IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,389

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RICHARD B. GOSSARD, *et al.*,

Appellants

vs.

ADIA SERVICES, INC.,

Appellee.

ON CERTIFICATION FROM THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Case No. 95-3305

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This is a suit for tortious interference with the non-competition provision of franchise agreements between the plaintiffs and Nursefinders, Inc. ("Nursefinders"). Gossard v. Adia Services, Inc., 922 F. Supp. 558 (M.D. Fla. 1995). Nursefinders is a nationwide franchisor of businesses which supply temporary nurses to health care providers. Id. Plaintiffs are Nursefinders franchisees in West Florida. Defendant Adia Services, Inc. ("Adia") is the parent company of Nursefinders. Id. Although the franchise agreements between plaintiffs and Nursefinders bound only Nursefinders not to compete, the trial court found that there was evidence of oral assurances given by Larry Carr, Nursefinders' founder and former owner, from which the jury could find that the parties understood the non-competition provision to extend to parents and affiliates of Nursefinders. Id., 922 F. Supp. at 560 n.1.

At the time the franchise agreements were entered into, Larry Carr controlled Nursefinders and was therefore in a position to make a non-competition promise which was binding on any parents and affiliates of Nursefinders. Subsequently, Carr sold all his stock to Adia. In making this sale, however, Carr did not request Adia to assume liability under the franchise agreements. 922 F. Supp. at 561. Plaintiffs now concede that "Adia is not a party to the franchise agreements and that the agreements do not contractually prohibit Adia from doing anything." App. Brief at 37.[1]

After its acquisition of Nursefinders, Adia acquired StarMed Staffing Corporation

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[1] That concession was necessary for their case. In Florida, as elsewhere, a party cannot be liable for interference with its own contract. United of Omaha Life Ins. Co. v. Nob Hall Associates, 450 So. 2d 536, 539 (Fla. 3d DCA 1984), rev. dism. 458 So. 2d 273 (Fla.), rev. den. 458 So. 2d 274 (Fla. 1984). That rule applies even where the party is not an original signatory, but is an agent of the original signatory or becomes liable as a successor party. McGanty v. Staudenraus, 901 P.2d 841 (Or. 1995).

("StarMed"), a business located in Tampa, Florida (outside of any of the plaintiffs' exclusive territories) which recruited nurses nationally and internationally to travel to areas where their services are needed. R2/36/8. StarMed was already doing business in West Florida prior to its acquisition by Adia. Plaintiffs allege, however, that after the acquisition StarMed's management changed and its advertisements improved, and its business in West Florida increased. App. Brief at 10-11. In this suit, plaintiffs seek to recover all the revenues StarMed made after its acquisition by Adia in the territories of West Florida covered by their Nursefinders franchises, whether or not those revenues resulted from better management and increased advertising. Gossard v. Adia Services, Inc., supra, 922 F. Supp. at 562.

Following a jury verdict for the plaintiffs, the trial judge entered judgment as a matter of law for the defendant. Gossard v. Adia Services, Inc., supra. The district court concluded that "[l]iability for the violation of [the non-competition] promise should fall on Nursefinders, the party that made the promise, and not upon the defendant, a party that gave no such undertaking." Id. at 561. The district court noted that "Nursefinders was in a position to protect its promise when it sold out to the defendant, but it did not do so." Id. Alternatively, the district court held that plaintiffs had not proved damages, because (1) "Star-Med had substantial business in the plaintiffs' territories prior to its purchase by Adia, and there is absolutely no reason to think the plaintiffs would have gained any of that business in the absence of the purchase," and (2) "because of the strong competition within the plaintiffs' territories in the field of temporary nursing help, it is uncertain how much, if any, of Star-Med's business the plaintiffs would have acquired if Star-Med, instead of being purchased, had simply closed its doors." Id. at 562.[2]

[2] Within plaintiffs' franchise territories there were at least 35 temporary staffing agencies, including some owned by large national and international companies that "compete very fiercely." R31/238/133. A nurse recruiter testified that her hospital used seven different

Plaintiffs appealed on both the liability and the damages issues. The Eleventh Circuit's decision addresses the liability issue only. Recognizing that under the Restatement, a person may be liable for interference with a contract between the plaintiff and a third person by "inducing or otherwise causing" the third person not to perform, the Eleventh Circuit found that "[t]here is no evidence in the record which suggests that Adia 'induced' Nursefinders to breach the franchise agreement." Gossard v. Adia Services, Inc., 120 F.3d 1229, 1231 (11th Cir. 1997). It also concluded that there was no case law in Florida which addresses the issue of whether, in the absence of inducement, there would be liability in the situation of competition between two subsidiaries of the same parent corporation, one of which has franchises with a non-competition covenant. Id., 120 F.3d at 1231, n.1. After briefing and argument, the Eleventh Circuit certified the following question to this Court:

> WHETHER FLORIDA LAW RECOGNIZES A CLAIM FOR TORTIOUS INTERFERENCE AGAINST A CORPORATION WHICH PURCHASES AS A SUBSIDIARY A CORPORATION WHICH HAS A PREEXISTING OBLIGATION NOT TO COMPETE AGAINST ITS FRANCHISEE, PLAINTIFF HEREIN, AND SUBSEQUENTLY PURCHASES ANOTHER SUBSIDIARY WHICH IS IN DIRECT COMPETITION WITH THE FRANCHISEE.

Gossard v. Adia Services, Inc., supra, 120 F.3d at 1231.

Depending on how this Court answers the certified question, the Eleventh Circuit may have to address additional contentions of the parties when the case returns to it. In the Eleventh Circuit, Adia contended that it was not a stranger to the franchise agreements (because, under plaintiffs' theory of the case, the agreements governed Adia's conduct) and thus is not liable under Florida law, which holds that only strangers to a contract can be liable for interference; that

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local agencies. R31/238/87-88, 95-96. In addition, there were 11 travel nurse companies (including StarMed) which advertised in nursing magazines. R31/238/41-43.

parol evidence was improperly admitted to establish that the agreements extended to Adia; and that the district court correctly ruled that there was no basis in the evidence for an award of damages. The Eleventh Circuit may also have to address plaintiffs' alternative contentions that they were entitled to a new trial on damages and that the district court erred in dismissing their punitive damages claim, as well as Adia's alternative contention that any new trial should be on liability as well as damages, in view of the district court's erroneous instruction on the burden of proof.

SUMMARY OF ARGUMENT

If Adia and Nursefinders were unrelated companies and Adia had entered the Florida market, Adia could not be held liable for tortious interference with contract even if it knew that Nursefinders had made a broad promise to its franchisees that there would be no competition from third parties. That would be true even if Adia knew of the broad non-competition clause; knew that its conduct would cause a breach of contract and would damage the franchisees; and had a specific intent to cause competitive damage to the Nursefinders franchisees. In these circumstances, in the absence of a parent-subsidiary relationship between Adia and Nursefinders, a jury would not have been permitted to impose liability.

The Eleventh Circuit recognized that the parent-subsidiary relationship is the core issue in the case. The question certified by the Eleventh Circuit asks whether the parent-subsidiary relationship, which was created when Adia purchased Nursefinders, imposed a non-competition obligation on Adia that did not previously exist, <u>even though Adia did not assume liability under the franchise agreements when it purchased Nursefinders</u> (as it might have done).

In Point I, we show that, in the absence of a parent-subsidiary relationship, a party is free to take actions which advance its own commercial interests -- even where it knows that such actions will render competitors or others unable to perform their contracts -- so long as the party does not breach its own contractual obligations or induce others to breach theirs. Adia did not assume the franchise agreements when it acquired Nursefinders, and the Eleventh Circuit correctly found that there was no evidence that Adia induced Nursefinders to breach its franchise agreements. Accordingly, unless the parent-subsidiary relationship between Adia and Nursefinders created an obligation under tort law that did not previously exist, Adia remained free after its acquisition of Nursefinders, as it had been before, to compete with Nursefinders in the Florida market.

In Point II, we show that the parent-subsidiary relationship between Adia and Nursefinders did not impose liability for tortious interference which would not otherwise exist. When it became the controlling shareholder of Nursefinders, Adia may have assumed a fiduciary obligation to operate Nursefinders for the benefit of other Nursefinders shareholders (if there were any) and creditors. But there is no evidence that Adia violated that obligation. Adia did not cause Nursefinders to do anything to help StarMed compete in Florida (such as, for example, letting StarMed use its customer lists or its Nursefinders brand name). Everything Adia is alleged to have done was through its StarMed subsidiary. The fiduciary duty of a controlling shareholder is not to misuse its position of control to cause the controlled corporation to take actions contrary to the interest of other stockholders or creditors. There is, however, no authority to support plaintiffs' position that Adia, as a controlling shareholder of Nursefinders, had a fiduciary duty not to allow other companies it might own to compete with Nursefinders.

