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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

G.I. McDOUGAL, INC. et al., Plaintiffs and Appellants, v. MAIL BOXES ETC., INC. et al., Defendants and Respondents.	B196029 (Los Angeles County Super. Ct. No. BC294647)

APPEAL from a judgment of the Superior Court of Los Angeles County, Wendell H. Mortimer, Jr., Judge. Reversed.

Gordon & Rees, M.D. Scully, H. Scott Sirlin, Amy M. Darby and Justin D. Lewis for Plaintiffs and Appellants.

Morrison & Foerster, Jane H. Barrett, Ruth N. Borenstein and Mark R. McDonald for Defendants and Respondents.

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INTRODUCTION

This appeal arises from a judgment in favor of defendants entered after the trial court granted motion for summary judgment of defendants United Parcel Service (UPS), Mail Boxes Etc., Inc. (MBE), and Rocky Romanella as to all causes of action alleged by plaintiffs Gil I. McDougal, Inc. (sometimes McDougal), Sanford Industries, Inc. (sometimes Sanford), and Martin Senoff, Inc. (sometimes Senoff). We conclude that because plaintiffs have created numerous triable issues of fact, summary judgment should be reversed.

In the cause of action for intentional interference with prospective economic advantage, defendants did not satisfy their burden of production of evidence on whether plaintiffs had shown defendants' interference in plaintiffs' economic relationship with a third party amounted to independently actionable conduct, and on whether plaintiffs had no reasonable probability of future economic relationship with their customers. Plaintiffs also created triable issues of fact as to whether they lost customers as a result of defendants' interference.

In the cause of action for breach of franchise agreements, plaintiffs created triable issues of fact as to whether defendant MBE breached its contractual duty to provide local and regional marketing materials to franchisees, whether MBE had control of national media fees collected from franchisees, whether MBE used funds collected from MBE franchisees to purchase advertising for The UPS Store instead of MBE Centers, and whether UPS, an affiliate of MBE, violated the franchise agreement by establishing or licensing businesses that competed with plaintiff franchisees in their franchise territories.

In the cause of action for tortious interference with contractual relations, defendants did not show that their conduct was privileged or that federal law preempted this cause of action.

In light of our findings on these causes of action, we need not deal with the remaining causes of action. We reverse the judgment.

PROCEDURAL AND FACTUAL HISTORY

Plaintiffs McDougal, Sanford, and Senoff were franchisees of Mail Boxes Etc., Inc. and operated franchised retail shipping stores called "Mail Boxes Etc. Centers." UPS acquired MBE in 2001. UPS convinced most MBE franchisees to sign amendments to their franchise agreements and thereby join the Gold Shield Program, pursuant to which some 87 percent of MBE franchisees converted their businesses to "The UPS Store." McDougal, Sanford, and Senoff, however, were among those MBE franchisees who did not agree to amend their franchise agreements, join the Gold Shield Program, or convert their business to The UPS Store. Instead McDougal, Sanford, and Senoff continued to operate their franchised businesses as MBE Centers. These plaintiffs allege that UPS, its subsidiary MBE, and UPS manager Rocky Romanella began to abandon and undermine the MBE Center franchisees, to violate contractual duties in their franchise agreements and to violate duties in tort and statute.

The Complaint: The operative complaint is the tenth amended complaint.

McDougal, Sanford, and Senoff were each members of a group of "MBE Franchisee Plaintiffs," who sued Mail Boxes Etc., Inc. (MBE), MBE's parent UPS, UPS manager Rocky Romanella, and other defendants for damages. The complaint alleged that MBE franchisees operated retail outlets for packaging and shipping items for the general public in accordance with franchise agreements with MBE. Before April 30, 2001, Mail Boxes Etc. USA, Inc. was franchisor of the "Mail Boxes Etc." franchise system and a wholly owned subsidiary of Mail Boxes Etc., Inc., a California corporation. On April 20, 2001, United Parcel Service General Services Company, a wholly owned subsidiary of UPS, acquired the assets and some liabilities of Mail Boxes Etc. USA, Inc., transferred those assets and liabilities to United Parcel Service of America, Inc., which in turn transferred those assets and liabilities to the newly formed MBE Inc., a wholly owned subsidiary of UPS. The complaint alleged that as owners of MBE and its trademark, trade name, and related intellectual property, UPS and MBE conspired to destroy the MBE franchised businesses and distribution system, and establish in its place "The UPS Store," a network of UPS-favored businesses.

The complaint alleged that in the 1970's, MBE opened and operated outlets which packaged and shipped small parcels, sold shipping materials, and provided mail box rentals and photocopy, fax, and voicemail services. In 1980, MBE began franchising this concept to independent franchisees, to whom MBE licensed the rights to use the "Mail Boxes Etc." trademark, trade name, and retail packaging and shipping system. MBE allowed franchisees to offer services from multiple shipping companies (including UPS, Federal Express, DHL, Airborne Express, and the U. S. Postal Service), to set their own retail prices, and to develop add-on services to serve local customers.

