

TORTIOUS INTERFERENCE WITH CONTRACTUAL OR ADVANTAGEOUS RELATIONSHIP

Interference With Contract - Not A Corporate Officer

PLF claims that DFT improperly interfered with a contract between PLF and TP [third person/company]. To prove this claim, PLF must show that, more likely than not, the following five things are true:

1. PLF had a contract with TP;
2. *< if contested¹ >* DFT knew about the contract;
3. DFT intentionally [persuaded] [caused] TP to break that contract;
4. DFT had an improper motive or used an improper method in interfering with the contract;² and
5. DFT's actions caused PLF to suffer economic harm.³

I will now explain each of these things to you.

(a) Contract with Third Party

First, PLF must prove that s/he/it had a contract with TP. S/he/it must also prove that the contract was in effect when DFT acted.

< if not in dispute >: There is no dispute that the parties had a contract [describe the contract]

¹ In many cases, there is no serious dispute that the defendant knew about the contract. Where appropriate, the judge may combine elements 2 and 3 into a single element: "2. DFT knowingly and intentionally [persuaded] [caused] TP to break that contract."

² If there is a factual dispute about whether defendant acted as a corporate officer, the judge will need to include some of the instructions set forth in X.2, below. In such cases, which arise rarely, the judge may want to add the following alternative, in addition to element #4:
If DFT was a company [official] [director] [supervisor] acting within the scope of his responsibilities to the company, s/he acted because of spite and hateful motive, unrelated to any legitimate interest of the company.

³ See *Psy-Ed Corp. v. Klein*, 459 Mass 697, 715-716 (2011) and cases cited; *Bourque v. Cape Southport Associates, LLC*, 60 Mass. App. Ct. 271, 277 (2004), quoting *Swansea Dev. Corp. v. Taunton*, 423 Mass. 390, 397 (1996).

< *If the existence of a contract is disputed* > Use Instructions on “Existence of Contract” from Contract Claim – General Instructions, part (a)]

(b) Knowledge of Contract and of Interference⁴

Second, PLF must prove that DFT knew that a contract existed between PLF and TP, and also knew that DFT was interfering with performance of that contract. PLF may do this by direct evidence or by indirect evidence. PLF does not have to prove that DFT knew about the specific contract. Nor does PLF have to prove that DFT knew the precise, formal terms of the contract; it is enough to show that DFT knew certain facts that, when added together, gave DFT knowledge of the contract. Also, DFT can be liable even if s/he/it mistakenly thought the agreement between PLF and TP was not binding when in fact it was binding. Ignorance of the law is no excuse.⁵

(c) Intent to Interfere

Third, PLF must prove that DFT intentionally caused TP to break the contract. [If appropriate, instruct on “intent to produce a result” and “intent of an entity”]

⁴ As noted in footnote 1, above, in cases where knowledge is not contested, the judge may combine the second and third elements by adding the word “knowingly” to item “(c) Intent to Interfere.”

⁵ Restatement (Second) of Torts, § 766. This instruction adopts the actual knowledge” test articulated in § 766, comment i, of the Restatement. See also *Psy-Ed Corp. v. Klein*, 459 Mass 697, 715-716 (2011) and cases cited; *Cacciola v. Nellhaus*, 49 Mass. App. Ct. 746, (2000); *Goldsmith v. Traveler Shoe Co.*, 236 Mass. 111, 116 (1920) (“In order to show that the defendant maliciously prevented the performance of the agreement . . . it [is] essential to prove that it had knowledge of the contract in question”) *Ryan, Elliott & C. v. Leggat, McCall & Werner*, 8 Mass. App. Ct. 686, 691-692 (1979).

It is possible that a “should have known” test also applies, but no Massachusetts appellate court appears to have adopted such a test. For a “should have known” instruction, see Massachusetts Superior Court Civil Practice Jury Instructions, § 12.4.3 (Lipchitz and Wilson, eds. MCLE 2018) (“The requirement of knowledge may be found if, from the facts and circumstances of which the defendant had knowledge, the defendant should have known of the existence of the contractual relationship between the plaintiff and XYZ Company”), citing 44B Am. Jur. 2d Interference, § 12 (2014). If giving this instruction, the judge may wish to add an instruction defining the phrase “should have known.” See Definitions.

On this issue of intent, PLF does not have to prove that DFT acted out of hostility or wanted to harm PLF, as long as DFT intended to cause TP to break the contract.⁶

When I say that DFT caused TP to break the contract, I mean that, because of DFT's actions, TP violated the contract or did not perform TP's obligations under the contract.