Moreover, even if Adia had caused Nursefinders to take action which facilitated StarMed's competitive entry into Florida, that would not violate Adia's fiduciary duty in the absence of evidence that minority shareholders were damaged or creditors were rendered unable to collect on claims against Nursefinders. Here, there were no minority shareholders of Nursefinders, and there is no showing that Nursefinders lacks assets to satisfy its franchisees' claims.

Finally, in Point III, we respond to plaintiffs' contention that Adia was guilty of other wrongful conduct which justifies imposition of interference liability. Primarily, plaintiffs argue that Adia is guilty of misrepresentations, because it was allegedly less than candid when the Nursefinders franchisees protested to it about the StarMed acquisition. Plaintiffs also argue that Adia had a predatory intent to achieve market dominance. Since these arguments do not involve the parent-subsidiary issue that was the subject of the certified question, and involve factual matters that were also before the Eleventh Circuit, issues relating to other alleged wrongful conduct need not be addressed by this Court.

In any event, the additional contentions plaintiffs raise do not present a sufficient alternative basis for liability. Had Adia and Nursefinders been independent companies, Adia would have had no obligation to inform Nursefinders of its competitive plans in West Florida. Nor would there have been a basis for charging Adia with predatory conduct in violation of the antitrust laws. Plaintiffs' case must rise or fall on whether the parent-subsidiary relationship between Adia and Nursefinders created liability that would not otherwise exist. As we demonstrate in Point II, it did not.

ARGUMENT

I. Before Adia became Nursefinders' parent, a jury would not have been permitted to impose liability on Adia for interfering with Nursefinders' franchise contracts, in the absence of evidence that Adia induced Nursefinders to breach the contracts, or committed some other, independently wrongful conduct.

In the absence of a parent-subsidiary relationship, Adia could not be held liable for interfering with a non-competition agreement between Nursefinders and its franchisees, unless

Adia induced Nursefinders itself to breach the agreement (which the Eleventh Circuit found it did not do) or committed some other independently wrongful conduct. For example, as the trial court explained, even if GM "promises its dealers in Pinellas County that only GM cars would be sold in that county [and] sends a copy of that agreement to Ford . . . Ford cannot be liable for intentional interference with contract if it sells its cars in Pinellas County contrary to GM's promise." Gossard v. Adia Services, Inc., supra, 922 F. Supp. at 561. That would be true even if Ford knew that its actions would "cause" GM to be unable to perform its non- competition promise.

The case law in Florida and elsewhere supports the trial court's conclusion. Parties may take legitimate steps to advance their own commercial interests, even though the result may be to cause competitors or others to be unable to perform their contracts with third parties. The case law simply does not support plaintiffs' argument that a person may be held liable for interference with contract every time he or she takes a legitimate commercial action knowing that it might "otherwise cause" someone else to be unable to perform a contract with a third party.

To be sure, competition or other legitimate commercial interests do not justify inducing another person to commit a breach of contract. But, as the Eleventh Circuit found, Adia did not induce Nursefinders to breach its franchise contract. At most, Adia failed to conduct its affairs in a manner which made it possible for Nursefinders to fulfill its franchise contracts. Tort law does not impose a duty on firms to conduct their business in a manner which makes it possible for other persons to fulfill their contracts.

1. Florida law recognizes that in the ordinary course of business, parties may lawfully take actions that render other persons unable to fulfill their contracts, without running

the risk of liability for tortious interference with contract. For example, creditors may take lawful steps to collect their debts, even where a foreseeable result is that the debtor cannot fulfill its contracts with third parties. Ethyl Corp. v. Balter, 386 So. 2d 1220 (Fla. 2d DCA 1980), rev. denied, 392 So. 2d 1371 (Fla.), cert. denied, 452 U.S. 955 (1981); Peninsula Fed. Sav. & Loan Ass'n v. DKH Properties, 616 So. 2d 1070 (Fla. 3d DCA), rev. denied, 626 So. 2d 204 (1993). A landlord may disapprove a new tenant although that makes an existing tenant unable to perform her contract to transfer the lease; and a wholesaler may disapprove a new distributor, although that makes it impossible for an existing distributor to perform its contract to sell its business to a third party. Serafino v. Palm Terrace Apartments, Inc., 343 So. 2d 851 (Fla. DCA 3d, 1976); Genet Co. v. Annheuser-Busch, Inc., 498 So. 2d 683 (Fla. 3d DCA 1986).

Cases from other jurisdictions agree. A store may cancel its lease of space in a shopping center where the developer fails to perform, even though it knows its action will cause the developer to default under the ground lease. Hibbs v. K-Mart Corp., 870 F.2d 435 (8th Cir. 1989) (Iowa law). A bank may offset against a customer's account to collect a legitimate debt, even though it knows its action will cause the customer to default on contracts with third parties. Berger v. Cas' Feed Store, Inc., 543 N.W.2d 597, 599 (Iowa, 1996). Other cases are to the same effect.[3]

2. One commercial interest that parties may lawfully advance is their interest in competition -- even if the result is to render other competitors unwilling or unable to perform

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[3] Nationsbank v. Southtrust Bank of Georgia, 487 S.E.2d 701 (Ga. App. 1997) (lender may interfere with borrower's contract to transfer assets to a third party in order to protect its security); Birkenwald Distrib. Co. v. Heublein, Inc., 776 P.2d 721 (Wash. App. 1989) (wine distributor may interfere with transfer of distributorship to distributor which it disapproves); Ran Corp. v. Hudesman, 823 P.2d 646, 648 (Alaska 1991) (landlord may interfere with a prospective or actual lease assignment).

their contracts with third persons. For example, "A may advertise his goods for sale at such a low rate as to result in a breach of contract by B, who was under contract with C, to buy at a higher price, but that would not make A liable to C." Macklin v. Robert Logan Assocs., 639 A.2d 112, 121 (Md. 1994). Other cases agree. Kand Med., Inc. v. Freund Med. Prods. Inc., 963 F.2d 125, 128-29 (6th Cir. 1992) (Ohio law); Allen & O'Hara, Inc. v. Barrett Wrecking, Inc., 898 F.2d 512, 516-17 (7th Cir. 1990) (Wisconsin law). If a lender may take lawful steps to protect its collateral despite adverse impacts on the borrower's ability to perform contracts with third parties (Ethyl Corp. v. Balter, supra), and a manufacturer may take lawful steps to protect its interest in selecting distributors despite adverse impacts on a distributor's contract to transfer its business (Genet Co. v. Annheuser-Busch, Inc., supra), then a company in the temporary services (or any other) business may take lawful steps to enter a new market despite adverse impacts on competing firms. The law of non-interference is not a device for protecting markets from otherwise lawful competition.

Of course, the competition must be lawful. If it is not, the jury may find interference. For example, in one case plaintiffs cite, the defendants were still employed by plaintiff when they lured customers away by surreptitiously starting a competing business in violation of their fiduciary duty to their employer, and after resigning their employment continued to do so in violation of a non-competition covenant. In those circumstances, the competition was not lawful, and a jury was permitted to find that defendants had wrongfully interfered with plaintiff's business relations with its customers. Insurance Field Services v. White & White Inspection, 384 So. 2d 303 (Fla. 5th DCA 1980). In the present case, however, Adia was not bound by a non-competition covenant with plaintiffs; Adia did not induce Nursefinders to violate its non-competition covenant with plaintiffs; and (as we show in Point II) Adia did not violate a fiduciary duty to Nursefinders.

3. Under the Restatement, a person who induces or "otherwise causes" another to breach a contract may be liable for interference. Gossard v. Adia Services, Inc., supra, 120 F.3d at 1231, quoting Restatement of Torts (Second), § 766.[4] Plaintiffs argue that "otherwise causes" should be read in its broadest sense, to require that any person whose conduct foreseeably results in another person being unable to perform a contract to be held liable, unless he can prove to a jury that the conduct was justified. App. Brief 25, 28. Under plaintiffs' argument, a defendant is liable for actions "destroying or diminishing the value of any benefits" under another person's contract (App. Brief 32), or actions which "make [another persons's] contract rights less valuable or contract obligations more burdensome." (App. Brief 25). Therefore, plaintiffs argue, Adia should be found liable here because its actions "damaged [Nursefinders'] franchise relationship[s]" or "detrimentally affect[ed] or destroy[ed] the subject matter of [the franchise agreements]." App. Brief 3, 22, 24, 25.

