UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 05–4345, 06–1033

MATRIX GROUP LIMITED, INC.
Plaintiff – Appellee – Cross–Appellant

v.

RAWLINGS SPORTING GOODS COMPANY, INC. and K2, INC.
Defendants – Appellants – Cross–Appellees

On Appeal from the United States District Court
for the Eastern District of Missouri

APPELLEE'S BRIEF

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SUMMARY OF CASE AND STATEMENT CONCERNING ORAL ARGUMENT

Following a five–day jury trial, the plaintiff–appellee, Matrix Group Limited, Inc. ("Matrix"), obtained a verdict against defendant–appellant Rawlings Sporting Goods Company, Inc. ("Rawlings") for breach of an exclusive license agreement between Matrix and Rawlings concerning equipment bags, and Matrix obtained a verdict against defendant–appellant K2, Inc. ("K2") for its tortious interference with Matrix's business relationships.

In light of the large number of issues raised on appeal, and in light of the size of the record, Matrix believes oral argument could be helpful in this matter. Matrix does not oppose the request of Rawlings and K2 (collectively, the "defendants") for 20 minutes per side.

CORPORATE DISCLOSURE

Pursuant to Fed. R. App. P. 26.1, the plaintiff–appellee, Matrix Group Limited, Inc., states that is has no corporate parent, and that no publicly held company owns more than 10% of its stock.

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STATEMENT OF JURISDICTION

The plaintiff–appellee, Matrix Group Limited, Inc. ("Matrix"), is a Florida corporation with a principal place of business in Safety Harbor, Florida. Appellants' Appendix ("App.") 55. Defendant–appellant Rawlings Sporting Goods Company, Inc. ("Rawlings") is a Delaware corporation with a principal place of business in Fenton, Missouri. *Id.* Defendant–appellant K2, Inc. ("K2") is a California corporation with a principal place of business in Carlsbad, California. App. 257. Matrix sought substantial damages from Rawlings and K2 (collectively, the "defendants"), and thus the district court had diversity jurisdiction over this action pursuant to 28 U.S.C § 1332.

This court has jurisdiction over a final judgment. Prior to trial, on April 13, 2005, the district court granted Matrix's motion for summary judgment on Rawlings' single breach of contract claim, dismissing Rawlings' claim without prejudice for failure to comply with the notice and cure provision of the parties' exclusive license agreement, dated July 31, 1996, as amended ("Agreement"). Appellants' Addendum ("Add.") 27. At the same time, the court granted Rawlings' motion for summary judgment on Matrix's tortious interference claim (Claim 9), and granted the defendants' motion to dismiss Matrix's claim that the defendants violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") (Claim

10). *Id.* During the trial, Matrix dismissed one of its breach of contract claims (Claim 7). App. 728–30, 759.

At trial, with the agreement of the parties, Matrix's remaining breach of contract claims against Rawlings were submitted to the jury as a single question whether Rawlings breached the Agreement, with the damages calculated in two parts, and Matrix's tortious interference claim against K2 was submitted to the jury as a single question. Add. 93–94. The jury found for Matrix on all issues, and, on May 9, 2005, the court entered judgment in favor of Matrix. Add. 41.

On May 31, 2005, Matrix sought its attorneys' fees and costs as provided for under the Agreement, which the court treated as having the same effect of a motion filed under Fed. R. Civ. P. 59. App. 894–96, 984–87. On July 27, 2005, after ruling on the defendants' post–trial motions, the court entered an amended judgment in favor of Matrix. Add. 60. On November 10, 2005, after ruling on Matrix's attorneys' fee request, the court entered a final judgment in favor of Matrix. App. 1004–1009. On December 9, 2005, the defendants timely filed their notice of appeal, and on December 22, 2005, Matrix timely filed its notice of cross–appeal. App. 1010, 1023. Thus, this court has jurisdiction over the appeal and cross–appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Did the court properly grant Matrix summary judgment under Delaware law concerning wrongful termination of the Agreement because Rawlings failed to comply with the notice and cure provision of the Agreement, *Witco Chem. Corp. v. Dow Chem. Co.*, 623 F. Supp. 308 (D. Del. 1985), *aff'd,* 795 F.2d 1019 (Fed. Cir. 1986); *Harper v. Delaware Broadcasters, Inc*, 743 F. Supp. 1076 (D. Del.), *aff'd,* 932 F.2d 959 (3d Cir. 1991)?

2. Did the court properly grant Matrix summary judgment concerning wrongful termination of the Agreement because Rawlings failed to assert its insolvency defense properly and because Matrix was not insolvent, *Production Resources Group, LLC v. NCT Group, Inc.*, 863 A.2d 772 (Del. Ch. 2004)?

3. Did the court properly deny Rawlings' motion for a new trial because the jury's damages award was fully supported by Matrix's expert and not against the clear weight of the evidence, *White v. Pence*, 961 F.2d 776 (8th Cir. 1992)?

4. Did the court properly deny K2's motion for judgment because K2's actions constituted tortious interference under Florida law, *Gossard v.*

Adia Services, Inc., 723 So. 2d 182 (Fla. 1998); *McGurdy v Collis*, 508 So. 2d 380 (Fla. Dist. Ct. App.), *review denied*, 518 So. 2d 1274 (Fla. 1987)?

5. Did the court properly instruct the jury without relevant objection from K2 on Matrix's claim of tortious interference against K2, *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812 (Fla. 1994)?

6. Did the court properly deny K2's motion for a new trial because Matrix's tortious interference claim against K2 was fully supported by testimony from K2 witnesses and not against the clear weight of the evidence, *White v. Pence*, 961 F.2d 776 (8^{th} Cir. 1992)?

7. Did the court erroneously grant Rawlings' renewed motion for judgment on the jury award to Matrix for the terminal value of the Agreement because the award was fully supported by Matrix's expert under the preeminent method in Delaware for calculating the value of corporate assets, *Neal v. Alabama By–Products Corp*, 1990 WL 109243 (Del. Ch. Aug. 1, 1990), *aff'd*, 588 A.2d 255 (Del. 1991), *Cede & Co. v. Technicolor, Inc.*, 1990 WL 161084 (Del. Ch. Oct. 19, 1990), *aff'd in part, rev'd in part on other grounds*, 634 A.2d 345 (Del. 1993)?

8. Did the court erroneously grant the defendants' motion to dismiss Matrix's claim under the Florida Deceptive and Unfair Trade Practices Act because the Florida Legislature expressly authorized suits by

not only "consumers," but also "persons," Fla. Stat. § 501.211(2); *Beacon Property Management, Inc. v. PNR, Inc.*, 890 So. 2d 274 (Fla. Dist. Ct. App. 2004); *American Honda Motor Co. v. Motorcycle Information Network, Inc.*, 390 F. Supp. 2d 1170 (M.D. Fla. 2005)?

9. Did the court erroneously dismiss Matrix's claim for punitive damages under Florida law by applying the standard contained in a 1936 decision instead of the superseding Florida statute governing punitive damages, Fla. Stat. § 768.72; *Standard Jury Instructions Civil Cases No. 96–1*, 689 So. 2d 1042 (Fla. 1997)?

STATEMENT OF THE CASE

This is an appeal and cross–appeal following a five–day jury trial in which the jury found that Rawlings breached an agreement granting Matrix an exclusive, continuous license to use Rawlings' trademarks on team and personal equipment bags, and K2 tortiously interfered with Matrix's business relationships.

On January 30, 2004, Matrix sued Rawlings in the District of Maine ("Maine court"), alleging a breach of the exclusive license Agreement, App. 52–60, which was attached to the complaint. App. 61–85. One business day after receiving a courtesy copy of the complaint, on February 2, 2004, Rawlings filed a bare bones breach of contract complaint in the Eastern

District of Missouri ("Missouri court"), App. 105–108, and sent a letter purporting to terminate the Agreement on the sole grounds that Matrix had allegedly failed to use its "best efforts" under the Agreement. App. 134–35.

In response to this escalation, on February 17, 2004, Matrix filed a motion for a temporary restraining order and preliminary injunction in Maine. App. 161. Although the Maine court (Hornby, J.) found that Matrix had a "very strong" likelihood of success on the merits, it declined to award injunctive relief on the ground that damages would rectify the breach, which was affirmed on appeal. *Matrix Group Ltd. Inc. v. Rawlings Sporting Goods Co.*, 378 F.3d 29 (1st Cir. 2004). Following the trial, the Missouri court (Webber, J.) denied Matrix's motion for a permanent injunction. App. 890–93.

At the same time the Maine court denied Matrix's motion for a preliminary injunction, it granted Rawlings' motion to transfer venue to the Eastern District of Missouri. App. 252. On March 10, 2004, Matrix filed its answer, and asserted claims against Rawlings and K2. App. 254–74. Subsequently, the court granted Matrix's motions to consolidate the two cases and realign the parties. App. 304–305.

On November 23, 2004, Matrix filed a motion for partial summary judgment on Matrix's eighth claim and on Rawlings' sole claim for relief, both of which concerned the propriety of Rawlings' purported termination of the Agreement on February 2, 2004. App. 319–20. On April 13, 2005, the court granted Matrix's motion, finding that termination was improper under the Agreement because Rawlings did not give Matrix notice and an opportunity to cure prior to termination. Add. 6–12, 27.

On February 17, 2005, the defendants filed a motion to dismiss Matrix's claim based on the Florida Deceptive and Unfair Trade Practices Act. App. 369–71. At the same time, Rawlings filed a motion for summary judgment on Matrix's contract claims based on a new theory that Matrix was "insolvent," and thus, the termination was proper. *Id.* The defendants also sought summary judgment on Matrix's tortious interference claims, asserting that their interference, if any, was justified. *Id.* On April 13, 2005, the court granted summary judgment against Rawlings on its insolvency argument, granted the motion to dismiss Matrix's FDUTPA claim, granted summary judgment against Matrix on the tortious interference claim asserted against Rawlings, and granted summary judgment against Matrix on one of its two theories of tortious interference asserted against K2. Add. 12–27.

The jury trial began on May 2, 2005. While the jury was deliberating concerning the compensatory claims, on May 6, 2005, the court considered K2's renewed motion for judgment on Matrix's punitive damages claim.

App. 769–72, 818–21. Applying the standard articulated in *Winn & Lovett Grocery Co. v. Archer*, 126 Fla. 308, 171 So. 214 (1936), the court dismissed the claim. Trial Transcript ("Tr.") (Volume: Page) 4: 110–20.

In response to questions on the jury verdict form, on May 9, 2005, the jury found that Rawlings breached the Agreement and awarded Matrix $4,096,312 in damages for a 10–year period, and $2,053,688 in damages for the period beyond 10 years. Add. 93. In response to a single question, the jury found that K2 tortiously interfered with Matrix's business relationships, and awarded Matrix $2,500,000 in damages. Add. 94.

On May 19, 2005, the defendants filed post–trial motions for judgment and for a new trial. App. 864–89. On July 27, 2005, although the court concluded that the Agreement had value at the end of the 10–year period, the court nevertheless granted the motion for judgment challenging that portion of the damages award. Add. 42–59. The court otherwise denied the defendants' motions. *Id.* On November 10, 2005, the court awarded Matrix attorneys' fees and costs under the Agreement and pursuant to Fed. R. Civ. P. 54(d). Add. 61–82. On December 9, 2005, the defendants filed their notice of appeal, and on December 22, 2005, Matrix filed its notice of cross–appeal. App. 1010, 1023.

STATEMENT OF FACTS

In contrast to the defendants' approach, *see* Appellants' Brief 3–13, "[w]e review the facts in the light most favorable to the jury verdict." *McGuire v. Tarmac Environmental Co.*, 293 F.3d 437, 439 (8th Cir. 2002) (citation omitted) (breach of contract and tortious interference action).