(d) Improper Motive or Method

Fourth, PLF must prove that DFT either acted with an improper motive or used an improper method.⁷ PLF must prove at least one of these two things but does not have to prove both improper motive and improper method.

PLF must prove more than just ordinary business competition or using lawful methods to pursue legitimate financial goals. For example, a business does not act improperly if it tries to lure customers away from a competitor and to disrupt an existing relationship in the process, as long as its actions were fair and reasonable under the circumstances.⁸

⁶ "Malice, in the sense of ill will, has not been a true element of the torts of intentional interference either with a contract or with a prospective contractual relation." *United Truck Leasing Corp., v. Geltman*, 406 Mass. 811, 814 (1990). In the event of a factual dispute over whether defendant acted as a corporate official, the court will need to make clear that this sentence applies only if the jury finds that the defendant was not a corporate official. *Blackstone v. Cashman*, 448 Mass. 255, 262-266 (2007) (requiring malice where defendant is a corporate official acting within the scope of employment).

⁷ *Schwanbeck v. Federal-Mogul Corp.*, 31 Mass. App. Ct. 390, 412-413 (1991) ("improper conduct . . . may include ulterior motive (e.g., wishing to do injury) or wrongful means (e.g., deceit or economic coercion))."

Note that the fourth element is entirely different if the defendant was acting within the scope of duty as a corporate officer. See below, Corporate Officer Defendant and n. 13, quoting *Blackstone v. Cashman*, 448 Mass. 255, 268 (2007) (where defendant acted as a corporate official, "the actual malice standard in effect replaces the disjunctive analysis 'improper in motive or means' with a single question, whether the controlling factor in the alleged interference was actual malice")

⁸ See *Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc.*, 68 Mass. App. Ct. 582, 608-609 (2007).

To decide whether DFT's motive or method was improper, you may ask a number of questions, including:

- What did DFT do?
- What was DFT's motive?
- What interest did TP have in performing the contract?
- What did DFT try to accomplish by interfering with the contract?
- What interest does society have in protecting DFT's freedom to act and TP's interests in the contract?
- How directly or indirectly did DFT interfere with the contract?
- What were the relationships between PLF, DFT and TP?⁹

No single question or answer will determine whether DFT's motive or method was improper. You must consider all the circumstances.

Perhaps some examples will help. I'll start with improper method. Physical violence, fraud or other unlawful conduct by DFT would strongly support a claim of improper method. But, if DFT used only economic pressure, that might be acceptable. You need to look at the circumstances. You may ask, for instance, how strong was the economic coercion and how much harm did DFT threaten? Sometimes economic pressure is a reasonable way to accomplish an objective; if the method is reasonable, it is acceptable. The same is true of simple persuasion or limited economic pressure when a business is competing for customers or products. On the other hand, coercive pressure that has nothing to do with fair business competition is improper. You should follow the instructions I just gave you to decide whether or not those kinds of pressure are improper methods to get someone to act.

Now, I'll turn to improper motives. You may find an improper motive if someone acts only out of spite and only for the purpose of harming

⁹ See *United Truck Leasing Corp. v. Geltman*, 406 Mass. 811, 817 n. 10 (1990) (noting that the "seven general factors" set forth in Section 767 of the Restatement (Second) of Torts "may be helpful in determining" improper means or motive).

someone else, without any legitimate interest of its own. However, you may find that there was no improper motive if [someone] [a company] tries to compete lawfully or to promote its own financial or business interests. Keep in mind that a motive to pursue personal gain, including financial gain, is legitimate and is not an improper motive.¹⁰

(e) Economic Harm

Finally, PLF must prove that DFT's interference with the contract caused PLF to suffer economic harm.¹¹

< Damages—See Model Instruction at End of This Document >

Interference With Contract - Corporate Officer Defendant

PLF claims that DFT improperly interfered with a contract between PLF and TP [third person/company]. To prove this claim, PLF must show that, more likely than not, the following five things are true:

1. PLF had a contract with TP;
2. DFT knew about the contract;
3. DFT intentionally [persuaded] [caused] TP to break that contract;
4. If DFT acted within the scope of his/her responsibilities as a company official,¹² s/he acted because of spite and hateful motive, unrelated to any legitimate interest of the company.

¹⁰ *Blackstone v. Cashman*, 448 Mass. 255, 268 (2007), quoting *King v. Driscoll*, 418 Mass. 576, 587 (1994) ("The motivation of personal gain, including financial gain . . . is not enough to satisfy the improper interference requirement").

