1075, 1088 (5th Cir. 1988), *cert. denied,* 490 U.S. 1047, 109 S. Ct. 1955, 104 L. Ed. 2d 424 (1989); *Shanno v. Magee Industrial Enterprises, Inc.,* 856 F.2d 562, 566-67 (3d Cir. 1988); *Electro Services, Inc. v. Exide Corp.,* 847 F.2d 1524, 1526-27 (11th Cir. 1988); *T.D.S., Inc. v. Shelby Mutual Ins. Co.,* 760 F.2d 1520, 1532-33 & n.16 (11th Cir. 1985); *Neff v. Kehoe,* 708 F.2d 639, 644 (11th Cir. 1983); *C.A. May Marine Supply Co. v. Brunswick Corp.,* 649 F.2d 1049, 1053 (5th Cir.), *cert. denied,* 454 U.S. 1125, 102 S. Ct. 974, 71 L. Ed. 2d 112 (1981); *United Roasters, Inc. v. Colgate-Palmolive Co.,* 649 F.2d 985, 992-93 (4th Cir. 1981), *cert. denied,* 454 U.S. 1054, 102 S. Ct. 599, 70 L. Ed. 2d 590 (1981); *Carpa, Inc. v. Ward Foods, Inc.,* 536 F.2d 39 (5th Cir. 1976); *Lehrman v. Gulf Oil Corp.,* 500 F.2d 659, 663-64 (5th Cir. 1974), *cert. denied,* 420 U.S. 929, 95 S. Ct. 1128, 43 L. Ed. 2d 400 (1975); *Terrell v. Household Goods Carriers' Bureau,* 494 F.2d 16, 23 (5th Cir.), *cert. dismissed,* 419 U.S. 987, 95 S. Ct. 246, 42 L. Ed. 2d 260 (1974); *Albrecht v. Herald Co.,* 452 F.2d 124, 128 (8th Cir. 1971); *Farmington Dowel Products Co. v. Forster Mfg. Co.,* 421 F.2d 61, 81-82 (1st Cir. 1970); *Simpson v. Union Oil Co. of California,* 411 F.2d 897, 909 (9th Cir.), *rev'd on other grounds,* 396 U.S. 13, 90 S. Ct. 30, 24 L. Ed. 2d 13 (1969); *Gleason v. Title Guarantee Co.,* 300 F.2d 813, 815 (5th Cir. 1962); *Standard Oil Co. of California v. Moore,* 251 F.2d 188, 220 (9th Cir.), *cert. denied,* 356 U.S. 975, 78 S. Ct. 1139, 2 L. Ed. 2d 1148 (1958). *See generally* Wright, *Tort Responsibility for the Destruction of Goodwill,* 14 Cornell L.Q. (1929).

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against his licensor under an exclusive-territory license, for interfering with the plaintiff/licensee's customers in his exclusive territory. Having proved such interference with existing customers, the plaintiff's damages properly included not only any lost sales to those customers, but also the diminished fair market value of the exclusive territory as a going concern. And in *Gregg v. U.S. Industries, Inc.*, 887 F. 2d 1462, 1469-70 (11th Cir. 1989), the plaintiff successfully brought tortious interference and fraud claims against the purchaser of the plaintiff's corporations in exchange for stock, alleging that the buyer's conduct had interfered with the plaintiff's existing relationship with its secured money lender. Having proved the interference with an existing business relationship, the plaintiff was entitled to recover for the difference between the value of the companies which he had sold, and the income-producing value of the stock which he had received.

In light of the underlying purpose of tort damages--to fully compensate the plaintiff for the natural and probable consequences of the defendant's wrongdoing--in some cases the defendant's conduct will do more than deprive the plaintiff of his anticipated return on the transaction in question; the impact may be so dramatic and far-reaching that its natural and probable consequence is to damage the plaintiff's business in general, undermining its future profitability and goodwill. In the instant case, the federal appellate court already has determined that Georgetown's proof of this point was competent--that Georgetown offered substantial competent evidence that the newspaper advertisement, with its devastating impact upon virtually all of Georgetown's existing contracts for the sale of Ethan Allen furniture, was sufficient to destroy the company's goodwill, and thus the company itself. As the above-cited authorities make clear, Florida has long recognized, in such cases, that the plaintiff may recover for all of the natural and probable consequences of the defendant's conduct, including the destruction of the plaintiff's business.