But plaintiffs' sweeping reading of the Restatement, as well as the other tests plaintiffs propose, suffers from the defect that they seek to prohibit plainly lawful commercial conduct. Under plaintiffs' tests, a bank could not protect its collateral, and a manufacturer could not choose its distributors, if it knew that third-party contracts might be affected. Under plaintiffs' tests, the entry of Ford into the Florida market in the trial court's example -- which in the broadest sense "otherwise causes" a breach of GM's dealer contracts -- would be subject to tort liability. Indeed, under plaintiffs' reasoning, Ford could be liable for entering the Florida market even if the GM dealer contracts had no non-competition clause, simply because Ford's presence

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[4] Plaintiffs also cite the Florida Bar Standard Jury Instructions, which repeat the Restatement language. App. Brief 23.

in the market would "diminish[] the value of any benefits" under the GM dealer contracts; or would make GM dealerships "less valuable;" or make it "more burdensome" for GM dealers to meet their annual sales targets. App. Brief 25, 32. That cannot be the law.

Plaintiffs also argue that Adia is liable because StarMed's competition was "directed against the subject matter" of the Nursefinder franchise agreements, "directly affect[ed] the res or property rights" under the agreements, "damaged the franchise relationship," or "detrimentally affect[ed] or destroy[ed] the subject matter of the [franchise agreements] such that a party cannot keep his promises thereunder." App. Brief 3, 22, 24, 25. Exactly the same statements might also be made about the lender which acts to protect its collateral against a borrower which attempts to transfer assets to a third party, or a manufacturer which acts to protect its choice of distributors. One could equally well argue that the effect on GM dealer agreements of Ford's entry into the Florida market would be to "directly affect or destroy the subject matter" of the non-competition clauses in the GM dealer contracts. Yet all concede that neither Florida nor any other state would impose liability in that situation. It simply is not the law that a company can be held liable because it knows that the effect of its lawful competitive activities will be to "damage" or "detrimentally affect" contracts that other market participants may have with third parties.[5]

Plaintiffs' arguments are neither compelled by the Restatement, nor consistent with the

[5] The same defect is apparent in the tests for liability proposed by Judge Kovachevich. Judge Kovachevich denied Adia's motion for summary judgment because there was evidence that "Defendant knew that StarMed's business was incompatible with Nursefinders' business," that Adia "inten[ded] to interfere" and did so for its "own business advantage," and that "loss of business" ensued. App. Brief 18. So also in the GM-Ford example, Ford knew its business was "incompatible" with GM's; Ford "intended to interfere" with GM's dealer contracts; Ford entered the Florida market for its "own business advantage;" and GM's dealers in Florida suffered "loss of business."

case law. The Restatement itself, in giving examples of what constitutes "otherwise causing" a breach of contract, describes situations in which the defendant was engaged in independently wrongful conduct -- not in lawful competition: "The phrase 'otherwise causing' refers to the situations in which A leaves B no choice, as, for example, when A imprisons or commits such a battery upon B that he cannot perform his contract with C, or when A destroys the goods that B is about to deliver to C. This is also the case when performance by B of his contract with C necessarily depends upon the prior performance by A of his contract with B and A fails to perform in order to disable B from performing for C." Restatement, supra, § 766 comment h.

Plaintiffs argue that these examples are not limiting, and that the principle applies even to conduct that is perfectly lawful. Under plaintiffs' argument, the jury may find causation whenever there is a foreseeable cause-in-fact, regardless of whether the conduct was legitimate. App. Br. 24-25. But they cite no cases to this effect: every case they cite which sustains jury findings of liability involves a defendant which either induced a party to the contract to breach it (which the Eleventh Circuit found did not occur here),[6] or committed independently wrongful

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[6] Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So.2d 812 (Fla. 1994) (furniture manufacturer published ads, urging customers of plaintiff with unfilled orders to breach their contracts and take their business to defendants' new outlets); GHK Associates v. Mayer Group, Inc., 274 Cal. Rptr. 168 (Ct. App. 1990) (defendants induced company they controlled to breach contract with plaintiff); Harvey Corp. v. Universal Equipment Co., 29 So. 2d 700 (Fla. 1947) (defendant induced landlord to refuse to allow tenant to possess leased property); United Yacht Brokers, Inc. v. Gillespie, 377 So. 2d 668 (Fla. 1979) (seller induced buyer to refuse to pay his broker's commission); Monco Enterprises, Inc. v. Ziebart Corp., 673 So. 2d 491 (Fla. 1st DCA 1996) (franchisor induced prospective purchaser from franchisee not to complete the transaction); Frank Coulson, Inc. - Buick v. General Motors Corp., 488 F.2d 202 (5th Cir. 1974) (shareholder induced GM to breach its contract with a dealer); Chipley v. Atkinson, 1 So. 934 (Fla. 1887) (defendant induced employer to terminate plaintiff's employment contract, by refusing to allow plaintiff's employer to use the facilities of defendant's employer (the local railroad) unless plaintiff was fired).

acts directed at blocking another's performance of its contract (as in the Restatement examples).[7]

4. Plaintiffs argue that the lawfulness of defendant's conduct is relevant only on the issue of justification, on which the defendant bears the burden of proof and on which the jury's findings are conclusive. App. Brief 24, 41. But under this argument, Ford could be required to prove to a jury -- in the example posited by the trial court -- that its entry into the Florida market was "justified" despite the damage inflicted on GM dealers.

That is not the law. In all the cases we have cited, which hold that businesses may take lawful actions to protect their commercial interests (including competitive interests) despite adverse effects on others' ability to perform their contracts, the courts have upheld summary judgment or judgments n.o.v. for the defendants. Plaintiffs were not permitted to take to the jury the issue of whether a party advancing a legitimate competitive or other commercial interest

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[7] Tamiami Trail Tours, Inc. v. Cotton, 463 So.2d 1126 (Fla. 1985) (assault and battery); Rabun v. Kimberley-Clark Corp., 678 F.2d 1053 (11th Cir. 1982) (defendant made false representations to plaintiff's creditors, to induce them to repossess equipment on which payments were current); G.M. Brod & Co., Inc. v. U.S. Home Corp., 759 F.2d 1526 (11th Cir. 1985) (defendant breached its management contract with defendant, as part of a scheme to drive it out of business and take over its work force and business); Piedmont Cotton Mills v. H.W. Ivey & Co., 137 S.E.2d 528 (Ga. App. 1964) (defendant made plaintiff's performance of a construction contract more expensive by going to the construction site and physically destroying a bridge plaintiff had built as part of the contract); Franklin v. Brown, 159 So. 2d 893 (Fla. 1st DCA 1964) (defendant tricked seller of real estate into breaching his contract to pay broker's commission, by buying the real estate through a "straw man" to conceal the fact that the sale was to a person the broker had contacted); Gregg v. U.S. Indus., Inc., 887 F.2d 1462 (11th Cir. 1989) (defendant wrongfully withheld dividends payable on its shares, causing shareholder to breach an agreement pledging the shares); Tippett v. Hart, 497 S.W.2d 606 (Tex. Civ. App.) writ ref'd n.r.e., So. 1 S.W.2d 874 (Tex. 1973) (defendant committed trespass by allowing his cattle to graze on plaintiff's land, causing a breach of plaintiff's contract with the government not to allow grazing); In re Knickerbocker, 827 F.2d 281, 286-88 (8th Cir. 1987) (defendant bank breached its agreement with borrower to disburse funds to the borrower's landlord, causing borrower to violate the lease); Pelton v. Markegard, 586 P.2d 306 (Mont. 1978) (defendant paid its creditor with a non-negotiable check, making it impossible for him to pay under his contract with the plaintiff); In re Sunrise Sec. Lit., 793 F. Supp. 1306, 1325 (E.D. Pa. 1992) (defendant participated in concealment of company's financial condition).

should be liable for tortious interference because a foreseeable consequence was that a third party would be unable to perform its contracts.[8]

The reason is simple. If a competitor entering a new market, or a lender protecting its collateral, or any other business person otherwise complying with the law, may be forced to prove to a jury that its conduct was "justified" at the behest of anyone who has lost money as a result, then tort law would become a vehicle for chilling a wide range of legitimate commercial conduct. That result is especially to be avoided where the conduct at issue is otherwise lawful competition, since "[t]he policy of the common law has always been in favor of free competition." U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 443 S.E.2d 833, 836 (Ga. 1994).

