

**CASE NO. 10-11739-A**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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GUNDER'S AUTO CENTER,

Plaintiff-Appellant

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

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**APPELLANTS BRIEF**

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June 8, 2010

**APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Plaintiff/Appellant, GUNDER'S AUTO CENTER, pursuant to Federal Rule of Civil Procedure 26.1, and the 11<sup>th</sup> Circuit Local Rule 26.1, files this Certificate of Interested Persons and Corporate Disclosure Statement and states that the following individuals, corporations, or entities may be interested in this appeal:

- Boggess, Rhonda B.; counsel for Defendant/Appellee, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY;
- Butler Pappas Weihmuller Katz Craig, LLP, law firm
- Curry, Charles B., The Honorable Judge of the Tenth Judicial Circuit in and for Polk County, Florida;
- Day, Stephen; counsel for Defendant/Appellee, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY;
- Geohagan, Alan Brent; counsel for Plaintiff/Appellant, GUNDER'S AUTO CENTER;
- Grimm, Reed; counsel for Defendant/Appellee, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY;
- Gunder, Ray, related party;

- Gunder's Auto Center, Inc.; Plaintiff/Appellant;
- Insurance Placement Services, Inc., related party;
- McMann, Mark D., attorney;
- Merryday, Steven D.; United States District Judge, Case No. 8:09-cv-00456-SDM-MAP;
- Oglesby Reinsurance Ltd, related party;
- Pizzo, Mark A., U.S. District Court Magistrate Judge;
- SF Insurance Placement Corporation of Canada, related party;
- State Farm Annuity and Life Insurance Co., related party;
- State Farm Bank, F.S.B., related party;
- State Farm International Life Insurance Co., related party;
- State Farm Mutual Automobile Insurance Company; Defendant/Appellee;
- State Farm County Mutual Insurance Company of Texas, related party;
- State Farm Finance Corporation of Canada, related party;
- State Farm Fire and Casualty Company, related party;
- State Farm Fire and Casualty Company, related party;
- State Farm Florida Insurance Company, related party;

- State Farm Guaranty Insurance Company, related party;
- State Farm General Insurance Company, related party;
- State Farm Indemnity Company, related party;
- State Farm International Services, Inc., related party;
- State Farm Investment Management Corp., related party;
- State Farm Investor Services (Canada) Holding Company, related party;
- State Farm Life and Accident Assurance Company, related party;
- State Farm Life Insurance Company, related party;
- State Farm Lloyds, Inc., related party;
- State Farm Realty Investment Company, related party;
- State Farm VP Management Corp., related party;
- Taylor, Day, Currie, Boyd & Johnson, law firm;
- Top Layer Reinsurance, Ltd., related party;
- Weihmuller, John W.; counsel for Defendant/Appellee, STATE FARM  
MUTUAL AUTOMOBILE INSURANCE COMPANY.

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**STATEMENT REGARDING ORAL ARGUMENT**

Appellant, GUNDER'S AUTO CENTER, hereby requests oral argument in Case No. 10-11739-A. Oral argument is appropriate under the circumstances of this case, since, *inter alia*, there exists an issue related to the sufficiency and reasonable interpretation of extrinsic/circumstantial evidence to which oral argument may assist in bringing clarity, and there exists a separate possibility of at least an attempt to utilize recent case law to otherwise broaden an otherwise established area of law which lends itself to the oral argument forum for such an attempt to be more fully synthesized and considered.

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**STATEMENT OF JURISDICTION**

This Court has jurisdiction on appeals from final orders pursuant to 28 U.S.C. § 1291 in that only final order and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. § 158, generally are appealable. The U.S. District Court Middle District of Florida issued their final Order Granting Defendant's Summary Judgment on March 26, 2010, and final judgment was entered on March 29, 2010.

The U.S. District Court Middle District of Florida had original jurisdiction by reason of diversity of citizenship of the parties pursuant to 28 U.S.C. § 1332(a) and removal from the State Court Action was proper under 28 U.S.C. § 1441(a) on March 13, 2009.

### **STATEMENT OF THE ISSUES**

1. Whether, under Florida law, the Trial Court erred in granting Appellee's, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY's, (hereinafter referred to as "STATE FARM") Motion for Summary Judgment against Appellant, GUNDER'S AUTO CENTER, (hereinafter referred to as "GUNDER'S") and in favor of STATE FARM, for purposes of GUNDER'S sole remaining count for slander; to that extent, and more specifically, whether, under Florida law, the Trial Court incorrectly applied the legal concept of qualified privilege to the alleged slanderous acts of STATE FARM against GUNDER'S.

2. Whether, under Florida law, the Trial Court erred in granting STATE FARM'S Motion to Dismiss First Amended Complaint against GUNDER'S and in favor of STATE FARM, for purposes of GUNDER'S count for tortious interference with a business relationship.

### **STATEMENT OF THE CASE**

#### **i. The Course of Proceedings and Dispositions in the Court Below**

On or about November 7, 2008, GUNDER'S filed its original Complaint in this case against STATE FARM in Florida State Court, in the Tenth Judicial Circuit in and for Polk County, Florida.

On March 13, 2009, STATE FARM filed its Notice of Removal (Doc. #1) of this case to the United States District Court for the Middle District of Florida.

On April 7, 2009, GUNDER'S filed its First Amended Complaint (Doc. #5). Thereafter, on April 24, 2009, STATE FARM filed its Answer (Doc. #6) to Count I for Slander in the First Amended Complaint, its Motion to Dismiss (Doc. #7), *inter alia*, Count II for Tortious Interference with a Business Relationship in the First Amended Complaint, and its Motion to Strike (Doc. #8) certain paragraphs in the First Amended Complaint.

On May 22, 2009, the Trial Court issued its Order (Doc. #12) granting STATE FARM's Motion to Dismiss, *inter alia*, Count II for Tortious Interference with a Business Relationship in the First Amended Complaint.

