IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,389

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

INITIAL BRIEF OF APPELLANTS

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QUESTION CERTIFIED BY ELEVENTH CIRCUIT

While noting that its "particular phrasing of the question is not intended to limit the Florida Supreme Court's inquiry," the Eleventh Circuit has certified the following question:

> 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., 120 F.3d 1229, 1231 (11th Cir. 1997), reviewing on appeal, 922 F. Supp. 558 (M.D. Fla. 1995).[1]

INTRODUCTION[2]

This initial brief on a certified question of Florida law from the United States Court of Appeals for the Eleventh Circuit is filed on behalf of the Appellants/Plaintiffs, RICHARD BRUCE GOSSARD, JOYCE GOSSARD, BARNEY DEWEES, JOHN DALY, NURSEFINDERS OF SARASOTA, INC., NURSEFINDERS OF ST. PETERSBURG, INC., and NURSEFINDERS OF MOBILE, INC., who on appeal to the Eleventh Circuit are seeking to reverse the District Court's setting aside a jury verdict in their favor and entry of a judgment as a matter of law [JMOL] in favor of Appellee/Defendant, ADIA SERVICES, INC.

At the conclusion of a two and half week trial before

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[1]For the convenience of this Court, copies of the opinions of the Eleventh Circuit and District Court are appended to this brief.

[2]References to the record in the Eleventh Circuit Court of Appeals, which was transmitted to this Court, will be designated as "R___/___/___" referring to the volume, document and page number of the court papers. References to the Plaintiffs', Defendant's and District Court's trial exhibits will be designated as "P.Ex.___," "D.Ex.___" and "C.Ex.___" respectively. Unless otherwise noted, all emphasis has been supplied by counsel.

Magistrate Judge Thomas G. Wilson, United States District Court for the Middle District of Florida, the jury found that Defendant Adia, under Florida law, tortiously interfered with Plaintiffs' franchise agreements with Adia's wholly-owned subsidiary, Nursefinders, and awarded $2,488,000 in compensatory damages on a general verdict. (R11/199/1). Even though originally presiding Judge Elizabeth A. Kovachevich had *twice* rejected Adia's argument that Plaintiffs' claim was not legally viable and that Adia's conduct was not a cause of the breach of contract (R1/6/5; 4/72/6; 7/114/9), and the jury had resolved the causation issue and all other factual issues against Adia, Magistrate Wilson set aside the jury's liability finding and entered a JMOL on the basis that Adia did not "otherwise cause" the contract non-performance under Restatement (Second) of Torts §766. 922 F. Supp. at 560-562.[3] The Eleventh Circuit has now certified the "causation" issue to this Court. 120 F.3d at 1231 ("**the question is whether Adia 'otherwise caused' Nursefinders to violate the franchise agreements**").

Respectfully, the District Court's "causation" ruling is contrary to law and fact. Florida law, which follows the Restatement, clearly recognizes a claim for tortious interference under the facts of this case. To be sure, the Restatement makes clear that "causation" is a question of fact for the jury. Here, there is abundant record evidence supporting the jury's finding

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[3]As an additional/alternative basis for the entry of JMOL, Magistrate Wilson determined that the jury damage award was based on an erroneous legal theory. 120 F.3d at 1230-1231; 922 F. Supp. at 562-563. The Eleventh Circuit has certified only the liability/ "causation" issue and Magistrate Wilson's damage rulings are not before this Court.

that Adia, by purchasing, funding and developing affiliate-Starmed which Adia knew competed in Plaintiffs-franchisees' exclusive territories, directly and knowingly caused subsidiary-franchisor Nursefinders to be in breach of its agreements with Plaintiffs which prohibited any affiliate of Nursefinders from competing in Plaintiffs' territories. Moreover, it is virtually undisputed that Adia's actions significantly damaged if not totally destroyed the franchise relationship between Plaintiffs (franchisees) and Nursefinders (franchisor). Further, there is substantial evidence that Adia wrongfully stimulated interbrand competition within Plaintiffs' exclusive territories in violation of the agreements with the intended consequence of devaluing Plaintiffs' franchises so that Adia could advantageously repurchase them.

Accordingly, this Court should answer the certified question in the affirmative. Under Florida law, a parent corporation should not be able to knowingly circumvent its subsidiary-franchisor's preexisting territorial exclusivity covenants and duty of good faith and fair dealing to its franchisees by creating and augmenting a competing affiliate. "Causation" was established.

STATEMENT OF THE CASE AND FACTS

(i) Statement of facts.

A brief recitation of the facts is set forth in the reported decisions of the Court of Appeals and District Court. 120 F.3d at 1230-1231; 922 F. Supp. at 560. As both decisions expressly note, however, the jury resolved all factual issues in favor of the Plaintiffs. Id. Significantly, neither the Court of Appeals nor District Court question the sufficiency of evidence underlying

these facts. As detailed in the Argument below, Florida law on tortious interference with an existing contract follows the Restatement and entrusts the jury as trier of fact to determine whether there is "causation" and "intentional and improper interference." Thus, in order for this Court to determine whether Plaintiffs have made out a viable claim for tortious interference under Florida law, it is necessary that the Court consider all of the record evidence read in a light most favorable to Plaintiffs.

Plaintiffs' negotiation and purchase of exclusive territory franchises. From 1986 to 1988, Plaintiffs entered into a series of five contractual relationships with a franchisor which came to be known as Nursefinders. The exclusive territory franchises, covering principally the entire gulf coast of Florida, permitted Plaintiffs to recruit and provide nurses to clients on a temporary and long-term basis in defined geographic areas free of any competition from the franchisor or any related entity such as an affiliate or parent company. Larry Carr, the president of Nursefinders, had started this nurse placement business in Texas in 1974 and, upon success, began selling franchises in 1978-79 to his long-time friends and relatives. The franchisor provided a turn-key operation offering training, seminars and continuing support and development. In return, the franchisor received a significant start-up fee ($15,000-$30,000); a 5% weekly royalty on all gross sales; and the right to retake the franchise territory if minimum sales quotas were not met. (R11/218/1-2; 23/233/144-146; 26/235/51-52; 30/237/7-8; P.Ex.1-5; 120 F.3d at 1230).

Prior to purchasing the franchises, Plaintiffs were given a

federal and state mandated disclosure statement/offering circular detailing key provisions of the franchise agreement and a copy of the contract. Carr met with the Plaintiffs individually to discuss in detail the provisions of the franchise agreement. Of utmost concern were the exclusive territory rights. Carr "beat to death" the fact, and the parties agreed, that Plaintiffs were buying a geographic area and that the franchisor was contractually covenanting that neither it nor any related affiliate or parent corporation would compete by selling similar products or services inside the exclusive areas. 120 F.3d at 1230-1231. Further, when there was a violation of a party's exclusive territory, in conformity with longstanding policy, the franchisor was obligated to remedy the matter by having the competing entity turn-over its business and disgorge any revenue. (R11/218/2,n.1; 21/232/33-34,70; 23/233/37-40, 102; 26/235/41,53-55; 28/236/43-45; 30/237/5-11,35-40; P.Ex.24,56).

Based upon the parties' representations, understanding and agreement, the individual Plaintiffs passionately invested their time, energy, life savings and "sweat equity" into developing the franchises. Because the start-up costs for a single operation were imposing and ranged between $125,000 and $180,000, Plaintiff Bruce Gossard began as a 25% investor with Carr in the Orlando franchise. Gossard developed strong relationships with hospitals and made full-time nurse placements of long-term duration. Keying on the massive influx of seasonal residents in Florida and its impact on the hospital census, the Orlando franchise rocketed to number one in the country in sales with 90% of its business being long-term.

(R21/232/74-75; 26/235/10-20). Gossard then sold his share of the Orlando franchise and, together with his wife Joyce, purchased the St. Petersburg territory in May of 1986. Employing the same strategy, the Gossards successfully obtained long-term assignments and made their franchise first in sales nationally after 22 months. Along with other individual Plaintiffs, the Gossards subsequently purchased the Sarasota, Spring Hill, Fort Meyers, and Ocala (which included Mobile) franchise areas. Plaintiff John Daly invested money out of the equity in his house, left his insurance job, and made a traumatic move so he could become actively involved in running the Fort Meyers office. (R26/235/22-50; 30/237/7-10).

As always, the strength of the Nursefinders' system was the maintenance of the integrity of the exclusive territories. On numerous occasions, the franchisor, as obligated, turned over all the business and nurses of company-owned offices or franchisees found competing in another franchisee's exclusive territory. On no occasion did the franchisor not enforce the agreed upon remedy of long-standing practice and custom. (R21/232/33-34,70; 23/233/102; 26/235/41,53-55; 28/236/43-45).

Adia's share acquisition of Nursefinders and knowledge of Plaintiffs' exclusive franchise agreements. In early 1986, Defendant Adia, a large California corporation in the personnel placement business whose sales would subsequently top $700 million, approached Carr about the purchase of Nursefinders (then called Personnel Finders Inc.). Adia was interested in getting into medical supplemental staffing and liked the cash-generation from Nursefinders' sale of franchises. To increase its overall market

share, Adia adhered to a policy and practice of interbrand competition among its product lines. (R23/233/222; 24/234/51; 30/237/195; 31/238/10,27-30).

Carr specifically advised Adia president Walter Macauley, however, that such a system would not work and would conflict with Nursefinders' franchise agreements which prohibit competition from a related company supplying similar services. Tara Harrison, Nursefinders' corporate counsel, likewise informed Adia's officers, during its due diligence, about the franchisor's contractual obligations and how neither an affiliate nor parent could compete in any way within the franchisees' exclusive territories. Adia's officers visited Nursefinders' home offices on several occasions and reviewed the franchise disclosure statements and contracts. Nevertheless, with full knowledge of the exclusive territorial rights and the franchisor's contractual covenant that neither it nor any related affiliate or parent would compete within franchisees' territories, Adia decided to purchase all of Nursefinders' stock and a contract was executed on December 29, 1986. It was agreed that Carr would remain president of Nursefinders until the end of 1988. Carr was also told Nursefinders would be the flagship of Adia's health care business and that any related acquisitions would fall under his division. (R11/218/2; 21/232/88-97; 23/233/40, 72-77,89-91,234-241; 30/237/196-199; 31/238/29-35; 33/239/8-13; 120 F.3d at 1231).

Adia's secret purchase of competing Starmed in disregard of Nursefinders' and Plaintiffs' interests. In furtherance of its policy of interbrand competition to achieve market dominance, Adia

in late 1987 began a search to purchase a travel nurse company which, in general terms, would place nurses in long-term assignments from one geographic region to another. Earlier in the year, Ann Rains of Nursefinders had started to develop a similar travel or touring nurse program for internal operation within the franchise system. Rains' proposal was met with initial franchisee complaints due to fear of territorial infringement and uncertainty as to how the system would work. In early fall 1987, Rains met with Adia president Macauley regarding the program and the franchisees' resistance was noted. Carr believed an internal travel nurse program would benefit the franchisees only if it was under their control. (R23/233/32,57-61,107-121; P.Ex.51,219).

By early 1988, however, Adia, without Nursefinders' or Carr's knowledge, was secretly soliciting numerous independent travel nurse companies. Adia's negotiations for Travcorps, one of the largest in the country, fell through. Adia then targeted Starmed, an operation headquartered in Tampa which keyed on Florida's seasonal work, recruited 20% of its nurses from Florida, and whose largest hospital clients were located within the Plaintiffs' exclusive territories. Adia officer John Hamachek, whose fees were dependent on his corporate acquisitions, informed various acquisition candidates that Adia could start its own travelling nurse company through its subsidiary Nursefinders but that Adia preferred to purchase an existing business. According to Hamachek, he and Macauley discussed whether the purchase of a travel nurse company would interfere with and damage Nursefinders but they decided, without ever doing any studies, that there would be no

competition because the two businesses were different. (R11/218/2; 24/234/50; 31/238/12,37-44,54; P.Ex.45,46,164; C.Ex.1,pp.7,9-11,22,44-45,51,58,69-70).

At a meeting between Carr, Nursefinders' president, and Macauley, Adia's president, in late March, 1988, at a time when Adia's acquisition negotiations with Starmed were well in place, Carr was informed for the first time that Adia was looking into buying an unnamed travel nurse company in Florida. Carr adamantly protested that this would cause a violation of the franchise agreements and rejected as absurd Macauley's contention that there wouldn't be any competition with the franchisees. Macauley placated Carr and said if he was so upset by the idea it would be dropped. Several days later Carr received a memorandum from Macauley erroneously outlining their previous discussions and making it sound like Carr wouldn't object to any such purchase. In the presence of corporate counsel, Carr immediately phoned Macauley and angrily refuted Macauley's contentions that this wouldn't result in a violation of the exclusive territory agreements and exclaimed that Macauley was totally wrong and that purchasing a separate travel nurse company would ruin Nursefinders and cause it to breach its franchise agreements. Macauley again downplayed the matter as not being that important and stated that Adia wouldn't do anything. (R21/232/125-133; 23/233/18,45-46; P.Ex.99,135).