After evaluating a plan to create a network of 1,700 to 2,000 UPS-operated stores, UPS rejected that plan as requiring an initial investment and management costs that were too high. Instead on April 30, 2001, UPS acquired MBE, and later transferred MBE's assets and liabilities to MBE, Inc., a wholly-owned subsidiary of UPS. The complaint alleged that UPS and MBE collaborated to acquire the MBE franchise system with the intent of eliminating the then-current MBE Center business model and any potential for MBE franchisees to recoup their investment or realize the benefit of their own goodwill, by coercively converting the MBE Center system into "The UPS Store."

The complaint alleged that UPS and MBE collaborated in a scheme to enforce a new "The UPS Store" franchised distribution system which required, under threat of termination, that MBE franchisees convert to "The UPS Store" and required that converted franchisees strictly comply with UPS's costly marketing plan, operating manuals, and standards for operating franchised businesses. The complaint alleged that UPS and MBE collaborated to effectuate either the coerced conversion of MBE Centers to The UPS Store franchise, or failing conversion, to destroy MBE Centers. MBE began competing directly with franchisees who did not convert to The UPS Store by creating "discount operations" in The UPS Store which would operate at financially insolvent levels until they destroyed non-converting franchisees' business operations.

The complaint alleged that MBE discriminated against MBE Center franchisees in favor of The UPS Store franchisees to destroy MBE Center franchisees' ability to compete effectively and manipulated franchisee relationships to direct profit to the

franchisor and away from MBE Center and The UPS Store franchisees. MBE breached its franchise agreements with franchisees by permitting its affiliate, UPS, to enter into agreements with other retail outlets that compete with those MBE franchisees who did not convert to The UPS Store. The complaint alleged that MBE and UPS, with the intended consequence of coercing MBE franchisees to convert to The UPS Store franchise, implemented tortious and anticompetitive practices, which included falsely representing to MBE franchisees that the MBE business model was broken and needed to be replaced by "the Gold Shield Program" and announcing to MBE franchisee plaintiffs that they would go out of business if they did not become The UPS Store. The complaint alleged that UPS acquired franchisee assets with the intent to destroy the MBE franchise system and to turn all independently owned MBE businesses into The UPS Store for the purpose of creating UPS-owned retail outlets. The complaint also alleged that MBE and UPS set about to destroy each MBE plaintiff franchisee's ability to exercise its right of renewal under its franchise agreement, destroy each MBE plaintiff franchisee's goodwill and ability to transfer the Mail Boxes Etc. franchise, eliminate the MBE franchise system and replace it with a "UPS only" operation, destroy the Mail Boxes Etc. trademark, trade name, and goodwill, and prevent MBE franchises from dealing with carriers which compete with UPS. The complaint alleged that MBE and UPS negated exclusive territories bargained for by MBE franchisees by having MBE restrict franchisee operations to single-shipper services, which became part of a retail network of UPS services that functioned as UPS-authorized shipping outlets within MBE franchisees' exclusive territory.

The complaint alleged that in spring 2002, UPS conducted "The UPS Store" test programs to test the UPS plan to replace all MBE Centers with The UPS Store. In late 2002 and early 2003, MBE announced a plan to re-brand all MBE stores as The UPS Store. At meetings with MBE franchisees, UPS presented "The Gold Shield Amendment" to amend existing MBE franchise agreements. Ninety percent of 3,000 former MBE Center franchisees became "The UPS Store" franchisees. Thus MBE and UPS effectively destroyed the MBE franchise system for the 350 MBE franchisees who

continued doing business under the “Mail Boxes Etc.” mark and the original independent franchisee business model.

The complaint alleged that plaintiff MBE franchisees, who refused to convert to The UPS Store franchises, were told there were not enough MBE Center franchisees to warrant national advertising and the level of marketing support which they had received before the sale of MBE to UPS and which was provided for in their franchise agreements. UPS and MBE nationally advertised that Mail Boxes Etc. was now The UPS Store, even though all MBE franchisees had not become The UPS Store franchisees, causing customers to question the viability of the MBE franchisee plaintiffs’ business continuity. The complaint alleged that MBE and UPS directed customers to the nearest The UPS Store location, even though an MBE plaintiff franchisee’s location might be closer.

The complaint alleged that UPS and MBE set about to destroy the MBE franchise system and deprived MBE franchisee plaintiffs of their contractual rights under their franchise agreements to sell or transfer their franchised businesses, and to renew automatically their MBE franchise agreements for successive 10-year periods.

The complaint also contained allegations, set out more fully *post*, that MBE and UPS damaged plaintiffs by converting MBE advertising funds, false advertising, directing customers away from MBE Centers, and by operating business that encroached on plaintiff franchisees’ exclusive territories.