On June 11, 2009, GUNDER'S filed its Request for Reconsideration (Doc. #14) and Motion to Set Aside/Amend Order Granting STATE FARM's Motion to Dismiss Count II, Tortious Interference with a Business Relationship, of the First Amended Complaint, and Accompanying Memorandum of Law.

On June 29, 2009, the Trial Court issued its Order (Doc. #17) denying GUNDER'S Request for Reconsideration and Motion to Set Aside/Amend Order Granting Defendant's Motion to Dismiss Count II, Tortious Interference with a Business Relationship.

On January 29, 2010, STATE FARM filed its Motion for Summary Judgment (Doc. #49) against GUNDER'S.

On March 26, 2010, the Trial Court issued its Order (Doc. #71) granting

STATE FARM's Motion for Summary Judgment against GUNDER'S. On March 29, 2010 final judgment (Doc. #72) was entered against GUNDER'S and in favor of STATE FARM.

On April 14, 2010, GUNDER'S filed its Notice of Appeal to this Court.

**ii. Statement of the Facts**

"GUNDER'S is an auto/body repair shop that is, and has been since 1971, in the business of, among other things, repairing damaged vehicles." (Doc. #62, Attach. #4, para. 2) "Up until mid to late 2004, GUNDER'S was a member of STATE FARM's "preferred program". At that time it was referred to as the "Service First" program." (Doc. #62, Attach. #4, para. 3)

"Leading up to GUNDER'S termination as a "preferred shop", Ray Gunder of GUNDER'S had recognized over the previous two (2) to three (3) years that STATE FARM was effectively refusing to even entertain the notion of paying shops, including GUNDER'S, for certain procedures and/or at certain rates that they considered to be above what State Farm referred to as the "prevailing competitive market rate" related to the repair of customer vehicles that were insured by STATE FARM or for which STATE FARM was responsible." (Doc. #62, Attach. #4, para. 4)

"During those two (2) to three (3) years leading up to GUNDER'S termination in 2004 as a "preferred shop", Ray Gunder of GUNDER'S openly

communicated with other auto body repair shops to determine if STATE FARM was dealing with them in the same manner as stated above, to determine whether they were incurring certain expenses and desired to be fairly reimbursed for procedures necessary to bring a damaged vehicle back to “pre-loss” condition consistent with such expenses that STATE FARM was refusing to entertain the notion of paying, and to relay to the other auto body repair shops what GUNDER’S had been similarly encountering with STATE FARM. As part of Ray Gunder’s of GUNDER’S communications, [his] intent was to empower [the] market area (Polk County, Florida) auto body repair shops with a “global” knowledge regarding this issue, so that GUNDER’S, as well as the other auto body repair shops, could use this knowledge together to encourage STATE FARM to at least entertain paying for the expenses referenced above.” (Doc. #62, Attach. #4, para. 5)

Bob Davis, the Estimatics Team Manager for the Polk County, Florida area, on behalf of STATE FARM, has and does oversee the estimates for vehicle repairs at GUNDER’S and all other auto body repair shops in Polk County, Florida. (Doc. #62, Attach. #22, pp. 235-236) STATE FARM, via Bob Davis, admonished Ray Gunder, as a representative of GUNDER’S at the start of a meeting in 2004 for non-actionable communications with other auto body repair shops regarding what was being charged and what was being paid for by STATE FARM. Shortly

thereafter, and generally contemporaneous therewith, GUNDER'S was terminated as a "preferred shop" in State Farm's "Service First" program. (Doc. #62, Attach. #4, paras. 6 and 7). It can be reasonably inferred that the communications for which STATE FARM, via Bob Davis, was admonishing GUNDER'S were those described in the paragraph above.

Immediately thereafter, *and not before*, Ray Gunder of GUNDER'S began receiving inquiries from customers regarding comments made by STATE FARM about GUNDER'S that were false. (Doc. #62, Attach. #4, paras. 8-10)

STATE FARM, via Bob Davis, acknowledges that he was/is not pleased with Ray Gunder, as a GUNDER'S representative, and his above-referenced communications. (Doc. #62, Attach. #22, pp. 200, 202, 204-205) Defendant, through Bob Davis, further acknowledges personality conflicts with Ray Gunder of GUNDER'S. (Doc. #62, Attach. #22, pp. 194-196).

Moreover, after 2004, any collision claims that came through STATE FARM and which involved GUNDER'S were sent to a special unit of claim representatives, the "Complex Team". (Doc. #62, Attach. #21, pp. 9-10). In addition to other matters handled by the Complex Team, it also dealt with claims involving auto body repair shops on a list referred to as the "non-program" or "non-preferred" list. (Doc. #62, Attach. #21, pp. 51-52, 190-191) Even though the Complex Team's responsibility was the entire state of Florida, GUNDER'S was

one (1) of only four (4) auto body repair shops in the state placed on this “special” list. (Doc. #62, Attach. #21, pp. 51-52; Doc. #62, Attach. #33, pp. 11-12) There are approximately 4,000 auto body repair shops in the state of Florida. (Doc. #62, Attach. #4, para. 22) Claim representatives on the Complex Team were told that GUNDER’S was put on the list for charging a rate that was higher than the “prevailing competitive rate”. (Doc. #62, Attach. #21, pp. 43-46)