Matrix became Rawlings' exclusive equipment bag licensee in 1994, and the parties entered into the exclusive license Agreement on July 31, 1996, which they amended on several occasions. App. 61–85; Trial Exhibit ("Ex.") P–1. When Matrix took over Rawlings' equipment bag business, Rawlings had sales of approximately $300,000 a year, which Matrix increased to over $3,000,000 a year, although the sales had declined in the last few years. Tr. 2: 132–33.

According to the President of Matrix, Louis Orloff, and seconded to some degree by current and former Rawlings' executives, the recent declines were due to a number of factors, such as bankruptcies among sporting goods retailers, the emergence of Nike, questionable Rawlings business decisions, and the like. Tr. 2: 135–37, 151–53, 3: 102, 235–40; Ex. P–7A, P–65; *see also* Tr. 1: 129–30, 136, 143–45 (competing bag sale declines). At trial, Rawlings' current executives claimed that the declines were due to Matrix's failure to use its "best efforts" to promote Rawlings' equipment bags, although they acknowledged that Rawlings had neither informed Matrix it was not using its "best efforts," nor written to Matrix in over two years. Add. 4; Tr. 1: 124, 127–28, 166–67; *accord* App. 331, 343.

Under the Agreement, Matrix had an exclusive, continuous license to use Rawlings' trademarks in connection with the manufacture, sale, distribution, advertising, and promotion by Matrix of the licensed products, including specifically team and personal sporting equipment bags. App. 61–62 (Agreement ¶ 1.1). Consistent with Matrix's exclusive license, Rawlings agreed and covenanted that:

- it will "not now or during the term of this agreement manufacture, sell, distribute, advertise, or promote any personal or team equipment bags that compete with Matrix's equipment bags." App. 81 (Agreement ¶ 1.7).
- "neither it nor any other licensee will make and sell bags which exceed 32 inches in overall length, 28 inches in length of any compartments, 15 inches in height and 18 inches in width unless agreed to by the parties." App. 65 (Agreement ¶ 7.3).
- "neither it nor any other licensee, subsidiary or affiliate will make or sell bags which exceed said size restrictions [set forth in paragraph 7.3]. . ." App. 82 (Second Amendment and Restatement ¶ 10).
- "Rawlings, its subsidiaries and affiliates shall immediately cease manufacturing, sale, distribution, advertising and promotion of team or personal equipment bags of any kind in conjunction with the Trademarks, whether individually, or in conjunction with another Rawlings' trademark or any names or marks of its subsidiaries or affiliates, and shall not authorize any other party to use the Trademarks in any such manner." App. 80 (Agreement ¶ 1.6).

Matrix's exclusive license was continuous as long as Matrix met the sales targets set forth in the Agreement and did not otherwise breach the Agreement. App. 61–63, 68 (Agreement ¶¶ 1.1, 3, 14). Matrix met or exceeded the Agreement's sales targets every year by at least 150%. Tr. 2: 119, 3: 156, 159–60. Both Orloff and Matrix's expert at trial, Donna Smith, testified that without any sales growth, Matrix would continue to meet its sales targets set forth in the Agreement until 2028. Tr. 2: 119–20, 3: 158. Indeed, Liz Daus, the former Director of Licensing for Rawlings, considered the Agreement "continuous" and that it would "keep going and going and going." Tr. 3: 230.

K2 acquired Rawlings in December 2002 and obtained all of Rawlings' license agreements as part of its due diligence. Tr. 3: 26–27. After firing Rawlings' President, Steve O'Hara, in 2003 for failing to carry out K2's directives in a sufficiently aggressive manner, the President of K2, Wayne Merck, was essentially running Rawlings during the summer of 2003. Tr. 1: 93–94, 3: 41–43, 75–76. As the CEO of K2, Richard Heckmann, explained, K2 aggressively acquired and consolidated subsidiaries, and adopted a "take no prisoner" attitude towards new subsidiaries whose executives were expected to do whatever it took to achieve the required financial results or look elsewhere for work. Tr. 3: 45–47.

K2 acquired Rawlings' former competitor, Worth, Inc., in September 2003, and then installed Worth's former president, Robert Parish, as Rawlings' new president. Tr. 1: 87–88. K2 intended to combine the operations of Rawlings and Worth "from the outset," and Rawlings announced the combination in January 2004. Tr. 1: 155–56, 3: 57–59; Ex. P–120A at 81–82, P–74.

In September 2003, Orloff wrote Rawlings that the apparent plan to consolidate the Rawlings and Worth sales forces would violate the Agreement, and Parish immediately forwarded Orloff's letter to K2. Tr. 1: 94–97; Ex. P–4. K2 and Rawlings nevertheless decided to proceed with the consolidation. Tr. 1: 106–108, 3: 65–67, 71–72. Merck testified that Parish told him that Parish did not think he would be able to hit the objectives Merck had established for him because of the Matrix Agreement, but Merck believed that Parish understood he nevertheless was expected to produce returns. Ex. P–120A at 94–97.

In late 2003, Rawlings began to implement K2's plan to consolidate portions of the Rawlings and Worth sales forces into a single sales organization under Rawlings. Tr. 1: 157–58, 3: 90–92. Rawlings' President and its sales executives all acknowledged that in 2004 Rawlings began to sell equipment bags produced by a former *competitor* of Rawlings — now its affiliate — that directly competed with the bags sold by Matrix. Tr. 1: 157–62, 168–69, 2: 60, 3: 90–92; *accord* Tr. 1: 117–18, 3: 103–106. Rawlings' executives readily acknowledged that Rawlings used the same sales people to sell the competing equipment bags that Matrix relied upon to market the Rawlings brand bags. Tr. 1: 158–62, 3: 91–92. After Rawlings proceeded with implementation of the consolidation in January 2004 over Matrix's objection, Matrix filed suit. Tr. 2: 155–56.

While the suit was pending, K2 acquired another competitor of Rawlings, Miken, Inc., and, at the time of trial, was developing plans to have the same sales people who sold Rawlings equipment bags also sell Miken's equipment bags. Tr. 3: 65, 84–85, 90. After the district court ruled in April 2005 that the termination of Matrix was ineffective due to Rawlings' failure to comply with the notice and cure provision of the Agreement, Rawlings' executives testified that they took no steps to stop selling competing bags in violation of the Agreement. Tr. 1: 170–74, 3: 104, 106.

SUMMARY OF ARGUMENT

Rawlings' Appeal. The district court properly entered summary judgment against Rawlings on the wrongful termination of the Agreement. Rawlings mischaracterizes the record when it claims that Matrix did not dispute it failed to use its "best efforts" under the Agreement, and, more importantly, the claim is immaterial because Rawlings did not comply with the notice and cure provision of the Agreement before attempting to terminate the Agreement. Rawlings was given free rein to introduce its "best efforts" evidence at trial, which the jury rejected.

The district court also properly rejected Rawlings' after–the–fact defense based on Matrix's alleged insolvency, raised for the first time a year after the alleged termination occurred. Rawlings did not assert the insolvency defense as an affirmative defense, and did not comply with the notice provision before attempting to terminate the Agreement. Moreover, Matrix was not insolvent.

Rawlings' attack on the damages award is nothing more than an entreaty that the jury should have believed its expert instead of Matrix's expert. Rawlings never challenged Matrix's expert on *Daubert* grounds, and her carefully reasoned opinion fully supported the jury's award.

K2's Appeal. Under controlling Florida law, as interpreted in a case with similar facts, K2 engaged in tortious interference against Matrix. Most of K2's contentions are new arguments after trial, and thus are not cognizable on appeal. Moreover, K2's contentions are contrary to the evidence that a reasonable juror could have believed.

K2's challenges to the jury instructions are equally unavailing. K2 never challenged the instructions on the grounds asserted on appeal. Even if K2 had not waived its objections, the jury instructions properly stated the law. Finally, the evidence — particularly the testimony of K2's senior executives — fully supported the jury's verdict against K2.

Matrix's Cross–Appeal. The district court erroneously granted Rawlings' renewed motion for judgment after trial on the "terminal value" of the Agreement even though the court recognized that the continuous Agreement had value at the end of 10 years. Matrix's expert determined the remaining value of the Agreement after 10 years using a well–respected valuation formula frequently employed by the Delaware courts. The jury was entitled to utilize this expert testimony to award damages.

The district court erroneously granted the defendants' motion to dismiss Matrix's claim under the Florida Deceptive and Unfair Trade Practices Act because the Florida Legislature expressly broadened the scope of the statute to entertain suits by not only "consumers" but also "persons." Florida courts frequently permit businesses to assert claims under this statute.

The district court erroneously granted K2's motion for judgment on Matrix's claim for punitive damages under Florida law by applying the standard from a 1936 case instead of the superseding Florida statute governing punitive damages. The jury, and not the judge, should have determined if Matrix was entitled to punitive damages.

ARGUMENT

I. THIS COURT SHOULD DENY RAWLINGS' APPEAL.

A. The District Court Properly Granted Matrix Partial Summary Judgment Because Rawlings Failed To Comply With The Notice And Cure Provision To Terminate The Agreement.

Rawlings contends that the district court erroneously granted summary judgment concerning wrongful termination of the Agreement because Matrix failed to use its "best efforts" under the Agreement. *See* Appellants' Brief at 15–20. This court reviews *de novo* the district court's grant of summary judgment. *Johnson v. Metropolitan Life Ins. Co.*, 437 F.3d 809, 812 (8th Cir. 2006). Rawlings premises its argument on a mischaracterization of the record and a misapplication of the terms of the Agreement.

Rawlings begins its argument by alleging numerous facts that it claims show Matrix failed to use its "best efforts" under the Agreement, and then claiming "Matrix did not address this evidence, which was undisputed." Appellants' Brief at 15. That is untrue. Other than the temporary decline in sales, Matrix specifically denied the asserted facts that allegedly showed it failed to use its "best efforts" to sell equipment bags. App. 356–63; *see* Add. 2 (district court noting denial). In any event, these facts were immaterial because Rawlings did not comply with the notice and cure provision of the Agreement.

Furthermore, contrary to Rawlings' assertion that it was somehow prevented from asserting its "best efforts" defense at trial, *see* Appellants' Brief at 20–21, the summary judgment ruling did not preclude Rawlings from asserting this defense at trial. We briefly set the stage procedurally.

On November 23, 2004, Matrix filed a motion for partial summary judgment on Matrix's eighth claim and on Rawlings' sole claim for relief, both of which concerned the propriety of Rawlings' purported termination of the Agreement on February 2, 2004. App. 319–20. The motion also sought summary judgment on Rawlings' second affirmative defense based on Matrix's failure to use its "best efforts" under the Agreement. *Id.*; *see* App. 292. On April 13, 2005, the district court granted Matrix's motion in part, dismissing Rawlings' claim *without prejudice* and finding that Rawlings' attempted termination was improper under the Agreement because Rawlings did not give Matrix notice and an opportunity to cure prior to termination. Add. 6–12, 27. The court did *not* dismiss Rawlings' second affirmative defense based on its "best efforts" argument. *Id.* On April 29, 2005, the court denied Matrix's motion *in limine* to exclude evidence that Matrix allegedly failed to use its "best efforts" under the Agreement. App. 746–48.