Unbeknownst to Nursefinders' President Carr, and over his prior adamant protestations, the purchase of Starmed was secretly consummated by Adia on June 19, 1988. Contrary to Adia's previous standard operating procedure, no press release of the Starmed

purchase was issued. Carr first found about the Starmed deal in the fall of 1988 while reading an investment brochure. Carr called Ray Marcy, who was second in command at Adia, to bitterly complain about Adia's purchase of Starmed causing a breach of the agreements and Marcy agreed it was a serious problem. Carr again confronted Macauley on the matter and about Macauley's intentionally misleading the franchisees to think that Nursefinders' management agreed with Adia's position. (R21/232/123-124,134-140,164; 23/233/53-54; 24/234/40; 30/237/206; P.Ex.11,164; 120 F.3d at 1231)

Adia supports and augments affiliate-Starmed's growth. Having purchased and thereby created a competing affiliate in contravention to Nursefinders' franchise covenants, Adia immediately proceeded to substantially assist Starmed's growth. Starmed's directors were replaced and Macauley and Yvef Paternot from Adia came on board. Adia had final approval of the selection of a CEO and Richard Benson from Adia was subsequently installed as president. Adia required that Starmed hire a director of nursing and comptroller who Adia's officers helped select. Adia had approval and control powers over Starmed's business plan and expenditures. Adia computerized Starmed's accounting and finance system, made all of Starmed's insurance decisions and, critically, provided unlimited funding and credit which was essential to business growth. Adia, who had access to Nursefinders' training material and techniques, likewise supplied marketing and nurse recruitment assistance. Starmed's national advertisements were changed from little black and white ads "that look[ed] like some kid made [them]" to slick full-page four-color ads. While

Plaintiffs' long-term nurse placement business was being totally destroyed, Starmed's business increased 100% the year after Adia's purchase and its revenues in Plaintiffs' territories skyrocketed from $914,000 in 1989 to $6 million in 1991. (R23/233/185-186,202-204,215; 24/234/28,46-47; 26/235/92,157,206; 30/237/219-221; 31/238/49; P.Ex.16,70,72; C.Ex.1,pp.32,60-61,87-89,92-93).

Affiliate-Starmed competes within Plaintiffs' territories in violation of franchise agreements. Starmed, now Nursefinders' affiliate by reason of its acquisition by Adia, competed in Plaintiffs' exclusive territories as to the hiring and placement of nurses. Both Starmed and Plaintiffs sought to place nurses for extended periods of time on a contract basis. They both targeted the supplemental staffing needs of hospitals. While travel nurses are generally under contract for 13 week periods, fifty to seventy percent of Plaintiffs' business had likewise been long-term placement prior to the Starmed purchase. Further, Starmed placed nurses at the same hospitals, used many of the same nurses, and advertised and recruited nurses in Plaintiffs' territories. A full fifty percent of Starmed's revenues were generated in Plaintiffs' territories. (R11/218/2; 23/233/219; 24/234/36-38,118; 26/235/108-111; 28/236/31,64-68,71-77,83-86,128,137-143,146,150,162; 30/237/13-20,43,53,57; 31/238/84-92,99,110; P.Ex.44,49,79,111,164,187; C.Ex.1,p.43,99,126; 120 F.3d at 1231).

Franchisees vociferously complain upon discovery of Adia's purchase of Starmed. The franchisees first became aware of Adia's secretive purchase of competing affiliate Starmed in June of 1989 at the franchisees' national convention. One of the franchisees,

Harry League, found out and disseminated the information to the others. Ironically, Macauley made a speech at the meeting discussing Adia's acquisitions but failed to mention Starmed. A firestorm of outrage and complaints began thereafter. League immediately sent a letter to Marcy signed by the other franchisees and followed with a letter to Macauley. League, who would later meet with Macauley, was extremely upset about affiliate-Starmed's infringement on his territory and that his franchise contract had been breached. Another franchisee, Bruce Pecaro, had his attorneys send a letter seeking straight answers as to whether Starmed was improperly invading his exclusive territory. After the franchisees took greater notice of Starmed's activities and unrest grew, Macauley attended a group meeting in December of 1989 or January of 1990 at which time the Starmed debacle was discussed. Pecaro had informed Macauley that his agreements were being violated and he would not be giving permission to Adia to let Starmed compete in his territories. Pecaro told Adia to either sell Starmed or buy him out because he didn't want any part of the situation. A second meeting between Macauley and the franchisees was held in February of 1990. On both occasions, Macauley promised that Adia would sell Starmed if the matter could not be resolved. (R21/232/160,165; 23/233/120-121,128-136,148-149,151,153-154,199,216-217;24/234/66-78; 26/235/91,94-102; 28/236/55-57; 30/237/42,58,207-209,212-213,222-224; 31/238/18-20; P.Ex.11,25,27,49,127,199,208,217).

Adia admits responsibility for Starmed problem and harm to Plaintiffs and Nursefinders. Although Adia was not a signatory or contractual party to the franchise agreements, it was aware of the

exclusivity provisions and at all times requested that complaints about Starmed's causing a breach of the agreements *not* be directed at Nursefinders but rather at Adia as the entity responsible for purchasing Starmed resulting in interference with Nursefinders' contractual relationship with its franchisees. Adia admitted that Nursefinders did not cause the problem. Carr, Pecaro and Gossard were all specifically told to voice their grave concerns to Adia officer Jon Rowberry or Macauley and *not* to Nursefinders. The face-to-face meetings were with Adia officers. Alan Riggs, a Nursefinders' officer, agreed that Adia's ownership of a competing affiliate would cause a violation of the franchise agreements. (R23/233/126,130,191,207; 24/234/52; 26/235/91; 30/237/59; 33/239/44-45).

Likewise, there were numerous express admissions of Plaintiffs' damages. In a meeting between Gossard, Macauley and Carr in Tampa in January of 1990, Macauley unequivocally acknowledged that Gossard was the most damaged by the purchase of Starmed although he was unsure as to the amount of money involved. Macauley echoed these comments to the other franchisees at the February 1990 meeting in Texas. Marcy likewise stated that the Starmed purchase caused significant damage to the franchise relationship. To be sure, once the harm caused by Starmed became clear, Adia offered a token compensation arrangement where, in exchange for Adia's ability to continue to operate affiliate-Starmed, the franchisees would receive a $500 fee for each nurse referral to Starmed and 1% of the revenue from each Starmed placement in the franchisees' territory. These proposals were

rejected as patently contrary to the franchisees' existing contractual rights. Macauley thus stated at the February 1990 meeting that he envisioned a change in the exclusive territorial rights under the original franchise agreements. Adia's substantial interference was undeniable. After considerable discussion between Adia and Nursefinders about the Starmed purchase causing a material change in the franchise relationship, Nursefinders' disclosure statement was amended with language recommended by Adia stating that Nursefinders' parent owned Starmed which may place nurses in a franchisee's territory. (R21/232/147-149,163-164; 23/233/184,193, 212-215; 24/234/54-62; 26/235/95-102,105; 30/237/206,211; 31/238/ 18-20,56; 33/239/35; P.Ex.25,162,208).

Adia's buy-out of other franchisees and sham-sale of Starmed. In addition to its policy of interbrand competition so as to divide and conquer for greater market share, Adia's strategy was to buy out the larger market franchises and run them as company offices at a higher profit. In an effort to both silence the franchisees who were most vocal about Adia's interference through its purchase of competing affiliate-Starmed, and meet Adia's company objectives, therefore, Adia bought out Pecaro's and League's franchises and attempted to do the same with Plaintiff Gossard. (R21/232/161-162; 23/233/119,156-157,224-25; 24/234/71,74).

Further, in order to facially appease the franchisees who would no longer tolerate the destruction of their contractual rights, Adia, on March 2, 1990, devised a phony sale of Starmed to assetless Benson for $10 million (ten times Starmed's earnings) where Adia would finance the entire deal by taking a note back for

the full purchase price, maintain total control and have buy-back rights, but none of these facts would be mentioned in the immediate press releases and notices to the franchisees. Indeed, Adia's officers candidly admitted that the scheme was planned to show the franchisees that Adia did something about Starmed but that once the franchise unrest settled Adia would exercise its re-acquisition rights. As Macauley acknowledged, Adia did no investigation of the credit-worthiness of Benson, a former Adia officer with little or no personal wealth, exactly because Adia maintained control. Adia's note from Benson for the full purchase price was not shown as a receivable on Adia's annual statement and the sale, which was the first to be booked on a cost-recovery basis, was not recognized as a real sale for accounting purposes. Carr called Riggs at Nursefinders and told him the Starmed sale was a "charade." Virtually none of Adia's ownership rights and obligations changed. Adia continued to provide financial assistance to competing affiliate-Starmed and Starmed continued to advertise that its parent corporation was one of the largest temporary personal service companies in the world. (R21/232/167-169; 24/234/76-82,87, 92-98; 26/235/107; 30/237/79-81,226-227; 31/238/4,7-8,57-58; 33/ 239/60; P.Ex.10,11,17,23,44,67,107,186; D.Ex.169; C.Ex.1,p. 104).

Plaintiffs lose benefits under exclusive territory agreements, revenues decline and long-term business and franchise relationships are destroyed. After Plaintiffs filed the instant lawsuit in January of 1991, Adia finally arranged for the refinancing of Benson's note to a third-party that September. Adia then received $5 million cash for the note and a sale took place for the first

time although Adia was still entitled to Starmed's financial information under the note. The damage was done, however. (R1/1/1; 24/234/99-101; 30/237/81-82; 31/238/6-7,60-61; 33/239/47). From 1989-1991, Adia's ownership and support of a competing affiliate in contravention to the franchise agreements caused significant harm to Plaintiffs. While Starmed's revenues in Plaintiffs' exclusive territories increased dramatically from $914,000 to $6 million, Plaintiffs' total revenues dropped from $9.5 to $7.3 million even though Plaintiffs were adding territories. Most noticeable was the rapid decline in Plaintiffs' long-term placement business. Prior to Starmed's purchase in 1988, a substantial portion of Plaintiffs' nurse placements were booked on a long-term basis. The placements swiftly decreased in 1988, 1989 and 1990 and were virtually non-existent in 1991. In St. Petersburg, for example, the long-term business plummeted from 70% in 1987, to 50% in 1988, 5% in 1990, and 1% in 1991. Numerous individual accounts were wiped out. In 1987, Humana Hospital Northside was the largest account in Pinellas County. From $700,000 revenues in 1987, the business took a tail-spin to $330,000 in 1988, $90,000 in 1989, and to about $19,000 in 1991. At East Point Hospital in Lehigh, Plaintiffs were supplying all of the business 7 days a week, 24 hours a day, until Starmed came in and took the business away in May of 1989. Plaintiffs likewise lost all of their business to Starmed at the Gulf Coast Hospital in Fort Meyers. In conjunction with the loss of revenues and lost value of business, Starmed's placements also depleted the available nursing pool in Plaintiffs' exclusive territories. Plaintiffs' own nurses were enticed to terminate their relationship

and work for Starmed. (R11/218/7; 26/235/57-75,85-87; 28/236/11-12,149,182; 30/237/13-16,47,92-97; P.Ex.70,72,221).

Further, had competing affiliate-Starmed's accounts and business been turned over as agreed upon under the franchise agreements, Plaintiffs could have easily handled the additional long-term business. Notwithstanding any general national nursing shortage in 1980's, Plaintiffs had access to enough nurses in their territories to cover the business. Finally, the working franchise relationship between Plaintiffs and Nursefinders was destroyed. Adia took what was a "family, close knit business and turned it into dirt." All enthusiasm was gone. The only remaining link between franchisor and franchisee was the 5% royalty check. The Plaintiffs were devastated and felt as if Adia "just ripped the heart right out of [them]." (R26/235/102-103,114-117; 28/236/79-80,152; 30/237/19-20, 26-27,98-102,162-170,177-178).[4]

(ii) Trial and appellate proceedings.

Judge Kovachevich finds tortious interference claims legally viable under Florida law and rejects Adia's "causation" arguments. Plaintiffs filed a diversity action alleging that Adia tortiously interfered with Plaintiffs' existing contract rights. As set forth in the complaints, Adia's purchase of competing Starmed caused Nursefinders to be in breach of its exclusive territory agreements with Plaintiffs. (R1/1/11; 2/36/11; 120 F.3d at 1231). Adia moved to dismiss Plaintiffs' action for failure to state a claim arguing that Adia, as a matter of law, did not "knowingly interfere" with and "cause" the contract breach. (R1/6/5). Presiding Judge

[4]Additional facts will be set forth in the argument below.

Kovachevich rejected these arguments and denied Adia's motion. Adia made the same arguments on motion for summary judgment. (R4/72/6-16). Judge Kovachevich once again rejected them and ruled in a well-reasoned order that, under Florida law, the relevant fact issues must be decided by the jury:

> Plaintiffs have shown three issues of fact raised by sufficient evidence addressing Defendant's intent and justification, and damage to Plaintiffs. By introducing evidence that Defendant knew that StarMed's business was incompatible with Nursefinders' business, i.e., the two companies were competitors, not complimentary to each other, Plaintiff has raised a material issue of fact regarding Defendant's intent to interfere with Plaintiff's contracts. Plaintiffs also introduced evidence to contradict Defendant's claim that Defendant's parent-subsidiary relationship with Nursefinders privileged or justified any interference with Plaintiffs' contracts. Evidence showing that Defendant interfered with Plaintiffs' contracts for Defendant's own business advantage raises an issue of justification that a jury should decide. Finally, Plaintiffs introduced sufficient evidence showing loss of business following Defendant's purchase of Starmed. Whether there exists a causal nexus between the two events is a fact question. For these reasons, Plaintiffs have raised issues of fact for the jury ....

(R7/114/10).

Jury findings. On Plaintiffs' Florida tortious interference claim, the jury was instructed by Magistrate Wilson as to the factual elements needed to be found including "causation" and "intentional interference." (R36/240/12). The jury returned a verdict finding a violation of Plaintiffs' franchise agreements; that Adia tortiously interfered without justification with the agreements; and that Plaintiffs sustained $2,488,000 in damages. (R11/199/1-2; 120 F.3d at 1231).