(According to STATE FARM’s Bob Davis, Polk County’s Estimating Team Manager, STATE FARM only pays based upon what the “prevailing competitive price” in the market is. (Doc. #62, Attach. #22, p. 51, p. 62, pp. 64-66) To that extent, the only GUNDER’S charges that STATE FARM alleges it would/does not pay and alleges were otherwise above the “prevailing competitive price” were, and have been, those charges for “denib/color, sand, and buff” on non-high-end, non-luxury vehicles, and for paint materials calculated using a “paint material calculator”. (Doc. #62, Attach. #22, pp. 172-174, p. 240). *However*, as testified to by other auto body repair shops in the Polk County market, Meisner’s Paint & Body, Douglas Collision, Dale Erndt (formerly of Lakeland Chrysler), Jenkins Lincoln Mercury, Dave Stewart of Stewart’s Auto Repair, and Bernie’s Body Shop, these shops *are* actually paid for paint material charges based on the use of a paint material calculator, and thus the same pricing constraints. (Doc. #62, Attachs. #23-28) STATE FARM acknowledges that, for its purposes, there is no

difference between the manner or use of a paint material calculator by GUNDER'S compared to any other shops. (Doc. #62, Attach. #22, p. 254)

Moreover, unlike GUNDER'S, the other local auto body repair shops testify that STATE FARM *also* pays them for the same "denib/color, sand, and buff" charges on non-high-end, non-luxury vehicles. (Doc. #62, Attachs. 23-28)

Thus, the reasonable inference one could come to is that charges for paint materials based upon the use of a paint material calculator *and* charges for denib/color, sand, and buff *must*, at a minimum, be charges that constitute the "prevailing competitive price", since that is the only price/charge Defendant will pay on. (Doc. #62, Attach. #22, p. 51, p. 62, pp. 64-66)

Consequently, even with regard to Defendant's comments regarding GUNDER'S overcharging or overcharging with regard to the "prevailing competitive price", one comes to the reasonable inference that this is not true, is false, and STATE FARM is aware of it.)

With regard to the above-referenced Complex Team where claims involving GUNDER'S were specially tagged and forwarded, when asked where the information would have been generated from that would ultimately have placed GUNDER'S on this "special" list for "special" treatment, the Complex Team manager said it would be Estimatics, the department of which Bob Davis was manager. (Doc. #62, Attach. #34, pp. 41-42; Doc. #62, Attach. #33, pp. 15-16)

Furthermore, Bob Davis acknowledges that he is a conduit for communication in the STATE FARM Winter Haven office where he works, and from where the Complex Team (of claim representatives) operated at all pertinent times, and is, in fact, involved in the training of what the claim representatives relay/state to STATE FARM's insureds/claimants. (Doc. #62, Attach. #22, p. 77, pp. 143-145)

Furthermore, GUNDER'S has been told by other Estimators that Bob Davis is the person directing that certain charges from GUNDER'S not be paid and, sometimes without any explanation. (Doc. #62, Attach. #4, para. 16-17; *see also*, Doc. #62, Attach. #30, p. 46) This is so *even though*, as set forth above and in the evidence, these are generally the same charges that are being paid to other auto body shops in the Polk County market. And, in fact, it is STATE FARM Estimatix (and its Estimators), managed by Estimatix Team Manager, Bob Davis (*see* Doc. #62, Attach. #22), that makes the decision as to whether the charges that have otherwise been denied GUNDER'S for payment by Defendant on a regular basis (via "supplement" requests), is or is not to be paid. (Doc. #62, Attach. #35, pp. 55-56) Bob Davis acknowledges that he oversees estimates that come through GUNDER'S. (Doc. #62, Attach. #22, pp. 235-236)

Moreover, as it relates to Bob Davis's power and control as the Estimatix Team Manager in the market where GUNDER'S does business, surveys conducted by STATE FARM are what supposedly set the "prevailing competitive market

price” for purposes of what Defendant is willing to pay. (Doc. #62, Attach. #21, pp. 163-164; Doc. #62, Attach. #29, pp. 47-48; Doc. #62, Attach. #22, pp. 51-52) The *only* person in the world that knows *the truth* of what all the surveys say for purposes of what constitutes “prevailing competitive market price” and what STATE FARM is willing to pay the auto body repair shops in the local Polk County market is Bob Davis. (Doc. #62, Attach. #29, p. 34, 37-39, 45-46, 47-48, 51-52) Thus, no auto body repair shop has ever had an opportunity to otherwise check or challenge whether or not Bob Davis’s messages/statements to them regarding what constitutes the “prevailing competitive market rate” is, for any particular repair procedure, is accurate or not (except as a result of the discovery uncovered as part of this litigation, as set forth above).

Furthermore, an estimator for STATE FARM, under the direction and supervision of Bob Davis as the Estimatics Team Manager, indicated to Ray Gunder of GUNDER’S in December of 2009, “that STATE FARM Estimatics Manager, Bob Davis, is the person behind and who has orchestrated the slanderous comments that have been made by STATE FARM and its representatives to GUNDER’S customers and/or potential customers”. (Doc. #62, Attach. #4, para. 18.)

As part of all of the actions on the part of STATE FARM, via Bob Davis, as set forth above, and through his areas of power and influence at STATE FARM, as

is set forth above or can be reasonably inferred from the above, Bob Davis, feeling a threat to his own control over the Polk County auto body repair market (aside and apart from any economic advantages to STATE FARM) due to Ray Gunder's of GUNDER'S communications, as previously described above, directed and orchestrated, as can be reasonably inferred from all of the above, the following STATE FARM representations/defamatory comments made to either customers or potential customers of GUNDER'S (who were/are also either insureds or were claimants of STATE FARM) as testified to by these same individuals: that there are "issues" at GUNDER'S; that they could receive better quality work at another shop; that taking their vehicle to GUNDER'S would cause unnecessary delays; that GUNDER'S workmanship is "substandard"; that other auto body repair shops could handle the repair in a more efficient manor; that State Farm has had "real problems" with GUNDER'S; that GUNDER'S "overcharges" its customers; that GUNDER'S charges a higher rate than other shops in the area; that GUNDER'S is known for procedures that are not needed and not actually done; that State Farm would have to provide the customer approval before they could take it to GUNDER'S to be repaired; that GUNDER'S is "too busy" to handle the collision claim; that the customer could not take their vehicle to GUNDER'S to be repaired and that GUNDER'S is not an option; that GUNDER'S is charging a rate that State