Plaintiffs correctly point out that when the defendant induces a third party to breach a contract, competition is not a valid justification. App. Brief 46, citing Morsani v. Major League Baseball, 663 So. 2d 653, 657 (Fla. 2d DCA 1995), rev. denied, 673 So. 2d 29 (Fla. 1996); Yoder v. Shell Oil Co., 405 So. 2d 743 (Fla. 2d DCA 1981), rev. denied, 412 So. 2d 470 (Fla. 1982). That is because "inducing breach of contract [is] itself wrongful conduct, and therefore actionable." Arntz Contracting Co. v. St. Paul Fire and Marine Ins. Co., 54 Cal. Rptr. 2d 888, 895 n.2 (Ct. App. 1996). "[I]t is unlawful for a party to a contract to break it, . . . and therefore

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8 Ethyl Corp. v. Balter, supra (judgment for plaintiff on jury verdict reversed); Peninsula Fed. Sav. & Loan Ass'n v. DKH Properties, supra (judgment for plaintiff reversed); Serafino v. Palm Terrace Apartments, Inc., supra (judgment for plaintiff reversed); Genet Co. v. Annheuser-Busch, Inc., supra (summary judgment for defendant affirmed); Hibbs v. K-Mart Corp., supra (judgment n.o.v. for defendant affirmed); Berger v. Cas' Food Store, Inc., supra (judgment on jury verdict for plaintiff reversed); Nationsbank v. Southtrust Bank of Georgia, supra (summary judgment for defendant affirmed); Birkenwald Distrib. Co. v. Heublein, Inc., supra (dismissal of complaint affirmed); Ran Corp. v. Hudesman, supra (summary judgment for defendant affirmed); Macklin v. Robert Logan Assocs., supra (judgment for plaintiff on jury verdict reversed); Kand Med. v. Freund Med. Prods., supra (summary judgment for defendant affirmed); Allen & O'Hara, Inc. v. Barrett Wrecking, Inc., supra (judgment n.o.v. for defendant affirmed).

when a third party procures or induces him to do so, he is causing him to do an unlawful act." Macklin v. Robert Logan Assocs., supra, 639 A.2d at 120, quoting Knickerbocker Ice Co. v. Gardiner Dairy Co., 69 A. 405, 408 (Md. 1908). Competition does not justify "causing [another] to do an unlawful act."

But Adia did not "caus[e] [Nursefinders] to do an unlawful act." All Adia did was to engage in lawful competition. Lawful competition does not become tortious simply because it may hinder other persons' performance of their contracts.

While the jury found that Adia's competition in the Florida market violated a commitment Nursefinders made prior to its acquisition by Adia, plaintiffs concede that Nursefinders' commitment was not binding on Adia. App. Brief at 37. Basically, plaintiffs are attempting to use an "interference" theory to remedy the failure of Nursefinders' former owner to require Adia to assume the franchise contracts when he sold his stock to Adia. This they may not do. Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228, 1235 (Ind. 1994) (purchaser of corporate assets who does not assume seller's contracts may discharge employee without liability for interfering with his employment contract with the seller).

Nor is the result changed by plaintiffs' argument that, in addition to making Nursefinders unable to perform its non-competition promise, StarMed's competition also made Nursefinders unable to perform its covenant of good faith and fair dealing. App. Brief 22-23, 30. The covenant of good faith and fair dealing is an "implied provision" of the franchise contract. Burger King Corp. v. Weaver, 798 F. Supp. 684, 688 (S.D. Fla. 1992) (applying Florida law). As such, the covenant binds the parties to the contract. But Adia was not a party to the contract. Adia would only be liable for interference with Nursefinders' ability to perform its covenant of good faith and fair dealing if it were also liable for interference with Nursefinders' ability to perform its non-competition promise. But it is not. As such, the covenant of good faith and fair dealing adds nothing to plaintiffs' case.[9]

5. The Restatement provides that anyone who "intentionally and improperly interferes with the performance of a contract" is subject to liability, subject to proof of justification or privilege. Restatement of Torts (Second), § 766 (emphasis added). The weight of authority, which follows the Restatement, recognizes that intentional interference with a contract is not tortious unless the action is also "improper." United Truck Leasing Corp. v. Geltman, 551 N.E.2d 20 (Mass. 1990) ("more than intentional interference must be established. 'Improperly' is the word used in the Restatement . . . . We accept it . . . as an element . . . in the proof of intentional interference with performance of a contract.").[10] In the absence of a parent-subsidiary

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[9] Nursefinders itself may have been liable for violating the covenant of good faith and fair dealing, if it first promised its franchisees that they would not face competition from any parent or affiliate, and then agreed to being taken over by Adia without a commitment from the new parent that it and its other subsidiaries would be bound by the non-competition clause.

[10] "A claim of tort liability for intentional interference with a contract is not made out unless the interference resulting in injury to another is wrong by some measure beyond the fact of the interference itself." Schinkel v. Maxi-Holding, Inc., 565 N.E.2d 1219, 1225 (Mass. App. Ct. 1991). See also Fisher v. Jones, 844 S.W.2d 954, 959 (Ark. 1993) ("For an interference to be actionable, it must be improper."); Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1043 (Ariz. 1985) (plaintiff "must show that the defendant acted improperly"); Westfield Dev. Co. v. Rifle Investment Assocs., 786 P.2d 1112, 1117-18 (Colo. 1990) ("The interference must be both intentional and improper."); Blake v. Levy, 464 A.2d 52, 54-55 (Conn. 1983) (conduct must be "in fact tortious"); HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc., 545 N.E.2d 672, 676 (Ill. 1989) (interference must be "unjustified" and "wrongful"); Winkler v. V.G. Reed & Sons, supra, 638 N.E.2d at 1235 ("absence of justification" is one element of the interference tort); Hill v. Winnebago Indus., Inc., 522 N.W.2d 326, 328-29 (Iowa App. 1994) ("The interference with a contractual relationship must be both intentional and improper."); Inventive Music Ltd. v. Cohen, 617 F.2d 29, 34 (3d Cir. 1980) (conduct must be "transgressive of generally accepted standards of common morality or of law") (applying New Jersey law); Montrone v. Maxfield, 449 A.2d 1216, 1217 (N.H. 1982) (defendant must have acted "wrongfully"); Morrow Dev. Co. v. American Bank and Trust Co., 875 P.2d 411, 416 (Okla. 1994) (plaintiff must prove that the interference was "wrongful" and "neither justified, privileged nor excusable").

relationship, Adia's competition with Nursefinders' franchisees would have been no more "improper" than Ford's competition with GM franchisees in the example posited by the trial court. In neither case would a jury have been permitted to impose liability.

Some courts have reasoned that a showing of "improper" conduct, while required for interference with prospective economic relations, should not be required for a prima facie case of interference with an existing contract. Those courts argue that, because the parties to an existing contract have a "legal assurance," they deserve a higher degree of protection than parties who have a mere expectancy of a future contract. Duggin v. Adams, 360 S.E.2d 832, 836 (Va. 1987); Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 750 (Cal. 1995); Posa, Inc. v. Miller Brewing Co., 642 F. Supp. 1198, 1204 (E.D.N.Y. 1986); NBT Bancorp. Inc. v. Fleet/Norstar Financial Group, Inc., 664 N.E.2d 492, 496 (N.Y. 1996).

But that reasoning has never been applied to a case where the most the defendant did was to make it impossible for another person to perform a contract.[11] The "legal assurance" that parties to a contract have is protection against breaches by other parties to the contract. A party to a contract has no legal assurance that the other party's ability to perform will not be undermined by a third party's lawful actions. The trial court ruled that Nursefinders' franchisees had a legal assurance that Nursefinders would not breach their franchise agreements. But they had no legal assurance that third parties not bound by the agreement would not take otherwise lawful action which might affect Nursefinders' ability to perform.

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[11] In NBT Bancorp., supra, relied on by plaintiffs, the defendant actively induced the Board of a takeover target not to complete a takeover transaction with plaintiff. The court sustained dismissal of the complaint because there was no existing contract. The case did not present the issue of whether, if there had been a breach, defendant could have been liable for activities which did not constitute inducement.

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Recognizing that the broad tests they propose are not a valid basis for liability, plaintiffs argue that Adia's conduct was wrongful or unlawful, and thus cannot claim the protection the law confers on legitimate competition. Plaintiffs make basically two contentions. First, they argue that Adia's conduct was wrongful because, as the controlling shareholder of Nursefinders, it had a fiduciary duty not to compete with it. According to plaintiffs, the parent-subsidiary relationship between Adia and Nursefinders makes this case different from the Ford-GM example posited by the trial court. We discuss that contention in Point II.