Magistrate Wilson enters JMOL. In its post-judgment motion for JMOL, Adia raised the same legal causation arguments twice rejected by Judge Kovachevich and further argued that the damage

award was without a sufficient evidentiary basis. (R11/209/27-31). Magistrate Wilson accepted Adia's liability and damage arguments and issued an order granting the motion. (R11/218/1-11). As to liability, Magistrate Wilson essentially nullified Judge Kovachevich's prior ruling and the jury's factual findings and determined that Adia did not legally "cause" Nursefinders to violate the franchise agreements as causation is defined under Restatement §766. 120 F.3d at 1231. Magistrate Wilson reasoned:

> The Second Restatement of Torts defines the tort of intentional interference with a contract as follows (§766):
>
> > One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.
>
> There was no evidence that, with respect to the franchise agreements, the defendant induced Nursefinders to do anything. Thus, the question here is whether the defendant "otherwise caus[ed]" Nursefinders to violate the franchise agreements.
>
> The Comments to §766 of the Restatement explain that "otherwise causing" refers to the situation where, unlike the circumstances involving inducement, the tortfeasor "leaves [the contracting party] no choice," that is, he affirmatively prevents the party from carrying out the contract. Restatement (Second) of Torts cmt. h. Examples of this are "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." Id. Another example is "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." Id.
>
> This case does not involve a situation that even roughly approximates the examples given in the Restatement. The evidence indisputably shows that, with respect to the franchise agreements, the defendant took no action at all toward Nursefinders.
>
> The plaintiffs contend, however, that Nursefinders had promised its franchisees that no parent or affiliate would provide nursing services within their territory, and that when the defendant purchased Star-Med it caused Nursefinders to

break that promise. While the defendant may have "caused" Nursefinders to be unable to carry out the agreements within some broad dictionary meaning of that term, it did not cause Nursefinders to breach the agreements in the legal sense. The Restatement, which in essence requires a contracting party either to be induced not to perform, or to be prevented from performing, his contractual obligations, clearly demands something far more direct than what occurred here to Nursefinders. (footnote omitted).

A hypothetical example submitted by Adia demonstrates the invalidity of the plaintiffs' claim. Suppose, the defendant says, that General Motors (GM) executes an agreement in which it promises its dealers in Pinellas County that only GM cars would be sold in that county. Further, GM sends a copy of that agreement to Ford, in order to make sure that Ford has knowledge of the agreement. Surely, the defendant argues, Ford cannot be liable for intentional interference with contract if it sells its cars in Pinellas County contrary to GM's promise.

This hypothetical, in my view, shows the lack of merit in the plaintiffs' claim. In this case, the only additional circumstance presented is the corporate relationship between the defendant and Nursefinders. However, Nursefinders had no authority to make a promise that would bind Adia. Indeed, recognizing that a contrary assertion would be self-defeating in this tort action, see Genet Company v. Annheuser-Busch, Inc. (sic), 498 So.2d 683, 684 (Fla.App.1986), the plaintiffs acknowledge that Adia is not a party to the franchise agreements and is not contractually bound by them. But since Adia is not bound by the franchise agreements, its situation is not meaningfully different from that of Ford in the defendant's hypothetical.

The plaintiffs, nevertheless, argue that, while Nursefinders' promise to its franchisees could not create contractual liability for the defendant, it did create tort liability for Adia. How this could be so was not explained. It seems to me either that Nursefinders could legally speak for the defendant, in which case the defendant would be subject to contract liability and not tort liability, or that Nursefinders could not legally speak for the defendant, in which case Nursefinders' promise created no liability at all on the defendant's part.

In all events, the circumstances here gave rise only to contract liability. Nursefinders, according to the jury, made a promise that was not kept. Liability for the violation of that promise should fall on Nursefinders, the party that made the promise, and not upon the defendant, a party that gave no such undertaking. Significantly, Nursefinders was in a position to protect its promise when it sold out to the defendant, but it did not do so. The plaintiffs, despite

these circumstances, did not sue Nursefinders for breach of the franchise agreements, but sued the defendant in tort instead. That tactic was a mistake because, under the facts of this case, the defendant did not commit a tort.

922 F. Supp. at 560-562.

Eleventh Circuit certifies liability/"causation" question to Florida Supreme Court. Plaintiffs appealed Magistrate Wilson's liability and damage rulings to the Eleventh Circuit Court of Appeals. In an opinion written by Judge Barkett, the Eleventh Circuit has certified only the liability/"causation" question to this Court. 120 F.3d at 1231-1232. Again, the Eleventh Circuit reiterates that the jury resolved all factual issues in favor of the Plaintiffs. Id. at 1230-1231. Although recognizing that this Court applies Restatement §766 to define the tort of "intentional interference with a contract" in Florida, the Eleventh Circuit (like Magistrate Wilson) queries "whether Adia 'otherwise caused' Nursefinders to violate the franchise agreements" and states that this important issue has not been addressed by the Florida Supreme Court. Id. at 1230-1231. In a footnote, the Eleventh Circuit suggests that the cases cited by Plaintiffs are distinguishable in that "[t]hey all involve a direct impact upon a contracting party's ability to perform its obligations." Id. at 1232 n.1.

SUMMARY OF ARGUMENT

Under the facts presented to the jury, Plaintiffs clearly made out a claim under Florida law for tortious interference with existing contractual rights. The jury's factual finding that Adia intentionally interfered with and caused a breach of Plaintiffs' franchise agreements (which precluded affiliate competition) by purchasing, funding and developing affiliate-Starmed which Adia

knew competed in Plaintiffs' exclusive territories is fully supported by the evidence.

Magistrate Wilson's ruling that there was no "causation" under Restatement §766 disregards that the issue is one of fact for the jury. Here, Adia's own officers readily admitted responsibility for Starmed and the damage it caused Plaintiffs and further acknowledged that Nursefinders did not cause the problem. Further, neither the Restatement nor the case law requires a defendant to induce or act upon a contracting party. It is sufficient that the tortfeasor's actions are directed against the subject matter of the contract so as to destroy or impair the parties' rights or obligations thereunder or make contract performance impossible.

Moreover, Magistrate Wilson completely overlooked that Adia, by purchasing Nursefinders, assumed a fiduciary duty to act in its subsidiary-franchisor's best interests. Not only did Adia intentionally cause Nursefinders to be in violation of its territorial exclusivity covenants to Nursefinders' detriment, but Adia wrongfully sought to devalue the franchises and force the Plaintiffs to sell them back to Adia. The fact that Adia and Nursefinders are separate entities is precisely why Adia is liable in tort. Regardless of any other potential remedy Plaintiffs might have against Nursefinders, Adia knowingly destroyed the franchise relationship and cannot be shielded from tort liability.

Respectfully, therefore, the certified question should be answered in the affirmative. Under Florida law, a parent corporation cannot be allowed to knowingly cause its subsidiary-franchisor to be in breach of its territorial exclusivity covenants

and duty of good faith and fair dealing to its franchisees by purchasing an affiliate which competes in franchisees' territories.

ARGUMENT

PLAINTIFFS MADE OUT A LEGALLY VIABLE CLAIM UNDER FLORIDA LAW FOR TORTIOUS INTERFERENCE WITH EXISTING CONTRACTUAL RIGHTS/RELATIONSHIPS UNDER THE FACTS PRESENTED TO JURY.

I. There is substantial record evidence to support jury's finding that Adia "caused" a loss of Plaintiffs' exclusive territorial rights under the franchise agreements with Nursefinders.

Respectfully, Magistrate Wilson's wiping out the jury verdict on the basis that there was no evidence that Adia "otherwise cause[d]" the breach of franchise agreements under Restatement §766 is contrary to fact and Florida law. Adia's "causation" defense was twice rejected by originally presiding Judge Kovachevich who ruled that Plaintiffs stated a legally viable claim for tortious interference and that there was sufficient evidence to go to the jury. At trial, the jury was instructed on the factual elements needed to be found *including causation* in conformity with Florida law and the Restatement:

> A third party interferes with a contract between two others if it induces or otherwise causes one of them to breach, or to be unable to perform the contract.
>
> Interference is intentional if the party interfering knows of the contract with which it is interfering, knows it is interfering, and desires to interfere or knows that interference is substantially certain to occur as a result of its action.

(R36/240/12). See Ethan Allen, Inc. v. Georgetown Manor, 647 So. 2d 812, 814 (Fla. 1994); Tamiami Trail Tours, Inc. v. Cotton, 463 So. 2d 1126, 1127 (Fla. 1985); Florida Standard J.I. (Civil) MI 7.1; Restatement (Second) of Torts §766 (1979).

The jury, as trier of fact, was presented with an abundance of evidence that Adia, in purchasing, funding and developing Starmed,

directly and knowingly caused Nursefinders to be in breach of or unable to perform its franchise agreements by purchasing Starmed and thereby creating an affiliate of Nursefinders which competed in Plaintiffs' exclusive territories. Indeed, Adia not only knew of Nursefinders' preexisting obligation not to have an affiliate or parent compete with its franchisees prior to Adia's purchase of Starmed, but prior to Adia's purchase of Nursefinders itself. Moreover, it was virtually undisputed that parent-Adia's actions significantly damaged the franchise relationship between Plaintiffs and subsidiary-Nursefinders. There was also substantial evidence that Adia purposefully stimulated interbrand competition within Plaintiffs' territories in violation of the agreements with the intended and wrongful consequence of devaluing Plaintiffs' franchises so that Adia could advantageously repurchase them. The record fully supports the jury's finding of causation.

The Restatement, case law and legal commentaries make crystal clear that whether a defendant's conduct is a cause of the loss of contractual rights or contract non-performance is a question of fact for the jury. See Restatement §766, comment o ("The question whether the actor's conduct caused the third person to break his contract with the other raises an issue of fact."); Rabun v. Kimberly-Clark Corp., 678 F.2d 1053, 1059 (11th Cir. 1982) (applying Georgia law) (reversing JNOV and reinstating jury verdict; "It is a question of fact, and thus for the jury, whether the defendant has played a material and substantial part in causing the plaintiff's loss of any benefits of the contract." (quoting Piedmont Cotton Mills v. H.W. Ivey & Co., 137 S.E.2d 528, 531 (Ga.

App. 1964))); W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on Law of Torts [hereinafter Prosser] §129, p.991 (1984)("It is a question of fact, and so normally for the jury, whether the defendant has played a material and substantial part in causing the plaintiff's loss of the benefits of the contract." (citing, e.g., Chipley v. Atkinson, 1 So. 934 (Fla. 1887))); 1 F. Harper & F. James, The Law of Torts §6.8 [Manner of Interference], p.499 (1956) ("In a close case, it is a question of fact for the jury whether the defendant's conduct has been a cause of the breach by inducement or otherwise bringing about a situation which was a substantial factor in the failure of one of the parties to perform his obligations under the contract.").

Moreover, in determining this question of fact under Restatement §766, it is equally settled that causation may be found where the defendant's actions make it impossible for one of the contracting parties to perform under the contract; or where the defendant's conduct detrimentally affects or destroys the subject matter of the contract such that a party cannot keep his promises thereunder; or where the defendant's actions make contract rights less valuable or contract obligations more burdensome. It is not in the least bit essential that the defendant actually induce, influence or act upon one of the contracting parties, as Adia asserted below, but rather causation can be established when the defendant's conduct directly affects the res or property rights under the parties' contract or contractual relationship. See, e.g., Franklin v. Brown, 159 So. 2d 893, 896 (Fla. 1st DCA 1964)(if "[defendant] intentionally destroyed the subject matter of the

contract existing between [plaintiff] and Welton Smith, or otherwise unlawfully rendered the latter's performance under the contract impossible, [defendant] would be liable in tort to the same extent as if he had unlawfully induced Welton Smith to breach its contract with [plaintiff]"); Restatement §766, comment k ("it is not necessary to show that the third party was induced to break the contract"); Prosser §129, at p.991 [Causation and Manner of Interference] ("actual inducement is not necessarily required at all ... it is enough that the contract performance is partly or wholly prevented, or made less valuable, or more burdensome by the defendant's unjustified conduct").

Here, while the causation question was put before the jury and properly decided by the trier of fact against Adia, it was never even a disputed evidentiary issue at trial. All of the witnesses, including Adia's own officers, readily admitted that Adia was directly responsible for the Starmed competition issue; that Nursefinders did not bring about the problem; and that the franchisees needed to make their complaints about Starmed's competition being in violation of the franchise agreements to Adia. To be sure, the greater part of the entire trial focused on Adia's handling of the firestorm of outrage from the franchisees and Nursefinders about affiliate-Starmed's competing within the exclusive territories and Adia's acts of deception prior to and after the purchase of Starmed including the sham-sale to Benson. The only conflicting liability testimony centered around whether Starmed was competing in violation of the franchise agreements and whether Adia had knowledge of this prior to purchasing the company.

The jury found against Adia on these factual issues as well and Magistrate Wilson's order agrees there is substantial evidence to support these jury findings. 922 F. Supp. at 560.

"Causation" was never factually disputed at trial as demonstrated by defense counsel's complete silence on the issue in closing argument. In fact, Adia's officers all but admitted liability to the extent Adia's purchasing of a competing affiliate rendered Nursefinders' performance of its contractual promise of territorial exclusivity impossible thereby causing Nursefinders to be in breach of its contract. Ray Marcy, who was the number two man at Adia, admitted Adia's purchase of Starmed caused a serious infringement on the franchisees' contract rights and a breach of Nursefinders' agreements. (R23/233/53-54,184). Walter Macauley, Adia's president and CEO, likewise acknowledged Adia's duty in tort not to cause Nursefinders to be in breach of its agreements. (R30/237/203,210 - "If Larry Carr had objected at this meeting or at any time before, [Adia] would never have made these purchases."). Moreover, there is substantial evidence of Adia's admission of causing financial harm to the Plaintiffs and damaging the franchisees' relationship with Nursefinders. Adia's conduct could not have had a more direct impact on Nursefinders' ability to perform its covenant of territorial exclusivity and the Plaintiffs' ability to reap the benefits of their rights under the agreements.