Farm is not willing to pay; that GUNDER'S is overcharging rates that are prevailing in the area. (Doc. #62, Attachs. 5-19)

None of the comments on the part of STATE FARM set forth above are true and, in fact are false. (Doc. #62, Attach. #4, paras. 9, 11, and 17) GUNDER'S has never overcharged a customer that is insured or a third party claimant of the STATE FARM or overcharged a customer that is insured or a third party claimant of STATE FARM with regard to STATE FARM's "prevailing competitive market rate". (Doc. #62, Attach. #20)

Moreover, STATE FARM is familiar with the manner in which each of the auto body repair shops in Polk County (GUNDER'S is located in Polk County) charge and how they go about their work. (Doc. #62, Attach. #22, pp. 261-262) To that extent, aside from overcharging based upon the "prevailing competitive price", STATE FARM's own testimony substantiates that there is no basis, at the very least, for any of the other STATE FARM comments set forth above that were relayed to GUNDER'S customers and/or potential customers. (Doc. #62, Attach. #22, pp. 233-234, pp. 236-237; Doc. #62, Attach. #29; Doc. #62, Attach. #30; Doc. #62, Attach. #31).

Finally, as a result of the slanderous comments by STATE FARM, Devon Anderson, Glen Weekly, Michael Esposito, Harold Barker, and Gwen Jenkins, took their vehicle to another auto body shop to be repaired (Doc. #62, Attachs. #5-

9) and, but for STATE FARM's slanderous comments, would have taken their vehicle to GUNDER'S to be repaired. GUNDER'S did not receive the business and money that GUNDER'S would have otherwise been paid, and which was otherwise paid to another auto body repair shop, due to the comments of STATE FARM to GUNDER'S customers and/or potential customers. In addition, pursuant to Michael Mard's, expert witness's, testimony (Doc. #62, Attach. #32), the injury/damages to GUNDER'S as a result of Defendant's slanderous comments is thus far calculated to be at least \$598,957.

**iii. The Standard/Scope of Review**

a. For purposes of the Trial Court's Order (Doc. #71) on STATE FARM's Motion for Summary Judgment, the standard of review to be applied by this Court is *de novo*, and the same standards that are to guide a Trial Court for purposes of a Motion for Summary Judgment should be followed by this Court. *Real Estate Financing v. First Guaranty Mortgage Corp.*, 950 F.2d 1540, 1543 (11<sup>th</sup> Cir. 1992). To that extent, summary judgment (Fed. R. Civ. P. 56) may only be granted if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See Payne v. Ryder Sys., Inc. Long Term Disability Plan*, 173 F.R.D. 537, 538 (M.D. Fla. 1997). A moving party must demonstrate that no issue exists as to any material fact in order to establish entitlement to summary judgment, even after all reasonable inferences are drawn in

favor of the party opposing summary judgment (i.e., GUNDER'S). *See Sweat v. The Miller Brewing Co.*, 708 F.2d 655, 656 (11<sup>th</sup> Cir. 1983).

b. For purposes of the Trial Court's Order (Doc. #12) and Order (Doc. #17) related to STATE FARM's Motion to Dismiss (Doc. #7), the standard of review to be applied by this Court is *de novo*, and the same standards that are to guide a Trial Court for purposes of a Motion to Dismiss should be followed by this Court. *GJR Invs. V. County of Escambia*, 132 F.3d 1359, 1367 (11<sup>th</sup> Cir. 1998). A complaint must meet only an "exceedingly low" threshold of factual and legal sufficiency in order to survive a motion to dismiss. *Perez v. Radio Shack Corp.*, 2002 WL 1335158, \*2 (S.D. Fla. 2002) (Citation omitted.) Courts should "...accept all factual allegations in the complaint as true and evaluate all inferences derived from those facts in the light most favorable to the plaintiff." *Id.* (Citation omitted.) A court should, therefore, only grant a motion to dismiss if "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

### **SUMMARY OF ARGUMENT**

With regard to the Trial Court's Order (Doc. #71) granting STATE FARM's Motion for Summary Judgment (Doc. #49), it is GUNDER'S position that the Trial Court failed to appropriately apply Florida law with regard to the legal concept of a

qualified privilege related to actions in defamation. In particular, the extrinsic evidence in the record and presented to the Trial Court presented a material issue of fact for a jury to consider as it relates to (1) whether the communications underlying the defamatory comments of STATE FARM were done so in good faith; there exists sufficient record evidence presenting a material issue of fact as to whether such defamatory comments were made in good faith and whether, therefore, a qualified privilege attaches at all to the defamatory comments of STATE FARM; and (2) assuming a qualified privilege does apply, whether such qualified privilege is divested due to extrinsic evidence establishing that the defamatory comments were made with express malice; the record evidence substantiates that at least a reasonable inference can be made that the primary motive behind the defamatory comments was to injure GUNDER'S and that, therefore, such comments were made with express malice divesting STATE FARM of any qualified privilege that may otherwise attach.

With regard to the Trial Court's Order (Doc. #12) and Order (#17) effectively granting STATE FARM's Motion to Dismiss (Doc. #7) the First Amended Complaint, it is GUNDER'S position that the Trial Court failed to appropriately apply Florida law with regard to (1) whether a cause of action in tortious interference with a business relationship may be dismissed on motion to dismiss when there is nothing in the pleadings indicating that STATE FARM was

or is a party to GUNDER'S contracts/business relationships with its customers and/or potential customers, nothing in the pleadings indicating that STATE FARM's consent is necessary for GUNDER'S to enter into a contract/business relationship with any of its customers and/or potential customers, and nothing in the pleadings indicating that STATE FARM is the source of any contracts/ business relationships between GUNDER'S and its customers and/or potential customers and (2) whether a cause of action in tortious interference with a business relationship may be dismissed on motion to dismiss when there nothing in the pleading indicating that STATE FARM's alleged tortious comments were made in an effort to protect an economic or financial interest and where the pleadings indicate, nonetheless, that STATE FARM engaged in improper conduct as part of its actions underlying this case.