Although Rawlings offered a substantial amount of evidence at trial it claimed showed Matrix did not use its "best efforts," Rawlings did not seek a jury instruction on its "best efforts" defense. *See* App. 701–15. Under Delaware law, which the parties agreed governed the contractual dispute, Rawlings had the burden of proof on this alleged defense, and Matrix had no obligation to rebut it. *Cf. Tanner v. Exxon* Corp., 1981 WL 191389, *4 (Del. Super. July 23, 1981) (burden of proving affirmative defense of mitigation in contract case on defendant); *VLIW Technology, LLC v. Hewlett–Packard Co.*, 840 A.2d 606, 612 (Del. 2003) (elements of breach of contract claim include only existence of contract, breach, and damages).

Before embarking on a discussion of Delaware law, we pause briefly to consider the role of unreported decisions in Delaware. Because Delaware permits the citation of unreported decisions, Delaware courts regularly rely on unreported decisions, and therefore, it is appropriate to consider such decisions in determining Delaware law. *See Cerabio LLC v. Wright Medical Technology, Inc.*, 410 F.3d 981, 989 n.4 (7th Cir. 2005) (notwithstanding Seventh Circuit rule on unreported decisions, appropriate to consider such decisions in determining Delaware law because Delaware courts rely on unreported decisions).

The district court properly granted Matrix summary judgment on the issue of whether the termination was proper under the Agreement. The parties agree that Delaware law controls interpretation of the Agreement. Appellants' Brief at 16; App. 70 (Agreement ¶ 23). Thus, Rawlings' lengthy discussion of cases from other jurisdictions, *see* Appellants' Brief at 16–19, many of which were also found to be factually inapposite by the district court, Add. 11, is entirely beside the point.

As the district court noted, "[w]here a contract is unambiguous, a court should enforce the contract according to its unambiguous terms." Add. 11 (citing *Continental Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1236 (Del. Ch. 2000); *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 704 (Del. Ch.), *aff'd*, 861 A.2d 1251 (Del. 2004). Further, Rawlings does not challenge the court's conclusion that "[t]he 'intent of the parties must be ascertained from the language of the contract.'" Add. 7

(quoting *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992)). Rawlings likewise has no quarrel with the court's observation that "[i]n ascertaining the intent of the parties, the contract should be read as a whole and interpreted in a manner which reconciles all provisions of the document, if possible." Add. 7 (citing *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996)).

As the district court concluded, Add. 8–9, the termination provisions of the Agreement are pellucid — absent termination for failure to meet sales targets (App. 62–63; Agreement ¶ 3) and absent immediate termination for insolvency, bankruptcy, government intervention, or lapse of liability insurance (App. 68; Agreement ¶ 14.1), Rawlings could *only* terminate the Agreement after providing notice and an opportunity to cure the alleged breach:

> If either Matrix or Rawlings breaches any of the provisions of this Agreement and fails to remedy the default within thirty (30) days after receiving written notice thereof, then the other party will have the right to terminate this Agreement upon giving thirty (30) days written notice to the breaching party.

App. 68 (Agreement ¶ 14.2).

Rawlings conceded that before it allegedly terminated the Agreement on February 2, 2004, it did not provide any prior notice that Matrix had breached the Agreement, nor did it provide Matrix with any opportunity to cure any alleged breach. App. 329–31, 342–43. In fact, Rawlings conceded that it had not written to Matrix for over two years concerning Matrix's efforts to sell equipment bags. App. 331, 343.

Rawlings' failure to comply with the Agreement's notice and cure provision vaporizes its retaliatory attempt to terminate the Agreement after Matrix filed suit to enforce the Agreement. Under Delaware law, the failure to follow contractual termination provisions renders the termination invalid. *Witco Chem. Corp. v. Dow Chem. Co.*, 623 F. Supp. 308, 315 (D. Del. 1985), *aff'd,* 795 F.2d 1019 (Fed. Cir. 1986) (contractual termination procedures under license agreement never triggered because plaintiff failed to comply with requirement to give written notice of alleged breach). Moreover, a defendant may not excuse its breach of contract by claiming that the plaintiff was in breach when the defendant failed to give the plaintiff notice of the alleged breach and an opportunity to cure. *See Harper v. Delaware Broadcasters, Inc.*, 743 F. Supp. 1076, 1084 (D. Del.), *aff'd,* 932 F.2d 959 (3d Cir. 1991); *accord U.S. Bank Nat'l Ass'n v. U.S. Timberlands Klamath Falls, LLC,* 2004 WL 1699057, *3 & n.24 (Del. Ch. July 29, 2004) (applying New York law, but citing *Harper* and collecting cases).

Rawlings asserts "a notice procedure is not the exclusive means of termination where a party is in material breach." Appellants' Brief at 17.

However, the two unreported lower court cases from Delaware (one from the Court of Common Pleas) cited by Rawlings did not even involve contracts with notice and cure provisions, and neither case has ever been cited by any court for any proposition. As the district court observed, "[t]he parties have presented the Court with no case applying Delaware law in which a party was permitted to terminate a contract notwithstanding an unambiguous notice and cure provision, and the Court has found no such case." Add. 11–12.

Regardless of whether a party must continue to perform its obligations under a contract if the other party repudiates the contract, *see* Appellants' Brief at 18–19, which Rawlings did *not* claim in the district court was the situation here, *see* App. 335–38, if a party wishes to terminate a contract, it must comply with the contractual notice and cure provision. *See Harper*, 743 F. Supp. at 1084; *Witco*, 623 F. Supp. at 315. Additionally, as the district court explained, the suggestion that a party need not comply with notice and cure provisions if the other party is in material breach, *see* Appellants' Brief at 19–20, would lead to an absurd result, namely, a party would only have to comply with the notice and cure provision if the alleged breach was *nonmaterial*. Add. 9. The Agreement does not limit the notice and cure provision to nonmaterial breaches, App. 68 (Agreement ¶ 14.2), and if Paragraph 14.2 were limited to nonmaterial breaches, the Agreement then would no longer have any provision addressing termination for material breaches. Add. 9. Since "[w]ords are to be given their ordinary meaning and should not be tortured to impart ambiguity where none exists," *MBIA Ins. Corp. v. Royal Indem. Co.*, 426 F.3d 204, 210 (3d Cir. 2005) (Alito, J.) (brackets altered and quotation omitted) (applying Delaware contract law), the district court correctly determined that Rawlings did not comply with the mandatory notice and cure provision, and thus did not properly terminate the Agreement on February 2, 2004.

B. The District Court Properly Granted Matrix Summary Judgment On Rawlings' Insolvency Defense.

Rawlings challenges the district court's decision to grant summary judgment against Rawlings on its contention that the termination was proper because Matrix was purportedly insolvent on February 2, 2004. Appellants' Brief at 21–28. This court reviews *de novo* the district court's grant of summary judgment. *Johnson v. Metropolitan Life Ins. Co.*, 437 F.3d 809, 812 (8^{th} Cir. 2006). Because Rawlings never asserted this affirmative defense until it filed its motion for summary judgment on February 17, 2005, because Rawlings did not provide written notice by certified mail as required by the Agreement, and because Matrix was not insolvent, this argument implodes.

As an initial matter, Rawlings claims that it was improper for the court to grant summary judgment against it without prior notice. *See* Appellants' Brief at 25. This court, however, has held that although a district court should not grant summary judgment *sua sponte*, it is appropriate to grant summary judgment in favor of the nonmoving party. *Johnson v. Bismark Pub. School Dist.*, 949 F.2d 1000, 1004–1005 (8th Cir. 1991).

1. Rawlings Waived Its Insolvency Defense By Failing To Assert It As An Affirmative Defense.

Rawlings did not claim Matrix was insolvent when it purported to terminate the Agreement on February 2, 2004, did not raise it as an affirmative defense to Matrix's breach of contract claims (unlike its "best efforts" defense), and did not raise insolvency as an issue until it filed its summary judgment motion a year later after discovery closed. App. 134–35, 292, 539, 567. "Although the district court did not address [the prevailing party's] alternative grounds for summary judgment, this court may affirm on any basis supported by the record." *Richmond v. Higgins*, 435 F.3d 825, 828 (8th Cir. 2006) (brackets added and citation omitted).

"A party cannot obtain recovery or base its affirmative defense on legal theories that are not contained in the pleadings." *Campania Management Co. v. Rooks, Pitts & Poust*, 290 F.3d 843, 852 (7th Cir. 2002) (citations omitted). "An affirmative defense is the defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true." *Emergency One, Inc. v. American Fire Eagle Engine Co.*, 332 F.3d 264, 271 (4th Cir. 2003) (citations omitted).

This, of course, is exactly what Rawlings claims. Like its "best efforts" defense, Rawlings contends that it is a complete defense to its flagrant breach of the exclusive license Agreement that Matrix was "insolvent." Unlike the "best efforts" defense, however, Rawlings did *not* assert the "insolvency" defense as an affirmative defense in its answer or even raise the issue until February 2005. Add. 14; App. 369. Because the Federal Rules of Civil Procedure aim to eliminate trial by ambush, this defense was waived under Fed. R. Civ. P. 8(c).

2. Rawlings Waived Its Insolvency Defense By Failing To Comply With The Written Notice Provision Of The Agreement.

Rawlings contends that it was entitled to terminate the Agreement pursuant to Paragraph 14.1 of the Agreement, which provided in relevant part that "Rawlings shall have the immediate right to terminate this Agreement *upon written notice to Matrix that* … Matrix becomes or is declared insolvent[.]" App. 68 (emphasis and ellipsis added). Pursuant to

Paragraph 22 of the Agreement, "[a]ny notices provided in this Agreement will be given by registered air mail, postage prepaid[.]" App. 70.

Rawlings does not, and cannot, dispute the district court's conclusion that the only notice concerning insolvency was contained in Rawlings' summary judgment motion, which was not served by "registered air mail," but rather was delivered through the court's electronic notification system. Add. 14; App. 428, 567. Rawlings' assertion that its February 2004 letter, which referred only to the "best efforts" defense, need not even mention insolvency, *see* Appellants' Brief at 28, cannot be reconciled with the plain language of the Agreement that Rawlings may terminate the Agreement only upon written notice to Matrix that Matrix is insolvent. App. 68 (Agreement ¶ 14.1). Once again, Rawlings' failure to comply with the termination provision of the Agreement voids the purported termination. *See Witco Chem. Corp. v. Dow Chem. Co.*, 623 F. Supp. 308, 315 (D. Del. 1985), *aff'd,* 795 F.2d 1019 (Fed. Cir. 1986).

3. Matrix Was Not Insolvent.

Rawlings asserts that the district court applied the wrong standard for evaluating insolvency under Delaware law, and, applying the correct standard, Matrix was insolvent in February 2004 based on a single internal unaudited financial statement. Appellants' Brief at 21–27. Rawlings is wrong on both counts.

"Delaware courts define insolvency in two ways." *Pereira v. Farace*, 413 F.3d 330, 343 (2d Cir. 2005), *petition for cert. filed,* 74 U.S.L.W. 3363 (U.S. Dec. 05, 2005) (No. 05–731) (citation omitted). As the district court noted, "[i]n order to prevail on its insolvency defense, Rawlings must demonstrate that Matrix has either: (1) "'a deficiency of assets below liabilities with no reasonable prospect that the business can be continued in the face thereof,'" *or* (2) "'an inability to meet maturing obligations as they fall due in the ordinary course of business.'" Add. 13 (quoting *Production Resources Group, LLC v. NCT Group, Inc.*, 863 A.2d 772, 782 (Del. Ch. 2004)).

Rawlings argues that this standard only applies to receivership actions and is inapplicable here because Rawlings had the right to "immediate" termination. Appellants' Brief at 23–25. Delaware courts, however, have also applied this standard in corporate cases that did not involve receivers. *See, e.g., U.S. Bank Nat'l Ass'n. v. U.S. Timberlands Klamath Falls, LLC,* 864 A.2d 930, 947–48 (Del. Ch. 2004), *vacated on other grounds*, 875 A.2d 632 (Del. 2005) ("having liabilities in excess of the book value of assets is not dispositive of insolvency").