4. *Ethan Allen Has Conceded the Point.* Moreover, we think that Ethan Allen now

is estopped to argue otherwise. At all relevant times, Ethan Allen has been well aware of both the district court's rationale for permitting Georgetown's recovery for the destruction of its goodwill, and also of the specific question of damages which the federal court asked this Court to resolve. As Ethan Allen has acknowledged (brief at 7 n.8), Judge Mishler ruled at trial that although Ethan Allen's liability derived from Georgetown's proof of interference with existing business relationships (existing contracts to purchase Ethan Allen furniture from Georgetown), Georgetown's damages included all of the natural and probable consequences of that immediate loss, including the loss or destruction of Georgetown's goodwill (*see* R32-18, 20-21, 27). As Ethan Allen also has acknowledged (brief at 11 n.11), that precise formulation by Judge Mishler--of the ***damages*** allowable in Florida--was the single question which the federal appellate court certified to this Court. Thus, Ethan Allen has acknowledged both the damage theory accepted by the federal district court, and the inquiry about consequential damages certified by the federal appellate court. And yet, Ethan Allen made a deliberate decision not to address that question in its initial brief. To the contrary (brief at 11 n.11), Ethan Allen has argued that the question presented is not appropriate for consideration, and has posed (and then attempted to answer) an entirely different question.

As this Court has long recognized, it is the appellant's burden to demonstrate the error of the lower court's decisionmaking. As the Court has put it, "it is the duty of a party resorting to an appellate court to make the error complained of clearly to appear." *Saunders v. Lischkoff,* 188 So. 815, 818 (Fla. 1939).[27/] That duty requires the appellant not only to create and to prepare a record which is adequate to permit the appellate court's adjudication of the issues on appeal, *see Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150, 1152 (Fla. 1979), but

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[27/] *Accord, Cloud v. Fallis,* 110 So. 2d 669, 673 (Fla. 1959); *In Re Estate of Schorr,* 409 So. 2d 487 (Fla. 4th DCA 1982); *Kehrmann v. Noll,* 365 So. 2d 398 (Fla. 3d DCA 1978), *cert. denied,* 376 So. 2d 373 (Fla. 1979).

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also to articulate and to demonstrate the lower court's purported error. As the Court put it in *Lynn v. City of Ft. Lauderdale,* 81 So. 2d 511, 513 (Fla. 1955): "It is elementary that when a decree of the trial court is brought here on appeal the duty rests upon the appealing body to make error clearly appear." The appellant cannot fulfill that duty by ignoring the lower court's rationale for decision, and simply "dumping the matter into the lap of the appellate court for a decision." *American Motor Inns of Florida, Inc. v. Bell Electric Co.,* 260 So. 2d 276, 277-78 (Fla. 4th DCA 1972). To the contrary, any issue not briefed by the appellant--and that means a fully-developed argument, citing authority[28]--is waived.[29]

In the light of these principles, Ethan Allen has waived any challenge to the trial court's rationale for decision, by relinquishing its opportunity to address the issue certified by the federal court to this Court. Forsaking its opportunity to address that question, Ethan Allen has chosen instead to reformulate the issue as one involving the scope of liability for tortious interference, and to devote the entirety of its brief to that invented issue, to the exclusion of any consideration of the principles of damages recoverable under Florida law. It would be far too late to permit Ethan Allen to address that critical question for the first time in a reply brief, when Georgetown will have no opportunity to answer. We respectfully submit, at least for the purposes of this case, that the law of the case has been established by omission. And beyond that, as we have demonstrated through substantial authority, Georgetown's theory of damage was entirely permissible under Florida law.

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[28] *See Rodriguez v. State,* 502 So. 2d 18 (Fla. 3d DCA 1986); *Singer v. Borbua,* 497 So. 2d 279 (Fla. 3d DCA 1986), *review dismissed,* 503 So. 2d 328 (Fla. 1987). *See generally Frazier v. Garrison I.S.D.,* 980 F. 2d 1514, 1527-28 (5th Cir. 1993).

[29] *See Dober v. Worrell,* 401 So. 2d 1322 (Fla. 1981); *Gulf Heating & Refrigeration Co. v. Iowa Mutual Ins. Co.,* 193 So. 2d 4 (Fla. 1967); *Wingate v. United Services Automobile Association,* 480 So. 2d 665 (Fla. 5th DCA 1985).

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B. FLORIDA LAW PERMITS A PLAINTIFF, IN PROPER CASES, TO RECOVER FOR TORTIOUS INTERFERENCE EVEN IF THE PLAINTIFF CANNOT PROVE THAT THE DEFENDANT'S CONDUCT INTERFERED WITH ANY EXISTING CONTRACTS OR BUSINESS RELATIONSHIPS, WHERE THE PLAINTIFF CAN PROVE THAT THE DEFENDANT'S CONDUCT DIMINISHED OR DESTROYED THE VALUE OF THE PLAINTIFF'S BUSINESS.