### **ARGUMENT and CITATIONS OF AUTHORITY**

#### **I. Summary Judgment – Slander/Defamation**

A. The Trial Court, under Florida law, erred in its application of a qualified privilege to the representations/defamation on the part of STATE FARM, since there is at least a material issue of fact both as to whether a qualified privilege arises under the facts of this case and/or whether express malice on the part of STATE FARM may be established under the facts of this case, and as such the Trial Court's order/judgment should be reversed.

For purposes of a cause of action in defamation, in order for a qualified privilege to attach to the representations underlying the defamation the following elements must be satisfied: “(1) *good faith*; (2) an interest in the subject by the speaker or a subject in which the speaker has a duty to speak; (3) a corresponding interest or duty in the listener or reader; (4) a proper occasion; and (5) publication in a proper manner.” *Thomas v. Tampa Bay Downs, Inc.*, 761 So.2d 401, 404 (Fla. 2d DCA 2000) (citing *Nodar v. Galbreath*, 462 So.2d 803, 809 (Fla. 1984)) (Emphasis added.) “Defendant has the burden to prove the affirmative defense of qualified privilege.” *White v. School Board of Hillsborough County*, 2008 WL 227990, \*6 (M.D. Fla. 2008) (citing *Miami Herald Pub. Co. v. Ane*, 458 So.2d 239, 240 (Fla. 1984)). “Privilege may be decided as a question of law by the court ‘[w]here the circumstances surrounding a defamatory communication are undisputed, or are so clear under the evidence as to be unquestionable.’” *White*, 2008 WL 227990, \*6 (citing *Nodar*, 462 So.2d at 810). (Emphasis added.)

If a qualified privilege does attach to the representations underlying the defamation, “...but the speaker is motivated more by a desire to harm the person defamed than by a purpose to protect the personal or social interest giving rise to the privilege, then it can be said that there was express malice and the privilege is destroyed.” *Nodar*, 462 So.2d at 811. “Proof of malice may be established indirectly, i.e., ‘by proving a series of acts which, in their context or in light of the

totality of surrounding 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.’’ *Corp. Financial, Inc. v. Principal Life Ins. Co.*, 461 F.Supp.2d 1274, 1293 (S.D. Fla. 2006) (citing *McCurdy v. Collis*, 508 So.2d 380, 382 (Fla. 1<sup>st</sup> DCA 1987) (citing *Southern Bell Telephone & Telegraph Co. v. Roper*, 482 So.2d 538, 539 (Fla. 3<sup>d</sup> DCA 1986))) (Emphasis added.); *see also Total Fleet Solutions, Inc., v. Nat’l Ins. Crime Bureau*, 612 F.Supp.2d 1232, 1235 (M.D. Fla. 2009); *Thomas*, 761 So.2d at 405; and *Randolph v. Beer*, 695 So.2d 401, 404 (Fla. 5<sup>th</sup> DCA 1997); and *American Ideal Management, Inc. v. Dale Village, Inc.*, 567 So.2d 497, 500 (Fla. 4<sup>th</sup> DCA 1990).

The Trial Court, through its Order (Doc. #71) appears to appropriately rely on the sentinel case under Florida law regarding the operation of a qualified privilege as it applies to defamation actions: *Nodar*. (Doc. #71, pp. 3-6) However, as it relates to this case, the Trial Court errs in effectively focusing in on only one (1) of the two (2) possible manners in which express malice may be established. As stated in *Nodar*, “[The] malice may be inferred from the language itself, *or* may be proven by extrinsic circumstances.” 462 So.2d at 810; *see also* citations in paragraph above, including, but not limited to *Corp. Financial, Inc.*, 461 F.Supp.2d at 1293. Although the Trial Court does mention at the end of its Order (Doc. #71, p. 6) that “plaintiff fails to provide extrinsic evidence of express

malice”, nonetheless, the Trial Court does not appear to provide any leeway for differing reasonable interpretations regarding the extrinsic evidence when it merely states to that extent: “The record shows that STATE FARM terminated the plaintiff from STATE FARM’s ‘preferred program’ and that the plaintiff objects to STATE FARM’s method of compensating repair shops for paint materials.” (Doc. #71, p. 6). GUNDER’S would propose that the record “shows” much more than this for purposes of this case, the application of a qualified privilege, and whether express malice exists.

To that extent, a reasonable interpretation of the facts as presented in the Statement of Facts above, presents one with a much, much more egregious environment whereby STATE FARM is “motivated more by a desire to harm the person defamed than by a purpose to protect the personal or social interest giving rise to the privilege...” *See Nodar*, 462 So.2d at 811. As set forth above in the Statement of Facts:

2. While GUNDER’S was considered a STATE FARM “preferred shop” (in the “Service First” program) and prior to 2004, GUNDER’S, through Ray Gunder, initiated communications with other auto body repair shops in the local market regarding the status and validity of STATE FARM’s willingness to pay for legitimate pricing.

3. STATE FARM, via Bob Davis, admonishes Ray Gunder and

GUNDER'S for these same communications and contemporaneously terminates GUNDER'S from their "preferred shop" list.

4. Shortly thereafter, GUNDER'S begins hearing from customers and/or potential customers that STATE FARM is relaying negative and false remarks to them regarding GUNDER'S.

5. As part of these comments, STATE FARM is falsely relaying, *inter alia*, that GUNDER'S charges over the "prevailing competitive market rate".

6. Moreover, STATE FARM refuses to pay GUNDER'S for certain repair procedures and pricing *that at the same time it is paying other auto body repair shops in the same local market* based upon the same manner of pricing (i.e., paint materials based on the use of a "paint material calculator").