None of the cases cited by Rawlings, *see* Appellants' Brief at 23, support the application of a rigid, "balance sheet" test for insolvency under the terms of an exclusive trademark license between commercial entities. Rawlings not only seeks to import a standard of insolvency from the Delaware Uniform Fraudulent Conveyances Act ("DUFCA") into the contract between Rawlings and Matrix, but even the cited cases applying DUFCA do not adopt a "bright line" approach to insolvency. *See Farland v. Willis,* 1975 WL 1960, *5 (Del. Ch. Nov. 12, 1975) ("no precise evidence" of insolvency under DUFCA); *Tri–State Vehicle Leasing, Inc. v. Dutton*, 461 A.2d 1007, 1008 (Del. 1983) (insolvency under DUFCA means "without assets to pay *probable* liabilities on existing debts *as they become absolute or matured*") (emphasis added). Other cited cases obviously did not adopt a snapshot approach to insolvency. *See Callahan v. Fenimore*, 1999 WL 959204, *6 (Del. Ch. Oct. 8, 1999) ("safe to conclude" that individual debtor with debts in excess of $112,000 and assets of less than $20,000 was insolvent); *Harrington v. Hollingsworth*, 1994 WL 374313 (Del. Ch. July 6, 1994) (individual who transferred *all* of his assets over several months was insolvent under DUFCA). Finally, contrary to Rawlings' suggestion, *see* Appellants' Brief at 23, the Delaware Chancery Court has made plain that the language quoted by Rawlings in *Geyer v.*

Ingersoll, 621 A.2d 784 (Del. Ch. 1992), was not "advancing a precise definition ... in determining whether, in fact, an entity is insolvent." *Francotyp–Postalia AG & Co v. On Target Technology, Inc.*, 1998 WL 928382, *5 n.8 (Del Ch. Dec. 24, 1998) (ellipsis added). Rawlings' authorities, all of which pre–date the *Production Resources* standard relied by the district court, cannot support the weight of Rawlings' absolutist approach.

Furthermore, it makes no sense to apply a different standard simply because there is a right to "immediate" termination in the event of insolvency. The exclusive license Agreement had been in place for many years and was considered "continuous" and on–going. App. 62 (Agreement ¶ 3); Tr. 1: 116–17, 141, 3: 230. In these circumstances, Rawlings should not be able to terminate the Agreement merely because a single unaudited financial statement purported to show liabilities exceeded assets a year earlier on a single day, February 29, 2004. This "gotcha" approach to insolvency elevates bookkeeping rules over business reality. *See Francotyp–Postalia*, 1998 WL 928382 at *5 ("Defining insolvency to be when a company's liabilities exceed its assets ignores the realities of the business world in which corporations incur significant debt in order to seize business opportunities.").

In any event, Matrix was solvent. The proof of the pudding is in the eating — although Rawlings claimed in February 2005 that Matrix was insolvent in February 2004, during the intervening year, Matrix "continued to do business, buying and selling merchandise, paying its employees, and satisfying its customers' requirements." Add. 13; *see* App. 428, 567. Both before and after February 29, 2004, Matrix continued to pay "its debts as they came due in the ordinary course of business," and Matrix "continued to have access to capital from its lenders." *Id.*

There is no evidence that Matrix was insolvent, either at the time Rawlings asserted it, or a year earlier. As the district court concluded, the single internal unaudited financial statement dated February 29, 2004, did not establish that Matrix's liabilities exceeded its assets. Add. 13. As Orloff explained, and as confirmed by Matrix's financial expert, the balance sheet included as liabilities capital contributions made to Matrix by Orloff and other Matrix insiders that Matrix had no binding obligations to repay. App. 428, 567–68. Once those entries are characterized properly as contributions to equity by Matrix's sole shareholder, Matrix's assets easily exceeded its liabilities. *Id.*

Although Rawlings now seeks to challenge the explanations of Matrix's president and accounting expert, *see* Appellants' Brief at 25–27, it did make its current arguments in the district court. App. 567–68. Suffice it to say, simply establishing in the district court that Matrix's internal financial statements were generally "accurate" (and relied upon "at some level," App. 388, 426) was insufficient to create a genuine dispute that Matrix was insolvent. *Cf. Helfter v. United Parcel Service, Inc.*, 115 F.3d 613, 616 (8th Cir. 1997) (conclusory statements insufficient to withstand properly supported summary judgment motion).

C. The District Court Properly Denied Rawlings' Motion For A New Trial Because Matrix's Damages Were Fully Supported By Expert Testimony.

Rawlings contends that it is entitled to a new trial because Matrix's damages were against the weight of the evidence, resulting in a miscarriage of justice. Appellants' Brief at 29–33. This court reviews the decision to deny a motion for a new trial with great deference, reversing only if the district court clearly abused its discretion. *Zutz v. Case Corp.*, 422 F.3d 764, 772 (8th Cir. 2005). Rawlings' argument that the jury had to accept its expert's testimony instead of Matrix's expert testimony is bootless.

"A district court may grant a new trial on the basis that the verdict is against the weight of the evidence, if failing to do so would result in a miscarriage of justice." *Harris v. Secretary of Army*, 119 F.3d 1313, 1318 (8th Cir. 1997) (citations omitted).

> The district court's discretion is not boundless, however. ... [T]he district court is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

White v. Pence, 961 F.2d 776, 780 (8th Cir. 1992) (brackets and ellipsis added and citations omitted); *see also Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1123 (8th Cir. 1999) ("The district court's denial of a motion for a new trial, meanwhile, is virtually unassailable when the verdict is claimed to be against the weight of the evidence.") (quotation omitted).

Certainly, "the trial judge may not usurp the functions of a jury … [which] weighs the evidence and credibility of witnesses." *White*, 961 F.2d at 781 (brackets and ellipsis added by court and quotation omitted). Thus, "[w]here reasonable men can differ in evaluation of credible evidence, a new trial on the ground of weight of the evidence should not be granted." *Id.*

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair–minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.

Lavender v. Kurn, 327 U.S. 645, 652 (1946). Rawlings' motion for a new trial cannot clear this high bar.

Rawlings begins its attack with an entirely new argument, namely, that Matrix did not demonstrate any damage resulting from "pre–termination breach of the Agreement." Appellants' Brief at 29. This not only is a new argument not cognizable on appeal, *see Alexander v. Pathfinder, Inc*, 189 F.3d 735, 742 (8th Cir. 1999), but it does not even make sense because Rawlings never effectively terminated the Agreement. Whether by *de facto* destroying Matrix's license rights through directing Rawlings' salespeople to sell competing equipment bags and failing to use Matrix to sell Rawlings equipment bags, or by informing Matrix that it was no longer the licensee, the harm inflicted on Matrix was lost profits through lost sales, *i.e.*, destruction of its equipment bag business. This court should not countenance the defendants' attempt to transform Rawlings' wrongful and ineffective termination into an artificial distinction that denies Matrix damages awarded by the jury based on Rawlings' breaches of the Agreement.

Rawlings' challenges to Smith's expert testimony are equally unavailing. It bears noting that Rawlings did not make a *Daubert* challenge to Smith's expert opinion, and thus the conflicting trial testimony on damages presented a garden–variety "battle of the experts" that the jury could accept or reject, in whole or in part. *Cf. True North Composites, LLC v. Trinity Indus., Inc.*, 191 F. Supp. 484, 526 (D. Del. 2002), *aff'd in part, rev'd in part on other grounds*, 65 Fed. Appx. 266 (Fed. Cir. 2003) ("The existence of evidence to the contrary demonstrates only that the amount of damages was contested, not that it is speculative."). Against this backdrop, we consider Rawlings' specific challenges *seriatim.*

First, Rawlings attacks Smith's decision to begin her calculations with assumed sales of $1,180,000 in 2004, which represented the median of Matrix's sales over the prior four years. Appellants' Brief at 29–30. As conceded by Rawlings' expert, James Castellano, it makes sense to use a median in a volatile industry. Tr. 4: 35–37, 52. Smith explained that she was not projecting actual sales in 2004, as Rawlings claims, but rather she was using a median as a starting point because it was a volatile industry. Tr. 3: 152–53, 155, 210. Smith's starting point was, if anything, conservative because Rawlings executives, using the same sales force that Matrix used, had projected sales in 2004 of between $1,000,000 and $4,000,000. Tr. 1: 136–37, 3: 92–94, 107–108, 154–55; Ex. P–13A, P–114A.

Second, Rawlings claims that Smith's decision to use a growth rate based on overall industry standards was unreasonable. Appellants' Brief at

30–32. Smith explained the reasoning behind her decision, and even Castellano accepted Smith's growth rate. Tr. 3: 149–51, 4: 42, 44. Rawlings had similar growth numbers built into its projected revenue numbers. Tr. 1: 136–37. Orloff was optimistic about the future of Matrix's bag business. Tr. 2: 154–55, 205–206. Because Matrix had outperformed the industry standard since taking over the Rawlings' equipment bag business in 1994, Tr. 3: 209, this was, once again, a conservative number.

Third, Rawlings argues that Smith unreasonably attributed only $1,172 to the Rawlings equipment bag business. Appellants' Brief at 32. This mischaracterizes her testimony. After scrutinizing Matrix's financial statements, including sending a senior member of her staff to Florida to interview Orloff and inspect the books and the facilities, Smith concluded that $1,172 in costs were unavoidable in the future, *not* that only $1,172 in costs were attributable to the Rawlings business. Tr. 3: 134–35, 148–49, 195–96, 208–209, 212. The jury was certainly entitled to credit her testimony over Castellano, who did not claim even passing familiarity with the industry, did not speak to any one at Matrix, did not inspect the facilities, and could not offer any opinion on the specific costs that should be deducted from Matrix's balance sheet based on the Rawlings business. Tr. 4: 38–39, 43. At the suggestion of Rawlings' counsel in closing argument, the jury took Matrix's balance sheet into the jury room and studied it carefully. Tr. 4: 90–91, 109–10. Rawlings cannot complain now because the jury rejected Rawlings' interpretation of that balance sheet.

Fourth, Rawlings argues that Matrix failed to mitigate its damages by selling other equipment bags or replacing the Rawlings business "with something else." Appellants' Brief at 33. Rawlings, however, does not point to *any* evidence at trial to support this argument. Its own expert never identified any amount to be deducted based on this theory, and Rawlings never sought a jury instruction on mitigation, both of which are fatal to its argument since Rawlings had the burden of proof on this affirmative defense, which was never asserted in its answer. *See Tanner v. Exxon Corp.*, 1981 WL 191389, *4 (Del. Super. July 23, 1981) (defendant had burden of proof on mitigation, which was an affirmative defense).

In fact, Matrix mitigated to the extent it could. Even after the purported termination, Matrix filled pending orders for Rawlings equipment bags from its inventory, reducing its damages for unsold Rawlings product. Tr. 2: 172, 3: 160. The evidence showed, however, that there was no viable way for Matrix to recoup the destruction of its equipment bag business resulting from Rawlings' breaches of the Agreement. Orloff's testimony made clear that without an established brand, it was impossible to compete in the bag business. Tr. 2: 108–109, 131, 170–71. Rawlings certainly never suggested Matrix could establish another brand or acquire another famous or enduring trademark.

