

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

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BOOKS ARE FUN, LTD.,

Plaintiff,

vs.

STEPHEN ROSEBROUGH, STEVEN CRADDOCK,  
MARK RADER, VIRGIL STRECK, READER'S  
CHOICE BOOKS, INC., and IMAGINE NATION  
BOOKS, LTD.,

Defendants.

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**No. 4:05-cv-00644-JEG**

**ORDER**

This matter comes before the Court on a motion for partial dismissal by Defendant Imagine Nation Books, Ltd. (Clerk's No. 64), advanced under Federal Rule of Civil Procedure 12(b)(6). Plaintiff Books Are Fun, Ltd. ("BAF"), is represented by Christine S. Poscablo, John M. Callagy, Martin A. Krolewski, Michael Lynch, Robert W. Schumacher, II, Robert I. Steiner, Gene R. LaSuer, Deborah M. Tharnish, and Steven L. Nelson. Defendant Imagine Nation Books, Ltd. ("Imagine Nation"), is represented by Adam Proujansky, Bernard F. Sheehan, Leslie R. Cohen, Frank C. Razzano, Michael R. Engleman, Wade R. Hauser, III, and David Luginbill. No party has requested a hearing, and none is needed to resolve the pending motion. This matter is fully submitted and is ready for disposition.

**SUMMARY OF MATERIAL FACTS**

Viewed in a light favorable to BAF, the pleadings reveal the following facts.<sup>1</sup> BAF is an Iowa corporation with its home office in Fairfield, Iowa. Imagine Nation is an Iowa corporation with its home office in Des Moines, Iowa. The remaining Defendants in this action are Reader's

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<sup>1</sup> Although the parties' motions largely analyze allegations made in the Second Amended Complaint (Clerk's No. 1) and although the Third Amended Complaint (Clerk's No. 104) was filed in response to Imagine Nation's Motion to Dismiss, upon analyzing the Third Amended Complaint, Imagine Nation concluded it would succeed even if the Court considered allegations made therein. See Reply 3-4 & n.4. Consequently, this Order gauges whether the Third Amended Complaint states claims upon which relief could be granted.

Choice Books, Inc. (“Readers Choice”), an Iowa corporation with its home office in Fairfield, Iowa; Stephen Rosebrough, an Iowa resident; Steven Craddock, an Ohio resident; Mark Rader, a North Carolina resident; and Virgil Streck, a Missouri resident.

**I. Relevant Factual History.**

BAF is in the business of selling books and other gift items at discounted rates to its customers. To execute its sales to certain customers, including employees of schools, BAF uses independent sales representatives who sign contracts memorializing the terms of their affiliations with BAF. Imagine Nation has attached to its motion a document that it claims is typical of such contracts (the “Exemplar Contract”). Because the Exemplar Contract has not been included in the record as part of the pleadings, the Court must satisfy itself of the propriety of considering terms contained therein when resolving the pending motion.

Federal Rule of Civil Procedure 12(b) provides that if, when considering a motion under Rule 12(b)(6), “matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . .” Fed. R. Civ. P. 12(b); see Blair v. Wills, 420 F.3d 823, 826-27 (8th Cir. 2005); Mattes v. ABC Plastics, Inc., 323 F.3d 695, 697 n.4 (8th Cir. 2003). Although this rule is not permissive, consideration of materials embraced by but not physically attached to the pleadings does not make a conversion automatic. Mattes, 323 F.3d at 697 n.4. When a court considers “documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading,” a Rule 12(b)(6) motion retains its character as a motion to dismiss. Mattes, 323 F.3d at 697 n.4 (quoting Kushner v. Beverly Enters., Inc., 317 F.3d 820, 831 (8th Cir. 2003)). For example, a defendant may supply documents necessarily embraced by a plaintiff’s complaint if the plaintiff does not. See BJC Health Sys. v. Columbia Cas. Co., 348 F.3d 685, 688 (8th Cir. 2003). More specifically, “[i]n a case involving a contract, the court may examine the contract documents in deciding a motion to dismiss.” Stahl v. United States Dep’t of Agric., 327 F.3d 697, 700 (8th

Cir. 2003) (citing In re K-tel Int'l, Inc. Sec. Litig., 300 F.3d 881, 889 (8th Cir. 2002); Rosenblum v. Travelbyus.com, Ltd., 299 F.3d 657, 661 (7th Cir. 2002)); see Mattes, 323 F.3d at 697 n.4 (consideration of “contracts upon which [a plaintiff’s] claim rests” does not change a motion to dismiss into a motion for summary judgment). A court may not, however, make conclusions based on documents submitted with a motion to dismiss if the documents contain disputed information untethered to specific factual allegations in the pleadings. See, e.g., Surgical Synergies, Inc. v. Genesee Assocs., Inc., 432 F.3d 870, 873 & n.3 (8th Cir. 2006) (holding that a court’s determination of the parties’ understanding of liabilities disclosed by a provision in a stock purchase agreement requiring reference to briefs and exhibits outside the pleadings converted a motion for judgment on the pleadings into a motion for summary judgment); BJC Health Sys., 348 F.3d at 687-88 (reliance on two insurance contracts and a letter containing an insurance quote improper where the complaint alleged the existence of a contract, not the specific contracts submitted, and the documents provided “were neither undisputed nor the sole basis for [the plaintiff]’s complaint”).

Whether Defendants interfered with contracts between BAF and its independent sales representatives is undisputably an issue raised by BAF’s complaint. BAF has not challenged the authenticity of the Exemplar Contract, has not alleged it is atypical of those it regularly uses, and has not objected to its inclusion in a conversation about the Imagine Nation motion to dismiss. Consequently, relevant terms of the Exemplar Contract will be considered when resolving the pending motion.