7. Bob Davis is the person in control of estimates and, ultimately, what aspects of the repairs to a vehicle are paid and are not paid for GUNDER'S and all the other auto body repair shops that operate in the same local Polk County market. Thus, Bob Davis is in control of paying other shops in the local market for repair procedures and, inexplicably, not paying GUNDER'S for the same repair procedures on a systematic basis.

8. Moreover, it is admitted by other STATE FARM

representatives, that Estimations is the department at STATE FARM, headed up by Bob Davis as the Estimations Team Manager, that would more than likely be the source of any information/representation passed along to other STATE FARM representatives (who communicate with insureds or claimants that submit collision claims) regarding whether and to what extent an auto body repair shop in Polk County, such as GUNDER'S, overcharges its customers.

9. Bob Davis further admits that he is a conduit for communication in the Winter Haven office, where he works along with claim representatives that communicate with insureds and claimants, and is actually involved in the training of what the claim representatives state to STATE FARM's insureds/claimants.

10. STATE FARM, after GUNDER'S was terminated as a "preferred shop" from the "Service First" program by STATE FARM, was unknowingly placed on a list of only, at most, four (4) shops out of approximately 4,000 auto body repair shops in the entire state of Florida, so that when any collision claim was submitted and GUNDER'S was identified and chosen by the insured/claimant to perform the vehicle repair work, such claim would be tagged and directed to a special group of claim representatives (who communicate with insureds and claimants regarding

collision claims) referred to as the Complex Team. The Complex Team claim representatives were informed that GUNDER'S was placed on this special list because GUNDER'S charges a rate that was higher than the "prevailing competitive rate".

11. The information necessary to place GUNDER'S on this special list would have been generated from Estimatics, which is the department of which Bob Davis is manager.

12. Bob Davis testified that STATE FARM only pays based upon what the "prevailing competitive price" is in the market. *But even though STATE FARM is relying to insureds/claimants who are either customers or potential customers of GUNDER'S that GUNDER'S charges over the prevailing competitive market rate, which information would come from the department of which Bob Davis manages, and even though STATE FARM, via Bob Davis, refuses to pay for certain procedures and pricing that he claims as a STATE FARM representative constitutes overcharging, at the same time STATE FARM, via Bob Davis, is inexplicably paying other shops in the same local market for the same repair procedures and pricing. Thus, inter alia, Bob Davis, as a STATE FARM representative, knows that GUNDER'S is not charging over the prevailing competitive price because STATE FARM, via Bob Davis, is paying other auto body repair shops for the*

*same repair procedures and pricing that it is refusing to pay GUNDER'S and, therefore, according to Bob Davis's own testimony, such repair procedures and pricing must constitute, at a minimum, the prevailing competitive rate since STATE FARM, via Bob Davis, is willing to pay other auto body repair shops for such.* In essence, it can be reasonably inferred that STATE FARM's failure to pay GUNDER'S, via Bob Davis, can only be explained as an attempt to injure GUNDER'S.

13. Moreover, a STATE FARM estimator, under Bob Davis as the Estimatics Team Manager, indicated to Ray Gunder of GUNDER'S that Bob Davis is the person behind and who has orchestrated the slanderous comments that have been made by STATE FARM to GUNDER'S customers and/or potential customers.

14. Finally, surveys conducted in the local market are what supposedly set the "prevailing competitive market price" upon which STATE FARM, via Bob Davis, relies for purposes of what repair procedures and pricing will be paid. Bob Davis is the only person in the world that knows the truth of what all the responses to these surveys reveal. Thus, a reasonable interpretation of such can indicate and assist in establishing that Bob Davis's control and power is threatened by the communications that Ray Gunder of GUNDER'S began prior to 2004 and prior to being

terminated as a STATE FARM preferred shop.

When one takes all of the above extrinsic circumstances and evidence into consideration, one could reasonably infer and come to the conclusion that STATE FARM, via Bob Davis, has engaged in and orchestrated defamatory representations regarding GUNDER'S (given the facts substantiating opportunity, means, intent, and ultimately motive) based upon a primary motive to injure GUNDER'S. *See Thomas*, 761 So.2d at 404 (citing *Nodar*, 462 So.2d at 806). "Where a person speaks upon a privileged occasion, but the speaker is motivated more by a desire to harm the person defamed than by a purpose to protect the personal or social interest giving rise to the privilege, then it can be said that there was an express malice and the privilege is destroyed." *Nodar*, 462 So.2d at 811.

The facts, as set forth above, certainly indicate that the motivation behind the defamatory comments is much more likely to be from a desire to harm GUNDER'S than to "protect the personal or social interest giving rise to the privilege". *See id.* This is particularly highlighted by the fact that the defamatory comments regarding GUNDER'S overcharging or charging over the prevailing competitive market rate do not serve STATE FARM or STATE FARM's insureds or claimants, since STATE FARM, via Bob Davis, has otherwise indicated through its defamatory comments that GUNDER'S overcharges or charges over the prevailing competitive market rate with regard to the same procedures and pricing for which

STATE FARM via Bob Davis pays other local Polk County auto body repair shops.

Under such circumstances, it can certainly be said that the reasonable inference is that such defamatory comments involved express malice on the part of STATE FARM via Bob Davis. “Proof of malice may be established indirectly, i.e., ‘by proving a series of acts which, in their context or in light of the totality of surrounding 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.’” *Corp. Financial, Inc. v. Principal Life Ins. Co.*, 461 F.Supp.2d 1274, 1293 (S.D. Fla. 2006) (Citations omitted.) All the above evidence, in light of the totality of circumstances, are “inconsistent with 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” on the part of STATE FARM via Bob Davis.

There exists, at the very least, a material issue of fact, as to whether or not the defamatory comments made by STATE FARM were made in good faith for purposes of a qualified privilege arising and whether or not, if such qualified privilege does arise, that such defamatory comments were made with express malice and based on the primary motivation to injure GUNDER’S by taking away his business and reputation.