1. Tort Law Protects the Value of Businesses, no less than it Protects the Value of a Business Contract or Relationship. The single question addressed by Ethan Allen is whether in proper cases a plaintiff in Florida may recover for an act of tortious interference which did not interfere with any particular contract or business relationship, but did undermine the value of the plaintiff's business, perhaps destroying that business entirely. For example, if the defendant steals the plaintiff's list of potential future customers, or copies his trademarks, such conduct may not affect at all the plaintiff's existing contracts or business relationships, but it will have an obvious impact upon the plaintiff's prospective future profitability, which of course is reflected in the value of his business. Or if the defendant wrongfully appropriates the plaintiff's sources of supply, even if that wrongdoing has not prevented the plaintiff from filling existing orders, it will certainly undermine the plaintiff's ability to make new contracts and to fill new orders. Or if the defendant interferes somehow with the plaintiff's production capability, even if the plaintiff has enough inventory to fill existing orders, the interference will significantly undermine the plaintiff's ability to secure new orders and to fill them.

Ethan Allen contends that the law of tortious interference in Florida does not forbid any of these obviously-tortious acts--that such acts must be redressed through some other cause of action, or not at all. At bottom, Ethan Allen's position is that Florida law does not embrace a cause of action for interference with an existing ***business***, but only with an existing business ***relationship***, which promises identifiable economic benefits to the plaintiff. To justify such an arbitrary constriction of the cause of action, Ethan Allen has argued (brief at 24) that society has

no interest in protecting the economic sanctity and goodwill of an established business like Georgetown, but only in protecting concrete business relationships. As Ethan Allen puts it: "Society's interest in protecting . . . noncontractual agreements . . . is the same as that movitating the protection of contracts: to provide security and predictability in business arrangements and to promote the fulfillment of commercial commitments." But "[t]his interest is absent," Ethan Allen contends (brief at 24), "where a person lacks a concrete business agreement or understanding and possesses only the unilateral expectation of future business from some unspecified persons--however reasonable that expectation may be. In that situation, society's interest in free and robust competition prevails."

As the Court is aware, however, society also has an interest in protecting the "security and predictability" of business ***enterprises***. If a defendant's conduct is sufficiently wrongful to warrant liability when it interferes with an existing contract or business relationship, Ethan Allen can hardly be correct that the identical conduct should be permissible--consistent with "society's interest in free and robust competition"--when it "only" interferes with an existing business. If it is unacceptable when a defendant lies, steals or cheats in order to disrupt an existing contract or relationship, it should be equally unacceptable if the defendant lies, steals or cheats in order to destroy an entire business.

Ethan Allen has repeatedly emphasized (*see, e.g.*, brief at 9, 10, 12, 15, 17) that a claim of tortious interference requires proof by the plaintiff of existing legal rights, and not merely unilateral expectations (*see* brief at 13, 24). What Ethan Allen has forgotten is that the economic value and goodwill of a business ***is*** an existing legal right, and is protected by ***societal*** expectations. In a variety of different contexts, our society protects the "security and predictability" of existing businesses, and of their existing goodwill, no less than existing contractual or business relationships. As we have noted, *supra* pp. 22-26, the goodwill of a company represents a part of its present value, and is treated and protected as such in a variety

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of legal contexts. It is an asset which can be sold, and which is protected by Florida's courts. As Ethan Allen itself has acknowledged (brief at 25)--contradicting its suggestion that society has no interest in protecting "only a unilateral expectation of future business" (brief at 24)--Florida law clearly protects goodwill in actions for defamation or trade libel, which Ethan Allen contends should be the only recourse available to a plaintiff like Georgetown.

But having conceded society's obvious and multi-faceted interest in protecting the goodwill of established business enterprises, Ethan Allen has offered no reason why such protection should be confined to the redress of statements which may be actionable as libel, and thus exclude from protection all of the other types of wrongful conduct--not involving spoken or written words--which are held to be tortious when they interfere with specific contracts or business relationships, but not (according to Ethan Allen) when they destroy an entire business. That purely-artificial distinction simply makes no sense; not surprisingly, it is not supported by any of the Florida decisions cited by Ethan Allen, or by any others.

2. *A Look at Ethan Allen's Citations.* We remind the Court that Georgetown's claim was not permitted to encompass any generalized loss of goodwill with the South Florida community at large. As Ethan Allen has pointed out (brief at 6 n.7), Georgetown's complaint did allege that Ethan Allen's conduct had undermined its standing with "future customers" in general (R17-631-8). That allegation was informed by this Court's pronouncement in *Swann v. Mitchell,* 435 So. 2d 797, 799 (Fla. 1983) (our emphasis) that "[g]oodwill is usually evidenced by ***general public patronage*** and is reflected in the increase in profits beyond those that may be expected from the mere use of capital." Nevertheless, the trial court held that Georgetown's damages must be confined to the goodwill lost in Georgetown's pre-existing customers, with whom it had a pre-existing relationship, and the reasonable expectation (according to our experts) of repeat purchases (*see* R34-78; R51-51-52; R63-19-25). That ruling was upheld by the federal appellate court, in its rejection of Georgetown's cross-appeal (*see* A. 6), and that

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ruling is now the law of this case. Therefore, the Court need not consider the propriety of the pronouncement quoted by Ethan Allen at page 14 of its brief--that a tortious-interference claim cannot be based upon "a business relationship with the community at large . . . ." *Southern Alliance Corp. v. City of Winterhaven,* 505 So. 2d 489, 496 (Fla. 2d DCA 1987). No such claim was litigated in the instant case.