BAF and Imagine Nation agree that contracts between BAF and its independent sales representatives set forth geographical areas within which contractors sell products provided by BAF. E.g., Exemplar Contract ¶ 2. Sales representatives bound by these contracts are independent agents, not BAF employees. See, e.g., id. ¶¶ 2.1, 5.5. The contracts are terminable by

either party upon written or oral notice with fifteen days' notice after the completion of a negotiated term. E.g., id. ¶ 6.1.

Craddock, Rader, and Streck are former BAF employees, and each is now an Imagine Nation employee. While at BAF, Craddock and Rader were regional managers in the company's school division, and Streck served as a regional manager in the corporate division. As regional managers, each oversaw sales forces in different geographical areas. Each had access to certain sales data BAF considers confidential.

Rosebrough, now a consultant for Imagine Nation, was an independent contractor for BAF from 1993 until 1995 and then served as a BAF employee until late 2003. For a time, Rosebrough was BAF's head book buyer, where he required access to testing and sales data for products BAF was selling and was considering selling. He played a role in deciding which books BAF tested<sup>2</sup> and sold, and he interacted with and cultivated business relationships with publishers from which BAF purchased books.

BAF claims Rosebrough deviated from his former practices just before leaving the company. For example, BAF claims he purchased excessive quantities of untested books and test books but did not purchase books he knew would be successful in the marketplace. As a result, BAF was saddled with a high inventory of untested books but had insufficient quantities of books expected to be good sellers. BAF claims the focus of this conduct was to frustrate BAF's sales representatives so Rosebrough could more easily convince them to leave the company. BAF contends Rosebrough succeeded in sowing dissatisfaction among sales representatives and customers.

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<sup>2</sup> "Testing" is a method by which BAF determines which books will be successful sellers. See Third Am. Compl. ¶¶ 12-15. BAF considers data resulting from this process confidential. Id. ¶ 13.

In either October or November 2003, Rosebrough resigned from BAF. According to BAF, Rosebrough represented he would create a consulting practice and develop certain materials for publishers. BAF contends Rosebrough specifically indicated he would not work for any of BAF's competitors. Rosebrough asserts that because no non-compete agreement existed between himself and BAF, he was free to seek employment wherever he wished.

On December 9, 2003, Rosebrough incorporated Defendant Reader's Choice Books, Inc. BAF claims Reader's Choice engaged in substantially the same business practices as BAF. More specifically, BAF alleges Reader's Choice sold discounted books and gift items through schools in a manner similar to BAF. Reader's Choice admits engaging in business practices "similar" to BAF's and admits it sold books in schools.

BAF accuses Reader's Choice of using data and testing methodologies developed by BAF to help Reader's Choice determine an attractive product lineup. BAF further contends Reader's Choice used confidential sales data and proprietary information to recruit a sales force and develop business practices allowing it to effectively compete with BAF. For example, BAF contends Reader's Choice hired a recruiter to locate independent contractors to sell its products, then armed this recruiter with confidential information about BAF salespersons. BAF further alleges Reader's Choice used confidential information to purchase products from publishers and suppliers.

According to BAF, Rosebrough recruited Craddock and Rader in 2003 or 2004; both left for Reader's Choice in the spring of 2004. Streck was recruited in 2004 and left for Reader's Choice in November of that year. Reader's Choice admits it recruited these individuals, but points out they were not restricted by non-compete agreements. Before leaving BAF, Craddock, Rader, and Streck allegedly contacted other BAF employees and independent sales representatives and attempted to persuade them to work for Reader's Choice. BAF claims that through

threats and promises, Craddock, Rader, and Streck induced BAF contractors and employees to leave for Reader's Choice.

Reader's Choice went out of business in December 2004 but allegedly assured employees and contractors they would be extended opportunities to work for a successor company.

RFA, Inc., was formed in December 2004 and changed its corporate name to Imagine Nation Books, Ltd., in February 2005. BAF claims Imagine Nation is the Reader's Choice successor company: Imagine Nation assumed Reader's Choice's contracts, hired its employees, retained its independent contractors, and "enticed" its vendors. Imagine Nation admits it purchased books Reader's Choice was unable to sell, hired some of its employees, and contracted with some of its independent contractors. Still, Imagine Nation denies it is the successor to Reader's Choice. After it was formed, Imagine Nation allegedly sent letters to BAF's independent sales representatives whose addresses Imagine Nation gleaned from a list BAF accuses Imagine Nation of improperly obtaining.

BAF includes a series of specific allegations of wrongful conduct taken by former sales representatives after they joined Imagine Nation.<sup>3</sup> For example, during a book fair, T. C. Davis, an Imagine Nation contractor who was previously affiliated with BAF, appeared at an Imagine Nation book fair wearing a BAF name badge but asked customers to make payments to Imagine Nation. An individual named Dan Dwyer, also a former BAF sales representative, conducted a book fair as an Imagine Nation representative but falsely represented he was still associated with BAF by displaying banners with the BAF name and logo. BAF contends Dwyer sold books "made exclusively for" BAF and distributed a receipt to a customer indicating the customer's transaction was with BAF. An individual named Robert Nolan, a former BAF sales

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<sup>3</sup> Many of the BAF allegations – primarily relating to wrongful use of its logo and the sale of duplicates of its products – are tangential to the pending motion and thus not included in this summary of material facts.

representative conducting a book fair as an Imagine Nation contractor, also represented he was associated with BAF, sold books “made exclusively for” BAF, and distributed a receipt indicating a purchase was from BAF. Nolan allegedly used bags adorned with the name “Books Are Fun” and the BAF logo.