Next, plaintiffs contend that Adia did not deal with the Nursefinders franchisees in an open, above-board fashion when it first purchased StarMed and later sold it. In addition, plaintiffs contend, Adia harbored a predatory intent to devalue the Nursefinders franchises so it could later buy them and achieve market dominance. We discuss these contentions in Point III. As previously observed, the issues discussed in Point III are outside the scope of the question certified to this Court, and need not be addressed by this Court.

II. The parent-subsidiary relationship between Adia and Nursefinders does not impose a non-interference tort liability on Adia that would not otherwise exist.

Plaintiffs' principal argument is that when Adia purchased Nursefinders, it assumed a fiduciary obligation not to compete with Nursefinders. By purchasing StarMed, plaintiffs argue, Adia breached that obligation. Accordingly, plaintiffs assert that Adia's conduct was "improper," and subjected it to liability for damage resulting from Nursefinders' inability to perform the non-competition covenant in its franchise agreements. App. Brief 31-32, 34-36, 47.

Plaintiffs' "fiduciary duty" theory has no support in the case law, and would have radical results if adopted. Indeed, adoption of plaintiffs' theory would force a dramatic change on the manner in which many corporations operating through multiple subsidiaries do business. When Adia became the sole shareholder of Nursefinders, it may have assumed a fiduciary duty to conduct Nursefinder's business for the benefit of that company. But Adia did not assume a fiduciary duty to conduct the business of its other subsidiaries for Nursefinders' benefit. It has never been the law that companies operating through multiple subsidiaries have a fiduciary duty not to allow any subsidiary to conduct its business in a way that causes competitive damage to another subsidiary, or that otherwise interferes with the ability of another subsidiary to perform its contracts.

There is no allegation in this case, and no evidence was presented at trial, that Adia caused Nursefinders to do anything to benefit Adia and harm Nursefinder franchisees -- as, for example, licensing StarMed to use the "Nursefinders" brand name, or causing Nursefinders franchisees not to supply nurses to hospitals where StarMed was seeking a contract. Even if Adia had assumed a fiduciary duty not to engage in that type of self-dealing, it did not assume a duty to restrict the activities of its other subsidiaries.

The cases plaintiffs cite (App. Brief 34-35 and n.8) confirm that in Florida, as elsewhere, the fiduciary duty of controlling shareholders applies when they "deal[] with the corporations they control[]." Garner v. Pearson, 545 F. Supp. 549, 558 (M.D. Fla. 1982) (emphasis added). Majority shareholders may not "use their control for ulterior purposes," KDT Indus., Inc. v. Home Ins. Co., 603 F. Supp. 861, 868 (D. Mass. 1985) (emphasis added), or "misuse [their] power" over the corporation they control. United States v. Byrum, 408 U.S. 125, 137-38 (1972) (emphasis added). Majority shareholders have a fiduciary duty "in the exercise of powers that are theirs by virtue of their position." Jones v. H.F. Ahmanson & Co., 460 P.2d 464, 472 (Cal.

1969) (emphasis added).[12]

There is no allegation or evidence here that Adia "misused its power" over Nursefinders, or engaged in "dealings with Nursefinders" that should be subject to rigorous scrutiny. The entire thrust of plaintiffs' case is directed only at the actions Adia took through StarMed. But whatever role Adia played in StarMed's management was not the exercise of powers it had "by virtue of its position" as the controlling stockholder of Nursefinders.

If there were evidence that Adia had used its position as controlling shareholder of Nursefinders to cause Nursefinders to "pull its competitive punches" in areas where StarMed was competing; or to cause Nursefinders to give StarMed access to its customer lists; or to cause Nursefinders to license StarMed to use the Nursefinder's brand name, then this might be a different case. In such circumstances, plaintiffs might argue that Adia had misused its position as controlling stockholder of Nursefinders to benefit StarMed -- by running Nursefinders for StarMed's benefit rather than for Nursefinders' benefit. But there is no such evidence here, and that is emphatically not the case.

Plaintiffs have cited a plethora of cases on the fiduciary duty of majority shareholders and other corporate insiders. App. Brief 34-35, 40 n.11, 47. In all of them, however, the majority shareholder or other insider engaged in some form of self-dealing or other misuse of his or her controlling position. For example, in the cases principally relied upon by plaintiffs, the controlling shareholder used his or her dominant position to strip the controlled corporation of

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[12] The leading Supreme Court decision states that when controlling shareholders' "contracts or engagements with the corporation" are challenged, the controlling shareholders have the burden of justification. Pepper v. Litton, 308 U.S. 295, 306 (1939) (emphasis added). Corporate insiders assume a fiduciary duty when they undertake to "conduct, manage, or direct the corporation's affairs." United States v. Byrum, supra, 408 U.S. at 137 n.11 (emphasis added).

assets or otherwise to obtain a preferred position vis-a-vis creditors.[13] In other cases plaintiffs cite, controlling shareholders otherwise misused their controlling position to deal with the controlled corporation for their own personal benefit to the detriment of other shareholders or creditors.[14] Those cases are irrelevant here, because none of them holds that a controlling shareholder has a fiduciary to conduct the affairs of its other companies in a manner that benefits the controlled company's interests. There is simply nothing to support plaintiff's contention that Adia had a fiduciary duty to conduct StarMed's business in a manner beneficial to Nursefinders.

Plaintiffs also cite several cases in which controlling shareholders, or other corporate

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[13] Pepper v. Litton, supra, 308 U.S. 295 (controlling shareholder got corporation to confess judgment in his favor, as part of scheme to deprive company of assets to meet a claim); Angle v. Chicago, St. Paul Minn. & Omaha R. Co., 151 U.S. 1, 15 (1894) (sole shareholder "took advantage of its position and powers" to strip the company of its assets); In re N&D Properties, Inc., 799 F.2d 726 (11th Cir. 1986) (controlling shareholder used her position to obtain lien on corporate assets ahead of other creditors); Allied Indus. Int'l v. AGFA-Gevaert, Inc., 688 F. Supp. 1516, 1521 (S.D. Fla. 1988) (controlling shareholder transferred assets out of the corporation to defeat creditors); United States v. Byrum, supra, 408 U.S. 125 (same); Superintendent of Ins. v. Bankers Life & Gas. Co., 404 U.S. 6 (1971) (same); Bayliss v. Rood, 424 F.2d 142 (4th Cir. 1970) (same); Garner v. Pearson, 545 F. Supp. 549 (M.D. Fla. 1986) (controlling shareholder used corporate funds to buy stock and converted stock, to defeat creditors); Brown v. Presbyterian Ministers Fund , 484 F.2d 998 (3d Cir. 1973) (insider purchased corporate asset at a discount); KDT Indus. v. Home Ins., supra, 603 F. Supp. 861 (insiders caused corporation to purchase assets from another company they controlled); In re Jackson, 141 B.R. 909 (Bankr. N.D. Tex. 1992)(insiders caused company to transfer assets to proprietorship they owned); In re Tanner's Transfer & Storage of Va., 22 B.R. 24 (Bankr. E.D. Va. 1982) (insider caused insolvent corporation to prefer some creditors over others).