¹¹ "A plaintiff must show economic harm to maintain an intentional interference action." *Cachopa v. Town of Stoughton*, 72 Mass. App. Ct. 657, 663 (2008). It does not matter that, prior to filing the action, the plaintiff was made whole for that economic harm. *Id.*

¹² The Supreme Judicial Court has defined the term "corporate official" "expansively." See *Blackstone v. Cashman*, 448 Mass. 255, 266-267 (2007) ("a corporate director, whatever the frequency of his involvement in day-to-day operations, has an important interest in and responsibility for the conduct of business by the company's corporate officers. A director

5. DFT's actions caused PLF to suffer economic harm.¹³

I will now explain each of these things to you.

(a) Contract with Third Party

First, PLF must prove that s/he/it had a contract with TP. S/he/it must also prove that the contract was in effect when DFT acted.

<if applicable>: There is no dispute that the parties had a contract [describe the contract]

<If the existence of a contract is disputed> See Instructions on Contract Claim – General – Existence of Contract (a) or, if necessary (a)(1) – (3)]

(b) Knowledge of Contract and Interference

Second, PLF must prove that DFT knew that a contract existed between PLF and TP, and also knew that DFT was interfering with performance of that contract. PLF may do this by direct evidence or by indirect evidence. PLF does not have to prove that DFT knew about the specific contract. Nor does PLF have to prove that DFT knew the precise, formal terms of the contract; it is enough to show that DFT knew certain facts that, when added together, gave DFT knowledge of the contract. Also, DFT can be liable even if s/he/it mistakenly thought the agreement between PLF and TP was not binding when in fact it was binding. Ignorance of the law is no excuse.¹⁴

[If appropriate, instruct on the definition of "knowledge" and "knowledge of an entity." See Definitions].

(c) Intent to Interfere

Third, PLF must prove that DFT intentionally caused TP to break the contract. PLF must prove that DFT not only meant to act, but also intended

therefore qualifies as a corporate official for purposes of the tort of intentional interference with advantageous relations, when he acts in furtherance of a legitimate corporate purpose.").

¹³ See *Psy-Ed Corp. v. Klein*, 459 Mass 697, 715-716 (2011) and cases cited.

¹⁴ See fn 3, above.

to cause TP to break the contract. By breaking the contract, I mean violating the contract or not performing TP's obligations under the contract.

[If appropriate, instruct on "intent to produce a result" and "intent of an entity" See Definitions]

(d) Acted Out of Spite

Fourth, PLF must show that DFT acted out of spite and only to harm someone else, without any legitimate business interest. You must ask: "did DFT act primarily because a spiteful, harmful purpose unrelated to a legitimate corporate or business interest?"¹⁵ In other words, PLF must prove that DFT was personally hostile, or harbored ill will, toward him/her.¹⁶ If so, then PLF has proven this part of the claim. However, it is not enough to show that DFT was trying to get more money for himself/herself/itself or for the business or the company. DFT had every right to pursue personal gain, including financial gain. S/he/it also had a right to compete lawfully or to promote his/her/its business interests.

(e) Economic Harm

Finally, PLF must prove that DFT's interference with the contract caused PLF to suffer economic harm.¹⁷

< Damages—See Model Instruction at End of This Document >

¹⁵ *Blackstone v. Cashman*, 448 Mass. 255, 268 (2007) (In discussing jury instructions where the defendant is a corporate official, the court said: "the actual malice standard in effect replaces the disjunctive analysis 'improper in motive or means' with a single question, whether the controlling factor in the alleged interference was actual malice. . . . Accordingly, when the defendant is a corporate official, the improper motive or means element should be formulated as whether the controlling factor in the defendant's interference was actual malice -- that is, a spiteful, malignant purpose unrelated to a legitimate corporate interest.").

¹⁶ *Sklar v. Beth Israel Deaconess Med. Ctr.*, 59 Mass. App. Ct. 550, 554 (2003); accord *Weber v. Community Teamwork, Inc.*, 434 Mass. 761, 783 (2001) (defendant's "behavior must rise to the level of personal hostility or ill-will to satisfy the actual malice standard").

¹⁷ "A plaintiff must show economic harm to maintain an intentional interference action." *Cachopa v. Town of Stoughton*, 72 Mass. App. Ct. 657, 663 (2008). It does not matter that, prior to filing the action, the plaintiff was made whole for that economic harm. *Id.*

Interference With Business Relationship

PLF claims that DFT improperly interfered with a business relationship that PLF [had] [reasonably expected to have] with TP [third person/company]. To prove this claim, PLF must show that, more likely than not, the following five things are true:

1. PLF reasonably expected to benefit from a business relationship with TP;
2. DFT knew about the [expected] business relationship;
3. DFT intentionally [persuaded] [caused] TP not to enter into that relationship;
4. DFT had an improper motive or used an improper method in interfering with the relationship;¹⁸ [and]
5. *< if defendant acted as a corporate official, director or supervisor >* If DFT acted within the scope of responsibilities as a company [official] [director] [supervisor],¹⁹ s/he acted because of spite and hateful motive, unrelated to any legitimate interest of the company; and
6. DFT's actions caused PLF to suffer economic harm.²⁰

I will now explain each of these things to you.