With all due respect, therefore, Magistrate Wilson's assertion that Adia "took no action at all toward Nursefinders" misses the mark and fails to support his causation analysis under Restatement §766. 922 F. Supp. at 561. Again, the courts have imposed

liability where the defendant's conduct directly impacted the subject matter or res of the contract and was not aimed at the contracting parties. The key focus is on the defendant's intent and knowledge of the substantial certainty that his acts will make it impossible for a party to perform his obligations or destroy or diminish the value of a party's contractual rights or relationship.

In Gregg v. U.S. Indus., Inc., 887 F.2d 1462 (11th Cir. 1989), for example, another panel from the Eleventh Circuit upheld a jury verdict for plaintiff (Gregg) on a Florida tortious interference claim where the defendant (U.S.I.) failed to disburse dividends on stock pledged by the plaintiff to a bank (Leesburg Bank) thereby causing the bank to liquidate plaintiff's stock. Id. at 1473-74. The defendant took no actions toward the plaintiff or his bank but rather failed to release funds which were the subject matter of the parties' banking relationship. The court found substantial evidence to establish liability under Florida law where the defendant was aware of the harm which would result to plaintiff if the dividends were not disbursed yet the defendant intentionally withheld them. Id. at 1474.

Similarly, in Tippett v. Hart, 497 S.W.2d 606 (Tex. App.), w.r.n.r.e., 501 S.W.2d 874 (Tex. 1973), the court upheld a jury verdict finding tortious interference and causation and rejected the identical argument raised by Adia below that a defendant must somehow induce, act or prevail upon, influence or persuade a party to breach the contract. Id. at 610. There, the plaintiff (Hart) entered into a agricultural contract with the United States which prohibited the grazing of cattle on part of plaintiff's land.

There was evidence that defendant (Tippet) knew of the agreement yet permitted his cattle to graze the land thereby causing plaintiff to be in breach of her contract and subjected to a monetary penalty. Id. at 607-08. In rejecting defendant's contention that there was no evidence that it intentionally procured or induced the plaintiff to breach her contract, the court held that interference with contract includes all invasion of contract relations including any act "'destroying or damaging property which is the subject matter of the contract.'" Id. at 610. Because the defendant's acts resulted in plaintiff's noncompliance with the contract, and defendant knew the affects of his acts, legal causation was established. Id. at 610-11.[5]

Here, Adia likewise legally caused Nursefinders to be in breach of its contractual covenant that no affiliate would compete in the franchisees' exclusive territory. There was substantial evidence for the jury to conclude that Adia knew of Nursefinders' promise and of franchisees' corresponding rights under the agreements yet intentionally destroyed the subject matter of the contract as well as the parties' working relationship. Adia was expressly forewarned by Carr, the president of Nursefinders, that Adia would be interfering and urged not to purchase a competing affiliate. Adia rendered Nursefinders' performance and Plaintiffs'

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[5]See also In re Knickerbocker, 827 F.2d 281, 286-88 (8th Cir. 1987)(reversing JNOV on tortious interference claim where evidence that defendant-lender knew that withholding distribution of grain sale proceeds to farm landlords would disable farmers from fulfilling lease obligations to landlords); Pelton v. Markegard, 586 P.2d 306, 308 (Mont. 1978)(reversing dismissal of tortious interference claim where defendant's failure to pay third-party caused third-party to be in breach of its contract with plaintiff).

receipt of the benefits under the agreements impossible. Legal causation was certainly established. There is no case law establishing the opposite.

Moreover, apart from causing Nursefinders to be in breach of its express contractual grant of exclusive territory, Adia likewise legally caused Nursefinders to be in violation of its implied covenant of good faith and fair dealing which precludes a franchisor from destroying a franchisee's business through competition. See Vylene Enterprises, Inc. v. Naugles, Inc., 90 F.3d 1472, 1477 (9th Cir. 1996); Scheck v. Burger King Corp., 756 F. Supp. 543, 549 (S.D. Fla. 1991), reconsideration denied, 798 F. Supp. 692 (1992)(applying Florida law)(cases holding that franchisor's decision to sanction establishment of business in competition with franchisee is breach of implied covenant of good faith and fair dealing, despite fact that franchise agreements declined to grant franchisee an exclusive territory).[6] Florida should not allow a parent to create a competing affiliate of its subsidiary-franchisor which destroys the franchisees' business in express derogation of the franchisees' contractual rights.

Further, Magistrate Wilson's observation that "[t]his case does not involve a situation that even roughly approximates the examples given in the Restatement" is neither significant nor

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[6]See also Burger King Corp. v. C.R. Weaver, 798 F. Supp. 684, 688 (S.D. Fla. 1992)(applying Florida law); Larese v. Creamland Dairies, Inc., 767 F.2d 716, 717 (10th Cir. 1985); Dunfee v. Baskin-Robbins, Inc., 720 P.2d 1148, 1152-1154 (Mont. 1986). See generally Spandorf, Gurnick & Fern, Implications of the Covenant of Good Faith: Its Extension to Franchising, 5(2) Franchise L.J. 3 (Fall 1985); Brown, Franchising: The Duty to Perform in Good Faith and Fair Dealing, 2(1) Franchise L.J. 17 (Spring 1982).

accurate. 922 F. Supp. at 561. The examples of "otherwise causing" contract non-performance set forth in comment h to §766 - which are the same examples originally set forth in comment d to §766 of the First Restatement of Torts (1939) - are non-exhaustive and not intended to define or in any way restrict the factual scenarios establishing causation. The comments plainly state that "[t]here is no technical requirement as to the kind of conduct that may result in interference with the third party's performance of the contract." Restatement §766, comment k. The critical focus under the Restatement is on the defendant's intent and knowledge of resultant harm:

> *h. Inducing or otherwise causing.* ... The rule stated in this Section applies to any intentional causation whether by inducement or otherwise. The essential thing is the intent to cause the result. ... (On purpose and intent, see Comment j).
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> * * *
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> *j. Intent and purpose.* ... [The rule] applies also to intentional interference, as that term is defined in §8A, in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action. The rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action. ...

Restatement §766, comments h, j.

Second, comment h to Restatement §766 lists as an example the situation where "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." As explained below, a critical fact which the District Court completely overlooks or misunderstands is that Adia, upon purchasing Nursefinders and becoming the sole controlling shareholder of the subsidiary company, assumed an entirely separate

fiduciary obligation/duty (like a corporate officer or director) to act in Nursefinders' best interests. And it is precisely Adia's breach of its independent and antecedent obligation by creating an affiliate in competition with the Plaintiffs in complete disregard of Nursefinders' interests that disabled and rendered Nursefinders' performance of its preexisting contractual obligations impossible. E.g., In re N & D Properties, Inc., 799 F.2d 726, 731-32 (11th Cir. 1986)(controlling shareholder breaches its fiduciary duty to corporation and creditors when acting for its own benefit and bears burden of proving fairness of its actions); Leaco Enterprises, Inc. v. General Elec. Co., 737 F. Supp. 605, 610 (D. Ore. 1990) (rejecting Magistrate's recommendation for summary judgment on tortious interference claim; there is "evidence which could support a finding that [parent] GE considered its own benefit and not the best interests of [subsidiary] CGE in directing CGE to terminate Leaco's contract. As a controlling shareholder in CGE, GE has a fiduciary duty to consider CGE's interests in such transactions.").

Further, Magistrate Wilson's causation analysis overlooks established law that tortious interference need not even result in a breach of contract. A defendant is liable for purposefully interfering and damaging the parties' contractual relationship as well as for destroying or diminishing the value of any benefits under the contract. E.g., Franklin, 159 So. 2d at 896. Here, it was undisputed that Adia's actions had an absolutely devastating affect on the Plaintiffs' franchise relationship with Nursefinders. Indeed, Adia's Marcy expressly admitted that even if there was no breach of contract, Adia's ownership of Starmed caused substantial

damage to the franchise relationship. (R23/233/193,215).

Equally significant, however, there was evidence before the jury that Adia purposely augmented affiliate-Starmed's competition within the exclusive territories in order to reduce franchise revenues and market value and thus be able to advantageously repurchase the franchises. Marcy candidly acknowledged Adia's policy and extensive practice of interbrand competition and how in a maturing industry it was crucial to repurchase franchises and increase profit by operating them as company-owned offices. (R23/233/222; 24/234/50-51). Having devalued the franchises through direct competition, Adia's plan of attack was to purchase the "major market centers" including Plaintiffs' St. Petersburg office which was number one in the country in sales. (R23/233/117; 24/234/48-49,74; 26/235/32). Adia's actions in purposefully devaluing and eliminating the Plaintiffs' "sweat equity" in their franchises is precisely the type of intentional and improper/ malicious conduct giving rise to an action for tortious interference in Florida as elsewhere. See Wagner v. Nottingham Assocs., 464 So. 2d 166, 168 (Fla. 3d DCA), rev. den., 475 So. 2d 696 (Fla. 1985)(jury verdict finding tortious interference supported by evidence that defendant intended to impair plaintiff's ability to make payment on property mortgage so that defendant could retake property).[7]

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[7]See also Sade Shoe Co., Inc. v. Oschin and Snyder, 209 Cal. Rptr. 124, 127 (Ct. App. 1984)(defendant's refusal to consent to assignment of plaintiff's lease is actionable as tortious interference where defendant's predominant purpose is to regain possession of property for own personal gain); Mendelson v. Blatz Brewing Co., 101 N.W.2d 805, 808 (Wis. 1960)(majority shareholder's causing termination of plaintiff's contract with corporation in

The "GM-Ford" hypothetical submitted by Adia and heavily relied upon by Magistrate Wilson in his order (which hypothetical Adia ironically abandoned altogether on appeal to the Eleventh Circuit), not only fails to give any support to Magistrate Wilson's causation analysis but fully highlights the critical differences in the case presented to the jury. 922 F. Supp. at 561.

First and foremost, the hypothetical is totally inapposite as Adia was the sole controlling parent shareholder of franchisor-Nursefinders while GM and Ford are mere competitors with no legal inter-relationship. As noted above, it is well settled that a sole or controlling shareholder has an obligation, like that of an officer or director, to act in the best interests of the corporation and not to its detriment. Indeed, the controlling shareholder is said to assume an "exacting obligation" of uncompromising loyalty to not only the corporation but also its creditors as part of the entire community of interests in the corporation. Further, when a sole shareholder's conduct is challenged, it carries the burden of proving that it acted with good faith and inherent fairness to the corporation and its creditors. See, e.g., Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 245, 84 L.Ed. 281 (1939); In re N & D, 799 F.2d at 731-32; Allied Indus. Intern. v. Agfa-Gevaert, Inc., 688 F. Supp. 1516, 1521 (S.D. Fla. 1988), aff'd, 900 F.2d 264 (11th Cir. 1990); Garner

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order to acquire plaintiff's stock for less than it was worth states cause of action for tortious interference).

v. Pearson, 545 F. Supp. 549, 556-58 (M.D. Fla. 1982).[8]

It is precisely in recognition of these established corporate principles, of course, that sole and controlling shareholders are liable for tortious interference with the subsidiary's/ corporation's existing contracts when they are not acting in the corporation's best interests but rather in furtherance of their own separate motives such as to enhance the parent's interest in another subsidiary or to reduce the profits or competition of the other contracting party. Parent/shareholder interference with existing contractual relationships is improper, unjustified and non-privileged where such action is not taken in good faith to protect the interests of the subsidiary/corporation. E.g., Phil Crowley Steel Corp. v. Sharon Steel Corp., 782 F.2d 781, 783-84 (8th Cir. 1986); Fury Imports, Inc. v. Shakespeare Co., 554 F.2d 1376, 1383-85 (5th Cir. 1977); In re Conti Commodity Serv., Inc. Sec. Lit., 733 F. Supp. 1555, 1568 (N.D. Ill. 1990), other part of order rev'd, 976 F.2d 1104 (7th Cir. 1992), cert. den., 116 S.Ct. 1318 (1996); Leaco Enter., Inc., 737 F. Supp. at 609-10; Pure, Ltd.

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[8]Accord United States v. Byrum, 408 U.S. 125, 92 S.Ct. 2382, 2391, 33 L.Ed.2d 238 (1972); Superintendent of Ins. for St. of N.Y. v. Bankers L. & C. Co., 404 U.S. 6, 92 S.Ct. 165, 169, 30 L.Ed.2d 128 (1971); Pepper, 60 S.Ct. at 245; Bailey v. Meister Brau, Inc., 535 F.2d 982, 993 (7th Cir. 1976); Brown v. Presbyterian Ministers Fund, 484 F.2d 998, 1005 (3d Cir. 1973); Hanraty v. Ostertag, 470 F.2d 1096, 1099 (10th Cir. 1972); Bayliss v. Rood, 424 F.2d 142, 146 (4th Cir. 1970); KDT Inds., Inc. v. Home Ins. Co., 603 F. Supp. 861, 868 (D. Mass. 1985); United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 205 (D. D.C. 1982), aff'd sub nome, Maryland v. United States, 460 U.S. 1001 (1983); First Nat. Bank of La Marque v. Smith, 436 F. Supp. 824, 829 (S.D. Tex. 1977), modified on other grounds, 610 F.2d 1258 (5th Cir. 1980); In re Jackson, 141 B.R. 909, 915 (Bnkr. N.D. Tex. 1992); In re Tanner's Transfer & Storage of Va., Inc., 22 B.R. 24, 26 (Bnkr. E.D. Va. 1982); Jones v. H.F. Ahmanson & Co., 460 P.2d 464, 471-472 (Cal. 1969).

v. Shasta Beverages, Inc., 691 F. Supp. 1274, 1279-80 (D. Haw. 1988); McIntosh v. Magna Systems, Inc., 539 F. Supp. 1185, 1193-94 (N.D. Ill. 1982); Dependahl v. Falstaff Brewing Corp., 491 F. Supp. 1188, 1198 (E.D. Mo. 1980), mod., 653 F.2d 1208 (8th Cir.), cert. den., 454 U.S. 968 (1981); Collins v. Vikter Manor, Inc., 306 P.2d 783, 788 (Cal. 1957); Shapoff v. Scull, 272 Cal. Rptr. 480, 484 (Ct. App. 1990); Culcal Stylco, Inc. v. Vornado, Inc., 103 Cal. Rptr. 419, 421-22 (Ct. App. 1972); Frank Coulson, Inc.- Buick v. Trumbull, 328 So. 2d 271, 273 (Fla. 4th DCA), cert. dism., 336 So. 2d 604 (Fla. 1976); Sunamerica Financial, Inc. v. 260 Peachtree Street, Inc., 415 S.E.2d 677, 683 (Ga. App. 1992); Shared Comm. Serv. of 1800-80 JFK Boulevard, Inc. v. Bell Atlantic Properties, Inc., 692 A.2d 570, 574-575 (Pa. 1997); Valores Corporativos, S.A. v. McLane Co., Inc., 945 S.W.2d 160, 167-168 (Tex. App. 1997).