In August 2005, an individual named Jeanette Showman terminated her contract with BAF and became an independent contractor for Imagine Nation. BAF claims that in September 2005, a BAF employee was told by a “contact” that the contact had been informed Showman was changing companies about one month before she ceased working for BAF. BAF contends this scenario was not uncommon: It accuses Imagine Nation of asking BAF representatives to sign agreements wherein they promised to join Imagine Nation at a later date but would work for BAF in the interim. According to BAF, these individuals would attempt to transfer business and customers to Imagine Nation before departing. Imagine Nation admits it contacted and solicited BAF sales representatives but emphasizes that conduct its independent contractors undertake cannot bind Imagine Nation.

## **II. The Challenged Counts.**

The current rendition of Plaintiff’s Complaint contains ten counts brought against different combinations of Defendants. Imagine Nation has moved to partially dismiss Count V and to dismiss Count VI in its entirety.

### **A. Count V (Intentional Interference with Existing Contracts).**

In Count V, BAF alleges Defendants interfered with two types of contracts. First, BAF claims Defendants interfered with contracts between BAF and its sales representatives by

- (a) inducing sales representatives to sell products from third parties in violation of their contractual obligation to [BAF];
- (b) inducing [BAF] representatives to sign agreements with Reader’s Choice or Imagine Nation providing that they will join Reader’s Choice or Imagine Nation at a later date, while continuing to “work” with [BAF], while planning and making arrangements to leave [BAF] and undertaking

action to transition their business and customers to Reader's Choice or Imagine Nation;

- (c) making derogatory and untrue comments about [BAF];
- (d) inducing sales representatives to participate in Reader's Choice or Imagine Nation meetings and/or training to work for Reader's Choice or Imagine Nation;
- (e) inducing sales representatives to funnel [BAF] confidential information to Reader's Choice or Imagine Nation in violation of their contractual obligation to [BAF]; and
- (f) inducing sales representatives to terminate their [BAF] contracts by improper means or with the sole or predominant purpose of financially injuring or destroying [BAF].

Third Am. Compl. ¶ 87. Defendants allegedly undertook this conduct "by using improper means or with the sole or predominant purpose of financially injuring or destroying [BAF]." Id. Second, BAF accuses Imagine Nation of soliciting BAF buyers and at least one administrative employee to work for Imagine Nation, despite having knowledge of non-compete agreements between those parties and BAF. Id. ¶ 89. Imagine Nation has moved to dismiss Count V insofar as it relies on these allegations.<sup>4</sup>

**B. Count VI (Intentional Interference with Prospective Business Advantage).**

In Count VI, BAF sets forth an interference with prospective business advantage claim against Imagine Nation and two other Defendants. According to BAF, Imagine Nation and its agents made misrepresentations about BAF's business dealings and trustworthiness in attempts to persuade sales representatives to end their relationships with BAF. Id. ¶ 92-94. These misrepresentations were allegedly made with the sole or predominant purpose of financially

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<sup>4</sup> BAF alleges Jerry Bullard, an Imagine Nation employee, recruited BAF representatives to work for Reader's Choice while he was employed at BAF. Third Am. Compl. ¶ 88. BAF claims this conduct, attributable to Imagine Nation, breached an agreement between Bullard and BAF. Id. Imagine Nation has not sought dismissal of Count V insofar as it relies on this allegation. See Br. in Supp. of Mot. to Dismiss 1 n.1.

injuring or destroying BAF. Id. ¶ 95. BAF alleges a number of sales representatives ceased working with BAF, leading to lost income which BAF would have realized had these representatives not ended their affiliations with the company. Id. ¶ 96-97. Imagine Nation moves to dismiss Count VI in its entirety.

## DISCUSSION

### I. Imagine Nation's Motion to Dismiss.

Relying on Federal Rule of Civil Procedure 12(b)(6), Imagine Nation argues BAF's Complaint fails to state claims upon which relief could be granted with respect to two causes of action set forth therein.

#### A. Legal Standards.

Federal Rule of Civil Procedure 12(b)(6) permits dismissal of those claims failing to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). The standard used to evaluate motions of this type is closely tied to the notice pleading requirement set forth in Rule 8(a). Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513-15 (2002); see Romine v. Acxiom Corp., 296 F.3d 701, 704-05 (8th Cir. 2002); Stone Motor Co. v. Gen. Motors Corp., 293 F.3d 456, 465 (8th Cir. 2002); Schmedding v. Tnemec Co., 187 F.3d 862, 864 (8th Cir. 1999); Webb v. Lawrence County, 144 F.3d 1131, 1135-36 (8th Cir. 1998); see also Fed. R. Civ. P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief"). Under this "simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" Swierkiewicz, 534 U.S. at 514 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)); accord Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (stating the "accepted rule that a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"); Kforce Inc. v. Surrex Solutions Corp., 436 F.3d 981, 983 (8th Cir. 2006); Knieriem v. Group Health Plan,

Inc., 434 F.3d 1058, 1060 (8th Cir. 2006); Alpharma Inc. v. Pennfield Oil Co., 411 F.3d 934, 937 (8th Cir. 2005); Mattes, 323 F.3d at 697-98; Stone Motor Co., 293 F.3d at 464. “[F]air notice of what the plaintiff’s claim is and the grounds upon which it rests” is sufficient. Conley, 355 U.S. at 47; see Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 346-47 (2005) (without alleging a causal link between the decline of a security’s value after disclosure of alleged misrepresentations and damages suffered, allegations that plaintiffs paid artificially inflated prices for the security did not “provide[] the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the [alleged] misrepresentation”).

Whether a plaintiff may ultimately succeed is not the test; in fact, “it may appear on the face of the pleadings that a recovery is very remote and unlikely.” Swierkiewicz, 534 U.S. at 515 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984)). Instead, the issue is “whether the claimant is entitled to offer evidence to support the claims.” Scheuer, 416 U.S. at 236. Neither “inartfully drawn” complaints, Jenkins v. McKeithen, 395 U.S. 411, 422 (1969), nor complaints which “do[] not state with precision all elements that give rise to a legal basis for recovery,” Schmedding, 187 F.3d at 864, bar relief under this test.