¹⁸ If defendant acted as a corporate officer (or if there is a factual dispute on that question), the judge will need to include some of the instructions set forth above. The judge should add the following alternative, in place of, or in addition to element #4:

If DFT was a company official acting within the scope of his responsibilities to the company, s/he acted because of spite and hateful motive, unrelated to any legitimate interest of the company.

¹⁹ The Supreme Judicial Court has defined the term "corporate official" "expansively." See *Blackstone v. Cashman*, 448 Mass. 255, 266-267 (2007) ("a corporate director, whatever the frequency of his involvement in day-to-day operations, has an important interest in and responsibility for the conduct of business by the company's corporate officers. A director therefore qualifies as a corporate official for purposes of the tort of intentional interference with advantageous relations, when he acts in furtherance of a legitimate corporate purpose.").

²⁰ See *Psy-Ed Corp. v. Klein*, 459 Mass 697, 715-716 (2011) and cases cited.

(a) Advantageous Relationship with Third Party

First, PLF must prove that s/he/it reasonably expected to receive some economic benefit from [a future] [an ongoing] business relationship with TP. The expectation may arise from past dealings or discussions between PLF and TP or from a history of transactions between them. The evidence must be specific enough to show that PLF realistically expected a future economic benefit. Simple hope or optimism is not enough. However, PLF does not have to prove the expectation with certainty, because future events are always uncertain. For that reason, you must consider whether economic benefits from a business relationship with TP were reasonably likely.²¹

[< *elements (b) to (e)*> Adapt elements (b) to (e) above—from Intentional Interference With Contract – Not A Corporate Officer or from in Intentional interference With Contract – Corporate Officer Defendant, as appropriate—by replacing references to “contract” with references to a “business relationship” or an “expected business relationship.”]

< *Damages—See Model Instruction at End of This Document*>

Damages for Intentional Interference

If PLF proves all five things I have just described, s/he/it must prove the amount of damages resulting from the interference. By instructing you on damages, I am not suggesting anything about your answers to Questions x, or y.

The purpose of damages is to compensate PLF for the harm resulting from the interference. You may not award damages for the purpose of rewarding PLF or punishing DFT. As with the other elements of his/her/its claim, PLF

²¹ Owen v. Williams, 322 Mass. 356, 361-362 (1948) (“an existing or even a probable future business relationship from which there is a reasonable expectancy of financial benefit is enough”).

must prove that, more likely than not, DFT's conduct caused the damages. You should not award damages for any harm that PLF or someone other than DFT caused.

(a) Types Of Damages

You should consider several types of damages.

You should award damages for any out-of-pocket loss that DFT's interference caused PLF to suffer. For instance, you should award PLF damages to cover any money spent to reduce the harm s/he/it suffered, to recover business lost because of DFT's conduct, or to determine the amount of PLF's losses.

Next, PLF is entitled to damages for any lost profits.²² To determine lost profits you first ask: How much money or property would PLF have received if DFT had not caused TP to breach the contract? Then you subtract the direct expenses that PLF would have had to spend to receive that money or property. The result is lost profits. Please note that you do not deduct anything for overhead or fixed expenses.²³

You should award PLF an amount equal to any profits that PLF would have made if DFT had not interfered with the contract. You may consider PLF's past earnings, general economic conditions, and the competitive conditions in the business at the time. You may also consider any other circumstances that help you determine, with reasonable certainty, how much profit PLF lost because of DFT's actions. It is enough if the evidence shows the

²² See *Selmark Assocs, Inc. v. Ehrlich*, 467 Mass. 525, 545 (2014) (lost profits for breach of contract); *O'Brien v. Pearson*, 449 Mass. 377, 388-389 (2007) (lost profits for breach of fiduciary duty).

²³ *Ricky Smith Pontiac, Inc. v. Subaru of New Eng.*, 14 Mass. App. Ct. 396, 426 (1982). Note that, in some cases, the jury may need to consider "semi-fixed" expenses, i.e. expenses that reflect the need to increase overhead to handle the amount of increased future business allegedly lost. *Id.*, 14 Mass. App. Ct. at 429.

amount of lost profits in general terms, because the law recognizes that precise calculation of lost profits is often impossible.²⁴

As an alternative to lost profits, PLF may recover the profits that DFT made as a result of the interference.²⁵ PLF may not recover both. PLF is entitled to recover whichever amount is greater – PLF's lost profits or the DFT's profits. So, you should determine and write down both of those amounts so that I know what you have decided.²⁶ Then, because PLF may not recover both, I will finally award damages only for the larger amount.