[14] First Nat'l Bank of LaMarque v. Smith, 436 F. Supp. 824 (S.D. Tex. 1977), modified on other grounds, 610 F.2d 1258 (5th Cir. 1980) (diversion of corporate assets for personal benefit); Bailey v. Meister Brau, Inc., 535 F.2d 982 (7th Cir. 1976) (controlling shareholder "cause[d] the corporation to engage in a securities transaction in which the shareholder had a conflict of interest"). Plaintiff has also cited cases holding that a controlling shareholder has a fiduciary duty when selling shares of the controlled corporation. Hanraty v. Ostertag, 470 F.2d 1096 (10th Cir. 1972); United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 205 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). See also Jackson v. Dole Fresh Fruit Co., 921 F. Supp. 454 (S.D. Tex. 1996) (corporate manager induced his company to terminate supply contract with plaintiff, because plaintiff failed to hire a consultant with whom the manager had a kickback arrangement).

insiders, caused the corporation to commit a breach of contract. App. Brief 35-36. For example, in Phil Crowley Steel Corp. v. Sharon Steel Corp., 782 F.2d 781 (8th Cir. 1986), the chairman of the parent company ordered a subsidiary to stop supplying goods it was contractually obligated to supply. The court held that the purchaser had an action against the parent for interference with contract. In that case, as well as the other similar cases plaintiffs cite, the controlling shareholder was exercising its position of control, and thus was subject to the fiduciary duty governing a corporate insider's exercise of control.[15] Moreover, in those cases, the controlling shareholder was directly inducing the subsidiary to breach its contract with a third party.[16]

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[15] In addition to Phil Crowley, the following cases cited by plaintiffs (at App. Brief 35-36) all involved situations in which the parent company caused the subsidiary to breach the contract: In re ContiCommodity Servs., Inc. Sec. Litig., 733 F. Supp. 1555 (N.D. Ill. 1990) (parent caused subsidiary to breach contracts with subsidiary's customers), rev. in part, 976 F.2d 1104 (7th Cir. 1992), cert. denied, 116 S. Ct. 1318 (1996); Leaco Enterprises, Inc. v. General Elec. Co., 737 F. Supp. 605 (D. Or. 1990) (parent ordered subsidiary to cancel plaintiff's contract); Pure, Ltd. v. Shasta Beverages, Inc., 691 F. Supp. 1274 (D. Haw. 1988)(same); McIntosh v. Magna Systems, Inc., 539 F. Supp. 1185 (N.D. Ill. 1982)(same); Culcal Stylco, Inc. v. Vornado, Inc., 103 Cal. Rptr. 419 (Ct. App. 1972)(same); GHK Associates v. Mayer Group, Inc., 274 Cal. Rptr. 168, 185 (Ct. App. 1990)(same); Shared Communications Servs. of 1800-80 JFK Boulevard, Inc. v. Bell Atlantic Properties, Inc., 692 A.2d 570 (Pa. Super. 1997) (same); Valores Corp., S.A. v. McLane Co., 945 S.W.2d 160 (Tex. App. 1997, writ denied) (same); Collins v. Vickter Manor, Inc., 306 P.2d 783 (Cal. 1957)(officers and directors of company caused it to breach plaintiff's contract); Shapoff v. Scull, 272 Cal. Rptr. 480 (Ct. App. 1990) (same); Dependahl v. Falstaff Brewing Corp., 491 F.Supp. 1188, 1198 (E.D.Mo. 1980), modified, 653 F.2d 1208 (8th Cir. 1981) (controlling shareholder ordered company to breach plaintiff's employment contract); Sunamerica Financial, Inc. v. 260 Peachtree Street, Inc., 415 S.E.2d 677 (Ga. App. 1992) (senior legal officer of parent directed subsidiary not to make payments under lease agreement with plaintiff).

[16] In some of the cases plaintiffs cite, a minority shareholder induced the company to breach a contract. Fury Imports, Inc. v. Shakespeare Co., 554 F.2d 1376 (5th Cir. 1977) (distributor owning one-sixth of manufacturer's shares induced manufacturer to breach its contract to sell to a competing distributor); Frank Coulson, Inc. - Buick v. Trumbull, 328 So.2d 271 (Fla. 4th DCA), cert. dism., 336 So. 2d 604 (Fla. 1976) (owner of 90,000 GM shares induced GM to breach its distributorship agreement with plaintiff). In those cases, the defendant may not have owned a sufficiently large share of the company to be a fiduciary. Nevertheless, the fact that the defendant induced the manufacturer to breach its contract with the plaintiff was a sufficient basis of liability, that is not present here.

Neither of those elements is present here. Adia was not utilizing its position of control over Nursefinders when it acquired StarMed and helped it manage a business which included sending nurses to hospitals in Florida. Indeed, Adia did not induce Nursefinders to take any action with respect to StarMed's conduct of business in Florida. And, as the Eleventh Circuit found, Adia did not induce Nursefinder to commit a breach of contract.

Similarly, plaintiffs state that cases from Florida and elsewhere "recognize[] tortious interference claims against officers, directors and agents who fail to act in the best interests of their corporation or principal." App. Br. 38 and n. 10. But in both of the Florida cases cited, the defendants induced the companies of which they were officers to cancel contracts with plaintiffs. O.E. Smith's Sons, Inc. v. George, 545 So. 2d 298 (Fla. 1st DCA 1989); Sloan v. Sax, 505 So. 2d 526 (Fla. 3d DCA 1987). The cases plaintiffs cite from other jurisdictions also involved situations where the defendants induced the companies of which they were officers or directors to breach a contract with the plaintiffs.[17] Those cases are irrelevant here, because -- as the Eleventh Circuit correctly found -- Adia did not use its position as controlling shareholder of Nursefinders to induce Nursefinders to breach its franchise agreements.

Moreover, even if Adia had used its position as controlling shareholder of Nursefinders to

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[17] Only two cases cited by plaintiffs (at App. Brief 38 n.10) deviate from this factual pattern. In S.N.T. Indus., Inc. v. Geanopulos, 525 A.2d 736 (Pa. Super. 1987), appeal denied, 549 A.2d 137 (Pa. 1988), defendant caused the company which he co-owned with plaintiff to refuse to make an offer needed to renegotiate a lease; after cancellation, he then bought out plaintiff and -- pursuant to a secret prearrangement with the landlord -- renewed the lease. In that case, the defendant breached his fiduciary duty to his co-owner, by causing the company he controlled to take action for his personal benefit. That element of liability is not present here, because Adia did not cause Nursefinders to take any action contrary to the interests of other owners.

In Moellers North America, Inc. v. MSK Covertech, Inc., 912 F. Supp. 269 (W.D. Mich. 1995), defendants were corporate officers who participated in inducing another company to breach its contract with plaintiff. Defendants, unlike Adia, directly induced a breach of contract.

induce Nursefinders to breach the franchise agreements, Adia would not have breached a fiduciary duty in the absence of any adversely affected minority shareholders (Adia owned 100% of Nursefinders' stock), and in the absence of any showing that Nursefinders had been deprived of assets to pay creditors' claims (there is no allegation that Nursefinders lacks assets to meet franchisees' claims). Under Florida law, a parent company is justified in causing its subsidiary to cancel a contract with a third person, even where the action is taken for the parent's benefit. Babson Bros. Co. v. Allison, 337 So.2d 848, 850 (Fla. 1st DCA 1976), cert. denied, 348 So. 2d 944 (Fla. 1977); Ethyl Corp. v. Balter, 386 So. 2d 1220, 1224-25 (Fla. 3d DCA 1980), rev. denied, 392 So. 2d 1371 (Fla.), cert. denied, 452 U.S. 955 (1981).[18]

If, as plaintiffs contend, Adia had a fiduciary duty to conduct Nursefinders' affairs for Nursefinders' benefit, it also had a fiduciary duty to conduct StarMed's affairs for StarMed's benefit. Yet the entire thrust of plaintiffs' argument is that Adia should have caused StarMed to cease doing business in the Florida market in order to benefit Nursefinders. Under plaintiffs' view of the law, Adia was obligated to violate its fiduciary duty to conduct StarMed's business for StarMed's benefit. Plaintiffs cannot have it both ways -- unless they are willing to argue that one company cannot own two subsidiaries which compete with each other without violating its fiduciary duties to one or the other, or both.

Plaintiffs' theory boils down to the proposition that a single company cannot own separate subsidiaries whose businesses may overlap. That theory would draw the courts into the

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18 See also Canderm Pharmacal Ltd. v. Elder Pharmaceuticals, Inc., 862 F.2d 597 (6th Cir. 1988) (upholding dismissal of interference claim against a company which caused a subsidiary to terminate an exclusive distributorship with plaintiff, so the company's products could be distributed through another subsidiary); American Medical Int'l, Inc. v. Giurintano, 821 S.W.2d 331, 336-37 (Tex. App. 1991)(sole stockholder privileged to interfere in subsidiary's contracts); Felsen v. Sol Cafe Mfg. Corp., 249 N.E.2d 459 (N.Y. 1969) (same); Brierwood Shoe Corp. v. Sears, Roebuck & Co., 479 F. Supp. 563, 565 (S.D.N.Y. 1979) (same).

area of economic regulation under the guise of tort law. The American economy is full of examples of companies which own several subsidiaries, many with activities that compete directly with each other, or that otherwise may impinge on others. The same company (or its subsidiaries) may sell competing brands of products ranging from soft drinks, breakfast food and perfume to automobiles. A decision that a company violates its fiduciary duty to a subsidiary selling one product if it allows another subsidiary to sell a competing product would have profound implications for the manner in which business is conducted in this country.