What Georgetown did argue, and what its evidence showed, was that Ethan Allen's newspaper advertisement not only caused the wholesale cancellation of Georgetown's existing orders for Ethan Allen furniture, but also so seriously undermined Georgetown's pre-existing relationship with its past customers that it deprived Georgetown of the repeat business which the experts said was essential to its continued economic viability. Ethan Allen contends that the latter category of damages could not alone--that is, in the absence of interference with any existing contracts or relationships--sustain a claim of tortious interference; and Ethan Allen has purported to cite a number of Florida cases which assertedly support that contention (*see* Ethan Allen's brief at 14-19). On closer inspection, however, none of the cited decisions involve a claim of lost goodwill with a particular and identifiable group of patrons. All of the cited cases involved either an asserted loss of reputation in the community at large, or instead the plaintiff's exclusive (but unsuccessful) assertion of interference with a particular contract or business relationship.[30/]

As we have noted, the plaintiff's claim in *Southern Alliance Corp. v. City of Winter Haven,* 505 So. 2d at 496 (Ethan Allen's brief at 14) was a claim of lost goodwill with the

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[30/] Ethan Allen has asserted three times in its brief (pp. 1, 9, 23) that the federal appellate court found the Florida district courts' opinions to unanimously favor Ethan Allen's position, but nonetheless certified the question in the absence of a definitive ruling by this Court. That assertion is false. The federal court concluded that "we do not find the decisions of the Florida district courts of appeal determinative . . . and we find no controlling precedent of the Florida Supreme Court . . . . (A. 13).

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"community at large . . . ." Similarly, in *International Funding Corp. v. Krasner,* 360 So. 2d 1156 (Fla. 3d DCA 1978) (Ethan Allen's brief at 14), the defendants in a mortgage-foreclosure action counterclaimed for tortious interference against their mortgagee, on the basis of statements allegedly made to the press and to others that the counterplaintiffs had defaulted on the loan; but their counterclaim failed to identify any business interests or enterprises which allegedly were injured by such statements. At most, it alleged some general damage to reputation--not an economic loss.

Apart from the above two decisions, all of the other cases cited by Ethan Allen (brief at 15-17) are cases in which the plaintiff did ***not*** allege a loss of business value or goodwill, but only that the defendant had interfered with a specific and identifiable business relationship; but the plaintiff failed to demonstrate that the particular relationship in question afforded him any legal rights. For example, in *Lake Hospital & Clinic, Inc. v. Silversmith,* 551 So. 2d 538, 544-45 (Fla. 4th DCA 1989), *review denied,* 563 So. 2d 634 (Fla. 1990) (Ethan Allen's brief at 15), the plaintiff doctor's primary allegation was that the hospital had wrongfully terminated his staff privileges, and he added the secondary allegation that his termination had destroyed some pre-existing relationships with other doctors and some patients. But the plaintiff failed to identify either the doctors or the patients, and thus his pleading was facially insufficient.[31/] All of the other Florida decisions cited by Ethan Allen at pages 15-17 of its brief fall into exactly the same category; they are cases in which the plaintiff alleged interference with a specific relationship, but failed to allege or prove that the plaintiff had enjoyed any rights or reasonable economic

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[31/] Moreover, the court in *Lake Hospital* noted that any such loss would be compensable secondary to the plaintiff's potential recovery for wrongful termination, 551 So. 2d at 545. That *dictum* can only re-enforce our first argument--that harm to reputation or goodwill in proper cases will be compensable secondary to the immediate economic consequences of the defendant's wrongdoing, if the plaintiff can prove that such loss was the natural and probable consequence of that wrongdoing. *Lake Hospital* provides powerful support for our primary contention, which Ethan Allen has chosen not to address.

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expectations in the context of that relationship.[32/] These decisions stand for nothing more than the well-settled proposition that the plaintiff must prove what he pleads. When the plaintiff alleges interference with an existing contract or business relationship, he must prove the existence of such a relationship, and the attendant rights which it embraced.

But none of these decisions even hints at the proposition for which they are cited by Ethan Allen--that the definition of tortious interference in Florida is limited to such cases, to the exclusion of any more-generalized allegation of wrongful destruction or diminution of the value of a plaintiff's business--in which the plaintiff also has legal rights. Ethan Allen has failed to cite a single case which stands for that proposition, because no such case exists. To the contrary, the handful of Florida cases which do touch on the issue strongly suggest that, even in the absence of interference with an identifiable contract or relationship, a defendant may be found liable in Florida for tortiously interfering with a plaintiff's business enterprise, undermining or destroying its goodwill.