None of the cases cited by Rawlings, *see* Appellants' Brief at 33, suggests that Matrix should have mitigated its damages by getting into a different business after Rawlings breached the Agreement. In *American General Corp. v. Continental Airlines Corp.*, 622 A.2d 1, 11 (Del. Ch.), *aff'd mem.*, 620 A.2d 856 (Del. 1992), the court observed "[w]hile there is a general duty to mitigate damages if it is feasible to do so, a plaintiff need not take unreasonably speculative steps to meet that duty." In *Ripsom v. Beaver Blacktop, Inc.*, 1988 WL 32071, *15 (Del. Super. Apr. 26, 1988), *aff'd mem.*, 567 A.2d 418 (Del. 1989), the court rejected an attack on the damages because it was "essentially a battle of the experts." In *Gannett Co. v. Kanaga*, 750 A.2d 1174 (Del. 2000), the court rejected another "battle of the experts" in a defamation action. Neither the law nor the evidence supports Rawlings' "mitigation" argument.

II. THIS COURT SHOULD DENY K2'S APPEAL.

A. The District Court Properly Denied K2's Motion For Judgment On The Tortious Interference Claim.

K2 challenges the district court's decision denying its renewed motion for judgment on a number of grounds, most of which are unsheathed for the first time on appeal. Appellants' Brief at 33–51. This court reviews *de novo* a district court's denial of a motion for judgment as a matter of law, while examining the evidence in the light most favorable to the prevailing party and viewing all inferences in the prevailing party's favor. *Zutz v. Case Corp.*, 422 F.3d 764, 769 (8th Cir. 2005). This court may not consider K2's new arguments on appeal. Even considering these new arguments, this court should conclude that the district court properly denied K2's motion for judgment.

On a motion for judgment under Fed. R. Civ. P. 50(b), the court must not disturb the jury's verdict "unless no reasonable juror could have found for the non–moving party based on the trial record." *Sanders v. May Dep't Stores Co.*, 315 F.3d 940, 943 (8th Cir.), *cert. denied*, 539 U.S. 942 (2003) (citation omitted). Thus, the court draws "all reasonable inferences in favor of the non–moving party and [does] not make credibility determinations or weigh the evidence." *Kipp v. Missouri Highway & Transp. Comm'n*, 280 F.3d 893, 896 (8th Cir. 2002) (quotation omitted and brackets in original).

Moreover, the court must "assume that the jury resolved all conflicts of evidence in favor of the [non–moving] party," and take as true "all facts which the prevailing party's evidence tended to prove." *Walsh v. Nat'l Computer Sys., Inc.,* 332 F.3d 1150, 1158 (8th Cir. 2003) (citation omitted and brackets in original). Therefore, K2 must show that there is "a complete absence of probative facts" to support the verdict. *Id.* at 1158 (quoting *Browning v. President Riverboat Casino–Missouri, Inc.,* 139 F.3d 631, 634 (8th Cir. 1998)).

1. K2 Has Waived Almost All Of Its Challenges By Failing To Assert Them At Trial.

K2 cannot now seek to overturn the jury verdict on grounds that were not presented during trial. "By definition, a Rule 50(b) motion is a renewal of a prior Rule 50(a) motion made at the close of the evidence and as such is limited to the issues raised in the previous motion." *Andreas v. Volkswagen of America, Inc.*, 336 F.3d 789, 794 (8th Cir. 2003). Accordingly, new arguments advanced by K2 in its motion for judgment following the verdict are barred. *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1061 (8th Cir. 1993). In addition, this court does not consider arguments not raised in the district court. *Alexander v. Pathfinder, Inc*, 189 F.3d 735, 742 (8th Cir. 1999).

In its motion for judgment at the close of the plaintiff's case, the *only* argument K2 presented was,

> Matrix has introduced no evidence that K2's actions in consolidating Rawlings and Worth, Inc. were not justified, or that K2 used improper means, e.g., physical violence, misrepresentations or illegal conduct in its consolidation of the sales forces of Rawlings and Worth, Inc.

App. 763; *see also* Add. 52 (district court's similar description of K2's motion); App. 809–12 (similar grounds asserted by K2 at the close of the evidence).

Therefore, K2 has waived most of the arguments it now makes on appeal: (1) K2's argument that Matrix failed to establish "pre–termination breaches" of the Agreement (Appellants' Brief at 33–37) debuts on appeal; (2) K2's argument that Matrix failed to establish an "indirect termination theory" at trial (*id.* at 43–44) appears for the first time on appeal; (3) K2's argument that Matrix failed to prove K2 "purposefully caused a wrongful termination" of the Agreement (*id.* at 49–50) was a new argument after trial; and (4) K2's argument that Matrix failed to prove damages from the resulting interference or that the damages were duplicative (*id.* at 35–37, 51), was only raised in passing *after* trial, and the district court specifically found that K2 had waived any challenge to the damages by failing to raise that argument at trial. Add. 57. Under the Eighth Circuit authorities quoted above, this court may not consider any of these arguments. *See also Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 991 F.2d 1533, 1540–41 (11th Cir. 1993) (refusal to consider challenges to tortious interference claim under Florida law that were not contained in original motion for judgment).

2. K2 Engaged In Tortious Interference Under Florida Law.

Although K2 correctly notes that Florida law governs Matrix's tortious interference claim, Appellants' Brief at 35, K2 never set forth the elements of such a claim under Florida law. The trial evidence easily satisfied each of the four elements of such a claim.

A claim of tortious interference under Florida law requires: (1) the existence of a contract or business relationship; (2) known to the defendant; (3) with which the defendant intentionally and unjustifiably interfered; and (4) causing damage to the plaintiff. *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1994). As the district court noted, "provided 'there is evidence proving the elements of tortious interference with a business relationship … set forth in *Ethan Allen*,' Florida law recognizes 'a claim for tortious interference against a corporation which purchases as a subsidiary a corporation which has a preexisting obligation not to compete.'" Add. 52 (ellipsis added by court and quoting *Gossard v. Adia Services, Inc.*, 723 So. 2d 182, 184–85 (Fla. 1998)); *cf. Gossard v. Adia Services, Inc.*, 173

F.3d 825 (11th Cir. 1999) (reinstating jury verdict). Following *Gossard*, K2's motion for judgment as a matter of law faces a Sisyphean struggle.

K2 did not, and could not, dispute the first element of a tortious interference claim, namely, that Matrix had business relationships not only with Rawlings through the exclusive license Agreement, but also with retailers, and, under the terms of the Agreement, App. 65 (Agreement ¶ 7.8), with the Rawlings salespeople who sold the equipment bags. Tr. 2: 124–25, 138–39, 150–52. Not only did Matrix have legitimate contractual relationships, but, under Florida law, "[a] protected business relationship need not be evidenced by an enforceable contract." *Gossard*, 723 So. 2d at 184 (citation omitted).

K2 also did not, and could not, dispute the second element of a tortious interference claim, namely, that it was aware of these business relationships. K2 obtained all of Rawlings' license agreements as part of its due diligence, and Rawlings provided Matrix's royalty information to counsel in the spring of 2003. Tr. 2: 64–66, 3: 26–27; Ex. P–136 at 19. Furthermore, the President of K2 was essentially running Rawlings during the summer of 2003. Tr. 1: 93–94, 3: 42–43, 73.

In its motion for judgment at the close of the plaintiff's case, K2 did not dispute that it intentionally interfered with Matrix's business relationships, which is part of the third prong of a tortious interference claim. App. 760–64. In its motion at the close of all of evidence, K2 asserted in a single sentence, with no explanation or authority, that there was no evidence of intentional interference. App. 811. After trial, K2 attempted to expand its argument to claim there was no evidence K2 intended to interfere with Matrix's business relationships. App. 873–74. On appeal, K2 now offers numerous, new arguments why there was no intentional interference. Appellants' Brief at 46–50. K2 is not permitted to move the goal posts after trial in order to challenge the intentional interference element of a tortious interference claim.

Even if K2's new arguments after trial concerning intentional interference had not been waived, they are nonstarters. Parish confirmed that there was "ongoing activity with K2 corporate" concerning Matrix when he came aboard in September 2003. Tr. 1: 95. Everyone agreed that K2 directed the consolidation of Rawlings and its former competitor, Worth, Inc., even after Orloff warned Parish (who told K2) that the consolidation would inexorably violate the Agreement. Tr. 1: 96–103, 2: 143–45, 3: 59–67, 70–73, 81–82; Ex. P–123A at 40. Heckmann acknowledged that K2 took numerous steps to cut costs and make changes at Rawlings, which may have included actions concerning Matrix. Tr. 3: 43–45. K2's newly minted argument on appeal that it did not "specifically intend" to interfere with Matrix's business relationships cannot be reconciled with the evidence viewed in the light most favorable to Matrix.

Although K2 is now apparently suggesting that Matrix failed to prove causation on the ground that Rawlings' termination eliminated Matrix's business relationships, *see* Appellants' Brief at 34 n.9, this new argument on appeal has been waived. K2's novel distinction between "pre–termination" and "post–termination" breach is entirely artificial and assumes a legal conclusion expressly rejected by the district court, namely, that Rawlings' attempted termination was effective under the Agreement. Furthermore, K2's attempt to re–characterize its actions using an arbitrary timeline does not change the underlying reality — its actions, purchasing Worth and then directing the consolidation of Rawlings and Worth even after being warned that it would harm Matrix, caused Rawlings to breach the Agreement and sever Matrix's relationships with Rawlings, its retailers, and its salespeople.

> Pursuant to *Gossard,* causation is established when one intentionally and improperly interferes with a business relationship between two other parties by "inducing or otherwise causing" one party to breach or sever the business relationship.

St. Johns River Water Mgmt. Dist. v. Fernberg Geological Services, Inc., 784 So. 2d 500, 505 (Fla. Dist. Ct. App.), *review denied,* 805 So. 2d 806

(Fla. 2001) (quoting *Gossard*, 723 So. 2d at 184; Restatement (Second) of Torts § 766 (1979)). "'Induce' means to cause one party 'to choose one course of conduct rather than another.'" *St. Johns*, 784 So. 2d at 505 (quoting *Gossard*, 723 So. 2d at 185 n.1; Restatement (Second) of Torts § 766 cmt. h (1979)). "The inducement may be by persuasion or intimidation so long as the party induced is free to choose one course over another if he or she is willing to suffer the consequences." *St. Johns*, 784 So. 2d at 505 (citing *Gossard*, 723 So. 2d at 185 n.1). Matrix established that K2's interference was intentional and caused the ruptures in its business relationships, and it is too late in the day for K2 to contend otherwise.

Thus, on the third element of a tortious interference claim, this leaves K2's claim that its actions were justified. Appellants' Brief at 44–46. As the district court explained, interference may be justified under certain circumstances: "[u]nder Florida law, '*so long as improper means are not employed*, activities taken to safeguard or promote one's own financial and contractual interests are entirely non–actionable.'" Add. 52 (emphasis added and quoting *Ethyl Corp. v. Balter,* 386 So. 2d 1220, 1225 (Fla. Dist. Ct. App. 1980), *petition for review denied*, 392 So. 2d 1371 (Fla.), *cert. denied*, 452 U.S. 955 (1981).

However, "[t]he privilege is not without limit." Add. 53. "In those circumstances in which there is a qualified privilege to interfere with a business relationship, the privilege carries with it the obligation to employ means that are not improper." *McGurdy v. Collis,* 508 So. 2d 380, 384 (Fla. Dist. Ct. App.), *review denied*, 518 So. 2d 1274 (Fla. 1987). Accordingly, notwithstanding any financial interest of the defendant, "a tortious interference claim may succeed if improper methods were used." *KMS Restaurant Corp. v. Wendy's Int'l, Inc.*, 361 F.3d 1321, 1327 (11th Cir. 2004).