Respectfully, Magistrate Wilson's observation in this regard that, although there was a "corporate relationship between [Adia] and Nursefinders[,] the two are separate legal entities," misses the point entirely. 922 F. Supp. at 561. It is exactly because parent-Adia and subsidiary-Nursefinders are separate and distinct legal entities, and because Adia has denied any privity of contract, vicarious liability, or alter ego status, that Adia's liability is grounded in tortious interference. A contrary holding would turn Florida law on its head. See Peacock v. General Motors Acceptance Corp., 432 So. 2d 142, 143 (Fla. 1st DCA 1983)(fact that parent and subsidiary are distinct legal entities does not prevent

claim for tortious interference with franchise agreement).[9]

Furthermore, Magistrate Wilson's statement that "Nursefinders had no authority to make a promise that would bind Adia" has no relevance and confuses the legal and factual issues in the case. 922 F. Supp. at 561. It has never been Plaintiffs' position that Nursefinders made a promise which is contractually binding on Adia. It is undisputed that Adia is not a party to the franchise agreements and that the agreements do not contractually prohibit Adia from doing anything. Nursefinders' authority to make exclusive territorial covenants is not at issue. Again, what Adia and Magistrate Wilson respectfully fail to recognize in contravention to the case law is that Adia, upon purchasing Nursefinders' stock, assumed an entirely separate legal obligation at common law to act in the best interests of Nursefinders and not to tortiously interfere with its preexisting contracts with third parties to Nursefinders' detriment. Indeed, the evidence establishes that Adia's own officers at all time recognized this fiduciary duty but simply breached it. Before purchasing Starmed, Hamachek admitted that he and Macauley discussed whether Adia's ownership of a travel nurse company would interfere with or damage Nursefinders. Adia's fiduciary duties do not arise out of the

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[9]See also, e.g., Phil Crowley, 782 F.2d at 783-84 (parent as separate entity tortiously interferes with subsidiary's contract when its causing contract breach disregards subsidiary's interests); In re Sunrise Sec. Lit., 793 F. Supp. 1306, 1326 (E.D. Pa. 1992)(under Florida law, defendant-agent is distinct legal entity and thus liable for tortious interference with principal's contract); GHK Assocs. v. Mayer Group, Inc., 274 Cal. Rptr. 168, 185 (Ct. App. 1990)(rejecting parent's argument that it was a party to subsidiary's contract since defense of no privity of contract was pleaded).

franchise agreements or any actions of Nursefinders on behalf of Adia, but arise at common law whereby one has a common law duty not to knowingly interfere with the contractual rights of another. In the same exact manner, case law from Florida and other jurisdictions recognizes tortious interference claims against officers, directors and agents who fail to act in the best interests of their corporation or principal. See O.E. Smith's Sons, Inc. v. George, 545 So. 2d 298, 300 (Fla. 1st DCA 1989); Sloan v. Sax, 505 So. 2d 526, 528 (Fla. 3d DCA 1987).[10]

Unlike Adia's "GM-Ford" hypothetical involving competitors with no legal inter-relationship, therefore, Adia as the controlling parent shareholder had an independent duty under common law which Adia plainly breached by purchasing and augmenting competing-affiliate Starmed and causing franchisor-Nursefinders, against its interests, to be in violation of its preexisting contract containing a covenant not to have a competing affiliate in the franchisees' exclusive territories. Indeed, as detailed above, the record conclusively shows that Adia's own officers understood Adia's independent fiduciary duty not to place Nursefinders in breach of its franchise agreements and not to destroy the franchise

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[10]See also, e.g., Q.E.R., Inc. v. Hickerson, 880 F.2d 1178, 1183-84 (10th Cir. 1989); Moellers North America, Inc. v. MSK Covertech, Inc., 912 F. Supp. 269, 271 n.3 (W.D. Mich. 1995); CNC Serv. Ctr. v. CNC Serv. Ctr., 753 F. Supp. 1427, 1447-48 (N.D. Ill. 1991); Seven D. Enterp., Ltd. v. Fonzi, 438 F. Supp. 161, 163-164 (E.D. Mich. 1977); Carpenter v. Williams, 154 S.E. 298, 300-301 (Ga. App. 1930); Millelman v. Witous, 552 N.E.2d 973, 987 (Ill. 1989); Hunter v. Board of Trustees, 481 N.W.2d 510, 517-518 (Iowa 1992); Honingmann v. Hunter Group, Inc., 733 S.W.2d 799, 808-809 (Mo. App. 1987); Embree Const. Group, Inc. v. Rafcor, Inc., 411 S.E.2d 916, 924 (N.C. 1992); S.N.T. Indus., Inc. v. Geanopulos, 525 A.2d 736, 739-740 (Pa. Sup. 1987), app. den., 549 A.2d 137 (Pa. 1988); Lorentz v. Dreske, 214 N.W.2d 753, 760 (Wis. 1974).

relationship between the Plaintiffs and Nursefinders.

The "GM-Ford" hypothetical is also irrelevant because there was evidence before the jury that Adia purposefully intended to devalue the Plaintiffs' franchises so that Adia could repurchase them and increase its profit margin by operating them as company offices. Furthermore, as previously noted, the courts have made clear that a controlling shareholder's obligations extend to the corporation's creditors as well. E.g., Allied, 688 F. Supp. at 1516. Because Nursefinders had a continuing obligation to Plaintiffs to provide an exclusive territory free of company-related competition, Plaintiffs stood as Nursefinders' creditors and Adia owed a fiduciary duty to them as well. See Black's Law Dictionary p.194 (5th ed. 1983)("creditor" is "[o]ne who has a right to require the fulfillment of an obligation or contract"). Adia recognized it could have developed a travel nurse program within the franchisees but acted instead for its own and Starmed's aggrandizement. Without question, therefore, Adia's creation of a competing affiliate in total disregard of the interests of both franchisor-Nursefinders and Plaintiffs-franchisees gave rise to a tortious interference claim. See Shared Comm. Serv. of 1800-80 JFK Boulevard, Inc., 692 A.2d at 574-575 (affirming jury verdict finding tortious interference; evidence supports view that parent corporation's purpose in causing subsidiary to breach contract with plaintiff was not to prevent subsidiary's asset dissipation but rather to help another subsidiary's/affiliate's aggrandizement); Fury Imports, Inc., 554 F.2d at 1383-85 (reversing JNOV; shareholder liable for tortious interference with corporation's

exclusive distributor contract with plaintiff where shareholder's causing termination of contract did not benefit corporation and meant to eliminate plaintiff as competitor).[11]

Additionally, Magistrate Wilson's interpretation of the facts and Florida law as only providing Plaintiffs a breach of contract claim against Nursefinders is diametrically contrary to precedent from this Court permitting the injured party to bring a separate tort action against the wrongdoer who caused the breach in addition to, or in lieu of, a contract action against the party in default. See Harvey Corp. v. Universal Equip. Co., 29 So. 2d 700, 704 (Fla. 1947). Indeed, even if the agreement at issue is legally unenforceable and does not give rise to a breach of contract action, this Court has held that the third party can still be found liable in tort for interfering with the parties' contractual relationship. See United Yacht Brokers, Inc. v. Gillespie, 377 So. 2d 668, 672 (Fla. 1979).

The District Court's statement that "Nursefinders was in a position to protect its promise when it sold out to the defendant, but [] did not do so" likewise is not germane to the legal or factual issues in the case. 922 F. Supp. at 561. Adia, as a matter of law, assumed an obligation to act in franchisor-Nursefinders' interests when it became the controlling shareholder. This duty did not arise out of the stock purchase agreement or any other contract. Further, if what is being referenced to by

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[11]See also Angle v. Chicago, St. Paul, Minn. & Omaha R. Co., 151 U.S. 1, 13-15, 14 S.Ct. 240, 38 L.Ed. 55 (1894)(sole shareholder is liable to corporate creditor for tortious interference with contract where shareholder deprives corporation of ability to satisfy debt).

Magistrate Wilson was Nursefinders' ability to insert an indemnification provision, that would merely protect Nursefinders and not eliminate the Plaintiffs-franchisees' remedy in tort for contract interference. Moreover, the District Court's analysis places the shoe on the wrong foot. Adia was not required to purchase Nursefinders. If after having been told about the scope of Nursefinders' exclusive territory agreements Adia felt this would overly constrain its business plans, Adia simply should not have bought Nursefinders. That is precisely the purpose of due diligence. Having done so, however, Adia assumed an independent duty at common law to not act in blatant disregard of the interests of its subsidiary and creditors. Adia - not Nursefinders - thumbed its nose at its legal obligations and should be made to pay.

In any event, as further detailed below, the multi-factor issue as to whether Adia was somehow justified or privileged under the circumstances of this case was appropriately submitted to the jury as trier of fact. (R36/240/14-15). See Monco Enterprises, Inc. v. Ziebart Corp., 673 So. 2d 491, 492 (Fla. 1st DCA 1996)("The question of whether an action is privileged is a jury question.").[12] The jury determined - and there is substantial record evidence to establish - that Adia's conduct was simply not "sanctioned by the rules of the game." G.M. Brod & Co., Inc. v. U.S. Home Corp., 759 F.2d 1526, 1535 (11th Cir. 1985).

Respectfully, therefore, this Court should answer the

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[12]See also Frank Coulson, Inc. - Buick v. General Motors Corp., 488 F.2d 202, 206-207 (5th Cir. 1974); Yoder v. Shell Oil Co., 405 So. 2d 743, 744 (Fla. 2d DCA 1981), rev. den., 412 So. 2d 470 (Fla. 1982); Ins. Field Services v. White & White Inspection, 384 So. 2d 303, 306-307 (Fla. 5th DCA 1980).

certified question in the affirmative. A corporation, which knows prior to purchasing both the subsidiary-franchisor as well the competing-affiliate that the franchisor has preexisting territorial exclusivity contracts prohibiting affiliate competition within the franchisees' territories, must be held liable in tort for causing a breach of the franchise contracts and destruction of the franchise relationship. "Causation" was established under §766.

II. Adia's other "no liability as a matter of law" arguments are meritless.

A. Party to the contract.

Adia's claim below that Florida law precluded a jury finding of liability because Adia was not a "stranger" to the franchise contracts is likewise factually and legally baseless. Again, the evidence fully establishes that Adia is not a party to the franchise agreements between Plaintiffs and Nursefinders and that at no time did Adia act as an authorized agent on behalf, or for the benefit, of Nursefinders. Further, neither Plaintiffs' nor Nursefinders' rights or obligations under the franchise agreements are contractually contingent on Adia's approval or recommendations and Adia was not the source of any business opportunity interfered with. Accordingly, Adia's reliance below on West v. Troelstrup, 367 So. 2d 253 (Fla. 1st DCA 1979), Doyal v. School Board, 415 So. 2d 791 (Fla. 1st DCA 1982), Genet v. Annheuser-Busch, Inc., 498 So. 2d 683 (Fla. 3d DCA 1986) and Williams Electric Co. v. Honeywell, Inc., 772 F. Supp. 1225 (N.D. Fla. 1991) is totally misplaced.[13]

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[13]In both West and Doyal, the First District Court of Appeal affirmed the dismissal of plaintiffs' tortious interference claims against defendants who acted adversely to plaintiffs' employment contracts because the defendants were precisely the individuals

Here, in secretly purchasing competing affiliate Starmed over Nursefinders' adamant protest and in causing the destruction of the franchise relationship and parties' preexisting contract rights, Adia most assuredly was not acting on behalf of, through, or as an authorized agent of Nursefinders. See Albritton v. Gandy, 531 So. 2d 381, 388 (Fla. 1st DCA 1988). Further, the franchise agreements clearly did not give Adia any disapproval or recommendation powers or grant or impose on Adia any contract rights or obligations. Adia's duty not to tortiously interfere with existing contractual relations arose under the common law and not any contract. Adia is simply not a party to the franchise agreements and is estopped to even argue this given Adia's denial of any privity of contract. See GHK Assocs., 274 Cal. Rptr. at 185.

Moreover, and significantly, even if Adia were deemed an agent acting on behalf of Nursefinders, Florida, like all other jurisdictions, has recognized that a defendant's "party to the contract" status merely establishes a qualified privilege and that the jury can still find tortious interference where the agent is not acting in the best interests of its corporate principal but rather in its own self-interest. E.g., O.E. Smith's Sons, Inc., 545 So. 2d at 299-300 ("it is for the trier of fact to determine whether [defendant's act] was for the furtherance of the

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authorized and designated to act on behalf of plaintiffs' employers in employment matters. 415 So. 2d at 792-93; 367 So. 2d at 255. In Genet and Williams, on the other hand, the parties to the conditional contracts specifically gave the defendants disapproval and recommendation powers and thus the defendants could not be found liable in tort as third parties for exercising their own contractual rights or for interfering with a business opportunity for which defendants themselves were the source. 498 So. 2d at 684; 772 F. Supp. at 1236.

corporation's interests of for [defendant's] personal interests with no benefit to the corporation"); Honigmann, 733 S.W.2d at 808 (jury free to find franchisor's officers liable to franchisees for tortious interference with franchise contract where the officers did not act in good faith to protect franchisor's interests).