When a complaint is assailed by a motion to dismiss, a court must deem as admitted all material allegations made therein, as liberally construed in favor of the plaintiff. Jenkins, 395 U.S. 421-22; Scheuer, 416 U.S. at 236; Knieriem, 434 F.3d at 1060; Schmedding, 187 F.3d at 864. With these benefits, a plaintiff will suffer dismissal of claims under Rule 12(b)(6) only in those “unusual” cases where there is some insuperable bar to relief. Strand v. Diversified Collection Serv., Inc., 380 F.3d 316, 317 (8th Cir. 2004); Romine, 296 F.3d at 704; Schmedding, 187 F.3d at 864; Frey v. City of Herculaneum, 44 F.3d 667, 671 (8th Cir. 1995).

**B. Count VI (Intentional Interference with Prospective Business Advantage).**

Imagine Nation has moved to dismiss BAF's intentional interference with prospective business advantage claim in its entirety.

**1. Allegations of the Complaint.**

BAF contends Imagine Nation persuaded independent sales representatives to terminate contracts with BAF by making misrepresentations about BAF's business dealings and trustworthiness. Third Am. Compl. ¶ 93. By these misrepresentations, Imagine Nation allegedly "intentionally and improperly induced [them] to terminate their relations with [BAF] with the sole or predominant purpose of financially injuring or destroying [BAF]." *Id.* ¶ 95. As a result, BAF claims the loss of "prospective relationships with the independent contractors and has correspondingly lost the income that would result from their sales." *Id.* ¶ 96.

**2. Elements of the Tort.**

To succeed on a claim of intentional interference with prospective business advantage under Iowa law, a plaintiff must allege and prove the following elements:

1. The plaintiff had a prospective contractual [or business] relationship with a third person.
2. The defendant knew of the prospective relationship.
3. The defendant intentionally and improperly interfered with the relationship in one or more particulars.
4. The interference caused either the third party not to enter into or to continue the relationship or the interference prevented the plaintiff from entering into or continuing the relationship.
5. The amount of damage.

Tredrea v. Anesthesia & Analgesia, P.C., 584 N.W.2d 276, 283 (Iowa 1998); accord Willey v. Riley, 541 N.W.2d 521, 527 (Iowa 1995); Economy Roofing & Insulating Co. v. Zumaris, 538 N.W.2d 641, 651 (Iowa 1995); Nesler v. Fisher & Co., 452 N.W.2d 198-99 (Iowa 1990); see also Restatement (Second) of Torts § 766B (1979). A binding contract is not necessary. Nesler, 452 N.W.2d at 196; Economy Roofing & Insulating Co., 538 N.W.2d at 651.

It is necessary for the defendant to act with “the sole or predominant purpose . . . to financially injure or destroy the plaintiff.” Tredrea, 585 N.W.2d at 283; accord Willey, 541 N.W.2d at 526-27 (collecting cases); Economy Roofing & Insulating Co., 538 N.W.2d at 651-52; Compiano v. Hawkeye Bank & Trust of Des Moines, 588 N.W.2d 462, 464 (Iowa 1999); Burke v. Hawkeye Nat’l Life Ins. Co., 474 N.W.2d 110, 114 (Iowa 1991); Harsha v. State Savings Bank, 346 N.W.2d 791, 799 (Iowa 1984); see also Nesler, 452 N.W.2d at 199 (“In a claim of interference with a prospective business advantage, the ‘purpose on the defendant’s part to financially injure or destroy the plaintiff is essential.’” (quoting Page County Appliance Ctr. v. Honeywell, 347 N.W.2d 171, 177 (Iowa 1984))); Farmers Co-op. Elevator, Inc., Duncombe v. State Bank, 236 N.W.2d 674, 679 (Iowa 1975) (“In cases of interference with existing contracts, a purpose to injure or destroy is not essential. The situation is different in cases involving interference with prospective advantage.” (citation omitted)). Where “a defendant acts for two or more purposes, [the] improper purpose must predominate in order to create liability.” Tredrea, 585 N.W.2d at 283 (citing Willey, 541 N.W.2d at 526-27); accord Harsha, 346 N.W.2d at 799. A plaintiff making such allegations is “held to a strict standard” that the improper purpose predominated because a “rule of strict proof operates ‘to avoid opening the door to virtually limitless suits of highly speculative and remote nature.’” Tredrea, 584 N.W.2d at 287 (quoting Page County Appliance Ctr., 347 N.W.2d at 178).

### **3. Analysis.**

Imagine Nation contends BAF’s intentional interference with prospective business advantage claim must be dismissed because although BAF has alleged “Imagine Nation’s sole purpose in allegedly misrepresenting BAF’s ‘business dealing and general trustworthiness’ was to intentionally interfere with BAF’s prospective business advantage with the independent contractors,” when the Complaint is read as a whole, it becomes “plain, as a matter of law, that Imagine Nation’s purpose in recruiting the independent contractors was to further its own

business and compete against BAF.” Because it acted to further its own business interests, Imagine Nation concludes it could not have acted with the sole or predominant purpose of injuring or destroying BAF.<sup>5</sup>

Resisting, BAF points to allegations that Imagine Nation coordinated the departure of BAF sales representatives by permitting them to continue working at BAF until a later date. BAF contends that in the interim, those representatives worked to transfer business to Imagine Nation. BAF argues this situation permits the inference that the “solicitations were done with the intent to financially harm [BAF].”

