

**IN THE CIRCUIT COURT OF THE FIFTHTEENTH JUDICIAL CIRCUIT IN AND
FOR _____ COUNTY, STATE OF FLORIDA**

ABC, INC., a Delaware Corporation,
and DEF, INC. OF FLORIDA,
a Florida Corporation,

Plaintiffs,

Case No. 00-12-123456
DIVISION: "X"

vs.

MNO, INC., a Florida
Corporation, XYZ, INC.,
a Delaware corporation

Defendants.

**DEFENDANT XYZ'S
MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT**

The undersigned attorney for Defendant XYZ in the above-entitled action moves the court for an order directing entry of a summary judgment in its favor, on the ground that there is an absence of a genuine issue as to any material fact, and Defendant XYZ is entitled to the judgment as a matter of law.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. XYZ ("XYZ" or "Defendant") is a company that began doing business in 1999, selling a legal expense plan and using the network marketing model of recruiting sales associates and members similar to Plaintiffs-ABC and DEF, Inc. of Florida (collectively, "Plaintiffs").
2. Plaintiffs allege that the Defendant tortiously interfered with the Plaintiffs' business relationships and contractual arrangements with their members and associates.
3. The contracts between the Plaintiffs and their Clients, Associates and Area Coordinators are contracts terminable "at will".

STANDARD FOR SUMMARY JUDGMENT

Florida Civil Procedure Rule 1.510(c) provides the standard for Summary Judgment and states in its pertinent part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fla. R. Civ. P. Rule 1.510(c) (emphasis added); *Ball v. Fla. Podiatrist Trust*, 620 So.2d 1018, 1022 (Fla. Dist. Ct. App. 1993) (“A summary judgment is appropriate where the material facts are not in dispute and the judgment is based on the legal construction of documents.”). Summary judgment should be granted where salient facts are not really in issue and controversy has resolved into one purely of law to be decided on undisputed basic facts. *Yost v. Miami Transit Co.*, 66 So.2d 214, 215 (Fla. 1953). A party opposing summary judgment must do more than assert that an issue exists. *Publix Supermarkets, Inc. v. Austin*, 658 So.2d 1064, 1068 (Fla. Dist. Ct. App. 1995). Instead, the Plaintiffs “must demonstrate the existence of such an issue either by countervailing facts or justifiable inferences from the facts presented.” *Harvey Bldg., Inc. v. Haley*, 175 So.2d 780, 783 (Fla. 1965). Failure to do so will result in the entry of summary judgment. *Id.*

Defendant is entitled to the judgment as a matter of law on Count IV of Plaintiffs’ Second Amended Complaint because the Plaintiffs fail to allege a claim under this Count and there are no genuine issues as to any material fact.

ARGUMENT

THE UNDISPUTED FACTS SHOW THAT THE DEFENDANT DID NOT ENGAGE IN TORTIOUS INTERFERENCE IN THE BUSINESS RELATIONSHIPS OR CONTRACTUAL ARRANGEMENTS OF THE PLAINTIFFS.

Count IV of Plaintiffs' Second Amended Complaint alleges that Defendant tortiously interfered with the contractual arrangements and business relationships of the Plaintiffs. (Plaintiffs' Second Amended Complaint, ¶¶ 51-57). However, the Plaintiffs' allegations, coupled with the undisputed facts, merely establish that Defendant was engaged in lawful competition with the Plaintiffs, causing Plaintiffs' associates and members to terminate at-will, contractual relationships with the Plaintiffs. Such facts fall well short of those necessary to establish causes of action for tortious interference with contractual arrangements and/or advantageous business relationships under Florida law.

There can be no tortious interference with contractual or business relations when the contract at issue is terminable at will. *Greenberg v. Mount Sinai Med. Ctr. of Greater Miami, Inc.*, 629 So.2d 252, 255 (Fla. Dist. Ct. App. 1993); *Unistar Corp. v. Child*, 415 So.2d 733, 735 (Fla. Dist. Ct. App. 1982) ("If the defendant can prove that the interference was lawful competition--a privilege which the courts recognize when the contract is terminable at will--the defendant will not be found to have committed the tort of wrongful business interference.").

The general rule is that an action for tortious interference will not lie where a party tortiously interferes with a contract terminable at will. This is so because when a contract is terminable at will there is only an expectancy that the relationship will continue. In such a situation, a competitor has a privilege of interference in order to acquire the business for himself.

Greenberg, 629 So.2d at 255 (emphasis added). Generally, a contract that contains no express provision as to duration, or which is to remain in effect for an indefinite period, is not deemed to be perpetual, but instead may be terminated at will, so long as the party terminating the contract

gives reasonable notice to the other party. *Perri v. Byrd*, 436 So.2d 359, 361 (Fla. Dist. Ct. App. 1983).

The Plaintiffs' Membership Contracts, Associate Agreements and Area Coordinator Appointment Agreements are all terminable at will. The Membership Contract of the Plaintiffs with their members, in paragraph N, expressly addresses termination of contract:

The member may cancel the contract at anytime by giving written notice to the company. The member shall be entitled to be reimbursed by the company the used portion of the membership fees paid for this Contract, the amount to be calculated on a pro-rata basis over the period of the contract.

(Exhibit 1, attached). Similarly, the Plaintiffs' Associate Agreement provides in paragraph 12 of its Policies and Procedures that an Associate Agreement with the Plaintiffs may be terminated "(A) at any time upon thirty (30) days written notice by the Associate, (B) by [Plaintiffs] with thirty (30) days written notice to the Associate..." (Plaintiffs' Second Amended Complaint, Exhibits 2 & 5). Finally, the Plaintiffs' Area Coordinator Appointment agreement provides in paragraph 8:

Termination of the Agreement: As the contractor, you acknowledge that your retainer hereunder is on an at-will basis and may be terminated at any time with or without cause by the company in its sole discretion.