[32/] That includes *Dwight v. Tobin,* 947 F. 2d 455, 460 (11th Cir. 1991) (Fla. law) (*see* Ethan Allen's brief at 13, 17), in which the plaintiff's claim was based exclusively upon alleged interference with an existing, enforceable contract ("Dwight has alleged no other legally enforceable agreement with which Ellman has interfered"), and the court held that the contract conferred no legal rights upon the plaintiff because it was voidable under the statute of frauds. As Ethan Allen has pointed out, *Dwight* was hotly debated by the parties before the federal appellate court, which obviously recognized that the plaintiff in *Dwight* had been trapped by the narrowness of his pleadings, which relied exclusively upon the existence of an enforceable contract. As a general proposition, however, as even Ethan Allen now acknowledges for the first time (brief at 23-24), "contracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality, or even uncertainty of terms, or harsh and unconscionable provisions or conditions precedent to the existence of the obligation, can still afford a basis for a tort action when the defendant interferes with their performance." *Allen v. Leybourne,* 190 So. 2d 825, 828 (Fla. 3d DCA 1986), *citing* W. Prosser, *Handbook of the Law of Torts* § 129, at 932 (4th ed. 1971). For analogous reasons, it has long been recognized that "an action will lie where a party tortiously interferes with a contract terminable at will." *Unistar Corp. v. Child,* 415 So. 2d 733, 734 (Fla. 3d DCA 1982) (en banc), *citing Chipley v. Atkinson,* 23 Fla. 206, 1 So. 934 (1887). The *Dwight* decision does not run a foul of this well-settled principle, because the plaintiff in *Dwight* had narrowly constricted his pleadings to the allegation of an enforceable contract.

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3. A Look at the Florida Cases. We should note at the outset that § 766B of the *Restatement (Second) of Torts* (1979), which creates a cause of action for interference with a "prospective contractual relation," says explicitly in Comment c that the tort includes "interference with a continuing business or other customary relationship not amounting to a formal contract."[33/] As Ethan Allen has pointed out (brief at 20 n.19), this Court and the district courts of Florida on repeated occasions have adopted various provisions of §§ 766-774A of the *Restatement*, which prescribe the elements and defenses in a tortious-interference case; but no Florida decision has explicitly adopted the above-quoted language from the comment to § 766B. At the same time, no Florida court has ever rejected any provision of §§ 766-774A of the *Restatement*.[34/] Given the Florida courts' repeated reliance upon the *Restatement* in adjudicating tortious-interference claims, it is not surprising that at least one leading commentator has described Florida law in terms identical to § 766B, noting that "[t]he tort also includes interference with . . . a continuing business . . . ." J. Martin, 1 *Florida Torts* § 28.20, at 28-41 (Matthew Bender 1992).

The handful of relevant Florida decisions supports that conclusion. For example, in *Zimmerman v. DCA at Welleby, Inc.*, 505 So. 2d 1371, 1373 (Fla. 4th DCA 1987), the plaintiff was entitled to a preliminary injunction on the basis of his threshold proof that the defendants' picketing was undermining the plaintiff's opportunities with "potential customers": "The record in the instant case supports an inference that appellants' picketing with signs and talking to potential customers had a deleterious effect on sales of condominium units. It therefore appears

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[33/] Ethan Allen has devoted two pages to § 766B (brief at 19-21), without ever acknowledging the critical language quoted above.

[34/] Ethan Allen has cited a handful of Florida decisions which have rejected various provisions of the *Restatement* of contracts or torts, but in areas having nothing to do with tortious interference (brief at 20 n.19).

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that appellees made a prima facie case in the trial court for the appropriateness of temporary injunctive relief." Over a decade earlier, in *National Association for the Advancement of Colored People v. Webb's City, Inc.*, 152 So. 2d 179, 182 (Fla. 2d DCA 1963), *vacated as moot,* 375 U.S. 190, 84 S. Ct. 635, 11 L. Ed. 2d 602 (1964), the court reached an identical conclusion in arriving at a holding which would not stand up to constitutional scrutiny today, but for reasons unrelated to the point at issue. The plaintiff in *Webb's City* had pleaded tortious interference by the NAACP in picketing its business, and the district court's outdated holding was that the plaintiff's right to conduct his business outweighed the NAACP's social objectives in picketing. But the key point for our purposes is that the court would not even have reached that balancing question without first concluding that the plaintiff had stated a cause of action, based on the defendant's attempt "to interfere with Webb's right to an unhampered market for the sale of its commodities and services by coercing customers or ***prospective*** customers into withholding patronage"--that is, by "causing plaintiff's customers and ***prospective*** customers not to ***enter into*** or continue business relations with the plaintiffs . . . ." 152 So. 2d at 182, 183 (emphasis added). As in *Zimmerman*, the cause of action was stated for the defendant's interference with the plaintiff's ongoing business.