As Imagine Nation argues, one reading of the Complaint could lead to the conclusion that Imagine Nation attempted to recruit independent sales representatives to boost its own business. If that is the case, BAF cannot succeed. The Supreme Court of Iowa recognized long ago that if

there was no real purpose or desire to establish a competing business, but, under the guise or pretense of competition, to accomplish a malicious purpose to ruin [the plaintiff] or drive it out of business, intending themselves to retire therefrom when their end had been secured, then they can claim no immunity under the rules of law which recognize and protect competition between dealers in the same line of business seeking in good faith the patronage of the same people.

Dunshee v. Standard Oil Co., 132 N.W. 371, 375 (Iowa 1911); see also Boggs v. Duncan-Schell Furniture Co., 143 N.W. 482, 483-86 (Iowa 1913) (defendants liable upon proof that after the plaintiff became the sole agent for selling a sewing machine, “defendants, for the purpose of destroying plaintiff’s business, . . . breaking him up financially, and putting him out of business, maliciously and willfully procured various old styles of” the machine and sold them at a price below the plaintiff’s while falsely representing it was selling the newest model, thus casting the

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<sup>5</sup> Imagine Nation also argues BAF has not sufficiently alleged interference with prospective business advantages spawning out of relationships between BAF and its sellers and administrative employees. This argument ultimately is surplusage: BAF does not allege Imagine Nation interfered with prospective business relationships of this type. See Third Am. Compl. ¶¶ 92-97.

plaintiff “in the light of a dishonest dealer, and unworthy of patronage, in that he was attempting to” reap excessive profits). More recently, the Court noted that if an actor has in addition to an improper purpose an “additional purpose of advancing his own interests,” liability does not extend to the actor unless it has “as at least one of [its] objects the purpose to injure or destroy the plaintiff.” Farmers Co-op. Elevator, Inc., 236 N.W.2d at 681. Put another way, incidental damages resulting from a defendant’s pursuit of its own competitive interests do not necessarily lead to the conclusion that intentional interference was also improper. See Compiano, 588 N.W.2d at 465-66 (collecting cases); Burke, 474 N.W.2d at 114-15; Preferred Mktg. Assocs. Co. v. Hawkeye Nat’l Life Ins. Co., 452 N.W.2d 389, 396 (Iowa 1990); Restatement (Second) of Torts § 766B cmt. *d* (noting that if an actor “had no desire to effectuate the interference by [its] action but knew that it would be a mere incidental result of conduct [it] was engaging in for another purpose, the interference may be found to be not improper”), § 767 cmt. *i* (if the actor and injured party are competitors, the actor’s intentional interference may not be improper, but the same conduct could be improper if the actor and the injured party were not competitors); cf. Berger v. Cas’ Feed Store, Inc., 543 N.W.2d 597, 599-600 (Iowa 1996) (holding a bank’s decision to exercise its right to setoff against a depositor did not reveal a predominant purpose to injure the plaintiff because “a party does not improperly interfere with another’s contract by exercising its own legal rights in protection of its own financial interests”).

This does not end the analysis. Reading the Complaint in a different light leads to the conclusion that Imagine Nation orchestrated the strategic departure of BAF’s independent sales representatives to maximize the financial harm its scheme would inflict upon BAF. An analogous case shows why BAF succeeds in this scenario. In Economy Roofing & Insulating Co. v. Zumaris, an employee prepared for his departure from a company by repairing and reconditioning old equipment and buying new equipment at the company’s expense after the employee’s bid to purchase the company failed. Economy Roofing, 538 N.W.2d at 652. The employee took

bid information and customer data from a company computer and attempted to persuade other employees to join a new business. Id. He ordered his employer's bookkeeper to withdraw company funds to which he was not entitled. Id. He then formed a new company that performed work which otherwise would have been performed by his previous employer. Id.

Reversing an order granting a directed verdict in favor of the employee on his former employer's interference with prospective business advantage claim, the Court concluded a jury could reasonably have concluded the former employee's actions were retaliatory for his failed bid to buy the company. Id. The Court found particular weight in the employee's new company's dealings with the former employer's customers. Id.; see also Burke, 474 N.W.2d at 114-15 (evidence sufficient to infer intent to financially injure or destroy a plaintiff insurance agent where an insurance company, in violation of industry custom, distributed a customer list saturated with plaintiff's customers and encouraged other agents to solicit and persuade those on the list to sign new policies, thus "interfer[ing] with [the plaintiff]'s contractual rights to renewal commission on the old policies, but demonstrably reduc[ing the plaintiff]'s chances of writing new business for these customers in the future").

It follows that if Imagine Nation employees mined valuable data from BAF, solicited BAF's sales representatives using that data, and then plucked independent sales representatives from BAF's ranks but delayed their departure long enough to give the sales representatives time to convince customers to follow them out the door, BAF has stated a claim for relief. See, e.g., Third Am. Compl. ¶¶ 23-30, 36, 41-47, 55-58, 60-63, 87, 89; see also id. ¶ 91 (incorporating paragraphs 1 through 90).

Two reasonable readings of the Complaint exist. At this stage of the proceedings, BAF benefits from a favorable reading of the pleadings, as well as the presumption that each factual allegation in its Complaint is true. As a result, Imagine Nation's Motion to Dismiss Count VI must be denied.

**C. Count V (Intentional Interference with Existing Contracts).**

Imagine Nation has also moved to partially dismiss BAF's intentional interference with contract claim.

**1. Allegations of the Complaint.**

BAF alleges Imagine Nation interfered with two types of contracts. BAF claims Imagine Nation interfered with contracts between BAF and its independent sales representatives. See id. ¶ 87. BAF also contends Imagine Nation solicited BAF buyers and an administrative employee despite having knowledge of non-competition agreements between the parties, resulting in the enforcement of those agreements to become more burdensome. Id. ¶ 89.