For example, Ford Motor Company owns a controlling interest in the British company that makes Jaguar automobiles (as well as a significant minority interest in the Japanese company that makes Mazdas). Has Ford violated a fiduciary duty whenever Jaguars or Mazdas are sold in territories where Lincoln-Mercury dealers are located? Whatever one may think of the desirability of allowing corporations to do business in this manner, significant issues of economics, antitrust and public policy are involved. Under current law, it is the function of the antitrust laws -- as well as special regulatory statutes governing particular industries -- to resolve these issues. "[C]ompetitive conduct permitted under the antitrust laws may [not] be punished as tortious interference. Indeed, such common law 'back dooring' would subvert the function of antitrust law in defining, and regulating, the boundary between permissible and impermissible competitive conduct." Willamette Dental Group v. Oregon Dental Service Corp., 882 P.2d 637, 644 (Or. App.), rev. denied 888 P.2d 569 (Or. 1995).

Plaintiff's own expert witness conceded the nonsensical nature of a rule which would impose on every parent corporation a fiduciary duty not to allow any of its subsidiaries to compete with any other. When defendants' counsel suggested that plaintiff's theory of the case would have required Pepsico -- which, at the time, owned the competing fast food chains of

Kentucky Fried Chicken, Taco Bell and Pizza Hut -- to pay each of its franchisees damages in the amount of the sales done by all of the other franchisees in their "exclusive" territories (the recovery plaintiffs seek here), the witness responded, "You must be kidding." R30/237/175. But that is precisely what plaintiffs seek here, and that is the theory of liability which plaintiffs are advancing.

III. Adia did not commit any other wrongful conduct that would form a sufficient basis for liability in the absence of a parent-subsidiary relationship between Adia and Nursefinders.

If Adia had committed some other tortious conduct which made it impossible for Nursefinders to perform its contracts with its franchisees, then there would have been a basis for finding that Adia "improperly" interfered with Nursefinders' contracts, within the meaning of § 766 of the Restatement. For example, in a case plaintiffs cite, a subsidiary interfered with one of its parent company's automobile distributorship agreements, through tortious conduct that included harassment of the distributor's employees and customers, seizure of the distributor's inventory, ransacking the distributor's files, and hiring "guards" who strewed beer cans, urinated and defecated in the distributor's car lot. Peacock v. General Motors Acceptance Corp., 432 So. 2d 142, 145 (Fla. 1st DCA 1983).

Plaintiffs argue that this case also involves independently tortious conduct by Adia, which forms an independent basis for Adia's liability. While we reiterate that the Court need not reach these arguments, since they are not within the scope of the question certified to the Court, we will nonetheless address plaintiffs' three arguments, and explain why they have no merit.

1. Plaintiffs allege that Adia engaged in "acts of deception" (App. Brief 26) because: (a) when Nursefinders' president complained about the proposed StarMed acquisition, Adia's president "downplayed the matter as not being that important and stated that Adia wouldn't do

anything;" (b) nevertheless, "the purchase of StarMed was secretly consummated;" and (c) in order to assuage the franchisees' protests when they learned of the purchase, Adia engaged in a "sham sale" of StarMed, while "failing to notify the franchisees that it retained control." App. Brief 9, 14-15, 26, 45. (To avoid factual controversy, we accept plaintiffs' characterization of the evidence for purposes of this brief, although we note that plaintiffs' recitation is significantly misleading.[19])

Significantly lacking in plaintiffs' presentation is an explanation of how Adia's alleged "acts of deception" result in liability. Plaintiffs do not allege that they were damaged because they learned of the proposed StarMed purchase later than they should have -- indeed, they admit that they did learn of it before it was consummated, but failed to prevent it. App. Brief 9-10. Nor do plaintiffs allege that they were damaged because Adia's initial sale of StarMed was a "sham." They do not argue, for example, that a "real" sale of StarMed at an earlier date would have lessened whatever damage they suffered from StarMed's presence in the Florida market, or that StarMed became a less effective competitor when, 18 months after the "sham" sale, there was a "real" sale.

In short, this is not an action for misrepresentation. Plaintiffs do not allege that they relied in any way on what Adia said or did not say to them, or that they were damaged by such

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[19] The sale of StarMed was a fully-leveraged buyout by Richard Benson, the StarMed President, who had no significant assets of his own. R33/239/24-27. Adia explained that it wanted to move quickly: "the quicker we sold it, the quicker this [controversy] would all be behind us." R33/239/24. But "in a situation where you want to sell quickly, most public companies or other investors will not give you full value." R33/239/24. The solution was a leveraged buyout by current management, under which Benson was not required to come up with up-front dollars, but agreed to a significant purchase price, with the expectation that he would be able to find other investors to put in their own cash and pay off Adia. R33/239/24, 24/234/100-01. That happened less than 18 months later, when third-party investors bought out a large portion of Benson's debt to Adia. R24/234/101.

reliance -- all of which are the fundamental allegations which are required in order to obtain relief for misrepresentation. Johnson v. Davis, 480 So. 2d 625, 627 (Fla. 1985). Rather, plaintiffs seek recovery for damages resulting from what StarMed did in the Florida market -- not from what Adia may have said to plaintiffs about StarMed.

2. Plaintiffs argue that Adia should be liable because it had a policy of "interbrand competition to achieve market dominance." App. Brief 7. They argue that Adia intended that the competition from StarMed would "devalu[e] Plaintiffs' franchises so that Adia could advantageously repurchase them" and thus achieve market dominance. App. Brief 3, 7.

These allegations do not advance plaintiffs' case. Were the temporary nurse staffing market more concentrated, such allegations might have made a case of monopolistic conduct in violation of the Sherman Act. But plaintiffs did not even try to prove a case of monopolization, which is understandable given "the strong competition within the plaintiffs' territories in the field of temporary nursing help." Gossard v. Adia Services, Inc., supra, 922 F.Supp. at 562. Nor do plaintiffs explain why a tort case is an appropriate vehicle for anti-trust allegations. See Willamette Dental Group v. Oregon Dental Service Corp., supra, 882 P.2d at 644.

Plaintiffs cite two cases in which, they assert, a tortious interference claim was sustained solely on the basis of the defendant's motivation to harm the plaintiff. App. Brief 33, citing Wagner v. Nottingham Assocs., 464 So. 2d 166 (Fla. 3d DCA), rev. denied, 475 So. 2d 696 (Fla. 1985); and Sade Shoe Co., Inc. v. Oschin and Snyder, 209 Cal. Rptr. 124 (Ct. App. 1984). In those cases, the defendant attempted to force a party with whom it had a contract to default or agree to an amendment.[20] Actions by a party to a contract, which are aimed at making another

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[20] In Wagner, the defendant mortgagee interfered with plaintiff mortgagor's attempts to obtain a building permit needed to obtain a lucrative lease. Defendant's sole motive was to diminish the mortgagor's cash flow so that he would default, enabling foreclosure and

party default, are improper conduct, and form an independent basis for interference liability.[21] Here, by contrast, even under plaintiffs' current theory, Adia was not seeking to create a default in a contract to which it was a party, and thus was not engaged in wrongful conduct.

Moreover, in both of the tortious interference cases on which plaintiffs rely, the defendant's sole or predominant motive was to cause economic damage.[22] By contrast, in this case, not even plaintiffs argue that a motivation to devalue the franchisees was the sole or predominant purpose of Adia's purchase of StarMed.[23] Adia's motive was to make money

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repossession. 464 So.2d at 168. In Sade, the defendant landlord refused consent to an assignment of the lease solely for the purpose of "regaining possession of the leased premises and/or extracting additional rent." 209 Cal. Rptr. at 126.

[21] Each party to a contract has a "duty to do nothing destructive of the other party's right to enjoy the fruits of the contract." Scheck v. Burger King Corp., 798 F.Supp. 692, 694 n.5 (S.D.Fla. 1992), quoting Conoco inc. v. Inman Oil Co., 774 F.2d 895, 908 (8th Cir. 1985). Each party to a contract has a duty not to engage in "interference with or failure to cooperate in the other party's performance." Restatement of Contracts (Second), § 205 comment d.

[22] In Wagner the mortgagee's intent to cause default and foreclose was the sole purpose in the action taken. By preventing the mortgagor from expanding his space, the mortgagee's action lessened his ability to repay, and could only have been intended to enhance the likelihood of default. Wagner, supra, 464 So.2d at 168. In Sade, the lessor's liability was based on its "predominant purpose" to repossess the premises or increase rents. Sade, supra, 209 Cal. Rptr. at 127.