**II. Dismissal on Motion to Dismiss – Tortious Interference with a Business Relationship**

A. The Trial Court, under Florida law, erred in dismissing the tortious interference with a business relationship count on motion to dismiss since, consistent with the pleading, STATE FARM was and is a stranger to the contracts and/or potential contracts between GUNDER’S and its customers and/or potential customers, and since it cannot be said, at the pleading stage, that even if STATE FARM were not a stranger to such contracts, that GUNDER’S cannot ultimately prove that such privilege as a “party to the contract” is divested due to STATE FARM solely acting upon an ulterior purpose and not otherwise in the best interest of STATE FARM, and as such the Trial Court’s order on the motion to dismiss should be reversed

The Trial Court, in its Order (Doc. #12) and (Doc. #17) related to STATE FARM’S Motion to Dismiss (Doc. #7) the First Amended Complaint, appears to rely on two (2) lines of reasoning for its order of dismissal: (1) because STATE FARM “indemnifies” GUNDER’S customers for the repair work performed, STATE FARM is therefore an “interested party in the business relation between [GUNDER’S] and those customers who are STATE FARM insureds”. (Doc. #12, p. 4) and (2) STATE FARM’s actions complained of were “undertaken to promote [its] financial or economic interest.” (Doc. #12, p. 4.)

With regard to the Trial Court’s first area of reasoning as its basis for its Order (Doc. #12) and Order (Doc. #17) related to STATE FARM’S Motion to

Dismiss (Doc. #7) First Amended Complaint, Florida law states that a party to a contract cannot be liable for interfering with that contract. *See Genet Co. v. Annheuser-Busch, Inc.*, 498 So.2d 683, 684 (Fla. 3<sup>rd</sup> DCA 1986). In *Genet*, Plaintiff Genet entered into a contract with a liquor wholesaler to purchase a wholesale dealership and the agreement required the approval of Defendant Annheuser-Busch, Inc. *See id.* Defendant Annheuser-Busch ultimately did not approve the agreement. Plaintiff Genet sued for tortious interference with a business relationship, and the Third District found in favor of Defendant Annheuser-Busch, Inc., citing that because the whole agreement was conditioned on Defendant Annheuser-Busch, Inc.'s approval and because Defendant Annheuser Busch, Inc. was the source of the business opportunity alleged to have been interfered with, Defendant Annheuser-Busch, Inc. was a party to the business relationship and, therefore, could not have interfered with it. *See id.*

Instructively, for purposes of this case, the Southern District of Florida, however, distinguished *Genet* from its case in *Nautical International, Inc. v. Intermarries USA, L.P.*, 5 F.Supp.2d 1333, 1344 (S.D.Fla 1998), when it found that because Plaintiff Nautical International was not required to obtain Defendant Intermarine's consent to sell its product (a manufactured boat) to third party foreign governments, and Defendant Intermarine was not the source of such contract with the third party foreign governments, then Plaintiff Nautical

International could make a claim against Defendant Intermarine's for tortious interference with the contract to sell these manufactured boats.

In the current case, although STATE FARM does ultimately pay GUNDER'S directly or reimburse some of GUNDER'S customers who are STATE FARM insured for the repair work that GUNDER'S performs on these particular customers' automobiles, GUNDER'S is never and has never been required to secure the consent of STATE FARM in order to contract with their, or any other customers or prospective customers to perform work on their automobiles. Nor is STATE FARM the source of the agreement between GUNDER'S and its customers for the work performed on its customers' automobiles and there is no allegation of such set forth in the First Amended Complaint. Likewise, the customers and/or prospective customer are not otherwise required to obtain the consent of STATE FARM before contracting with GUNDER'S to perform the repair work on their vehicle, nor is such alleged in the First Amended Complaint. STATE FARM simply pays a portion or, in some cases, the entire amount of GUNDER'S bill for the work performed repairing the automobiles based upon its own separate contract/policy with the customer. STATE FARM is not the source of any business relationship between GUNDER'S and its customers and/or prospective customers, and its authorization or consent is absolutely unnecessary for purposes of any business relationship between

GUNDER'S and its customers and/or prospective customers. There is no allegation in the First Amended Complaint that supports any such contention.

Since the Trial Court issued its Order (Doc. #12) and Order (Doc. #17) related to STATE FARM's Motion to Dismiss (Doc. #7) the First Amended Complaint, the opinion of another Florida court was issued on July 8, 2009, that may, at first blush, appear to broaden the opportunity for a potential tortfeasor to claim that it is no "stranger' to a business relationship" and therefore it cannot be liable for tortious interference with a business relationship: *Palm Beach Cnty. Health Care Dist. v. Professional Medical Education, Inc.*, 13 So.2d 1090, 1094 (Fla. 4<sup>th</sup> DCA 2009). However, as stated in *KMS Restaurant Corp.*, "[J]udicial decisions cannot make law beyond the facts of the cases in which those decisions are announced." 361 F.3d at 1326 (quoting *Watts v. BellSouth Telecomms., Inc.*, 316 F.3d 1203, 1207 (11<sup>th</sup> Cir. 2003)).