**2. Elements of the Tort.**

There are two species of interference with contractual relationship claims recognized by Iowa law. One type occurs when an actor interferes with the performance of a contract between the plaintiff and a third party by preventing the plaintiff from performing the contract or causing the plaintiff's performance to be more expensive or burdensome. Nesler, 452 N.W.2d at 194-95; see Restatement (Second) of Torts § 766A. The other occurs when an actor's interference causes the third party not to perform the contract or causes the third party's performance to be more expensive or burdensome. Nesler, 452 N.W.2d at 194; see Restatement (Second) of Torts § 766; see also Restatement (Second) of Torts § 766A cmt. *a* (explaining the distinction). Both forms of the tort are implicated here. The former is implicated with respect to BAF's claims that Imagine Nation intentionally interfered with contracts between BAF and its buyers and administrative employees: BAF contends Imagine Nation's conduct caused BAF's ability to enforce certain non-compete agreements to be more difficult. The latter is implicated with respect to BAF's claims that Imagine Nation interfered with contracts between BAF and its sales representatives because BAF contends Imagine Nation's interference caused sales representatives to breach or cease performance of these contracts.

Regardless of which type is pled, the elements are substantially the same. To succeed on an intentional interference with contract claim under Iowa law, a plaintiff must prove the following:

- (1) plaintiff had a contract with a third party;
- (2) defendant knew of the contract;
- (3) defendant intentionally and improperly interfered with the contract;
- (4) the interference caused the third party [or the plaintiff] not to perform, or made performance more burdensome or expensive; and
- (5) damage to the plaintiff resulted.

Green v. Racing Ass'n of Cent. Iowa, 713 N.W.2d 234, 243 (Iowa 2006) (quotation marks omitted); accord Gibson v. ITT Hartford Ins. Co., 621 N.W.2d 388, 399 (Iowa 2001); Jones v. Lake Park Care Ctr., Inc., 569 N.W.2d 369, 377 (Iowa 1997); Water Dev. Co. v. Bd. of Water Works, 488 N.W.2d 158, 161 (Iowa 1992); Nesler, 452 N.W.2d at 198.

### **3. Analysis.**

#### **a. Contracts Between BAF and its Administrative Employee and Buyers.**

Beginning with the alleged interference of contracts between BAF and its buyers and administrative employee, Imagine Nation claims BAF has not sufficiently alleged the fifth element of the tort – damages – because it has not claimed any employees or buyers joined Imagine Nation after leaving BAF. Responding, BAF points to allegations that enforcement of non-compete agreements between itself and buyers and administrative employees has become more burdensome because of Imagine Nation's conduct.

Imagine Nation's argument departs from the faulty premise that it must benefit from any interference for BAF to have suffered damages. It is unnecessary for an injured party to prove the actor benefitted from the alleged interference. In fact, if no BAF employee or buyer joined

Imagine Nation, that situation would strengthen, not weaken, BAF's claim: The lack of a benefit flowing to the actor suggests the actor's purpose was not to aid itself in its business endeavors, but rather to harm the Plaintiff. Cf. Restatement (Second) of Torts § 768 cmt. g ("If [the actor's] conduct is directed, at least in part, to [advancing his competitive interest], the fact that he is also motivated by other impulses, as, for example, hatred or a desire for revenge is not alone sufficient to make his interference improper. But if his conduct is directed solely to the satisfaction of his spite or ill will and not at all to the advancement of his competitive interests over the person harmed, his interference is held to be improper").<sup>6</sup> As a result, proof that BAF was damaged by losing employees or buyers to Imagine Nation is not necessary for purposes of stating a cause of action.

Stoller Fisheries, Inc. v. American Title Insurance Co., 258 N.W.2d 336 (Iowa 1997), cited by Imagine Nation, is inapposite. There, the Court reaffirmed that "actual loss or resultant damage to the party whose relationship or expectancy has been disrupted by defendant's intentional and wrongful interference is an essential element of the tort." Id. at 341. The Court did not hold, however, that the party interfering had to realize a benefit. See id. So long as the damage was actually realized by the plaintiff and was neither nominal nor speculative, sufficient proof existed. See id. Here, BAF alleges harm has resulted because Imagine Nation's conduct enhanced the difficulty of enforcing non-competition agreements. It is a truism that a non-competition clause cannot be "more difficult" to enforce – in fact, such a clause cannot be enforceable at all – unless the other party to the agreement is either engaged in conduct with a competitor or is no longer employed or affiliated with the entity attempting to enforce it. Allega-

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<sup>6</sup> The Supreme Court of Iowa has not explicitly adopted § 768. The Eighth Circuit, noting that the Court has largely followed the Restatement (Second) of Torts, has utilized § 768 in cases applying Iowa law. E.g., Nat'l Parcel Servs., Inc. v. J.B. Hunt Logistics, Inc., 150 F.3d 970, 971 (8th Cir. 1998); Sawheny v. Pioneer Hi-Bred Int'l, Inc., 93 F.3d 1401, 1409 n.7 (8th Cir. 1996); see also Nesler, 452 N.W.2d at 199 (stating that "sections 767 through 774 . . . provide guidance" to a determination of whether interference is improper).

tions that such conduct caused the enforcement of non-competition agreements to become more burdensome or expensive are sufficient to notify Imagine Nation how BAF believes it was damaged. See Dura Pharms., 544 U.S. at 346-47. And reading that allegation in the broadest possible light, as required, the Court concludes BAF could marshal proof that its damages have been neither nominal nor speculative.

To be sure, the Complaint is not a model of completeness. For example, BAF does not say who the “administrative employee” is, who the “buyers” are, and does not explain how the non-competition agreements have become more difficult to enforce. But the Rule 12(b)(6) filter is designed to capture the legally and factually insufficient, not the legally and factually ambiguous. On this record, the Court cannot conclude it is “beyond doubt” that if BAF marshaled facts to prove its allegations, its claim would still fail. See Conley, 355 U.S. at 45-46; Kforce, Inc., 436 F.3d at 983. Therefore, to the extent Imagine Nation seeks dismissal of Count V by arguing BAF has not alleged it was damaged by losing employees or buyers to Imagine Nation, its motion must be denied.