Similarly, in *Unistar Corp. v. Child,* 415 So. 2d 733, 734 (Fla. 3d DCA 1982) (en banc), the plaintiff was held to have stated a cause of action against a former employee for misappropriating the plaintiff's list of potential customers for the future purchase of diamonds; that assertedly undermined the value of the plaintiff's business, even if it did not impinge upon any existing contract or relationship. The list included not only 1850 dealers who had purchased from the plaintiff in the past, but also another 2350 "prospective dealers" whose names had been assembled after considerable research by the plaintiff. The defendant was not alleged to have disrupted any existing contracts or negotiations; he had simply obtained, by wrongful means, an unfair advantage in competing with the plaintiff for ***future*** business with past or prospective

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customers. That is identical to Georgetown's contention here, and it was sufficient to state a cause of action.

In *Merlite Land, Sea & Sky, Inc. v. Palm Beach Investment Properties, Inc.*, 426 F. 2d 495, 498 (5th Cir. 1970) (Fla. law), the defendant was a developer who had contracted to pay the plaintiff a commission on every sale of Florida property made to any prospective purchaser whom the plaintiff could induce to come to Florida on a free-vacation package. When the defendant refused to honor its promise to pay the commissions, the plaintiff sued for breach of contract and tortious interference, not only with respect to people who had purchased property, but also prospective contractual relationships with future customers, "including the loss of potential profits . . . ." *Id.* at 497. Recognizing that "[a] tort of interference with a business relationship encompasses prospective as well as current customers," the court held that a limitation-of-liability provision in the developer's contract with the plaintiff did not dispose of the lawsuit, because that provision related only to existing certificate holders, and the plaintiff had also pleaded a valid claim regarding prospective future certificate holders. *Id.* at 497.

Finally, as Ethan Allen has anticipated (brief at 18-19), we submit that a powerful analogy is found in *Insurance Field Services, Inc. v. White & White Inspection and Audit Service, Inc.*, 384 So. 2d 303 (Fla. 5th DCA 1980). The plaintiff in *Insurance Field Services* provided underwriting inspections, premium audits, and loss control work for various insurance companies. The defendant was a company formed by the plaintiff's branch manager and his wife (also an employee of the plaintiff), who had solicited the business of several insurance companies which ***in the past*** had utilized the plaintiff's services. The opinion provides no support for Ethan Allen's assertion (brief at 18) that the plaintiff was actually performing services for these companies "at the time of the solicitation," or that the defendant had done anything to divest the plaintiff company of any existing contracts or assignments with its customers--only that the solicited companies were "customers" because they had utilized the

plaintiff's services ***in the past***. The court made that crystal clear in the following passage from the opinion, 384 So. 2d at 308:

> Appellee's business, like most companies, revolves, in large measure, upon the building of good will accomplished when a client becomes accustomed to dealing with someone who is regularly performing a service. Appellee's field representatives and the individual appellants had been performing services for appellee's customers in a satisfactory manner, and the record provides no indication that its customers had any inclination to terminate using appellee's services.

It was because the client companies had done business with the plaintiff agency in the past, and because "the record provides no indication that its customers had any inclination to terminate using appellee's services," that the court found in *Insurance Field Services* that the plaintiff had acquired a legally-protected interest in those former customers.[35/]

As Ethan Allen apparently has recognized, *Insurance Field Services* provides a powerful analogy to Georgetown's position in the instant case. Here, as there, the plaintiff had a relationship with its past customers--people with whom it had dealt in the past--which justified a reasonable expectation (according to Georgetown's experts) that those customers would continue to deal with Georgetown in the future. As in *Insurance Field Services*, Georgetown had been "performing services . . . in a satisfactory manner, and the record provides no indication that its customers had any inclination" to buy their furniture from anybody else. To

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[35/] The opinion provides no support for Ethan Allen's assertion (brief at 19) that the "good will" referred to in the above-quoted passage was limited to those clients for whom the plaintiff agency was currently providing services, or for Ethan Allen's fanciful contention (brief at 19 n.18) that the damages awarded in *Insurance Field Services* were "precisely measurable by the lost profits that the plaintiff would have derived from the lost clients' business . . . ." That contention is Ethan Allen's invention, supported by no language from the opinion. To the contrary, the court merely noted that the plaintiff agency's profits had declined precipitously during the period of the defendant's solicitation of its former customers, and that the difference between those profits and the plaintiff's prior profits was properly attributed to the defendant's interference.

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the contrary, Georgetown's experts testified without contradiction that Georgetown had a reasonable expectation of repeat business from its former customers. As in *Insurance Field Services*, therefore, Georgetown had "economically advantageous business relationships, capable of ascertainment," which alone provided a sufficient predicate for the assertion of a tortious-interference claim against Ethan Allen.