(Plaintiffs' Second Amended Complaint, Exhibit 4). A reading of these clauses makes it amply evident that the Plaintiffs contracts with their members, associates and area coordinators were all terminable at-will and, accordingly, Defendant's activities as a business competitor do not constitute tortious interference with Plaintiffs' contractual relationships. *See Unistar Corp., supra*.

In *Sobi v. Fairfield Resorts, Inc.*, 846 So.2d 1204 (Fla. Dist. Ct. App. 2003), the court enumerated the essential elements that must be alleged in a cause of action for tortious interference in business relations:

(1) the existence of a business relationship; (2) the defendant's knowledge of the relationship; (3) the defendant's intentional and unjustified interference with the relationship; and (4) damage to the Plaintiff as a result of the breach of the relationship.

Id. at 1207; *Ethyl Corp. v. Balter*, 386 So.2d 1220, 1223 (Fla. Dist. Ct. App. 1980). In addition to these elements, “the existence of malice is key to the tort of tortious interference with a business relationship.” *Rockledge Mall Assoc., Ltd. v. Custom Fences of S. Brevard, Inc.*, 779 So.2d 554, 557 (Fla. Dist. Ct. App. 2001), *citing S. Bell Tel. & Tel. Co. v. Roper*, 482 So.2d 538 (Fla. Dist. Ct. App. 1986). In *Rockledge*, the court noted:

Absence of malice [is] a primary issue. The only way that malice can be proven in the absence of direct evidence is by proving a series of acts which, in their context or in light of the totality of the circumstances, are inconsistent with the premise of a reasonable man pursuing a lawful objective, but rather indicate a plan or course of conduct motivated by spite, ill-will, or other bad motive.

779 So.2d 554, 557 (emphasis added), *citing S. Bell*, 482 So.2d 538, 539.

While discussing the basis for determining the element of intentional and unjustified interference, the court in *St. Johns River Water Mgmt Dist. v. Fernberg Geological*, 784 So.2d 500 (Fla. Dist. Ct. App. 2001), made the following observations:

Interference is established when one intentionally and improperly interferes with a business relationship between two other parties by inducing or otherwise causing one party to breach or sever the business relationship.

The test is whether there was an understanding between the parties [which] would have been completed had the defendant not interfered.

784 So.2d at 504-505 (emphasis added) (internal quotation omitted). Furthermore, “[i]f the defendant can prove that the interference was lawful competition – a privilege which the courts recognize when a contract is terminable at will – the defendant will not be found to have committed the tort of wrongful business interference.” *Perez v. Rivero*, 534 So.2d 914, 916 (Fla. Dist. Ct. App. 1988) (emphasis added); *accord, Advantage Digital Sys. Inc. v. Digital Imaging*

Serv., Inc., 870 So.2d 111, 116 (Fla. Dist. Ct. App. 2003) (“Competition for business by a competitor is not actionable even if intentional, unless the competitor is attempting to induce a customer to breach a contract that is not terminable at will.” (internal citations omitted)).

In the instant case, it is clear that the Defendant did not interfere with any business relationship between the Plaintiffs and their members and, in fact, made every effort to avoid such interference. The Defendant had implemented a policy whereby anyone who joined it had to indicate that, if they were currently or formerly with the Plaintiffs, they had not been solicited by any XYZ’s agent who was bringing them into the XYZ Program. As such, Defendant did not in any manner intentionally or improperly interfere with the business relations between the Plaintiffs and their members or associates. Even if the Defendant had not implemented such a policy, there could be no tortious interference of business relationships because there was no “understanding” of an on-going business relationship between the Plaintiffs and their members/associates. To the contrary, the contracts between the Plaintiffs and their members/associates were such that the members/associates had the right to terminate them any time at will. Therefore, Defendant simply engaged itself in lawful competition and no “understanding” between the Plaintiffs and any of their members/associates suffered on account of any actions by the Defendant. *See, St. Johns River Water Mgmt Dist.*, 784 So.2d at 504-505.

Furthermore, as noted above, Florida law recognizes malice as the sole basis on which a cause of action for tortious interference in business relationships may be brought. *See Rockledge Mall Assoc., Ltd.*, 779 So.2d at 557. Taking into consideration the conduct of the Defendant, it is amply clear that its actions in the present case were not borne out of malice. The Plaintiffs and the Defendant are competitors in the same field of business. Being competitors, it is a part of the ordinary course of business for both parties to actively and aggressively solicit clients for their

respective companies. Thus, the Defendant's actions were in no way "motivated by spite, ill-will, or other bad motive." *Rockledge*, 779 So.2d at 557, citing *S. Bell*, 482 So.2d at 539.

Based on the above discussion, it is clear that the Defendant did not engage in tortious interference in the business relationships of the Plaintiffs with their members/associates/area coordinators or interfere with the Plaintiffs' contractual relationships with their members, associates and area coordinators. Consequently, Count IV of the Plaintiffs' Second Amended Complaint must be dismissed.

CONCLUSION

The Defendant did not tortiously interfere with the business relationships or contractual arrangements of the Plaintiffs with their members, associates or area coordinators because the conduct of the Defendant was no more than lawful competition and the Plaintiffs' contracts were terminable at-will. Therefore, summary judgment must be granted in favor of the Defendant on Counts IV of Plaintiffs' Second Amended Complaint.

Dated: _____, 2004

Respectfully submitted,

Attorney for Defendant
[Address]
[Telephone No.]
Florida Bar number _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular [delivery, or fax, or U.S. Mail] to: [name or names], on this _____ day of _____, 2004.

Attorney for Defendant