**b. Contracts Between BAF and its Sales Representatives.**

Turning to the contracts between BAF and its independent sales representatives, Imagine Nation argues BAF cannot recover because the contracts between BAF and its sales representatives were terminable at will. According to Imagine Nation, Iowa law does not recognize a cause of action for intentional interference with an existing contract terminable at will. BAF argues such a contract remains valid until its termination, meaning a third party can be held liable for interfering with this type of contract just as with a contract which is not terminable at will.

**i. Nature of the Contracts.**

Imagine Nation points to the following language as evidence that the contracts between BAF and its sales representatives are terminable at will:

6.1 Termination After Expiration of Stated Term - This Agreement may be terminated by either party at any time after the expiration of the Stated Term, by the terminating party giving the other party at least fifteen (15) days prior notice of termination (which notice may be oral or written).

Exemplar Contract ¶ 6.1. If the relationship survives the Stated Term, the contract continues on a month-to-month basis until a new contract is signed or the contract is terminated. See id. ¶ 6. BAF does not resist the characterization of these contracts as terminable at will. See Pl.’s Resist. to Def.’s Mot. to Dismiss 6-7, 10 n.2.

The Exemplar Contract is not terminable at will at any time. The termination without cause language becomes available only “after the expiration of the Stated Term.” Exemplar Contract ¶ 6.1. At that point, however, the contract’s terms state that it can be terminated by either party. E.g., Preferred Mktg. Assocs. Co., 452 N.W.2d at 391, 396 (noting that a contract providing “that either party could terminate . . . by written notice to the other party” deemed terminable at will for tortious interference claims); Orkin Exterminating Co. v. Burnett, 146 N.W.2d 320, 326 (Iowa 1966) (holding that an “agreement which was to ‘remain in full force and effect for one year’ and continue from year to year thereafter” but permitting either party to terminate “for any cause” was terminable at will). The Court recognizes that after the Stated Term, contracts like the Exemplar Contract are terminable by either party without cause and that BAF has not alleged Imagine Nation interfered with any relationship during any contract’s Stated Term. The Court further notes BAF does not resist Imagine Nation’s characterization of the contracts as terminable at will. As a result, the Court assumes for the purposes of this motion that the contracts between BAF and its sales representatives were terminable at will.

#### **ii. Sufficiency of BAF’s Allegations.**

As noted above, a plaintiff must prove a defendant “intentionally and improperly interfered with the contract.” See Restatement (Second) of Torts § 766A cmt. e. This element makes clear that intentional interference is not necessarily improper:

[I]f there is no desire at all to accomplish the interference and it is brought about only as a necessary consequence of the conduct of the actor engaged in for an entirely different purpose, his knowledge of this makes the interference intentional, but the factor of motive carries little weight toward producing a determination that the interference was improper.

Id. § 767 cmt. *d*; accord Green, 713 N.W.2d at 244; Berger, 543 N.W.2d at 599; Toney v. Casey's Gen. Stores, Inc., 460 N.W.2d 849, 853 (Iowa 1990); Nesler, 452 N.W.2d at 197. The following factors test whether intentional interference is also improper:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interest sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interest of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.

Restatement (Second) of Torts § 767; accord Green, 713 N.W.2d at 244 (collecting authorities); Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 767-68 (Iowa 1999); Jones, 569 N.W.2d at 377; Toney, 460 N.W.2d 853; Water Dev. Co., 488 N.W.2d at 161-62. Examining “whether the actor's conduct was fair and reasonable under the circumstances” is required. Fin. Mktg. Servs., Inc. v. Hawkeye Bank & Trust of Des Moines, 588 N.W.2d 450, 458 (Iowa 1999) (quoting Toney, 460 N.W.2d at 853). And when assessing reasonableness, “[r]ecognized standards of . . . business customs and practices are pertinent, and consideration is given to concepts of fair play and whether the defendant's interference is not ‘sanctioned by the “rules of the game.”” Restatement (Second) of Torts § 767 cmt. *j*, discussed in Fin. Mktg. Servs., Inc., 588 N.W.2d at 458-59, and Toney, 460 N.W.2d at 853; see Hunter v. Bd. of Trs. of Broadlawns

Med. Ctr., 481 N.W.2d 510, 518 (Iowa 1992) (evidence of improper interference where an employee's termination breached customary business practices).

If a contract is terminable at will, however, additional concerns appear when judging whether intentional interference is improper, particularly where the actor and plaintiff are competitors:

One who intentionally causes a third person . . . not to continue an existing contract terminable at will does not interfere improperly with the [plaintiff's] relation if

- (a) the relation concerns a matter involved in the competition between the actor and the [plaintiff] and
- (b) the actor does not employ wrongful means and
- (c) his action does not create or continue an unlawful restraint of trade and
- (d) his purpose is at least in part to advance his interest in competing with the other.

Restatement (Second) of Torts § 768(1).<sup>7</sup> The Supreme Court of Iowa has noted that contracts terminable at will are “analogous to employments at will, to which [Iowa] law of contract interference has applied different rules.” Water Dev. Co., 488 N.W.2d at 162. The analogy is apt because “[o]ne’s interest in a contract terminable at will is primarily an interest in future relations between the parties, and [that party] has no legal assurance of them.” Restatement (Second) of Torts § 766 cmt. g. Until termination, however, “the contract is valid and subsisting, and the defendant may not improperly interfere with it.” Id.