The complaint contained 33 causes of action. The MBE franchisee plaintiffs alleged causes of action for tortious interference with contractual relations against UPS, tortious interference with prospective economic advantage against MBE and UPS, two causes of action for unfair competition (Bus. & Prof. Code, § 17200 et seq.) against MBE, and a cause of action for breach of franchise agreements against MBE. Plaintiff Senoff alleged a cause of action for violation of the New Jersey Franchise Practices Act against defendants MBE, UPS, and Rocky Romanella. Plaintiff McDougal alleged a cause of action for violation of the Indiana Franchise Relations Act against MBE and UPS.

Summary Judgment Motion: MBE and UPS filed motions for summary judgment or in the alternative for summary adjudication against 43 plaintiffs. McDougal, Senoff, and Sanford were among these 43 plaintiffs. MBE and UPS filed individual motions for summary judgment, or in the alternative for summary adjudication, against Sanford, McDougal, and Senoff.

Grant of Summary Judgment: The trial court granted defendants' motions for summary judgment on November 21, 2006. A judgment filed on December 20, 2006, found that defendants were entitled to summary judgment as a matter of law on all causes of action alleged by plaintiffs McDougal, Sanford, and Senoff in the 10th amended complaint, and ordered judgment entered in favor of defendants. Plaintiffs filed a timely notice of appeal.

STANDARD OF REVIEW

"A defendant's motion for summary judgment should be granted if no triable issue exists as to any material fact and the defendant is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The burden of persuasion remains with the party moving for summary judgment. [Citation.] When the defendant moves for summary judgment, in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence.' [Citation.] We review the record and the determination of the trial court de novo." (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003.)

A defendant moving for summary judgment bears the burden of showing that a cause of action has no merit because plaintiff cannot establish an element of the claim or because defendant has a complete defense. The burden then shifts to the plaintiff opposing the summary judgment motion to establish that a triable issue of fact exists as to these issues. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

ISSUES

Plaintiffs claim on appeal that:

1. The trial court erroneously adjudicated the third cause of action for tortious interference with prospective economic advantage;

2. Plaintiffs did not concede the 10th cause of action;

3. The trial court erroneously granted summary judgment as to the 24th cause of action for breach of franchise agreements;

4. The trial court erroneously adjudicated plaintiffs' first cause of action for tortious interference with contractual relations; and

5. The trial court erroneously applied a choice-of-law provision to bar plaintiffs' 13th and 14th causes of action.

DISCUSSION

1. *Plaintiffs Created Triable Issues of Fact Concerning Their Third Cause of Action for Tortious Interference With Prospective Economic Advantage, Which Requires Reversal of Summary Judgment*

a. *The Cause of Action, and Allegations of the Complaint*

The third cause of action alleged a cause of action for intentional interference with prospective economic advantage. This cause of action requires that plaintiff plead and prove: (1) an economic relationship between the plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts by the defendant designed to disrupt the relationship; (4) defendant's conduct which was wrongful by some legal measure other than the fact of interference itself; (5) actual disruption of the relationship; and (6) defendant's acts which proximately caused economic harm to the plaintiff. (*Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1153.)

Plaintiffs' third cause of action for interference with customer relationships alleged that MBE and UPS knew plaintiffs had existing economic relationships with customers that were likely to benefit plaintiffs economically in the future, based on plaintiffs' ability to provide customers with multiple shipping options and high quality

service. Plaintiffs alleged that MBE and UPS interfered with these economic relationships by engaging in unfair, deceptive and unlawful advertising that stated that all MBE stores were becoming The UPS Stores; causing MBE's website to direct customers to The UPS Store and away from MBE stores; causing MBE's call center to direct customers to The UPS Store even when an MBE Center was closer to the customer's location; causing MBE national advertising funds to be wrongfully diverted to be used solely for the benefit of The UPS Store and UPS; and abolishing the national media fund for MBE Centers that did not convert, while continuing to provide expensive national advertising for The UPS Stores. The complaint alleged that defendants' wrongful actions caused plaintiffs to suffer substantial interference with their prospective economic relationship with customers, which included: customers being confused as to what services plaintiffs offered and whether plaintiffs were a MBE or a The UPS Store; customers believing there were no longer MBE stores because UPS and MBE advertising stated that all MBE stores were becoming The UPS Stores; customers being unable to locate a MBE store because of defendants' wrongful diversion of customers on its website and phone line; and customers deciding to use another parcel packaging store because they mistakenly believed MBE only offered UPS products and services. The complaint alleged that defendants' wrongful actions caused plaintiffs to suffer lost business profits.

The trial court granted summary judgment on this cause of action because plaintiffs had not shown any wrongful act that caused customers to discontinue the business relationships.

b. *Defendants' Summary Judgment Motion Did Not Satisfy Their Burden of Production on Whether Plaintiffs Had Shown Interference That Amounted to Independently Actionable Conduct, and Did Not Shift the Burden to Plaintiffs*

Defendants focus on the fourth element of this cause of action, which requires interference that "amounts to independently actionable conduct. [Citation.] . . . [A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some

constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Korea Supply Co. v. Lockheed Martin Corp., supra*, 29 Cal.4th at p. 1159.) Defendants claim that plaintiffs failed to argue in the trial court that defendants' interfering conduct violated any specific legal standard, and that plaintiffs have raised a new ground on appeal, which is that the advertisements and website and telephone store locators were wrongful because they violated Business and Professions Code section 17500.