Indeed, Adia's "stranger to the contract" defense, like all of its "no liability as a matter of law" defenses, ignores the fact that, under Florida law, it was precisely the jury's function to determine whether Adia was liable in light of its status, relationship and proximity to the franchise contracts and contracting parties. Adia made the same arguments to Judge Kovachevich and was *twice* rejected. The factors which Magistrate Wilson instructed the jury to consider in making its factual determination as to the propriety of Adia's conduct are set forth in Restatement §767 and specifically include:

> (f) the proximity or remoteness of the actor's conduct to the interference and
>
> (g) the relations between the parties.

(R36/240/15). See McCurdy v. Collis, 508 So. 2d 380, 383 n.1 (Fla. 1st DCA), rev. den., 518 So. 2d 1274 (Fla. 1987). Adia freely argued to the jury that its status, relationship and proximity to the franchise agreements absolved it of liability. (R36/240/77 - "the first thing you have to determine is whether Adia is any way a party to the contract"). The jury considered but simply rejected Adia's arguments.[14]

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[14]Equally unpersuasive is Adia's suggestion below that Florida's economic loss rule (ELR) precludes a tortious interference action to the extent Adia's wrongful conduct caused a breach of contract. Adia is not a party to the franchise contracts

B. Improper interference and shareholder justification.

Adia's argument below that there was no evidence that it "improperly" interfered with the performance of the franchise agreements under Restatement §766 is also without merit. There was a mountain of evidence before the jury that Adia knowingly caused the destruction of Plaintiffs' exclusive territorial rights under their existing franchise agreements; knowingly destroyed Plaintiffs' and Nursefinders' franchise relationship; knowingly diminished the value of Plaintiffs' franchises for the purpose of advantageously repurchasing them; and after promising to sell competing Starmed so as to stop the continuing loss of contractual rights, knowingly engaged in fraudulent deceit by arranging the sham-sale of Starmed and failing to notify the franchisees that it retained total control. In plain violation of its fiduciary duties, Adia acted in total disregard of the interests of both its subsidiary-franchisor Nursefinders and Plaintiffs-franchisees as Nursefinders' creditors. "Improper" conduct was established.

Further, while Adia recognizes that the Restatement provisions are controlling in Florida, Adia ignores that it was the jury's precise function to determine all questions of fact including

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and has disavowed any contract liability, privity of contract, or vicarious liability for breach of contract. Irrespective of any claims Plaintiffs may have against Nursefinders, Plaintiffs' only remedy against Adia is in tort and the ELR is irrelevant. See Gregg, 887 F.2d at 1474; Banker's Risk Management Services, Inc. v. Av-Med Managed Care, Inc., 697 So. 2d 158, 161 (Fla. 2d DCA 1997). Moreover, it has never been Plaintiffs' position that Adia itself breached the franchise agreements as Adia falsely asserted below. Rather, by purchasing, funding and developing Starmed as an affiliate of Nursefinders which competed in Plaintiffs' exclusive territories, Adia knowingly caused Nursefinders to be in breach of Nursefinders' contracts and caused Plaintiffs to lose valuable rights thereunder.

whether or not Adia's conduct was "improper." See Restatement §767, comment l. The jury was surely permitted to find improper interference based on the record evidence. See, e.g., Phil Crowley, 782 F.2d at 784 (jury entitled to conclude that parent corporation acted with improper purpose where parent caused subsidiary to breach its contracts with full knowledge that breach would cause financial harm to subsidiary); Shared Comm. Serv., 692 A.2d at 574-575 (jury permitted to find that parent corporation's purpose in causing subsidiary to breach contract with plaintiff was not to prevent subsidiary's asset dissipation but rather to improperly help another subsidiary's/affiliate's aggrandizement).

Significantly, Adia also disregards that the jury found it to have intentionally caused the breach of an existing contract. This fact alone torpedoed Adia's baseless arguments regarding any "absolute" privilege for competition and shareholder financial interest. Florida case law has made clear that competition and financial interest not only present qualified privileges at best, but that they do not apply at all to the "purposeful causing of a breach of a contract." Morsani v. Major League Baseball, 663 So. 2d 653, 657 (Fla. 2d DCA 1995), rev. den., 673 So. 2d 29 (Fla. 1996); Yoder, 405 So. 2d at 744.

Indeed, the Restatement sections on competition and shareholder financial interest are expressly inapplicable to the causing of a breach of an existing contract and, in any event, these factors, where relevant, are merely to be considered by the jury in determining whether the defendant's conduct is improper or justified. See Restatement §768 [Competition], comment a ("an

existing contract ... involves established interests that are not subject to interference on the basis of competition alone"); Restatement §769 [Financial Interest], comment b ("The rule stated in this Section does not apply to the causing of a breach of contract."). As recently confirmed in NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc., 641 N.Y.S.2d 581, 585 (1996):

> [T]he degree of protection available to a plaintiff for a competitor's tortious interference with contract is defined by the nature of the plaintiff's enforceable legal rights. Thus, where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior ....

Further, Adia's suggestion below that it did not commit an independent wrong by its acting in blatant disregard of subsidiary Nursefinders' interests and causing Nursefinders to be in breach of its exclusive territorial covenants of which Adia had actual knowledge is in total contradiction to the case law. As explained above, Adia, as a controlling shareholder, owed an exacting fiduciary duty to both subsidiary Nursefinders and the Plaintiffs as Nursefinders' creditors. A breach of fiduciary duty is exactly the type of independent wrong providing a basis for a tortious interference claim. See Leaco Enterprises, Inc., 737 F. Supp. at 610; Jackson v. Dole Fresh Fruit Co., 921 F. Supp. 454, 459 (S.D. Tex. 1996); Restatement §769, comment d (corporate stockholder or agent employs wrongful means and improperly interferes by violating fiduciary duty).

In this regard, Adia's contention below that a controlling shareholder has an absolute justification to interfere with the corporation's contracts is completely erroneous. To be sure, that

argument was not only twice rejected by Judge Kovachevich who correctly ruled that the parent justification issue had to be decided by the jury (R7/114/10) but it was rejected by Magistrate Wilson as well. (R34/204/26-27). Adia's justification analysis turns the Restatement and Florida law upside down. Again, Florida case law has squarely rejected the notion that a parent and subsidiary are the same entity and incapable of tortiously interfering with one another. See Peacock, 432 So. 2d at 143. Here, Adia has always maintained that Nursefinders and Adia are "separate legal entities" and that neither is vicariously liable or the alter ego of the other. Indeed, Adia had the Magistrate Wilson instruct the jury that it could not disregard their separateness! (R10/164/R.J.I. No.13; 36/240/11).

At the very most, a parent's financial interest in its subsidiary allows the parent to assert a limited and qualified privilege and to show the jury that it acted in the best interests of its subsidiary. See Morsani, 663 So. 2d at 657 ("'[I]t is clear that the privilege to interfere in a contract because of a financial interest is not unlimited.'"); Frank Coulson, Inc. - Buick, 328 So. 2d at 273 (trier of fact must determine whether shareholder is privileged); see also, e.g., Culcal Stylco, 103 Cal. Rptr. at 421-422; Sunamerica Financial, Inc., 415 S.E.2d at 683-684; Valores Corporativos, S.A., 945 S.W.2d at 168 (all holding parent privilege is fact question for jury). Here, there was overwhelming evidence before the jury that Adia, in purchasing and augmenting competing-affiliate Starmed, was acting wholly contrary to Nursefinders' interests and that Adia was not acting to protect

any financial interest in Nursefinders. "Absolute" parent/ shareholder justification arguments virtually identical to Adia's were rejected in Phil Crowley, 782 F.2d at 784; Fury Imports, 554 F.2d at 1383-1384; and Shared Comm. Serv., 692 A.2d at 574-575.

In this regard, Adia's reliance below on Babson Bros. v. Allison, 337 So. 2d 848 (Fla. 1st DCA 1976), cert. den., 348 So. 2d 944 (Fla. 1977) and Ethyl Corp. v. Balter, 386 So. 2d 1220 (Fla. 3d DCA 1980), rev. den., 392 So. 2d 1371 (Fla.), cert. den., 452 U.S. 955 (1981) is sorely misplaced. Neither decision sets forth any absolute shareholder justification rule and both cases are otherwise factually and legally distinguishable.[15] Here, in total contrast to Babson and Ethyl, not only was Adia never authorized to cause subsidiary Nursefinders to breach its agreements and did so over Nursefinders' vociferous protest and against its best interests, but Adia never acted to protect any of its own financial or contractual interest in Nursefinders or the franchise agreements. The evidence established the complete opposite: Adia

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[15]In Babson, the First District ruled that an Illinois manufacturing corporation was not liable for tortious interference with its Georgia distributor's dealership contracts where the official responsible for contract non-renewal was expressly delegated such authority by both corporations' officers and directors and thus acted as an agent of the distributor. Based on Tentative Draft No.14 of the Restatement [subsequently rejected by the American Law Institute and replaced with current §769], the court also found the Illinois corporation privileged since the two corporations had common stock ownership and the non-renewed dealer was selling and servicing the Illinois corporation's own products. 337 So. 2d at 850-51. In Ethyl, on the other hand, the Third District found the defendant not liable for malicious interference with contractual and advantageous relations where the defendant was a principal party to the loan and reorganization contracts at issue; took actions to simply recover sums of money owed to it by a corporation of which the defendant was the sole shareholder; and acted to protect its own status as a co-obligor with the corporation. 386 So. 2d at 1224-25.

impaired and jeopardized its financial interest in Nursefinders in order to expand another subsidiary. This is precisely what the courts deem non-privileged and unjustified. See, e.g., Phil Crowley, 782 F.2d at 784; Fury, 554 F.2d at 1383-1384; Shared Comm. Serv., 692 A.2d at 574-575.

Moreover, Tentative Draft No.14 was subsequently rejected by the drafters of the Second Restatement (American Law Institute) and current §769, which has been applied in Florida, has not only abandoned the concept of financial interest as a "privilege" (rather, it is a fact consideration for jury) but unequivocally makes it inapplicable to causing a breach of an existing contract. See Morsani, 663 So. 2d at 65; Restatement §769, comment b.

Finally, Adia would have this Court simply obliterate a parent's fiduciary duties to its subsidiary and creditors. Corporations could be purchased and all their preexisting contracts/contractual relationships with third parties destroyed by the parent without any legal recourse against the true wrongdoer. This should not and cannot be the law.

CONCLUSION

Based on the foregoing arguments and authorities, Appellants/Plaintiffs respectfully request this Court to answer the certified question in the affirmative and hold that, under the facts presented to the jury, Appellants/Plaintiffs made out a claim for tortious interference under Florida law and established that "Adia 'otherwise caused' Nursefinders to violate the franchise agreements" under Restatement (Second) of Torts §766.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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APPENDIX

Richard Gossard, et al. v. Adia Services, Inc.,
882 F.Supp. 558 (M.D. Fla. 1995)

Richard B. Gossard, et al. v. Adia Services, Inc.,
120 F.3d 1229 (11th Cir. 1997)

Attorney General identified the matters under submission as "Act No. 602 (1969), which provided for two additional associate justice positions on the supreme court, the initial appointment of persons to the new positions, and *a change in the method of staggering terms.*" [11]

Admittedly, as Bradford points out, Act 602 had two conflicting provisions. Section 1 required a 3–3–3 staggering scheme for all of the Justices, and § 3 required elections in 1970 of the two new Associate Justices. In order to meet the requirements of both provisions, the State would have had to extend the terms of two of the original seven Associate Justices who were up for reelection in 1970. Instead, the State chose to ignore the provision requiring the 3–3–3 staggering scheme. It held elections in 1970 for both the new Associate Justices and the sitting Associate Justices whose terms were to expire, establishing a 5–2–3 and then 4–2–3 staggering scheme.

Act No. 602's staggered-term scheme, as actually implemented, was cleared by the Attorney General in 1996 as well. In a brief submitted earlier, the United States correctly explains that, in order to account for the inherent conflict in Act No. 602, "The state's submission includes not only Act 602, but also a full recounting of the election history for the two additional positions. The state also clearly has identified the current justices who occupy the positions created in 1969." [12] Because the Attorney General considered the entire "election history" of Act No. 602 to have been submitted along with the Act itself, her clearance of the Act in 1996 included the staggered-term scheme as implemented.

However, because the staggered-term aspect of Act No. 602 was post-, and not pre-, cleared, we must still address the issue of remedy. For the reasons we have already given, we believe that additional relief is not warranted.[13]

11. Joint Record, filed on March 13, 1996, Exh. 16 (emphasis added).

12. Memorandum of the United States as amicus curiae, filed on March 28, 1994, at 5 n. 3.

13. At oral argument, counsel for Bradford contended that, for the period 1969 through 1975, there was an unprecleared change in the way persons were appointed to fill the unexpired terms of Supreme Court Justices, and that this change had an effect on how the Justices' terms were staggered. Because this alleged change, which Bradford described as the "vacancy filling position" change, was not raised in his complaint-in-intervention, we decline to address it.

IV.

The defendants finally ask that we dissolve this three-judge court. We decline to do so at this time. Our order today could result in some unanticipated problems falling within our jurisdiction and needing our immediate attention before the upcoming 1996 election cycle.

For the above reasons, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) The defendants' motion to dismiss § 5 claims as moot, filed on March 22, 1996, is denied.