"The finder of fact is entitled to consider all of the circumstances when determining whether improper means have been used." Add. 53 (citing *McGurdy*, 508 So. 2d at 384).

> The justification for intentional interference "depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances among which the methods and means used and the relation of the parties are important."

McGurdy, 508 So. 2d at 384 (quoting *Insurance Field Services v. White,* 384 So. 2d 303, 306–307 (Fla. Dist. Ct. App. 1980) (tortious interference through improper violation of non–compete agreement)).

Florida courts rely on the Restatement (Second) of Torts in determining whether a defendant's actions were justified:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (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 interests sought to be advanced by the actor,
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
> (f) the proximity or remoteness of the actor's conduct to the interference, and
> (g) the relations between the parties.

McGurdy, 508 So. 2d at 383 n.1 (quoting Restatement (Second) of Torts § 767 (1979)).

As the district court noted, K2 had the burden to convince the jury that it was justified in taking the actions that interfered with Matrix's business relationships. Add. 35–38; *see* Add. 90 (jury instruction). "It appears that the question whether a defendant has engaged in conduct that goes beyond its privilege will generally be a question for the jury." Add. 53 (citing *KMS Restaurant*, 361 F.3d at 1325; *McGurdy*, 508 So. 2d at 385).

Under Florida law, causing the purposeful breach of a contract constitutes improper means. *McGurdy*, 508 So. 2d at 384; *Making Ends Meet, Inc. v. Cusick,* 719 So. 2d 926, 928 (Fla. Dist. Ct. App. 1998), *review dismissed*, 732 So. 2d 326 (Fla. 1999). The Florida Supreme Court applied this standard in *Gossard v. Adia Services, Inc.*, 723 So. 2d 182, 184–85 (Fla. 1998), which is the paradigm case of a tortious interference claim involving the acquisition of a subsidiary that has a preexisting obligation not to compete.

Although K2 obviously has a different view of evidence, *see* Appellants' Brief at 44–46, K2's argument "fails unless no reasonable juror could have found that it used improper means in undertaking the interference." Add. 56. The evidence fully supports the district court's findings:

> For example, a reasonable juror could have concluded that K2 knew about the License Agreement, that it had been informed of the consequences of acquiring Worth and combining the sales forces, that it was dissatisfied with Matrix's performance and viewed Matrix as a drain on its resources, that it viewed Matrix as an obstacle to its plans for Rawlings and its other subsidiaries, and that it took these actions with the purpose of causing harm to Matrix's existing business relationships and in an effort to rid itself of the obstacle created by having Matrix as the exclusive Rawlings licensee. Further, a reasonable juror could have concluded that K2 purposely caused Rawlings not to honor its contractual obligations and that K2 placed undue pressure on Rawlings in an effort to interfere with Matrix's relationships.

Add. 56; *see* Tr. 1: 95–97, 109, 168, 2: 143–45, 3: 27, 43–47, 59–67, 70–73, 76–77; Ex. P–4; Ex. P–120A at 49–52, 94–97; Ex. P–123A at 32.

Furthermore, K2 had a corporate mantra of "take no prisoners" in which senior executives were under tremendous pressure to consolidate newly acquired subsidiaries and achieve their financial targets or to look elsewhere for work. Tr. 3: 38–42, 47, 71, 76–77; Ex. P–120A at 94–97, 101–102. Following the firing of the prior Rawlings president for failing to act aggressively, Parish (who did not have an employment contract) did not need a weatherman to know which way the wind was blowing when he understood from K2's President that he was expected to meet his financial targets notwithstanding its possible impact on Matrix. Tr. 1: 88–89, 93–95; Ex. P–120A at 94–97, 101–102. A reasonable juror could have found K2's actions were unjustified.

Although K2 challenged the fourth element of a tortious interference claim, namely, damages, in its motion for judgment *after* trial, and again on appeal, Appellants' Brief at 35–37, 51, it did *not* challenge the damages component of Matrix's tortious interference claim in its motion for judgment at the close of the plaintiff's case, or at the close of all of the evidence. App. 760–64, 809–12. As the district court found, K2 waived such a challenge by not raising it until after trial. Add. 57; *see also Conseco Finance Service Corp. v. North American Mortgage Co.*, 381 F.3d 811, 822 (8th Cir. 2004) (refusing to consider even "eloquent and persuasive argument" on damages due to failure to comply with Fed. R. Civ. P. 50).

Even if these arguments were not waived, K2's challenge is unavailing. Although K2 claims that "Matrix was awarded every dime it sought," Appellants' Brief at 51, that is not true. Matrix's expert testified that Matrix suffered nearly $13,000,000 in damages, but the jury only awarded total damages of $8,650,000. Tr. 3: 161–62; Add. 93–94. Because the damages awarded did not exceed the total damages claimed, K2's assertion that the damages were duplicative stumbles at the threshold.

Furthermore, as K2 concedes, damages for breach of contract and for tortious interference are not co–extensive. *See* Appellants' Brief at 53–54; *Wright v. Nigh*, 399 So. 2d 515, 517 (Fla. Dist. Ct. App. 1981). There was ample evidence concerning Matrix's valuable, long–standing relationships with retailers, Tr. 2: 103–105, 111–12, 138–39, 150–53, as well as with Rawlings' salespeople. Tr. 2: 75, 124–25, 144, 189–90. Thus, in addition to the harm to the Rawlings relationship, which was not fully compensated, the jury could also award damages based on the interference with Matrix's other business relationships.

The jury would have been justified in awarding additional damages for Matrix's injuries to its relationships with third–party retailers, which originated long before its license with Rawlings, and to Matrix's overall business, including its goodwill. *See Ethan Allen,* 647 So. 2d at 815 (damages can include goodwill); *Albritton v. Gandy*, 531 So. 2d 381, 388 (Fla. Dist. Ct. App. 1998) (jury award for reputation damages entitled to "great effect" and strengthened where the judge refuses new trial). K2's eleventh–hour attack on the damages award is too little, too late.

B. This Court Should Reject K2's New Arguments Following Trial Challenging Two Jury Instructions.

K2 challenges two jury instructions on appeal. Appellants' Brief at 51–54. This court reviews the district court's jury instructions for an abuse of discretion. *Zutz v. Case Corp.*, 422 F.3d 764, 772 (8th Cir. 2005). "Our review is limited to whether the instructions, viewed on the whole, fairly and adequately represent the evidence and applicable law in light of the issues presented to the jury[.]" *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 886 (8th Cir. 2006) (ellipsis and quotation omitted). Not only did K2 fail to raise these objections during the trial, but the instructions were not erroneous, much less plainly erroneous.

1. K2 Has Waived Its Objections To Jury Instructions Nos. 7 And 9 By Failing To Object To Them At Trial.

At the jury instruction conference, K2 did not object on *any* grounds to Instruction No. 9, Tr. 4: 1–5 (separately transcribed), and K2 objected to Instruction No. 7 only on the following grounds:

> For the record, Defendants would object to Instruction #7 of the tortious interference instruction for the reasons stated in our

> motion for directed verdict in that Plaintiff has failed to make a submissible case as a matter of law and for the further reason that the instruction as proposed is far broader than the issues as framed by the pleadings and the evidence. So that objection, as you know, has already been encompassed in our motion for directed verdict.

Tr. 4: 4 (separately transcribed). K2 has waived its objections to these jury instructions under Fed. R. Civ. P. 51.

"Rule 51 makes it incumbent upon the attorneys in a civil case to ascertain how the jury is to be instructed and to state any objections before the jury retires." *Phillips v. Parke, Davis & Co.*, 869 F.2d 407, 409 (8th Cir. 1989).

> The purpose of Rule 51 is to compel litigants to afford the trial court an opportunity to cure a defective instruction and to prevent litigants from ensuring a new trial in the event of an adverse verdict by covertly relying on the error.

Cross v. Cleaver, 142 F.3d 1059, 1068 (8th Cir. 1998) (citations omitted). K2's failure to object waived any objection to Instruction 9.

"Not only is an objection required, but a general objection [is] insufficient to preserve the specific objections to the instruction that appellant may subsequently seek to raise on appeal." *Id.* (brackets added by court and quotation omitted). "A party cannot preserve a claim of instructional error for appellate review unless he makes a sufficiently precise objection and also proposes an alternative instruction." *United States v.*

Looking Cloud, 419 F.3d 781, 788 (8th Cir. 2005) (citation omitted). Suffice it to say, K2's general objections to Instruction No. 7 that Matrix failed to prove its case and that the instruction was somehow overbroad are insufficient to preserve the specific, different, objections to Instruction No. 7 presented now. *See Cross*, 142 F.3d at 1068. K2 does not, and cannot, contend that either instruction amounted to "plain error," which occurs only in the "exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Figge Auto Co. v. Taylor*, 325 F.2d 899, 907 (8th Cir. 1964) (citation omitted).

2. Instruction No. 7 Was Neither Erroneous Nor Plainly Erroneous.

Rawlings challenges Instruction No. 7, which provides:

> On Plaintiff's claims against defendant K2 for tortious interference with business relationships, your verdict must be for plaintiff, if you believe:
> First, plaintiff had existing business relationships; and
> Second, defendant interfered with those business relationships; and
> Third, defendant K2 did so intentionally and without justification; and
> Fourth, plaintiff was thereby damaged,
> Unless you believe plaintiff is not entitled to recover by reason of Instruction No. 8.

Add. 89. As this court often observes, the "district court has broad discretion in instructing the jury, and jury instructions do not need to be technically perfect or even a model of clarity." *Brown v. Sandals Resorts*

Int'l, 284 F.3d 949, 953 (8th Cir. 2002) (quotation omitted). Since this instruction tracks the elements articulated in the leading Florida case on this issue, *see Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1994), K2 cannot complain that the court failed *sua sponte* to provide additional, more detailed, instructions. *See Zutz v. Case Corp.*, 422 F.3d 764, 773 (8th Cir. 2005) (refusal to define terms not error); *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 886 (8th Cir. 2006) (same).

Although K2 argues that the court should have defined "existing business relationships," Appellants' Brief at 52, virtually every witness discussed Matrix's existing business relationships with Rawlings, its retailers, and its salespeople. Although K2 argues that the court should have defined "interfered" to exclude conduct that was "justified," *id.* at 52–53, the court, in fact, gave instructions excluding conduct that was justified. Add. 89–90. Although K2 argues that the court should have required a finding that K2 had the purpose of harming Matrix, Appellants' Brief at 53, the authorities quoted above make plain that the jury could, and should, consider all of the circumstances to determine if K2 interfered "intentionally and without justification." Add. 89. K2's waived objections to Instruction 7 are without merit.

3. Instruction No. 9 Was Neither Erroneous Nor Plainly Erroneous.

K2 challenges Instruction No. 9, which provides:

> If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained as a direct result of the breach or breaches of the parties' contract, mentioned in the evidence.

Add. 91.

K2 argues that this instruction allowed the jury to award damages against K2 for a "wrongful termination." Appellants' Brief at 53–54. That argument, however, assumes the jury ignored all of the instructions, which do not mention termination in explaining what is necessary to "find in favor of plaintiff," and the verdict form, which also does not mention termination in requiring the jury to determine "what, if any, damages" Matrix suffered. Add. 89, 93. Although K2 argues that the damages are duplicative, this is waived twice over, by not objecting to the instructions and by not raising the issue at trial in its motion for judgment as a matter of law. As explained above, Matrix was not awarded all of its damages, and the damages were not duplicative.