In moving for summary judgment, however, defendants did not satisfy their burden of production on this issue. Defendants' master memoranda of points and authorities in support of summary judgment, and defendant's individual summary judgment motions addressed to Senoff, Sanford, and McDougal, did not claim that these plaintiffs could not provide evidence that defendants' interference amounted to independently actionable conduct. Thus plaintiffs' opposition to the summary judgment motion was not required to produce evidence that created a triable issue of fact as to this issue.

c. *Defendants Did Not Meet Their Burden of Production Regarding Whether Plaintiffs Had No Reasonable Probability of Future Economic Relationship With Their Customers; Plaintiffs Created Triable Issues of Fact as to Whether They Lost Customers as a Result of Defendants' Interference; Therefore Summary Judgment as to This Cause of Action Should Be Reversed*

Defendants' summary judgment motion alleged that plaintiffs had no evidence that (1) they had an a reasonable probability of future economic relationships with any of their customers, or (2) they lost customers as a result of defendants' alleged interference.

None of defendants' separate statements, however, alleged any evidentiary showing that plaintiffs had no reasonable probability of future economic relationships with any of their customers. Thus defendants failed to meet their burden of production of evidence as to this element of the cause of action, and did not shift that burden to plaintiffs. A defendant moving for summary judgment must present evidence, and not simply argue, that the plaintiff does not possess and cannot reasonably obtain needed

evidence of at least one essential element of plaintiff's cause of action. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 853-855.) In any event, plaintiffs showed that there were multiple triable issues of fact as to this cause of action.

With regard to whether plaintiffs lost customers as a result of defendants' interference, defendants alleged that McDougal's customers who used a The UPS Store did so because of lower prices, not because of UPS's or MBE's interference, and that four of McDougal's customers stopped using McDougal's MBE Center for an unknown reason. McDougal, however, testified that UPS did interfere with his relationship with customers through false advertising that MBE was becoming The UPS Store and The UPS Store had new lower prices. McDougal responded in discovery that he lost customers as a result of defendants' advertising, misdirection of customers by the website and call center, and diversion and abolition of national advertising funding. McDougal produced a list of lost customers, which included 99 regular customers of McDougal's store who, McDougal alleged, discontinued their patronage as a result of defendants' alleged wrongful conduct in implementing the Gold Shield program. In a declaration, Mike Hillenburg stated that he regularly and routinely patronized McDougal's store until 2005, when he stopped patronizing McDougal's store because he saw no advertising for MBE stores and concluded that MBE stores were going out of business and being replaced by The UPS Stores.

Defendants alleged that Sanford, Senoff, and McDougal could not identify a single customer they lost as a result of any claimed act of interference by UPS or MBE. Sanford's declaration, however, cited three instances of regular patronage of his store by John Donnelly, Gerald Wright, and John Flaherty until late 2003, when these customers allegedly discontinued patronage of Sanford's store after viewing advertisements which stated that customers could obtain the same services for new, lower prices at The UPS Stores. Sanford also produced a list of 472 lost customers, who allegedly discontinued their patronage of Sanford's store as a result of defendants' alleged wrongful conduct in implementing the Gold Shield program. Senoff provided a list of customers' names claimed to be lost as a result of the Gold Shield Program, stated that there were a couple

of hundred prepaid copy cards outstanding, and provided a declaration of Gene McGuire, Senoff's long-time customer, who stated that he discontinued patronizing of MBE and instead patronized The UPS Store after listening to advertising about UPS's lower costs for the same services.

Plaintiffs' evidence was sufficient to create triable issues of fact as to whether plaintiffs' businesses lost customers as a result of defendants' interference. Therefore the summary judgment as to the third cause of action for interference with prospective economic advantage should be reversed.

2. *The Statement of Decision Erroneously Adjudicated the 10th Cause of Action, But the Judgment Makes the Issue of Error Moot*

The trial court's statement of decision stated: "10th Cause of Action conceded." Senoff, Sanford, and McDougal were not named as plaintiffs in this cause of action for violation of the California Franchise Relations Act. Thus, the statement in the statement of decision that the 10th cause of action was conceded was erroneous. The issue is moot, however, because the judgment states that defendant are entitled to summary judgment on all causes of action alleged by plaintiffs McDougal, Sanford, and Senoff in the operative 10th amended complaint. Since these plaintiffs did not bring the 10th cause of action, it was not included in the judgment.

3. *Plaintiffs Created Triable Issues of Fact as to Their 24th Cause of Action for Breach of Franchise Agreements, Which Requires Reversal of Summary Judgment*

a. *The Allegations of the Complaint*

Sanford, Senoff, McDougal, and several other plaintiffs alleged the 24th cause of action for breach of MBE franchise agreements against MBE. This cause of action alleged that Sanford executed an MBE standard form FA/UNI 693, McDougal executed an MBE standard form FA/REG 0693, and Senoff executed an MBE standard form FA 693, each for a term of ten years.