(2) All further relief requested by the complaining parties is denied on the merits.

(3) This three-judge court is not dissolved at this time.

Furthermore, because all the § 5 claims have now been resolved, it is ORDERED that the single-judge court may now proceed with all other claims.

Richard GOSSARD, et al., Plaintiffs,

v.

ADIA SERVICES, INC., Defendant.

No. 91–11–CIV–T–17(B).

United States District Court,
M.D. Florida,
Tampa Division.

Sept. 5, 1995.

Nursing services franchisees brought suit against acquirer of franchisor, claiming

tortious interference with franchise agreement. Following jury verdict in favor of franchisees, acquirer moved for judgment as matter of law. The District Court, Thomas G. Wilson, United States Magistrate Judge, held that: (1) acquirer had not tortiously interfered with franchise contract provision prohibiting competition within territory of franchise, by offering competing nursing services through another company; (2) in any event damage theory offered by franchisee was invalid, as it had erroneously assumed that all business done by competitor would have gone to franchisees but for acquirer's interference; and (3) judgment for franchisees was appropriate decision, rather than new trial, as there was no indication that franchisees could prove damages under an alternate theory.

Judgment for acquirer.

1. **Torts ⇐12**

Acquirer of corporation engaged in franchising nursing services (franchisor) did not tortiously interfere with franchise agreement under which franchisor agreed that neither it nor its parent or affiliates would provide nursing services in franchised territory, when acquirer provided competing nursing services in territory through another company it owned; acquirer had neither interfered directly with contract, or otherwise induced franchisor not to abide by contract, as required to satisfy Restatement of Torts requirements for viable contractual interference claim, and to extent that franchisor had not secured acquirer's promise to honor franchise agreement, to which acquirer was not party, franchisee's recourse was breach of contract action against franchisor, not tort suit against acquirer. Restatement (Second) of Torts § 766.

2. **Federal Civil Procedure ⇐2602**

Defendant in tortious interference with contractual relations case waived its right to challenge plaintiffs, by way of renewed motion for judgment as matter of law, contention that alleged wrongful conduct had caused defendant's loss and that damage had in fact occurred; defendant had failed to move for judgment as matter of law prior to submission of case to jury. Fed.Rules Civ. Proc.Rule 50, 28 U.S.C.A.

3. **Federal Civil Procedure ⇐2602**

Defendant in tortious interference with contract case did not waive right to challenge amount of damages by way of renewed motion for judgment as matter of law; defendant had vigorously and fully challenged damage theory at charge conference, which was prior to submission of case to jury. Fed. Rules Civ.Proc.Rule 50(a)(2), 28 U.S.C.A.

4. **Damages ⇐189**

Franchisees of nursing services had not established amount of damages incurred when franchisor, which had made contractual commitment not to provide competing nursing services in franchise area, was acquired by corporation (acquirer) which owned company offering competing services (competitor); franchisees had claimed entitlement to credit for all competitor's sales during period competitor was owned by acquirer, even though competitor had substantial business in franchisee territories before competitor was acquired, and there was no reason to think franchisees would have gained any of that business if acquisition had not occurred, and also acquirer had no contractual obligation to give competitor's business to franchisees. Restatement (Second) of Torts §§ 766, 774A.

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Stanley Howard Eleff, Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A., Tampa, FL, David J. Butler, Tacie H. Yoon, Brownstein & Zeidman, P.C., Washington, DC, for Adia Services, Inc.

ORDER

THOMAS G. WILSON, United States Magistrate Judge.

THIS CAUSE came on to be heard upon the Renewed Motion of Defendant Adia Services, Inc. for Judgment As A Matter of Law or for A New Trial (Doc. 208). At the hearing, the defendant clearly demonstrated that it did not "induce or otherwise cause" a breach of contract. It established further that the plaintiffs' theory of damages was fundamentally flawed. Consequently, the defendant's motion should be granted, and judgment entered in its favor.

I.

In about 1974, Larry Carr started a business in Texas in which he provided nurses on a temporary basis. The business was successful, and in 1978–79 he began selling franchises through a franchisor that subsequently took the name of Nursefinders, Inc. Franchise purchasers included the individual plaintiffs, who bought franchises covering, among other areas, Florida's west coast.

The people who purchased franchises in this area were long-time friends of Carr. At the time the sales of the franchises were being negotiated, Carr agreed with the franchisees that neither Nursefinders, nor its parent or affiliates, would provide similar services within the franchise territory.[1]

About the beginning of 1987, the defendant, Adia Services, Inc., purchased the company that came to be called Nursefinders. Approximately one and one-half years later, Adia purchased a company named Star–Med that was also involved in the field of temporary nursing help. Adia contends that Star–Med was different from, and compatible with, the Nursefinders' franchisees. Adia asserts, specifically, that Star–Med operated a touring nurse program where nurses were sent from one area of the country to another for a period of 13 weeks, whereas the franchisees ran a business that provided nurses locally for a short time. There was evidence, however, from which the jury could reasonably find that the two businesses competed, and that they competed within the plaintiffs' territories.

In this suit, the plaintiffs alleged in Count I that Adia had tortiously interfered with their franchise agreements with Nursefinders. The theory of the tort wavered throughout the trial. The plaintiffs settled on the contention that, by purchasing Star–Med, the defendant caused Nursefinders to violate its promise that neither a parent nor affiliate would provide similar services within a franchisee's territory. Although this theory seemed to me to be of doubtful validity, it was sent to the jury to see whether the theory had been factually established. There were plainly factual disputes, such as the construction of the franchise agreements, that could have ended the matter if resolved in the defendant's favor. The jury, however, found for the plaintiffs on the factual questions. This circumstance thus raises the issue whether the plaintiffs' theory on Count I is legally viable.

II.

[1] The *Second Restatement of Torts* defines the tort of intentional interference with a contract as follows (§ 766):

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

There was no evidence that, with respect to the franchise agreements, the defendant induced Nursefinders to do anything. Thus, the question here is whether the defendant "otherwise caus[ed]" Nursefinders to violate the franchise agreements.

1. The defendant argues that the plaintiffs are bound by the terms of the franchise agreements, which do not provide such broad exclusivity. Both sides to the agreements, however, testified to their understanding, and the jury could have reasonably found that there was the broad exclusivity arrangement, as the plaintiffs alleged. It seems to me that in this tort action the parol evidence rule should not operate to negate the stated intent of both sides to the various franchise agreements.

The Comments to § 766 of the *Restatement* explain that "otherwise causing" refers to the situation where, unlike the circumstances involving inducement, the tortfeasor "leaves [the contracting party] no choice," that is, he affirmatively prevents the party from carrying out the contract. *Restatement (Second) of Torts* § 766 cmt. h. Examples of this are "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." *Id.* Another example is "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." *Id.*

This case does not involve a situation that even roughly approximates the examples given in the *Restatement.* The evidence indisputably shows that, with respect to the franchise agreements, the defendant took no action at all toward Nursefinders.

The plaintiffs contend, however, that Nursefinders had promised its franchisees that no parent or affiliate would provide nursing services within their territory, and that when the defendant purchased Star–Med it caused Nursefinders to break that promise. While the defendant may have "caused" Nursefinders to be unable to carry out the agreements within some broad dictionary meaning of that term, it did not cause Nursefinders to breach the agreements in the legal sense. The *Restatement,* which in essence requires a contracting party either to be induced not to perform, or to be prevented from performing, his contractual obligations, clearly demands something far more direct than what occurred here to Nursefinders.[2]

A hypothetical example submitted by Adia demonstrates the invalidity of the plaintiffs' claim. Suppose, the defendant says, that General Motors (GM) executes an agreement in which it promises its dealers in Pinellas County that only GM cars would be sold in that county. Further, GM sends a copy of that agreement to Ford, in order to make sure that Ford has knowledge of the agreement. Surely, the defendant argues, Ford cannot be liable for intentional interference with contract if it sells its cars in Pinellas County contrary to GM's promise.

This hypothetical, in my view, shows the lack of merit in the plaintiffs' claim. In this case, the only additional circumstance presented is the corporate relationship between the defendant and Nursefinders. However, the two are separate legal entities. Moreover, Nursefinders had no authority to make a promise that would bind Adia. Indeed, recognizing that a contrary assertion would be self-defeating in this tort action, *see Genet Company v. Annheuser–Busch, Inc.* (sic), 498 So.2d 683, 684 (Fla.App.1986), the plaintiffs acknowledge that Adia is not a party to the franchise agreements and is not contractually bound by them. But since Adia is not bound by the franchise agreements, its situation is not meaningfully different from that of Ford in the defendant's hypothetical.

The plaintiffs, nevertheless, argue that, while Nursefinders' promise to its franchisees could not create contractual liability for the defendant, it did create tort liability for Adia. How this could be so was not explained. It seems to me either that Nursefinders could legally speak for the defendant, in which case the defendant would be subject to contract liability and not tort liability, or that Nursefinders could not legally speak for the defendant, in which case Nursefinders' promise created no liability at all on the defendant's part.

In all events, the circumstances here gave rise only to contract liability. Nursefinders, according to the jury, made a promise that was not kept. Liability for the violation of that promise should fall on Nursefinders, the party that made the promise, and not upon the defendant, a party that gave no such undertaking. Significantly, Nursefinders was in a position to protect its promise when it sold out to the defendant, but it did not do so. The plaintiffs, despite these circumstances, did not sue Nursefinders for breach of the franchise agreements, but sued the defendant in tort instead. That tactic was a

2. Neither side has found a case like this one. Moreover, contrary to the plaintiffs' contention, their cases are distinguishable. Thus, they all involve at least a direct impact upon a contracting party's ability to perform its obligations.

mistake because, under the facts of this case, the defendant did not commit a tort.

III.

[2, 3] Adia also contends that the jury's damage award cannot be sustained. To the extent that the defendant argues that the evidence fails to show causation or injury, that argument is contradicted by the evidence. Thus, assuming that Star–Med's operations under the defendant's ownership could legally cause harm, there was evidence in the record from which the jury could reasonably find that the plaintiffs were damaged by Star–Med's business. The far more serious question is whether the plaintiffs properly proved the extent of that damage.[3]

The *Restatement* makes clear that a party injured by intentional interference with a contract is entitled to recover its "pecuniary loss." *Restatement (Second) of Torts* §§ 766, 774A. Accordingly, the jury was given the following instruction (Doc. 195, p. 17):

> The plaintiffs claim damages for lost profits and loss of present value in their franchises. Damages of those types may be awarded in an appropriate case if sufficiently established. With regard to any recovery by the plaintiffs, you should take care not to award duplicate damages.

However, the plaintiffs' damage expert, Robert Yerman, did not focus on the plaintiffs' losses. Rather, his damage analysis was predicated upon the theory that the plaintiffs were entitled to credit for all of Star–Med's sales during the period it was owned by Adia (Doc. 205, pp. 16–17). This approach resulted from Yerman's view that under the terms of the franchise agreements Adia had an obligation to turn over all of Star–Med's business in the plaintiffs' territories to the plaintiffs (Doc. 205, pp. 18–19, 59).

Importantly, any suggestion that Adia caused the plaintiffs to suffer a loss of all of the business done by Star–Med in the plaintiffs' territories is contrary to the facts and economic reality. In the first place, 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. Furthermore, 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.

As indicated, however, Yerman did not predicate his damage theory on the economic facts. Rather, his approach was based upon his view that the franchise agreements required Adia to give all of Star–Med's business within the plaintiffs' territories to the plaintiffs. But this notion is simply wrong. As previously explained, Adia was not a party to the franchise agreements and was not contractually bound by them. Under that circumstance, it cannot plausibly be said that Adia was obligated to turn over Star–Med's business to the plaintiffs. In other words, Yerman's theory would improperly award contract damages in this tort case. If the plaintiffs wanted contract damages, they should have sued Nursefinders.

Although the plaintiffs argue to the contrary, Yerman's testimony provided the sole basis for the amount of the jury's award. Since that testimony was wrong at its core, the jury's verdict cannot stand.

It is not enough to conclude, however, that the jury's verdict should be overturned. The question then becomes whether that conclusion warrants judgment for the defendant, or only the granting of a new trial.

3. The plaintiffs contend that the defendant has waived its right to challenge causation, the fact of damage, the theory of damages, and the sufficiency of the evidence of damages as a result of a failure to move for judgment as a matter of law under Rule 50, F.R.Civ.P. (Doc. 211, p. 28). This contention appears correct as to causation and the fact of damage. It is not correct with respect to the attack on the theory of damages. The defendant vigorously and fully challenged the plaintiffs' damage theory at the charge conference (Doc. 204, pp. 31–40). Since Rule 50(a)(2), F.R.Civ.P., provides that motions for judgment as a matter of law "may be made at any time before submission of the case to the jury," the defendant's attack on the damage theory during the charge conference was timely and sufficient.

Rule 50(b), F.R.Civ.P., provides that, "[i]f a verdict was returned, the court may, in disposing of the renewed motion [for judgment as a matter of law], allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law." As the court of appeals has explained in a case involving insufficient proof of damages, Rule 50(b) gives the court discretion to enter judgment or to grant a new trial. *Network Publications, Inc. v. Ellis Graphics Corp.*, 959 F.2d 212 (11th Cir.1992). Generally, where a defect in proof could be expected to be cured at a second trial, the granting of a new trial is the preferred option. *Id.*

[4] In this case, however, circumstances militate against simply granting a new trial. In the first place, plaintiffs' counsel had to know that Yerman's damage theory was subject to serious challenge. Nevertheless, they proceeded solely on that theory, even though they had received an earlier opinion using a different approach from another expert from Yerman's firm (Doc. 205, pp. 86–91). It seems to me that having elected to proceed into a two-week trial on only Yerman's dubious (but more lucrative) theory, the plaintiffs should not now be given a second chance to present an alternative method.