In *Palm Beach Cnty. Health Care Dist.*, the court states, "The District [(alleged tortfeasor)] was the source of funds to pay for the services PME was to provide. Under the law of tortious interference, the District is not a 'stranger' to any contract that it ultimately will fund." 13 So.3d at 1094. However, in fact, the facts surrounding that case are materially distinguishable from the facts of this case. In *Palm Beach Cnty. Health Care Dist.*, it is critical to note that intertwined in the context of the statement referred to above is the fact that the consent of the

alleged tortfeasor was necessary for the contract/business relationship, which was alleged to have been interfered with, to come to fruition. 13 So.2d at 1093; *see Nautica Int'l, Inc.*, 5 F.Supp.2d at 1345-1346. Furthermore, the court in *Palm Beach Cnty. Health Care Dist.* provided much weight in its reasoning to the fact that the alleged tortfeasor was a governmental entity and, as such, was “the caretaker of public money raised by taxes”. 13 So.2d at 1094. Under the circumstances of this case, as set forth above, STATE FARM’s consent is and was not necessary for GUNDER’S contracts/business relationships with any of its customers and/or potential customers, and is not alleged in the First Amended Complaint, nor is STATE FARM a governmental entity and a “caretaker of public money”. To apply the statement of the court in *Palm Beach Cnty. Health Care Dist.*, *carte blanche*, that “[u]nder the law of tortious interference, the [alleged tortfeasor] is not a ‘stranger’ to any contract that it ultimately will fund”, would render a cause of action in tortious interference with a business relationship “hollow” if applied to circumstances such as this case without consideration of all of the facts involved in the *Palm Beach Cnty. Health Care Dist.* case. If something less is required other than (1) being an actual party to the contract or business relationship in question, (2) the tortfeasor’s consent being a part of the contract or business relationship in question, or (3) the tortfeasor being the source of the contract or business relationship in question, in order for an alleged tortfeasor to

escape liability from tortious interference with a business relationship, then such would leave parties such as GUNDER'S powerless, without any remedy at law, and without notice for purposes of what it could/should expect in its business endeavors as it relates to when, whether and to what extent its customer or potential customer base will choose to enter into a separate contract/policy with STATE FARM; such would continue to render GUNDER'S and STATE FARM *practically* strangers to one another's business relationships *but* leave GUNDER'S without legal recourse because the law would not otherwise consider them "strangers" as it relates to GUNDER'S business relationships with its customers and/or potential customers. GUNDER'S would be left without a breach of contract action *or* an action in tortious interference with a business relationship, and at the whim of STATE FARM and its feelings, wherever they may lead it as it relates to its actions affecting GUNDER'S.

Moreover, even if STATE FARM can somehow be said to possess even at the pleading stage a "privilege to interfere [ ] enjoyed by a party [ ] integral to the business relationship", such is not absolute[;] [t]he privilege is divested when the defendant acts solely with ulterior purposes and the advice is not in the principal's best interest". *Rosenbaum v. Becker & Poliakoff, P.A.*, 2010 U.S. Dist. LEXIS 5880, \*12 (S.D. Fla. 2010) (quoting *Rudnick v. Sears, Roebuck and Co.*, 358 F.Supp.2d 1201, 1206 (S.D. Fla. 2005) (quoting *O.E. Smith's Sons, Inc. v. George*,

545 So.2d 298, 299 (Fla. Dist. Ct. App. 1989))) (citing *Salit v. Ruden, McClosky, Smith, Schuster, Russell, P.A.*, 742 So.2d 381, 386 (Fla. Dist. Ct. App. 1999)). Therefore, GUNDER’S should be provided the opportunity beyond the pleading stage to establish that STATE FARM acted “solely with ulterior purposes and... not in the principal’s best interest”.

With regard to what appears to be the Trial Court’s second line of reasoning, the Trial Court primarily relies on *Barco Holdings, LLC and Genet Co. v. Annheuser-Busch, Inc.*, 498 So.2d 683 (Fla. 3d DCA 1986) for the general rule of law that no tortious interference exists when one whose action complained of was taken to *protect* that actor’s economic interest. Such, however, is not applicable under Florida law when one’s acts alleged to constitute tortious interference involves the use of “improper methods” even when engaging in such conduct to “safeguard or promote one’s financial interest.” See *KMS Restaurant Corp. v. Wendy’s International, Inc.*, 361 F.3d 1321, 1325 (11<sup>th</sup> Cir. 2004) (citing *Ethyl Corp. v. Balter*, 386 So.2d 1220, 1225-26 (Fla. 3d DCA 1980)). (Emphasis added.)

The Eleventh Circuit added in *KMS Restaurant Corp.*, that “[t]he significant inquiry to determine the privilege of justification is whether the means employed are not improper.” 361 F.3d. at 1327 (citing *G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526 (11<sup>th</sup> Cir. 1985)). (Emphasis added.)

In the current case, GUNDER’S alleges (the allegations being pertinent for

purposes of the standard of review on a motion to dismiss) improper conduct on the part of STATE FARM in its First Amended Complaint (*see, e.g.*, Doc. #5, para. 19). Given that, as alleged (at least for purposes of a motion to dismiss) STATE FARM'S slanderous comments are improper and unjustified, they do not receive the protection of economic interest "...privilege to interfere ..." See *KMS Restaurant Corps.*, 361 F.3d. at 1327.

### **CONCLUSION**

For all of the foregoing reasons, GUNDER'S, at the very least, clearly presents a material issue of fact as it relates to STATE FARM's Motion for Summary Judgment and therefore the Trial Court's Order (Doc. #71) granting same should be reversed and the case remanded for further proceedings consistent therewith, and GUNDER'S has sufficiently pled, for purposes of scrutiny on STATE FARM'S Motion to Dismiss, the elements necessary to substantiate a cause of action in tortious interference with a business relationship, and therefore the Trial Court's Order (Doc. #12) and Order (Doc. #17) effectively granting STATE FARM'S Motion to Dismiss should be reversed and this case remanded for further proceedings consistent therewith, in addition to and/or in the alternative grant GUNDER'S leave to amend its First Amended Complaint for the opportunity to comply and satisfy any shortcomings contained therein consistent with Florida law.

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface 641 lines and/or 7,488 words using Microsoft Word 2003 with 20 characters per inch and Times New Roman 14 font.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail on this 8<sup>th</sup> day of June, 2010 to Rhonda B. Boggess, Esquire and Reed W. Grimm, Esquire, Taylor, Day, Currie, Boyd & Johnson, 50 N. Laura St., Suite #3500, Jacksonville, FL 32202, and Clerk of Court, U.S. Court of Appeals, 11<sup>th</sup> Circuit.

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