The complaint alleged that section 14.01.B of the franchise agreements gave plaintiffs the right to renew their franchise agreements for successive periods of 10 years each, and section 14.01.B.1 gave plaintiffs the right to transfer their rights and duties under their franchise agreements and that MBE could not unreasonably withhold approval of the transfer. The complaint alleged that MBE breached these sections of the franchise agreements as alleged, *ante*, and that MBE's destruction of plaintiffs' renewal and transfer rights had resulted in the loss of the value of plaintiffs' business and good will and had damaged the resale value of plaintiffs' MBE Centers.

The complaint alleged that section 14.04.A of the franchise agreements provided that MBE USA could assign its right, title and interest in plaintiffs' franchise agreements only if the assignee agreed in writing to assume all MBE USA's obligations thereunder. The complaint alleged that MBE USA, acting in concert with BSG holdings, breached section 14.04.A by transferring assets to MBE without the latter undertaking the duties owed to plaintiffs under their franchise agreements.

The complaint alleged that section 9.01 of the franchise agreements granted each franchisee an exclusive franchise territory, within which the franchise would establish a MBE Center, and stated that only one partial or full-service MBE Center could be established in the franchise area. Section 9.01.A. provided that, so long as the franchisee was not in default under the franchise agreement, MBE or its affiliates would not franchise others or establish company-owned outlets, selling or leasing similar products or services under a different trade name or trademark, within the individual franchise area. Section 9.01.C stated that a franchisee's individual franchise area could be altered only by the parties' mutual written consent. The complaint alleged that MBE breached sections 9.01, 9.01.A and 9.01.C of the franchise agreements though UPS, as an MBE "affiliate," undertaking company-owned outlets selling or leasing similar products or services under a different trade name or trademark, which breach caused plaintiffs to lose revenue and be damaged.

The complaint alleged that section 8.03.A. stated that MBE would provide continuing consultation and advice regarding business, financial, operational, technical, pricing, legal, sales and advertising matters that directly related to the franchise operation, but breached section 8.03.A.

The complaint alleged that MBE breached section 8.03.8 of the franchise agreements, which required MBE to develop creative materials for local and regional marketing and make those marketing materials available to franchisees for publication or distribution in the franchisee's market area at the franchisee's expense.

The complaint alleged that MBE breached section 3.03 of the franchise agreements by converting funds in the National Media Fund, which funds were contributions paid by plaintiffs, and using those funds exclusively for UPS advertising and promotion of The UPS Store franchises.

The complaint alleged that section 1.03 of plaintiffs' franchise agreements required MBE to determine and publish suggested price lists for products and services offered at an MBE Center, but stated that a franchisee should offer products and services in accordance with the franchisee's own published price, which franchisees, in their sole discretion, could change. Section 8.02 required MBE to loan each franchisee one copy of its operations manual; the manual in effect when plaintiffs signed their franchise agreements provided that plaintiffs could set their own resale pricing as long as it was within MBE guidelines, and could use multiple shippers to suit customers' needs. The complaint alleged that MBE breached sections 1.03 and 8.02 by modifying the business operations manual to require that plaintiffs, upon renewal or transfer, must charge a set resale price and must use only UPS shipping services.

The complaint alleged that it was an implied term of the franchise agreements that MBE would protect and promote the distinctive and valuable "Mail Boxes Etc." trademark and trade dress and do nothing to damage or diminish them. The complaint alleged that MBE breached this implied term of the franchise agreements.

The trial court found no evidence of breach of contract and granted summary judgment as to this cause of action.

b. *Plaintiffs Created Triable Issues of Fact as to This Cause of Action, Requiring Reversal*

i. *Plaintiffs Created Triable Issues of Fact as to Whether MBE Breached Its Contractual Duty to Develop and Provide Creative Materials for Local and Regional Marketing and to Make Marketing Materials Available to Franchisees*

There are multiple triable issues of fact regarding this cause of action. The first triable issue of fact is whether MBE breached its duty to develop and provide creative marketing materials to plaintiffs.

The franchise agreements required MBE to provide creative materials for local and regional marketing. Section 8.03.B states: "MBE shall develop and provide creative materials for local and regional marketing and make such marketing materials available to its Franchisees for publication or distribution in the Franchisee's market area at Franchisee's own expense.