4. The Non-Florida Cases. Georgetown's position is overwhelmingly supported by the law outside of Florida. As we have noted already, Comment c to § 766B of the *Restatement* says clearly that the action lies for "interference with a continuing business," and the non-Florida decisions have overwhelmingly adopted that precept. As a leading commentator has put it: "The courts find tortious interference with business even without the necessity for the wrongdoer being held to interfere with any specific contract." 1 R. Dunn, *Recovery of Damages for Lost Profits* § 3.11, at 218 (4th ed. 1992). The doctrine dates back to a 1706 English decision--*Keeble v. Hickeringell,* 11 East 574, 103 Eng. Rep. 1127 (Q.B. 1706)--in which the defendant was liable for deliberately discharging a firearm, scaring away the ducks which constituted the plaintiff's livelihood. The basic principle announced in *Keeble*, and now embodied in the *Restatement*, has been enforced in virtually every American jurisdiction.[36/]

[36/] *See, e.g., A-Abart Electric Supply, Inc. v. Emerson Electric Co.*, 956 F.2d 1399, 1404 (7th Cir.), *cert. denied,* _____ U.S. _____, 113 S. Ct. 194, 121 L. Ed. 2d 137 (1992); *Whelan v. Abell,* 293 U.S. App. D.C. 267, 953 F.2d 663, 673-74, *cert. denied,* _____ U.S. _____, 113 S. Ct. 300, 121 L. Ed. 2d 223 (1992); *Delphi Industries, Inc. v. Stroh Brewery Co.*, 945 F.2d 215, 220 (7th Cir. 1991) (Ill. law); *Brotherhood Ry. Carmen of the United States and Canada, Division of Transportation Communications Union v. Missouri Pacific R. Co.*, 944 F.2d 1422, 1430 (8th Cir. 1991) (Mo. law), *quoting Fischer, Spuhl, Herzwurm & Associates, Inc. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 315 (Mo. 1979); *Kiepfer v. Beller,* 944 F.2d 1213, 1220 (5th Cir. 1991) *Monette v. AM-7-7 Baking Co.*, 929 F.2d 276, 281 (6th Cir. 1991) (Mich. law); *Robi v. Five Platters, Inc.*, 918 F.2d 1439, 1442 n.4 (9th Cir. 1990) (Cal. law); *Triple R Industries, Inc. v. Century Lubricating Oils, Inc.*, 912 F.2d 234, 237 (8th Cir. 1990) (Neb. law); *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951, 976-77 (10th Cir.) (Kan. law), *cert. denied,* 497 U.S. 1005, 110 S. Ct. 3241, 111 L. Ed. 2d 752 (1990), *aff'ing,* 663 F. Supp. 1360 (D. Kan. 1987); *Western Fireproofing Co. v. W.R. Grace & Co.*, 896 F.2d 286, 291 (8th

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For example, in *Kiepfer v. Beller,* 944 F. 2d 1213, 1220 (5th Cir. 1991) (Tex. law), the court affirmed a verdict for the plaintiff physician upon proof that he "had a successful referral practice . . . which showed no signs of decline," and whose "prospects for continued referrals were quite good," but who suffered "the complete loss of his referral practice [as] a proximate result of the campaign waged against him by [another doctor]," who "tortiously interfered with [the plaintiff's] ability to obtain referrals of patients from physicians in the San Antonio area." It was the plaintiff's existing business with which the defendant interfered, and with it the plaintiff's reasonable expectation of future profits. Likewise in *Drouet v. Moulton,* 245 Cal. App. 2d 667, 672, 54 Cal. Rptr. 278, 282 (1966), Moulton sold his bar to Drouet under a conditional sales contract, and then sought to collect on the contract by creating numerous disturbances at the bar, by sending people there to monitor and collect receipts, and by making false complaints to the police. The court had no trouble concluding that Drouet had stated a cause of action for tortious interference with his business: "Malicious interference with a business is a tort . . . for which general damages may be recovered to the extent of the foreseeable consequences of appellant's conduct. (*Schuler v. Bordelon,* 78 Cal. App. 2d 581[,