C. The District Court Properly Denied K2's Motion For A New Trial.

K2 argues in a single paragraph that the verdict was so against the weight of the evidence admitted during the five–day trial that it resulted in a miscarriage of justice. Appellants' Brief at 54–55. This court reviews the decision to deny a motion for a new trial with great deference. *Zutz v. Case Corp.*, 422 F.3d 764, 772 (8th Cir. 2005).

We doubt that K2's drive–by argument is sufficient even to seek a new trial. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.), *cert. denied*, 494 U.S. 1082 (1990) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"). Both of the issues raised in K2's two sentence argument untroubled by any record citation or explanation — its "pre–termination" theory and its attack on damages — were never raised during trial and thus are waived. *See* Add. 57–58 (order denying new trial). Moreover, as explained above, even if the court considers these waived arguments, they do not change the calculus — K2 received a fair trial and the jury simply ruled against it.

III. THIS COURT SHOULD GRANT MATRIX'S CROSS–APPEAL.

A. The District Court Erroneously Granted Rawlings' Motion For Judgment On The Terminal Value Of The Agreement.

Following trial, the district court granted Rawlings' renewed motion for judgment on the jury's award of $2,053,688 in damages for a period beyond 10 years for Rawlings' breaches of the Agreement. Add. 46–51, 60, 93. This court reviews the district court's entry of judgment as a matter of law in the light most favorable to the party who prevailed before the jury. *United Fire & Cas. Ins. Co. v. Garvey*, 419 F.3d 743, 746 (8th Cir. 2005) (reversing grant of motion for judgment after trial).

> Accordingly, we must (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

Id. (quotation omitted). Applying this standard, the district court decision to overturn the jury award should be reversed.

Before addressing the district court's decision, we place the damage calculations in context. Matrix had been Rawlings' exclusive bag licensee since 1994, and had been operating under the Agreement since 1996. Tr. 2: 109, 112, 115; Ex. P–1. The exclusive license Agreement did not specify a term of years, and in fact, the former Director of Licensing for Rawlings, Liz

Daus, considered the Agreement to be "continuous" and that it would "keep going and going and going." Tr. 2: 116–17, 141, 3: 230.

Matrix's exclusive license was continuous as long as Matrix met the sales targets set forth in the Agreement and did not otherwise breach the Agreement, App. 61–63, 68 (Agreement ¶¶ 1.1, 3, 14), and Matrix met or exceeded the Agreement's sales targets every year by at least 150%. Tr. 2: 101, 116–17, 119, 3: 156. Both the President of Matrix, Louis Orloff, and Matrix's expert, Donna Smith, testified without contradiction that without *any* sales growth, Matrix would continue to meet its sales targets in the Agreement until 2028, *i.e.*, 25 years *after* Rawlings breached the Agreement in 2003. Tr. 2: 120, 3: 156, 158.

Furthermore, the Agreement granted Matrix continuous, exclusive rights worldwide, with the exception of Japan, to the Rawlings trademark for use on any type of team or personal equipment bag. Tr. 2: 110, 122–23, 160, 167. Trademarks (unlike patents and copyrights) are perpetually renewable, 10 U.S.C. § 1059, and it goes without saying that trademarks are valuable assets. *See, e.g., In re Just Brakes Corporate Systems, Inc.*, 293 F.3d 1069, 1070–72 (8th Cir.), *cert. denied sub nom. Reinert & Duree, P.C. v. Sosne*, 537 U.S. 1019 (2002) (addressing rights to trademarks, the estate's "only valuable asset").

The Rawlings brand not only had a 110–year pedigree, but Rawlings was a leader in America's national pastime, baseball. Tr. 1: 138–39, 2: 170–71, 3: 158–59. K2 certainly thought that Rawlings and baseball had a bright future in 2002 when it paid $70,000,000 to acquire Rawlings. Tr. 3: 21, 34–35; Ex. P–120A at 11, 18–19, 67–68, 74; Ex. P–123A at 29, 36. Finally, the Agreement was freely transferable by Matrix to any party other than a Rawlings competitor, so that Matrix could assign or sell its rights under the Agreement. App. 81–82 (Agreement ¶ 13); Tr. 3: 158–59, 211.

At trial, Matrix presented evidence of the damages that resulted from the destruction of its license rights in three parts: (1) lost profits for a 10–year period; (2) the remaining or "terminal" value of the license Agreement at the end of 10 years; and (3) Matrix's unsold inventory of Rawlings bags. Tr. 3: 143–61. The court submitted the case to the jury on a verdict form that asked the jury to determine Matrix's contract damages separately for the first 10 years and then for the period after the initial 10 years. Add. 93.

Before returning its verdict, on May 9, 2005, the jury submitted two questions to the court, asking whether, after the conclusion of the case, (1) Matrix would still be the Rawlings' licensee, and (2) Matrix would be able to sell the Agreement to a third–party. Tr. 5: 3–4. The court answered both questions in the negative. *Id.* Almost immediately, the jury returned its verdict for Matrix, awarding $4,096,312 against Rawlings for the first 10–year period, and $2,053,688 for the subsequent period. Add. 93.

On Rawlings' renewed motion for judgment after trial, the district court found that although the jury could have reasonably concluded that the Agreement had remaining value at the end of the initial 10–year period, no reasonable juror could determine that value. Add. 49. Relying on a case interpreting Texas law, *Fluorine on Call, Ltd. v. Fluorogas Ltd.*, 380 F.3d 849 (5th Cir. 2004), the court determined that Smith's valuation methodology was "incomplete" and left jurors to "speculate as to the remaining value of the License Agreement," in violation of Delaware law. Add. 49–50. The district court incorrectly characterized Smith's testimony, incorrectly weighed the evidence, and incorrectly interpreted Delaware law.

Smith used a discounted cash flow ("DCF") analysis, also known as the "Gordon growth model," to calculate the "terminal value" of the Agreement, *i.e.*, its remaining value as an asset after a 10–year period. Tr. 3: 159. This "is considered by experts to be the preeminent valuation methodology." *Neal v. Alabama By–Products Corp.*, 1990 WL 109243, *7 (Del. Ch. Aug. 1, 1990), *aff'd*, 588 A.2d 255 (Del. 1991) (citation omitted). Indeed, the DCF method is "in theory the single best technique to estimate the value of an economic asset." *Cede & Co. v. Technicolor, Inc.*, 1990 WL 161084 (Del. Ch. Oct. 19, 1990), *aff'd in part, rev'd in part on other grounds*, 634 A.2d 345 (Del. 1993). This methodology is also "widely accepted in the financial community." *Henke v. Trilithic, Inc.*, 2005 WL 2899677, *5 (Del. Ch. Oct. 28, 2005), *modified on other grounds*, 2005 WL 3578094 (Del Ch. Dec. 20, 2005); *see also Prescott Group Small Cap, L.P. v. Coleman Co.*, 2004 WL 2059515, *14 (Del Ch. Sept. 8, 2004) (Gordon growth model is an "accepted financial measure" to calculate terminal value).

Delaware courts frequently use the DCF method, giving it "great, and sometimes exclusive," weight in valuing corporate assets. *Andaloro v. PFPC Worldwide, Inc.*, 2005 WL 2045640, *9 (Del. Ch. Aug. 19, 2005; *accord In re United States Cellular Operating Co.*, 2005 WL 43994, *10 (Del. Ch. Jan. 6, 2005) (DCF the "dominant approach"); *Onti, Inc. v. Integra Bank*, 751 A.2d 904, 925 (Del. Ch. 1999) (court favors DCF approach "based in large part on its wide acceptance").

The DCF methodology is easily explained, and may be applied to value an entire company or to value a single revenue producing asset:

> Briefly stated, *DCF analysis seeks to value* a company or *revenue producing asset* by estimating cash flows for each future year, estimating the terminal value — the amount to be realized upon future disposition of the asset, discounting the

> future cash flows and terminal value to present values using an appropriate discount rate, and adding the present values of the future cash flows and the terminal value.

Questrom v. Federated Dep't Stores, Inc., 84 F. Supp. 2d 483, 489 (S.D.N.Y. 2000), *aff'd*, 2 Fed. Appx. 81 (2d Cir. 2001) (emphasis added). DCF analysis can also be used to calculate lost profit damages. *See Munters Corp. v. Swissco–Young Indus., Inc.,* 100 S.W.3d 292, 301 (Tex. App. 2003) (upholding jury award based on testimony of nine years of lost profits plus terminal value).

Suffice it to say, Smith's testimony on the terminal value of the Agreement tracked the proper methodology for conducting a discounted cash flow analysis. After first calculating Matrix's lost profits for a fixed period of years, Smith then projected Matrix's cash flows into the future using a perpetual growth model, and, finally, reduced the projected cash flows to their present value using a discount rate, in order to calculate the terminal value of Matrix's exclusive, continuous, worldwide license. Tr. 3: 156–59; *see Andaloro*, 2005 WL 2045640 at *9 (describing steps of DCF analysis); *Henke*, 2005 WL 2899677 at *5 (same). Applying this well–established methodology, Smith concluded that the Agreement had a terminal value after 10 years of $8,700,000. Tr. 3: 159. Rawlings never raised a *Daubert* challenge to Smith's DCF analysis.

As the district court found, Smith testified that she valued the Matrix Agreement *as an asset* for purposes of determining its value at the end of a 10–year period. Add. 48–49; *see* Tr. 3: 158, 197–99, 205. Smith catalogued the numerous factors she took into account in reaching the conclusion that the Agreement had continuing vitality and value beyond 10 years — Matrix's 10–year history as a licensee, Matrix's ability to exceed sales targets without any sales growth until 2028, the strength of Rawlings as a company with a 110–year–old brand, and the rock–solid stability of the baseball industry. Tr. 3: 156, 158–59. Many of Smith's conclusions were echoed by senior executives from Rawlings and K2. Tr. 1: 138–39; Ex. P–120A at 18–19, 74–75; Ex. P–123A at 36. Rawlings' own expert conceded that these factors were relevant in determining the remaining value of the Agreement. Tr. 4: 49–50, 58–59. The district court also agreed that the jury rationally could have concluded that the Agreement had value at the end of the 10–year period. Add. 49.

Moreover, Smith explained that because the Agreement could be sold, it would have remaining value as an asset not merely to Matrix, but to potential third–party purchasers as well. Tr. 3: 158–59, 198–99, 211. Although the district court incorrectly relied on *Fluorine* to conclude that a "lost–asset valuation" requires evidence or analysis of what a "third–party would be willing to pay for the asset," Add. 49, that is immaterial because Smith, in fact, testified that her DCF analysis was intended to determine precisely "what somebody would be willing to pay for the right to have the contract." Tr. 3: 198, 205. This is an entirely appropriate use of the DCF methodology, which, after all, is designed to calculate the value of a revenue producing asset. *See, e.g., Questrom*, 84 F. Supp. 2d at 489; *Neal,* 1990 WL 109243 at *7. Similarly, Smith's expert opinion is competent evidence of the "market" value of a revenue producing asset. Tr. 3: 211; *see Schonfeld v. Hillard*, 218 F.3d 164, 178 (2d Cir. 2000). Thus, the district court erred by concluding that Smith's analysis was "incomplete." Add. 49.

It is beyond peradventure that the jury, in fact, weighed the evidence, and made its own determination concerning the Agreement's remaining value. As the district court noted, the two questions asked by the jury just prior to reaching its verdict (would Matrix still be the licensee, and would it be able to sell the Agreement to a third party) "indicate that the jury was focusing on the License Agreement's value as an asset." Add. 50. The jury not only focused on this issue, but reached its own conclusion. While Smith testified that she calculated the remaining value of the Agreement beyond the initial period of 10–years to be approximately $8,700,000, Tr. 3: 159, the jury, rather than simply accepting Smith's number, awarded Matrix only $2,053,688 for the period beyond 10 years. Add. 93.