Merely because “different rules” apply to an interference claim where the contract is terminable at will, such claims are not automatically barred. This conclusion renders Imagine Nation’s argument that “Iowa law does not recognize a claim for tortious interference with an at-will contract” simply wrong. Under Iowa law, “this tort is available even when the contract is terminable at will,” Reihmann v. Foerstner, 375 N.W.2d 677, 683 (Iowa 1985); the analysis is

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<sup>7</sup> See supra note 6 regarding the use of § 768 in cases applying Iowa law.

merely guided by rules different than those rules applicable where the contract is not terminable at will.

If a contract is terminable at will, the standard of “proof is more demanding than when the claimed interference is with an existing contract” that is not terminable at will. Water Dev. Bd., 488 N.W.2d at 162 (citing Toney, 460 N.W.2d at 853-54). The evidence required is akin to that needed to prove interference with a prospective business advantage. Water Dev. Co., 488 N.W.2d at 162; Toney, 460 N.W.2d at 853-54. A plaintiff must present “‘substantial evidence of a predominant motive on the part of [the defendant] to terminate the [contract] for improper reasons,’” such as to damage the plaintiff. Water Dev. Co., 488 N.W.2d at 162 (quoting Toney, 460 N.W.2d at 853 (alterations in the original)); accord Condon Auto Sales & Serv., Inc. v. Crick, 604 N.W.2d 587, 601 (Iowa 1999); Toney, 460 N.W.2d at 853-54; see also Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 911 (8th Cir. 2006) (applying Iowa law). Particularly where the parties are competitors, courts must be astute to the reality that competitors can, and do, frequently compete for business without intending to destroy the other:

[A] contract at will is usually not protected when the defendant’s interference with it is based on any legitimate business purpose and no improper means is used, as where one employer hires away employees of another whose contract rights are terminable at will. . . . In all such cases the plaintiff’s interest may be protected, but as a prospective advantage rather than as a contract, with the correspondingly greater freedom of action on the defendant’s part.

Water Dev. Co., 488 N.W.2d at 162 (quoting W. Page Keeton, et al., Prosser & Keeton on the Law of Torts § 129 (5th ed. 1984) (emphasis added)); accord Toney, 460 N.W.2d at 853 (quoting same); see also Restatement (Second) of Torts § 766 cmt. g (“If the defendant was a competitor regarding the business involved in the [at will] contract, his interference with the contract may not be improper.” (citing Restatement (Second) of Torts § 768 & cmt. i)).

A case cited by Imagine Nation shows how this test is applied. In Compiano v. Hawkeye Bank & Trust of Des Moines, the Supreme Court of Iowa reviewed claims brought by

independent agents licensed by a company which ended a business relationship with a bank affiliated with an association of banks. Compiano, 588 N.W.2d at 463. Before the end of the relationship, the bank and its affiliates referred customers seeking insurance and annuity products to the licensor, which then referred them to the agents. Id. Certain contracts terminable at will existed between the agents and the bank's affiliates. Id. at 464. The bank then decided to handle annuity and insurance needs internally, resulting in the end of its relationship with the licensor. Id. at 463-64. The agents brought claims against the bank, alleging the bank interfered with the contracts between the agents and the bank's affiliates as well as with prospective business relationships with future clients growing out of those contracts. Id. at 464. The Court noted the contracts between the agents and the bank's affiliates were terminable at will. Id. Consequently, the plaintiffs' interests were "protected as a prospective business advantage." Id. (citing Water Dev. Co., 488 N.W.2d at 162). As a result, the Court required a higher level of proof, which the plaintiffs were unable to reach. See id. at 464-45.

Contrary to Imagine Nation's claim that recovery is simply unavailable if an actor interferes with a contract terminable at will, a plaintiff can recover but must allege the actor's sole or predominate motive for the interference was to financially damage or destroy the plaintiff. Condon Auto Sales & Serv., 604 N.W.2d at 601; Compiano, 588 N.W.2d at 464; Water Dev. Co., 488 N.W.2d at 162; Toney, 460 N.W.2d at 853-54. BAF has alleged Imagine Nation interfered with contracts between BAF and its sales representatives "by using improper means or with the sole or predominant purpose of financially injuring or destroying [BAF]." Third Am. Compl. ¶ 87. Reading the Complaint as a whole unearths allegations bolstering this conclusory allegation beyond that required to survive a motion to dismiss. In addition to the allegations framing its interference with prospective business advantage claim (which the Court has already concluded are sufficient for that claim, see supra Part I.B.3), BAF contends Imagine Nation and its employees induced BAF sales representatives to sell competitors' products and work for

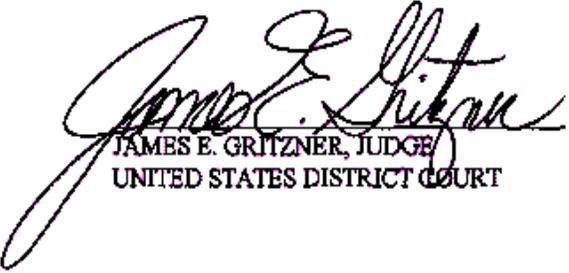
competitors while being contractually barred from engaging in such activity under the terms of agreements with BAF. See, e.g., Third Am. Compl. ¶¶ 63, 87. The Court cannot conclude “beyond doubt” that if these allegations are proven, BAF would not succeed. See Revere Transducers, Inc., 595 N.W.2d at 767-68 (holding defendant liable for interference where the defendant induced breaches of agreements between an employer and its employees). As a result, Imagine Nation’s Motion to Dismiss Count V on this ground must be denied.

### CONCLUSION

Based on the foregoing analysis, the motion for partial dismissal by Imagine Nation (Clerk’s No. 64) must be **denied**.

**IT IS SO ORDERED.**

Dated this 6th day of September, 2006.



JAMES E. GRITZNER, JUDGE  
UNITED STATES DISTRICT COURT