Finally, PLF may recover damages for emotional distress.²⁷ In awarding damages for emotional distress, you may consider, among other things, the following factors:

- The nature and character of the alleged harm;
- The severity of the harm;
- The length of time PLF has suffered and reasonably expects to suffer; and
- Whether PLF has attempted to reduce the harm, for instance by counseling or by taking medication.

²⁴ See generally, *O'Brien v. Pearson*, 449 Mass. 377, 388-389 (2007) (lost profits in a breach of fiduciary duty case were not proven with reasonable certainty); *N. Assocs., Inc. v. Kiley*, 57 Mass. App. Ct. 874, 886 and n. 24 (2003).

²⁵ *Jet Spray Cooler, Inc. v. Crampton*, 377 Mass. 159, 169-170 (1979) (lost profits in a trade secrets case); *Gilmore v. Century Bank & Trust Co.*, 20 Mass. App. Ct. 49, 55 (1985).

²⁶ This model instruction asks the jury to determine both amounts for three reasons (1) lost profits are often the subject of post-verdict motions or appeal and (2) if both types of damages are at issue, asking the jury's decision on both elements will likely help structure the jury's deliberations appropriately (3) a verdict on both issues may inform any post-verdict negotiations and promote settlement instead of appellate litigation.

²⁷ *Cachopa v. Town of Stoughton*, 72 Mass. App. Ct. 657, 664 (2008) ("[E]motional distress damages, which are recoverable as consequential damages flowing from the interference. "), citing *Draghetti v. Chmielewski*, 416 Mass. 808, 819 (1994) (permitting foreseeable damages for emotional distress on intentional interference action); *Ratner v. Noble*, 35 Mass. App. Ct. 137, 138 (1993) ("recovery for emotional distress is not allowed unless the elements of the [interference] tort are made out").

< ***future damages***> If PLF has proven that, more likely than not, in the future, s/he will suffer any [emotional distress, lost profits] because of the interference, you should award damages for that future harm. [If you find that PLF will suffer damages throughout his/her lifetime, you may consider life expectancy tables in evidence, to determine how long s/he will live.] There will be no future trial to evaluate any future damages that PLF may suffer. You must keep in mind that PLF will receive any judgment in this case in a lump sum and may invest it and earn money. Therefore, if you award future damages, you must reduce that portion of the damages to its present value as of [year], when PLF filed this case.

(b) Efforts to reduce damages <omit this section if mitigation of damages is not at issue>

PLF may not recover damages for any harm that s/he could have reduced or avoided through reasonable efforts. Unlike the issues I have discussed earlier, it is DFT, not PLF who has the burden to prove that, more likely than not, the PLF unreasonably failed to reduce his/her/its damages in whole or in part. If DFT has proven these things, you must eliminate from your award any damages for any harm that PLF reasonably could have reduced or avoided.

(c) General Instructions On Damages

I'll conclude with a few general instructions about all types of damages that I have mentioned in this case.

First, sometimes there is an element of uncertainty in proving one or more type of damage. That does not necessarily prevent you from awarding full and fair compensation. It is true that the evidence must make it possible for you to determine damages in a reasonable manner. However, we leave the amount of damages to your judgment, as members of the jury, sometimes with little evidence. Even so, you may not determine the plaintiff's damages by guessing. It is enough if the evidence allows you to draw fair and reasonable conclusions about the extent of the damages.

Second, you must not consider any interest on your damages award. The court will calculate interest on any award. In addition, you may not consider federal or state income taxes, because any damages in this case may or may not be subject to taxation. Someone else will have to address any tax considerations depending upon what you decide. In other words, just follow my instructions on what issues to consider. If you go beyond what I have outlined, your verdict may well have consequences that you did not intend.

[<*closing arguments*> Third, the law allows the lawyers to suggest an amount of damages in their closing arguments, but you should understand that any suggestions the lawyers make are not evidence and do not set any sort of standard or floor or ceiling for the amount of damages – it is up to you to evaluate the damages, based on the evidence and your own judgment.]

Finally, once you have calculated damages for [each type of damage that I described], you should add each of these types of damages to arrive at a total award. The total sum must not exceed fair compensation for the entire harm. You must avoid duplication or double counting of any elements of damages. When you have determined the amount of damages, using the instructions I have just given, you should write down an amount both in numbers and in words.