The jury acted well within its purview and exercised its discretion under Delaware law in evaluating all of the evidence and reaching its own conclusion on damages:

> What appears to have occurred is that the jury properly evaluated this economic testimony in light of the business climate between these parties and came to a reasonable damage figure. The jury was not required to accept one theory over the other nor were they required to believe all or nothing of the experts' testimony. What they were required to do was put these economic assertions in the context of all the facts presented during the trial. In spite of the arguments now made by counsel, this was the appropriate role for the jury and from the Court's perspective, they got it exactly right.

Christiana Marine Service Corp. v. Texaco Fuel and Marine Marketing Inc., 2004 WL 42611, *6 (Del. Super. Jan. 8, 2004); *see also True North Composites, LLC v. Trinity Industries, Inc.*, 191 F. Supp. 2d 484, 526 (D. Del. 2002), *aff'd in part, rev'd in part on other grounds*, 65 Fed. Appx. 266 (Fed. Cir. 2003) (under Delaware law, jury's decision to credit one party's expert testimony on damages over the other party's expert "demonstrates only that the amount of damages was contested, not that it is speculative"); *cf. Billingsley v. Omaha*, 277 F.3d 990, 993 (8th Cir. 2002) (jury's "historic function" is to weigh the evidence and make credibility determinations in reaching its verdict). Viewing the evidence in the light most favorable to the jury's verdict, the court erred in granting Rawlings' motion for judgment.

B. The District Court Erroneously Granted The Defendants' Motion To Dismiss Matrix's Florida Statutory Claim.

The district court granted the defendants' motion to dismiss Matrix's claim under the Florida Deceptive and Unfair Trade Practices Act because "[t]he clear focus of the FDUTPA remains on protecting the public from unfair and deceptive trade practices[,]" and thus the kinds of unfair practices Matrix allegedly suffered were not cognizable under the FDUTPA. Add. 25. This court reviews *de novo* a district court's grant of a motion to dismiss. *Creason v. Washington*, 435 F.3d 820, 823 (8^{th} Cir. 2006). The district court interpreted the statute too narrowly.

Prior to July 1, 2001, the FDUTPA provided that "[i]n any individual action brought by a *consumer* who has suffered a loss as a result of a violation of this part, such *consumer* may recover actual damages, plus attorneys' fees and court costs." Fla. Stat. § 501.211(2) (2000) (emphasis added). Effective July 1, 2001, the statute was amended, replacing "consumer" with "person." Fla. Laws 2001, ch. 2001–39, § 6, 2001–214, § 27. Persons include "corporations" under Florida law. Fla. Stat. § 1.01(3).

Applying the plain language of the amendment, Matrix is entitled to the protections of the FDUTPA. *See United States v. Cervantes*, 420 F.3d

792, 796 n.2 (8th Cir. 2005) ("One must keep in mind the 'threefold imperative' of statutory interpretation taught by Justice Felix Frankfurter as a professor at Harvard Law School before he took the bench: '(1) Read the statute; (2) read the statute; (3) read the statute!'") (citations omitted). This court should give "due significance" to the change in the statute because "[w]hen the Legislature makes a substantial and material change in the language of a statute, it is presumed to have intended some specific objective or alteration of law, unless a contrary indication is clear." *Caruso v. Caruso*, 814 So. 2d 498, 502 (Fla. Dist. Ct. App. 2002) (citations omitted); *see also Professional Consulting Services, Inc. v. Hartford Life & Accident Ins. Co.*, 849 So. 2d 446, 448 (Fla. Dist. Ct. App. 2003) ("It is a basic rule of statutory construction that the legislature does not intend to enact useless provisions.") (citation omitted); *DirecTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004) ("Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning.") (citation omitted).

"Courts have found that this amendment demonstrates a clear legislative intent to allow a broader base of complainants who have been injured by violations of FDUTPA to seek damages." *American Honda Motor Co. v. Motorcycle Information Network, Inc.*, 390 F. Supp. 2d 1170, 1164 (M.D. Fla. 2005) (collecting Florida cases). The FDUTPA "is now intended by its plain text to apply to any act or practice occurring in the conduct of any trade or commerce even as between purely commercial interests." *Beacon Property Management, Inc. v. PNR, Inc.*, 890 So. 2d 274, 278 (Fla. Dist. Ct. App. 2004).

Florida courts routinely permit businesses, and even competitors, to pursue claims under the FDUTPA. *See, e.g., Niles Audio Corp. v. OEM Systems Co.,* 174 F. Supp. 2d 1315, 1319–20 (S.D. Fla. 2001); *Sun Protection Factory, Inc. v. Tender Corp.*, 2005 WL 2484710, *13 (M.D. Fla. Oct. 7, 2005) (unpublished). Thus, one court held that a claim by a franchisee against a company which controlled both the franchisor and a direct competitor of the franchisee, and was using its position to undermine the franchisee's business, implicated "the broad concerns underlying FDUTPA." *Hanson Hams, Inc. v. HBH Franchise Co.,* 2003 WL 22768687, *2 (S.D. Fla. Nov. 7, 2003) (unpublished). Because the district court incorrectly cabined the FDUTPA, its order dismissing Matrix's claim should be overturned.

C. The District Court Erroneously Granted K2's Motion For Judgment On Matrix's Punitive Damages Claim.

After all of the evidence on the compensatory claims was submitted to the jury, the district court granted K2's motion for judgment on Matrix's punitive damages claim. Tr. 4: 110–20. This court reviews *de novo* the decision to grant a motion for judgment. *Catipovic v. Peoples Community Health Clinic, Inc.*, 401 F.3d 952, 956 (8th Cir. 2005). "Whether judgment as a matter of law is appropriate is judged by viewing the evidence in the light most favorable to the nonmoving party and giving him or her the benefit of all reasonable inferences from the evidence, but without assessing credibility." *Id.* (quotation omitted). Because the district court applied the wrong standard under Florida law to assess Matrix's punitive damages, it erroneously dispatched that claim.

Since the parties and the court agreed that Florida law governed both Matrix's tortious interference claim and its punitive damages claim against K2, Tr. 4: 110–11, the critical question was the proper standard to evaluate the punitive damages claim. Relying upon a 1936 Florida Supreme Court case, *Winn & Lovett Grocery Co. v. Archer*, 126 Fla. 308, 327, 171 So. 214, 221 (1936), as quoted and applied in a case interpreting the Florida Uniform Trade Secrets Act, *Perdue Farms Inc. v. Hook*, 777 So. 2d 1047, 1053 (Fla. Dist. Ct. App. 2001), which is not at issue in the case, the court dismissed Matrix's punitive damages claim utilizing the following standard:

> Exemplary damages are given solely as a punishment where torts are committed with fraud, actual malice, or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of

> the rights of others. Exemplary or punitive damages are therefore damages ultra compensation, and are authorized to be inflicted when the wrong done partakes of a criminal character, though not punishable as an offense against the state, or consists of aggravated misconduct or a lawless act resulting in injury to plaintiff when sought to be redressed by a civil action for the tort. In contract, exemplary damages are not recoverable unless the defendant's conduct constituting the breach of contract rises to the level of an independent tort showing actual malice, moral turpitude, wantonness or outrageousness.

Tr. 4: 112–13. Following argument from counsel, the court concluded without elaboration that the evidence in this case "does not rise to the level required under the law to submit on a punitive damage claim." Tr. 4: 120.

"Under Florida law, in order to recover punitive damages, a plaintiff must demonstrate to the trier of fact that the defendant is personally guilty of intentional misconduct or gross negligence." *IBP, Inc. v. Hady Enterprises, Inc.*, 267 F. Supp. 2d 1148, 1170 (N.D. Fla.), *aff'd*, 52 Fed. Appx. 487 (11th Cir. 2002) (citing Fla. Stat. § 768.72). "The Florida legislature has defined 'gross negligence' as conduct which is 'so reckless or wanting in care that it constitute[s] a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.'" *IBP*, 267 F. Supp. 2d at 1170 (quoting Fla. Stat. § 768.72 (2)(b)). Also, "intentional misconduct" is defined in the statute to mean that "the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage." Fla. Stat. § 768.72 (2)(a).

Like the trial court here, the defendant in *IBP* relied upon "a series of Florida cases that hold that punitive damages may only be awarded when there has been a showing of 'willful or wanton misconduct,'" but those cases "were decided before the Florida legislature's amendment of Section 768.72, which allows recovery of punitive damages based on clear and convincing evidence of 'intentional misconduct' or 'gross negligence.'" *IBP*, 267 F. Supp. 2d at 1170 n.33 (citations omitted).

Because "[t]he provisions of this section shall be applied to all causes of action arising after the effective date [1986] of this act," Fla. Stat. § 768.72 (4) (brackets added), the district court should have applied the standards of section 768.72 to evaluate the substance of Matrix's punitive damages claim. Some federal courts in Florida have even gone so far as to conclude that, under *Erie* principles, the procedures of this section should be applied in federal court. *See, e.g., Neil v. Gulf Stream Coach, Inc.*, 966 F. Supp. 1149 (M.D. Fla. 1997).

The Florida Supreme Court has provided further guidance in this area by promulgating standard jury instructions in cases involving punitive damages. *Standard Jury Instructions Civil Cases No. 96–1*, 689 So. 2d 1042 (Fla. 1997). These instructions provide, in pertinent part:

> Punitive damages are warranted if you find by the greater weight of the evidence that:
>
> ***
>
> (2) the conduct showed such an entire lack of care that the defendant must have been consciously indifferent to the consequences; or
>
> ***
>
> (4) the conduct showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights.

Id. at 1044. "Under this standard, malice did not have to be alleged or demonstrated to obtain a punitive damage award on any count alleged." *Herrera v. C.A. Seguros Catatumbo*, 844 So. 2d 664, 668 (Fla. Dist. Ct. App. 2003) (citing statute and standard jury instructions).

Applying this standard, the evidence detailed above in the discussion of the tortious interference claim against K2 was more than sufficient to permit the jury to consider whether to award punitive damages. *Cf. McGuire v. Tarmac Environmental Co.*, 293 F.3d 437, 441 (8th Cir. 2002) ("Under Missouri law, once a plaintiff has made a submissible case on the issue of intentional interference with a contract, they have also made a submissible case on the issue of punitive damages."). Therefore, the district court's decision to take the punitive damages claim away from the jury was erroneous.

CONCLUSION

Based upon the foregoing, the plaintiff–appellee, Matrix Group Limited, Inc., requests that this court deny the appeal filed by the defendants–appellants, Rawlings Sporting Goods Company, Inc. and K2, Inc., grant the cross–appeal filed by Matrix, reverse the order granting Rawlings' motion for judgment on the damages awarded for a period beyond 10 years, vacate the order granting the defendants' motion to dismiss Matrix's claim under the Florida Deceptive and Unfair Trade Practices Act, vacate the order granting K2's motion for judgment on Matrix's punitive damages claim, otherwise affirm the judgment entered by the district court, and remand for further proceedings.

Dated: May 23, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), the plaintiff–appellee, Matrix Group Limited, Inc., states that this brief, including the cross–appeal, contains 16,372 words.

P. J. Brann

Peter J. Brann

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2006, the original and nine copies of the foregoing Appellee's Brief and Appellee's Addendum of Unpublished Decisions, and one copy of the Appellee's Brief on disk were filed via UPS Overnight delivery, addressed as follows:

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In addition, two copies of the foregoing Appellee's Brief, one copy of Appellee's Addendum of Unpublished Decisions, and one copy of the Appellee's Brief on disk were served via UPS Overnight delivery, addressed as follows:

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