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Cir. 1990) (Mo. law); *Fishman v. Estate of Wirtz,* 807 F.2d 520, 546 (7th Cir. 1986) (Ill. law); *Richard Short Oil Co. v. Texaco, Inc.,* 799 F.2d 415, 419 (8th Cir. 1986) (Ark. law); *McLaurin v. Fischer,* 768 F.2d 98, 105 (6th Cir. 1985) (Ohio law); *Zippertubing Co. v. Teleflex, Inc.,* 757 F.2d 1401, 1408 (3d Cir. 1985) (N.J. law); *Aydin Corp. v. Loral Corp.,* 718 F.2d 897, 904 (9th Cir. 1983) (Cal. law); *Zions First National Bank, N.A. v. United Health Club, Inc.,* 704 F.2d 120, 125 (3d Cir. 1983) (Pa. law); *Hamro v. Shell Oil Co.,* 674 F.2d 784, 789 (9th Cir. 1982) (Cal. law); *Tose v. First Pennsylvania Bank, N.A.,* 648 F.2d 879, 898 (3d Cir.) (Pa. law), *cert. denied,* 454 U.S. 893, 102 S. Ct. 390, 70 L. Ed. 2d 208 (1981), *quoting Thomson Coal Co. v. Pike Coal Co.,* 488 Pa. 198, 209, 412 A.2d 466, 471 (1971); *Riblet Tramway Co. v. Ericksen Associates, Inc.,* 665 F. Supp. 81, 87 (D.N.H. 1987); *Buckaloo v. Johnson,* 14 Cal. 3d 815, 828-29, 122 Cal. Rptr. 745, 753, 537 P.2d 865, 873 (1975); *Greenberg v. Hollywood Turf Club,* 7 Cal. App. 3d 968, 86 Cal. Rptr. 885 (1970); *Gold v. Los Angeles Democratic League,* 49 Cal. App. 3d 365, 122 Cal. Rptr. 732 (1975); *Drouet v. Moulton,* 245 Cal. App. 2d 667, 54 Cal. Rptr. 278 (1966); *Carr v. Brown,* 395 A.2d 79, 84 (D.C.C.A. 1978); *Chemawa Country Golf, Inc. v. Wnuk,* 9 Mass. App. 506, 402 N.E.2d 1069 (1980); *Sterner v. Marathon Oil Co.,* 767 S.W.2d 686 (Tex. 1989).

177 P. 2d 959 (1947)].) These damages may include lost of profits, and injury to the value and reputation of a business."

Likewise in *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F. 2d 951, 976-77 (10th Cir.) (Kan. law), *cert. denied,* 497 U.S. 1005, 110 S. Ct. 3241, 111 L. Ed. 2d 752 (1990), the plaintiff hospital successfully prosecuted an action against Blue Cross for terminating its relationship with the plaintiff hospital, as a penalty for doing business with Blue Cross' competitors, and also to send a similar message to other hospitals; he recovered damages for the defendant's interference with the hospital's present and ***future*** Blue Cross patients. In *Whelan v. Abell,* 293 U.S. App. D.C. 267, 953 F. 2d 663, 667, 673-74, *cert. denied,* _____ U.S. _____, 113 S. Ct. 300, 121 L. Ed. 2d 223 (1992), the defendant's baseless lawsuit not only caused a venture-capital firm to withdraw the plaintiff's financing and forced the sale of another business; it also prevented the plaintiff's intended purchase of franchise rights in another business--all of which interfered with the plaintiff's "business opportunities." And in *Locricchio v. Legal Services Corp.,* 833 F. 2d 1352, 1357 (9th Cir. 1987) (Haw. law)--although Ethan Allen is correct (brief at 25-26) that the plaintiff's tortious-interference claim was insufficient because he could only allege a general loss of reputation, and thus the plaintiff's best recourse was an action for defamation--the court noted in *dictum* that a tortious-interference claim is appropriate whenever the plaintiff can allege a relationship "that has the probability of ripening into a future economic benefit to the plaintiff," based on "specific facts proving the possibility of future association."

As these and the other decisions make clear, it simply makes no sense to limit redress of tortious interference to specific, identifiable business relationships, and thus to exempt wrongful conduct which has injured or undermined an entire business. In both types of cases, the plaintiff has identifiable rights in a tangible, current asset--here the goodwill which Georgetown had built up over years of service to a base of repeat customers, which its experts

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said was an essential component of its economic viability. The jury found that Ethan Allen's advertisement was false, malicious and wrongful, and the appellate court has affirmed that finding. Even if that conduct had not caused the cancellation of a single existing order, it would be actionable as tortious interference, under Florida law and the law of every other jurisdiction. It was wrongful conduct which demonstrably destroyed an existing business, and such conduct should not go unredressed.

In addition, as we have demonstrated, in this case the plaintiff ***did*** prove that the defendant's conduct interfered with existing contractual relationships. The ensuing destruction of Ethan Allen's business was a natural and probable consequence of that interference. Under the well-settled principles of tort damages which we have reviewed above, as Judge Mishler instructed the jury, Ethan Allen was properly held liable for all of the natural and probable consequences of its wrongdoing. The plaintiff's articulation of those damages--the competence of its economic proof--already has been approved by the appellate court. Georgetown's judgment should be affirmed.

V
CONCLUSION

It is respectfully submitted that this Court should respond in the affirmative to the question certified by the United States Court of Appeals for the Eleventh Circuit, holding that in a tortious interference case, upon proper proof, a plaintiff may recover damages for the loss of goodwill based upon future sales to past customers.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 24th day of September, 1993, to: ANDREW L. FREY, ESQ., Mayer, Brown & Platt, 2000 Pennsylvania Avenue, N.W., Washington, D.C. 20006-1885; RON WEIL, ESQ., Weil, Lucio,

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Respectfully submitted,

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