Plaintiffs provided evidence that in the period between plaintiffs' purchase of their MBE Center franchises until inception of the Gold Shield Program, MBE provided creative marketing materials that effectively supported local and regional marketing efforts. These marketing materials included television and radio commercials created for regional or local advertising and were available to any MBE franchisee for local use. Plaintiffs provided evidence, however, that since the inception of the Gold Shield Program, there were no creative materials developed for local television advertising for the MBE Centers. Plaintiffs also provided evidence that before the Gold Shield Program, MBE created high-quality print advertisements consistent with annual events (such as holidays and back-to-school), current economic and business conditions, and corporate marketing initiatives. MBE placed advertisements with national media, and made local versions of print masters available to franchisees which included a section to insert local store information, allowing franchisees to place local advertising that capitalized on national advertising. These advertisements were updated, and plaintiffs saw new advertising masters, multiple times a year. Plaintiffs provided evidence that after the

inception of the Gold Shield Program, however, print advertising became less available, there was no longer national advertising and thus print advertising was not integrated with national advertising, and messages became generic and thus ineffective. Plaintiffs provided evidence that before the inception of the Gold Shield Program, several times a year MBE produced new, high-quality in-store posters and hanging signs to promote store services. Plaintiffs provided evidence that since the inception of Gold Shield, the quality of these signs diminished significantly, rendering them worthless and far inferior to what was provided to The UPS Stores. Before the inception of Gold Shield, MBE ran national promotions designed for local promotion, distributing contest entry forms to local businesses and broadcasting a national MBE Super Bowl commercial promoting a local store and customer selected in a national contest. Plaintiffs provided evidence that no in-store promotions for MBE Centers had been provided since the Gold Shield Program began. Plaintiffs provided evidence that MBE reduced the quality of marketing materials to such a level that they were no longer useful or effective, and that producing low-quality materials, or posting generic, inaccessible templates on a website, did not meet MBE's contractual obligation to develop and provide creative marketing materials to franchisees. Thus plaintiffs created a triable issue of fact as to whether MBE had breached its contractual duty to develop and provide creative materials for local and regional marketing and to make such marketing materials available to franchisees.

ii. *Plaintiffs Created Triable Issues of Fact Whether MBE Had Control of National Media Fees Collected From MBE Franchisees, and Whether MBE Used Funds Collected From Franchisees to Purchase Advertising for The UPS Store Instead of Mail Boxes Etc. Centers*

MBE's summary judgment motion asserted that MBE did not breach its duty relating to alleged conversion of marketing funds.

Plaintiffs raised a triable issue of fact as to which entity controlled the National Media Fee (NMF). MBE alleged that according to the franchise agreements, a National Media Fee (as defined in section 3.03 of the 1994 franchise agreement) was governed by

a national Advertising Advisory Council (AAC) comprised of franchisee members elected by franchisee and one member representing MBE, as set forth in section 3.03.B. Defendants alleged that the franchise agreements set forth the AAC's decision-making role in governing the NMF. Plaintiffs, however, introduced evidence that their franchise agreements did not include the provision mentioning the AAC. Plaintiffs also introduced evidence that a November 1997 franchise agreement states that "MBE shall administer the NMF with the advice of the Advertising Advisory Council." Plaintiffs cited testimony by a past MBE Marketing Director, Kurt Schusterman, that the AAC provided advice to MBE on marketing issues, and that the NMF was to be used to promote products and services of MBE through national advertising.

MBE alleged that the AAC's role was limited to an advisory capacity in only one respect, the creative direction of advertisements, and otherwise the AAC had authority over spending pooled marketing funds. Plaintiffs again set forth evidence that the 1993 and 1994 franchise agreements did not reference the AAC, that early 1997 franchise agreements stated that the AAC only advised MBE on strategy direction for advertisements, that the November 1997 franchise agreement stated that "MBE shall administer the NMF with the advice of the Advertising Advisory Council," and again cited Schusterman's testimony that the AAC provided advice and counsel to MBE on marketing issues.

MBE alleged that after April 2003, MBE proposed a number of national advertising programs to franchisees operating MBE stores. Plaintiffs disputed this fact, citing testimony that in January 2003, before inception of the Gold Shield Program, MBE reallocated $5 million of NMF funds (which had been committed in spring 2002 for national advertising for the MBE brand) to advertise The UPS Store instead. Plaintiffs also cited evidence that after the inception of the Gold Shield Program, the only national advertising for MBE stores was direct mail advertising, and that MBE paid for no advertising for MBE stores.

MBE alleged that in mid-2004, the AAC decided to terminate the NMF and return the vast majority of funds in the NMF to individual MBE franchisees. Plaintiffs disputed this fact, citing evidence that Stuart Mathis decided to eliminate the NMF advertising fund in the franchise agreements, which violated section 14.06 in franchise agreements prohibiting modifications to franchise agreements except by mutual consent of MBE and franchisees.

Defendants alleged that plaintiffs testified that they received distributions when the AAC decided to distribute most of the funds in the NMF, and that no plaintiff testified that its allotted share was less than what that plaintiff contributed. Plaintiffs disputed this fact, citing evidence that some plaintiffs received matching funds from the NMF and that a single direct mail piece focusing on MBE holiday shipping in 2003, and no other national advertising, was not effective to counter the implied disparagement by UPS in its $15 million introductory campaign. Plaintiffs also alleged that plaintiffs' franchise agreements required national advertising.