[23] When asked by plaintiffs' counsel whether he was aware of the "concept" that "you purchase [franchises] back after you've saturated the market," a former Adia officer testified that he was familiar with the concept and that two examples of it were other staffing firms (Kelly and Manpower). R23/233/224, 225. When asked whether that was Adia's strategy, the witness responded that Adia's strategy was to have company-owned offices "in major metropolitan areas, while franchising the medium- to smaller-size markets." R23/233/225-26. The witness testified that by "major metropolitan areas" he meant "the top 30 markets in the United States by population," such as "New York, Chicago, Los Angeles." R23/233/205, 206. Plaintiffs argue that St. Petersburg must have been part of this strategy, because plaintiffs' St. Petersburg office was number one in the country in sales. App. Brief 33. But when asked whether the "top 30" would be measured by the amount of business being done by a franchisee rather than by population, the witness explained that "Adia was more interested in operating company stores in major metropolitan areas, not necessarily markets that were already highly developed." R23/233,206. The reason, the witness explained, was that only if the area was large

through StarMed, which it did. Even though Adia owned StarMed for only two years, StarMed's revenues increased over six times during that period, and Adia made a $6.8 million profit from selling it. (These are facts plaintiffs themselves chose to emphasize in attempting to support their damage claim against Adia.[24]) Making money is a legitimate competitive motive. There is no evidence that Adia was seeking "market dominance" in West Florida by buying out "devalued" Nursefinders' franchises. Indeed, the only buyouts that actually occurred involved franchises outside of Florida.[25] To be sure, Adia offered to buy out plaintiff's franchise. But that was an attempt to settle the controversy, as plaintiffs admit. App. Brief 14. It is not wrongful for a party to try to settle or compromise a claim rather than litigate it.[26]

In any event, a business firm's intent to inflict economic damage on its competitor has never been deemed "wrongful," unless monopolization is involved. "The policy of the common law has always been in favor of free competition. . . . In the absence of prohibition by statute,

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enough to support "multiple locations" was it worth assigning a company executive to manage the operation. Id. There is no evidence that St. Petersburg supported multiple locations. Nursefinders had company-owned offices in Fort Lauderdale and Miami. R30/237/50.

[24] See Initial Brief of Appellants in the Eleventh Circuit, at p. 9.

[25] Plaintiffs cite Adia's buy-out of Pecaro's and League's franchises. App. Br. 14. League's franchise was in the Philadelphia area. R23/233/143. Pecaro had 11 franchises. One was in Chicago and one in Rockford, Illinois. The record does not show where the others were located. R23/233/115, 116, 135.

[26] Plaintiffs also cite Mendelson v. Blatz Brewing Co., 101 N.W.2d 805 (Wis. 1960) as a "wrongful motive" case. However, in that case the defendants, as controlling shareholders, induced the corporation to terminate plaintiff's employment contract, for the purpose of forcing him to sell his shares and to give the job to the son of one of the defendants. Defendants acted wrongfully for two reasons: first, they directly induced the corporation to terminate a contract; and second, they utilized their control of the corporation for their personal benefit rather than the corporation's benefit. Neither element is present here. As the Eleventh Circuit found, Adia did not induce Nursefinders to commit a breach of contract. Nor did Adia utilize its position as controlling shareholder of Nursefinders to induce Nursefinders to take any other action.

illegitimate means, or some other unlawful element, a defendant seeking to increase his own business may cut rates or prices, allow discounts or rebates, enter into secret negotiations behind the plaintiff's back, refuse to deal with him . . . ." U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 443 S.E.2d 833, 836 (Ga. 1994).

Adia, through StarMed, was engaged in legitimate competition. Competition does not become illegitimate when competitors have "bad thoughts" about other competitors. In Ethyl Corp. v. Balter, supra, 386 So. 2d at 1225, the court held that no claim had been stated for contract interference despite allegations of malicious intent, because "it is irrelevant whether the person who takes authorized steps to protect his own interests does so while also harboring some personal malice or ill-will toward the plaintiff." Id. "The proposition that a man may not . . . enter upon a lawful business is one to be advanced with considerable caution, and the cases seem firmly to establish the rule that if he . . . starts the business for personal advantage or gain his neighbor is without remedy however much he suffers, and even though the act may also have been tinged with animosity and malice." Beardsley v. Kilmer, 140 N.E. 203, 205-06 (N.Y. 1923), quoted in Ethyl Corp. v. Balter, supra, 386 So.2d at 1225.[27]

3. Plaintiffs argue that Adia conceded responsibility for the franchisees' damages. App. Brief 22, 27. But the only evidence they cite shows (as described by plaintiffs themselves) that an officer of Nursefinders "agreed that Adia's ownership of a competing affiliate would

[27] "The law has no roving commission to root out bad people or people whose minds may harbor bad thoughts." Della Penna v. Toyota Motor Sales, U.S.A., Inc., supra, 902 P.2d at 765 (Mosk, J., concurring), quoting Dobbs, Tortious Interference with Contractual Relationships, 34 Ark.L.Rev. 335, 347-48 (1980). "[B]ad thoughts are no tort." Arntz Contracting Co. v. St. Paul Fire and Marine Ins. Co., supra, 54 Cal. Rptr.2d at 895.

cause a violation of the franchise agreements." App. Br. 13.[28] However, even as plaintiffs describe this evidence, all it shows is what is conceded for purposes of this brief -- that Adia's purchase of a competitor caused a violation of the Nursefinder franchise agreements. That does not address the issue of whether Adia is liable for this violation, either in contract (and plaintiffs concede that Adia is not liable in contract) or in tort.[29]

Plaintiffs also argue that "there were numerous express admissions of Plaintiffs' damages." App. Br. 13. But all the evidence shows (again as described by plaintiffs themselves) is that "Gossard was the most damaged by the purchase of StarMed" and that the purchase "caused significant damage to the franchise relationship." App. Br. 13. In addition, the evidence, as plaintiffs describe it, shows that Adia attempted to "buy out" plaintiff and other franchisees who criticized the StarMed purchase. App. Brief 14. But all that shows, at most, is an acknowledgment that (1) StarMed's competition may have damaged the franchisees, (2) the controversy that preceded this law suit was damaging Adia's business relationship with its franchisees, and (3) Adia would like to have settled the controversy rather than let the ill feeling it generated damage that business relationship.[30] We know of no authority to suggest that a

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[28] We note that one of the witnesses whose testimony is cited (an Adia officer who was second in command), on the very next page of the transcript, stated that after discussing the issue with the franchisees and Adia, "I felt relatively comforted that from a franchise agreement there -- apparently in Adia's opinion, there was no violation." R23/233/192-3.

[29] Plaintiffs argue that Adia's president "acknowledged Adia's duty in tort" when he testified that "[i]f Larry Carr [Nursefinders' prior owner and a franchisee] had objected at this meeting or at any time before, [Adia] would never have made these purchases." App. Brief at 27, quoting R30/237/203, 210. But all the quoted language shows is that Adia's president might have decided not to purchase StarMed to avoid a business controversy with the franchisees. Indeed, Adia's president explained that he wanted to avoid a controversy that would damage the business relationship he had with the franchisees. R30/237/210.

[30] Adia officers explained that "the problem was that the franchisees were upset and it was hurting the relationship between the franchisees and the franchisor." R24/234/52. Adia

desire to settle a bitter business controversy, rather than engage in litigation, is an admission of liability.

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The trial court's conclusion that Ford would not be liable for competing with GM in Florida -- even if Ford knew GM had promised its dealers there would be no competition -- would not be altered if it were shown that Ford had been less than candid when asked by GM about its competitive plans, or that Ford hoped to buy out some GM dealers after GM sales wilted under competitive pressure. The fact is that Adia is in exactly the same position as Ford in that example, with only one exception -- the parent-subsidiary relationship between Adia and Nursefinders. Regardless of the allegations plaintiffs make about secrecy, deception and predatory intent, ultimately their case must rise or fall on a showing that Adia had a non-competition obligation arising from its status as Nursefinders' controlling shareholder. In Point II, we have demonstrated that Adia had no such obligation.

"did not want this, whatever this issue was, to get in the way of a successful working relationship we'd had with the Nursefinders organization." R30/237/210.

CONCLUSION

This Court should hold that Florida law does not recognize a claim for tortious interference in the situation described in the certified question.

Respectfully submitted,

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* Admitted *pro hac vice* by this Court's Order of October 16, 1997.

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by Federal Express this 11th day of December 1977 to:

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