Furthermore, it is questionable whether the plaintiffs could reasonably establish damages with a different approach. Thus, there is some indication that, if competition is properly taken into consideration, an expert would be unable to assess damages with any degree of accuracy (Doc. 205, p. 91). Significantly, the plaintiffs failed to take advantage of the opportunity to submit a memorandum on this issue (Doc. 216), and consequently, they have not provided any information showing that at a new trial they could prove substantial damages with sufficient certainty.

For these reasons, the plaintiffs' failure to prove damages warrants judgment as a matter of law. However, it is appropriate to add that, if it should be subsequently determined that a new trial is the appropriate remedy, then obviously the defendant's alternative request for a new trial should be granted. On the other hand, if it is concluded that Yerman's damage theory is legally sufficient, then the motion for new trial should be denied, since Yerman's testimony would support the jury's verdict.

It is, therefore, upon consideration

ORDERED:

That the Renewed Motion of Defendant Adia Services, Inc. for Judgment As A Matter of Law or for A New Trial (Doc. 208) be, and the same is hereby GRANTED, and the Clerk is directed to enter judgment in favor of the defendant Adia Services, Inc.

DONE and ORDERED.

Gerald J. MANGIN, Plaintiff,

v.

WESTCO SECURITY SYSTEMS, INC., a Florida corporation, Defendant.

No. 95–1676–Civ–T–23C.

United States District Court,
M.D. Florida,
Tampa Division.

Feb. 2, 1996.

Former employee brought action in state court against employer, alleging violations of Americans with Disabilities Act (ADA), Florida Civil Rights Act, and Florida Workers' Compensation Act and alleging intentional infliction of emotional distress. Employer removed, then moved to dismiss. The District Court, Jenkins, United States Magistrate Judge, held that: (1) disability discrimination claim under Florida Civil Rights Act was not barred by exclusive remedy provision of Florida Workers' Compensation Act; (2) intentional infliction of emotional distress claim was not barred by exclusive remedy provision of Workers' Compensation Act; (3) remedies under Florida Civil Rights Act were not preempted by ADA; and (4) employee's retaliatory discharge claim under

to break open locked containers which may contain the objects of the search [11].

In this case, the officers were authorized by the warrant to search for cocaine. Although they had located some cocaine in the bathroom, it was within the scope of the warrant to continue the search. In conducting the search, the officers opened the closet door and looked inside, finding a firearm instead of cocaine. The firearm was, therefore, lawfully seized.

B. *Jury instruction*

Jackson argues that the district court erroneously instructed the jury that it was not necessary for the defendant to know that he had been convicted of a felony.

[6, 7] This court reviews a challenge to a jury instruction as a question of law subject to *de novo* review, and the refusal to give a requested instruction for abuse of discretion.[12] Although this court has not addressed the issue of knowledge of a prior conviction, the issue has been addressed by other circuits. After reviewing the legislative history of 18 U.S.C. § 922(g), the Fourth Circuit held that proof that a defendant had knowledge of his status of a convicted felon is not needed in order to prove that a defendant knowingly possessed a firearm after a felony conviction.[13] The Fourth Circuit upheld the district court's jury instruction that stated, *inter alia*, that the jury should return a guilty verdict if it found beyond a reasonable doubt that Langley had been convicted in some court of a crime punishable by a term of imprisonment exceeding one year.[14] The Fifth Circuit also upheld a jury instruction that "the crime ... does not require proof that the Defendant knew he was violating the law." [15] The Fifth Circuit held that knowledge of a legal obligation is not an element of 18 U.S.C. § 922(g).[16] Based on the law, it does not appear that the district court erred in giving the instruction that it was not necessary that Jackson knew that he had been convicted of a felony.

[8] Further, the weight of the evidence in this case showed that Jackson knew, or should have known, that he was a convicted felon. The only evidence in support of his position that he was sentenced as a First Offender was his testimony. He introduced no documents indicating such treatment, and the government introduced documents showing that he was adjudicated guilty. It does not appear that the district court abused its discretion in applying the law to the facts of this case.

III. CONCLUSION

For the reasons stated above, the defendant's conviction is AFFIRMED.

Richard B. GOSSARD, Joyce Gossard, Barney Dewees, John Daly, Nursefinders of Sarasota, Inc., Nursefinders of St. Petersburg, Inc., Nursefinders of Mobile, Inc., Plaintiffs–Appellants,

v.

ADIA SERVICES, INC., Defendant–Appellee.

No. 95–3305.

United States Court of Appeals, Eleventh Circuit.

Sept. 4, 1997.

Nursing services franchisees brought suit against acquirer of franchisor, claiming

11. *Martinez*, 949 F.2d at 1120, citing *United States v. Gonzalez*, 940 F.2d 1413, 1420 (11th Cir.1991), *cert. denied*, 502 U.S. 1047, 112 S.Ct. 910, 116 L.Ed.2d 810 (1992) and *United States v. Morris*, 647 F.2d 568, 572–573 (5th Cir. Unit B 1981).

12. *Tokars*, 95 F.3d at 1531.

13. *United States v. Langley*, 62 F.3d 602, 604–606 (4th Cir.1995), *cert. denied*, — U.S. —, 116 S.Ct. 797, 133 L.Ed.2d 745 (1996).

14. *Id.* at 604, 606.

15. *United States v. Dancy*, 861 F.2d 77, 81 (5th Cir.1988).

16. *Id.*

tortious interference with franchise agreement. The United States District Court for the Middle District of Florida, No. 91–11–CV–T–17B, Thomas G. Wilson, J., 922 F.Supp. 558, entered judgment as matter of law in favor of acquirer, and franchisees appealed. The Court of Appeals, Barkett, Circuit Judge, held that question whether Florida law recognizes claim for tortious interference with contract against corporation which purchases, as subsidiary, second corporation which has preexisting obligation not to compete against its franchisee, and first corporation subsequently purchases another subsidiary which is in direct competition with franchisee, was appropriate for resolution by Supreme Court of Florida.

Question certified.

1. Federal Courts ⇐392

Question of whether Florida law recognizes claim for tortious interference with contract against corporation which purchases, as subsidiary, second corporation which has preexisting obligation not to compete against its franchisee, and first corporation subsequently purchases another subsidiary which is in direct competition with franchisee, was appropriate for certification to Supreme Court of Florida.

2. Federal Courts ⇐392

Where there is any doubt as to application of state law, federal court should certify question to state supreme court to avoid making unnecessary guesses and to offer state court opportunity to interpret or change existing law.

Hendrik Uiterwyk, Uiterwyck & Associates, Tampa, FL, Gary A. Magnarini, Mark Hicks, Hicks, Anderson & Blum, P.A., Miami, FL, for Plaintiffs–Appellants.

David J. Butler, Tacie H. Yoon, Swidler & Berlin, Washington, DC, for Defendant–Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

BARKETT, Circuit Judge:

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF FLORIDA, PURSUANT TO ARTICLE V, SECTION 3(b)(6) OF THE FLORIDA CONSTITUTION. TO THE SUPREME COURT OF FLORIDA AND THE HONORABLE JUSTICES THEREOF:

In this tortious interference claim, appellants Richard Gossard, Joyce Gossard, Barney Dewees, John Daly, Nursefinders of Sarasota, Inc., Nursefinders of St. Petersburg, Inc., and Nursefinders of Mobile, Inc. (collectively "Gossard") appeal the district court's entry of judgment as a matter of law in favor of Adia Services, Inc. ("Adia") notwithstanding the jury verdict which resolved all factual issues in favor of Gossard. The order was based on two findings: (1) Adia did not "induce or otherwise cause" a breach of contract under Florida law; and (2) the jury's $2,488,000 compensatory damage award was based on an erroneous legal theory. This case presents an important issue of Florida law that has not been addressed by the Supreme Court of Florida. Thus, we believe that the issue is appropriate for resolution by Florida's highest court. We therefore defer our decision in this case pending certification of the question to the Supreme Court of Florida. *See Varner v. Century Finance Co., Inc.*, 720 F.2d 1228 (11th Cir.1983).

Background

In 1974, Larry Carr founded a business which provided nurses to health care facilities and private clients on a temporary basis. Within four years, Carr began selling franchises subsequently named Nursefinders, Inc. In May of 1986, Richard Gossard purchased a franchise which covered, among other areas, Florida's west coast. The franchise agreement contained an exclusivity clause which provided that neither Nursefinders "nor any person or firm authorized or licensed by it shall establish an office for the

purposes" of providing competing services within the franchise territory. However, Carr and Gossard testified that during negotiations over the franchise, they agreed that neither Nursefinders, nor its parent or affiliates, would provide similar services within the franchise territory.

In the beginning of 1987, Adia purchased Nursefinders. In June of 1988, Adia purchased Star–Med, a company likewise involved in the field of temporary nursing help.

Gossard then filed this action alleging that by purchasing Star–Med, Adia caused Nursefinders to violate its promise of noncompetition within a franchisee's territory. In defense, Adia argued that it did nothing to interfere with and was under no contractual or fiduciary duty to abide by the exclusivity clause of the franchise agreement between Nursefinders and Gossard. The jury found for Gossard on the factual issues and awarded $2,488,000. However, the district court entered judgment in favor of Adia after determining that "[t]he evidence indisputably shows that, with respect to the franchise agreements, the defendant, [Adia], took no action at all toward Nursefinders." As for the damage award, the court determined that the jury erroneously based the award on Gossard's expert testimony which incorrectly calculated the damages based on a contract claim rather than a tort claim.

Discussion

In this diversity action, we are required to apply the substantive law of Florida, the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

[1] To define the tort of "intentional interference with a contract" Florida applies the Second Restatement of Torts:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

See Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So.2d 812, 814 (Fla.1994); Restatement (Second) of Torts, § 766 (1977).

There is no evidence in the record which suggests that Adia "induced" Nursefinders to breach the franchise agreement. Therefore, the question is whether Adia "otherwise caused" Nursefinders to violate the franchise agreements. Comment h under § 766 explains "otherwise causing" as referring to the situation where the tortfeasor "leaves [the contracting party] no choice," that is, the tortfeasor affirmatively prevents the party from performing the terms of the contract. In this case, Gossard contends that Adia's purchase of Star–Med caused Nursefinders to violate the franchise agreement it held with Gossard.

[2] There is no case law directly addressing this issue.[1] "Where there is any doubt as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary *Erie*[2] 'guesses' and to offer the state court the opportunity to interpret or change existing law." *Mosher v. Speedstar Div. Of AMCA Intern., Inc.*, 52 F.3d 913, 916–17 (11th Cir.1995)(citing *Jackson v. Johns–Manville Sales Corp.*, 781 F.2d 394, 396 (5th Cir.), *cert. denied*, 478 U.S. 1022, 106 S.Ct. 3339, 92 L.Ed.2d 743 (1986)). Thus we certify the following question to the Florida Supreme 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.

1. Contrary to Gossard's contention, his cases are distinguishable: They all involve at least a direct impact upon a contracting party's ability to perform its obligations.

2. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

Our particular phrasing of the question is not intended to limit the Florida Supreme Court's inquiry. The entire record in this case, together with copies of the briefs, shall be transmitted to the Supreme Court of Florida.

QUESTION CERTIFIED.

CELESTAIRE, INC., Plaintiff–Appellant,

v.

The UNITED STATES, Defendant–Appellee.

No. 97–1005.

United States Court of Appeals, Federal Circuit.

July 29, 1997.

Importer challenged Customs Service's classification of imported marine sextants as "optical navigational instruments," dutiable at 5.6% ad valorem, rather than as "other non-optical navigational instruments," not subject to tariff. The Court of International Trade, Wallach, J., 928 F.Supp. 1174, granted summary judgment for the United States, and importer appealed. The Court of Appeals, Michel, Circuit Judge, held that marine sextants qualified as optical navigational instruments.

Affirmed.

Customs Duties ⇐37(17)

Under Harmonized Tariff Schedules of the United States (HTSUS), marine sextants qualified as "optical navigational instruments," dutiable at 5.6% ad valorem, rather than as "other non-optical navigational instruments," not subject to tariff; sextant aided and enhanced human vision through its use of split-image mirror, which permitted user to see two objects in same plane, and mirror was not used in only subsidiary capacity. Harmonized Tariff Schedule, HTSUS 9014.80.10, 9014.80.50.

George R. Tuttle III, San Francisco, California, argued for plaintiff–appellant.

Mikki Graves Walser, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, New York City, argued for defendant–appellee. With her on the brief were Frank W. Hunger, Assistant Attorney General, David M. Cohen, Director, Washington, DC, and Joseph I. Liebman, Attorney in Charge, International Trade Field Office, New York City. Of counsel on the brief was Beth C. Brotman, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, New York City.

Before MICHEL, PLAGER, and CLEVENGER, Circuit Judges.

MICHEL, Circuit Judge.

Celestaire, Inc. ("Celestaire") appeals the order of the United States Court of International Trade granting summary judgment to the United States in Celestaire's challenge of the Customs Service's classification of imported marine sextants as "optical navigational instruments" (Harmonized Tariff Schedules of the United States ("HTSUS") subheading 9014.80.10), dutiable at 5.6% ad valorem, rather than as "other non-optical navigational instruments" (HTSUS subheading 9014.80.50), which are not subject to a tariff. CIT No. 93–02–00081. This appeal was submitted for our decision following oral argument on May 7, 1997. Because we hold that (1) sextants permit, aid or enhance human vision; (2) split-image mirrors are non-subsidiary optical elements in sextants; and (3) the appeal is not controlled by *United States v. Bliss & Co.*, 6 Ct. Cust.App. 433 (1915), which concluded that under then-extant Customs law sextants were metal articles, not optical instruments, we affirm.

BACKGROUND

Celestaire imports from China the Astra IIIB Delux, a marine sextant. "A marine