Thus plaintiffs created a triable issue of fact as to whether MBE controlled NMF collected from franchisees, and whether MBE used NMF collected from MBE franchisees to purchase advertising for The UPS Store instead of for MBE stores.

iii. *Plaintiffs Created Triable Issues of Fact Whether UPS, an Affiliate of MBE, Violated the Franchise Agreement by Establishing or Licensing Drop Boxes, ASO's, Customer Counters, and Alliances That Competed For Business Within MBE Franchisees' Territories*

MBE's summary judgment motion asserted that MBE did not breach the territorial encroachment provision of plaintiffs' franchise agreements.

Plaintiffs cited exclusive territory provisions in the MBE franchise agreements. The 1994 franchise agreements stated: "MBE agrees that during the term of the Franchise Agreement and as long as Franchisee is not in default under this agreement and all other agreements, MBE or our affiliates, if any, will not establish or operate, nor license any other person to establish or operate a business selling or leasing similar

products or services under a different tradename or trademark within the individual franchised territory specified within the Franchise Agreement." The 1993 franchise agreement stated: "MBE agrees that, so long as Franchisee is not in default under this Agreement, and all other agreements ancillary hereto, MBE or its affiliates, if any, will not franchise others or establish company-owned outlets, selling or leasing similar products or services under a different trade name or trademark, within the individual franchise area."

It was undisputed that UPS, not MBE, owned and determined the locations of UPS drop boxes. Defendants cited evidence that UPS drop boxes were unstaffed, self-serve boxes, resembling mailboxes, into which packages could be deposited for shipment via UPS, and that drop boxes did not sell or lease anything. Plaintiffs disputed this evidence, asserting that UPS drop boxes were a business because they brought UPS profit; UPS offered customers internet accounts which enabled a customer to print a shipping label, place the label on a package, and deposit the package into a UPS drop box for shipping, which created a profit for UPS for each package placed in its drop boxes.

Defendants asserted that Authorized Shipping Outlets (ASO's) were independently owned and operated stores where customers could drop off packages for delivery by UPS. Plaintiffs disputed this fact, alleging that UPS licensed ASO's, which offered many services beyond being merely a drop off location, and that ASO's offered shipping services similar to those offered by plaintiffs' businesses.

It was undisputed that UPS entered into contracts with independently owned and operated stores which, like ASO's, offered shipping services to the public and which were known as "alliances" and "customer counters." MBE asserted that UPS drop boxes and ASO's, customer counters, and alliances, were not "MBE franchises." Plaintiffs disputed this fact, citing evidence that UPS licensed ASO's and granted pack and ship retail outlets, similar to plaintiffs' businesses, the right to become licensed UPS shipping outlets.

Plaintiffs also provided evidence that setting up drop boxes or licensing ASO's within a franchisee's territory was direct competition with that franchisee, and took away business that could have come to a franchisee's business.

Plaintiffs did not dispute that UPS, not MBE, owned and determined the locations of UPS drop boxes. Plaintiffs argued, however, that UPS was an affiliate of MBE, that the franchise agreement provision prohibited "MBE or its affiliates" from establishing company-owned outlets selling similar products or services within an individual franchise area, and that MBE allowed its affiliate UPS to license, establish, and operate drop boxes and ASO's in plaintiffs' exclusive territories.

Defendants asserted that UPS had drop boxes and supported ASO's in franchisee's territories before UPS acquired MBE. Plaintiffs cited evidence that UPS established new drop boxes and licensed new ASO's in plaintiffs' territories.

Plaintiffs created a triable issue of fact as to whether UPS, an affiliate of MBE, violated the franchise agreement by establishing or licensing drop boxes, ASO's, customer counters, and alliances which competed for business within MBE franchisees' territories.

4. *Summary Judgment of the First Cause of Action for Tortious Interference With Contractual Relations Must Be Reversed*

Plaintiffs claim that the trial court erroneously granted summary judgment on the first cause of action for tortious interference with contractual relations.

"To prevail on a cause of action for intentional interference with contractual relations, a plaintiff must plead and prove (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148.)

This cause of action alleged that UPS had knowledge that plaintiffs had valid, existing MBE franchise agreements and bought MBE USA Inc. and acted for the sole purpose of turning MBE businesses into UPS-controlled stores under the name "The UPS Store" and destroying the MBE franchise system, good will, and reputation for UPS's own business gain without compensation to plaintiffs. The complaint alleged that UPS acted intentionally and wrongfully to divert profits and royalties from franchisees directly to UPS, to wrongfully and unlawfully coerce plaintiffs to become The UPS Store, and to destroy the MBE franchise system by eliminating all advertising and promotional materials for MBE plaintiff franchisees The complaint also alleged that UPS acted intentionally and wrongfully to induce MBE USA Inc. to constructively breach its franchise agreements with plaintiffs by: (1) requiring that MBE Inc. permit renewals of MBE Centers only as The UPS Store; (2) eliminating advertising and promotional materials support for franchisees who remained MBE businesses; (3) converting MBE advertising funds to pay for advertising for The UPS Store; and (4) bankrolling false and misleading advertising that all MBE franchises were converting to The UPS Store, when not all stores were, in fact, converting. The complaint alleged that UPS's conduct was designed to induce MBE USA Inc. to breach its franchise agreements so that UPS could eliminate competition by taking over the franchisees' goodwill and reputation without compensating the franchisees. The complaint alleged that UPS conducted unlawful price discrimination to coerce plaintiffs to materially modify their franchise agreements with MBE Inc., so as to remain competitive with lower wholesale prices UPS offered to competitor shipping outlets. The complaint alleged that UPS's conduct caused an actual breach of the MBE plaintiff franchisees' contractual relationships.

Defendants asserted that before April 2001, Mail Boxes Etc. USA was the franchisor of the MBE system, that UPS General Services Co., a wholly owned subsidiary of UPS, purchased most of the assets of MBE USA, including MBE franchise agreements, and transferred them to MBE, a wholly owned subsidiary of UPS. Plaintiffs disputed these facts, alleging that some plaintiffs entered into franchise agreements with Mail Boxes Etc., USA Inc. and others entered into franchise agreements with MBE, Inc.,

a Delaware corporation. Plaintiffs alleged that after performing due diligence regarding the purchase of MBE in 2000, UPS decided not to purchase MBE because the price was too high. In 2001, plaintiffs alleged that MBE's parent company, USOP, was in financial trouble and approached bankruptcy, and UPS purchased MBE at below "stand alone" value, which excluded MBE's goodwill. Plaintiffs also alleged that UPS General Services Co., a UPS subsidiary, caused the MBE franchise agreements to be transferred to MBE, a wholly owned subsidiary of UPS.

Defendants moved for summary judgment on this cause of action because any interference by UPS in MBE's agreements with plaintiffs was privileged and was preempted by the Federal Aviation Administration Authorization Act of 1994.

a. *Defendants Did Not Meet Their Burden of Production of Evidence That Their Conduct Was Privileged*

Defendants' claim of privilege in the trial court relied on *Culcal Stylco, Inc. v. Vornado, Inc*. (1972) 26 Cal.App.3d 879, 883. *Culcal Stylco* stated a qualified privilege, as follows: " 'One who has a financial interest in the business of another is privileged purposely to cause him not to perform a contract with a third person . . . if the actor (a) does not employ improper means, and (b) acts to protect his interest from being prejudiced by the contract[.]' " (*Id.* at p. 882.) *Culcal Stylco*, however, stated that merely because a parent corporation owns a subsidiary does not make its intentional interference with a contract of the subsidiary privileged as a matter of law. Instead, this privilege "is at most a qualified one dependent for its existence upon the circumstances of the case. It is essentially a state-of-mind privilege and therefore its existence cannot normally be satisfactorily determined on the basis of pleadings alone. [Citation.] The resolution of the issue turns on the defendants' predominant purpose in inducing the breach of the contract." (*Id*. at p. 883.)

First, in order for defendants to raise this claim of privilege, they were required to have raised it as an affirmative defense in their answer to the 10th amended complaint. (*GHK Associates v. Mayer Group, Inc*. (1990) 224 Cal.App.3d 856, 883.) The record does not contain the answer and thus does not show that defendants did so.

Second, resolution of the existence of the privilege is a question for the trier of fact. (*GHK Associates v. Mayer Group, Inc., supra,* 224 Cal.App.3d at p. 883.) Defendants failed to produce evidence that their conduct did not employ improper means and that they acted to protect their interest from being prejudiced by the contract. They therefore did not meet their burden of production and did not shift that burden to the plaintiff. Defendants did not show that their conduct was privileged.

b. *Federal Law Does Not Preempt This Cause of Action*

Defendants also argued in the trial court that the Federal Aviation Administration Authorization Act of 1994 preempted enforcement of state "law, regulation, or other provision having the force and effect of law related to a price . . . or service" of a carrier of property (49 U.S.C. §§ 14501, subd. (c)(1), 41713, subd. (b)(4)(A)) and that plaintiffs sought to invoke state law to hold UPS liable for conducting unlawful price discrimination. Price discrimination, however, is only one allegation in the first cause of action, which does not seek to enforce a cause of action for price discrimination against defendants. Instead this cause of action seeks to hold UPS liable for inducing the breach of franchise agreements between its subsidiary and plaintiff franchisees. Under the circumstances, federal law does not preempt this cause of action.

Summary judgment as to this cause of action must be reversed.

5. *Reversal of the Judgment Reverses Summary Judgment as to Both Causes of Action for Violation of Foreign Franchise Statutes*

Plaintiffs claim error in the summary judgment of the 13th cause of action by plaintiff Senoff for violation of the New Jersey Franchise Practices Act, and of the 14th cause of action by plaintiff Sanford for violation of the Indiana Franchise Relations Act. Our reversal of the judgment also constitutes reversal of summary judgment as to these two causes of action.

DISPOSITION

The judgment is reversed. Costs on appeal are awarded to plaintiffs Gil I. McDougal, Inc., Sanford Industries, Inc., and Martin Senoff, Inc.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.