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CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

FRED M. POWERS et al., Plaintiffs and Appellants, v. THE RUG BARN et al., Defendants and Respondents.	E033920 (Super.Ct.No. INC019331) **ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING** [NO CHANGE IN JUDGMENT]

The appellants' petition for rehearing filed April 23, 2004, is denied. The opinion filed in this matter on April 13, 2004, is modified as follows:

1. The last full paragraph on page 11 is modified to read as follows:

> Here, plaintiffs contend they raised a triable issue sufficient to avoid summary judgment on their claim for interference with contract by showing that defendants took intentional steps to disrupt the partnership agreement by hiring DeVall. But, as just explained, merely hiring a competitor's employee is not actionable interference with contract. For liability to attach, there must be some independently actionable conduct on the part of

the hiring entity, such as the breach of a separate contract in *Buxbom*, that would overcome the usual rule of nonliability.

2. Immediately following the paragraph modified in (1) above, the following paragraphs are inserted:

Plaintiffs dispute the applicability of the *Buxbom-GAB* rule of nonliability to this case. They point out that DeVall was not a mere employee of Earth Tapestries, but a general partner. "Partnership is a fiduciary relationship, and partners are held to the standards and duties of a trustee in their dealings with each other." (*BT-I v. Equitable Life Assurance Society* (1999) 75 Cal.App.4th 1406, 1410.) DeVall's fiduciary relationship with Powers, plaintiffs assert, elevated their partnership agreement above the status of a mere employer-employee relationship to a status which entitled the relationship to heightened protection against interference from third parties. Accordingly, plaintiffs conclude, liability for interference should attach in this context without any showing of independently actionable conduct as would be required in a mere employment situation.

We are not aware of any authority addressing whether the *Buxbom-GAB* rule of nonliability extends to the hiring of a competitor's partners, as opposed to its employees. The policies underlying the rule, however, lead us to conclude it should apply equally in the partnership context. As the

Supreme Court has recognized, "California has a settled policy in favor of open competition. [Citations.]" (*Howard v. Babcock* (1993) 6 Cal.4th 409, 416.) This policy is reflected in Business and Professions Code section 16600 (section 16600), which states: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

Section 16600 "ensures 'that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.' [Citation.]" (*Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 Cal.4th 697, 706.) "'The interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change.' [Citation.]" (*D'Sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933.) Thus, "[s]ection 16600 has specifically been held to invalidate employment contracts which prohibit an employee from working for a competitor when the employment has terminated, unless necessary to protect the employer's trade secrets. . . . The corollary to this proposition is that competitors may solicit another's employees if they do not use unlawful means or engage in acts of unfair competition." (*Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal.App.4th 853, 859.)

Section 16600's recognition of the right of "anyone" to pursue any lawful enterprise is significant. Nothing in the statute suggests the right does not extend to an individual who formerly occupied a partnership position with a competing entity. To the contrary, Business and Professions Code section 16602 (section 16602) makes clear that the general rule of unrestrained competition applies equally to former partners.

Section 16602 permits a *limited* form of restriction on the rule of open competition in the case of a former partner. Under section 16602, "a partnership agreement may provide against competition by withdrawing partners in a limited geographical area." (*Howard v. Babcock*, *supra*, 6 Cal.4th 409, 416.)[2] The fact the Legislature was obliged to enact section 16602 to authorize such limited restrictive covenants demonstrates by necessary implication that in all other respects, the general rule of open competition under section 16600 extends fully to former partners. Absent such a restrictive covenant, therefore, former partners may no more be prevented from competing with their former colleagues than may those who merely occupied the status of employees.

That being the case, it would be anomalous to hold that a third party may be liable for interference with contract merely for employing a former partner of a competitor, without any showing of independently wrongful conduct. Such a holding would effectively prevent the former partner from

pursuing his or her profession at all, since no new employer would be willing to employ the former partner at the risk of incurring tort liability for doing so. That result would be wholly irreconcilable with section 16600 and the policy of free mobility of employment.

In addition, acceptance of plaintiffs' contention that the fiduciary nature of a partnership relationship should preclude application of the *Buxbom-GAB* rule would require imposition of liability in a host of employment situations beyond the partnership context. Fiduciary relationships are not unique to partners. Officers of a corporation, for example, "stand in a fiduciary relation to the corporation and its stockholders." (*Bancroft-Whitney Co. v. Glen* (1966) 64 Cal.2d 327, 345.) Under the rule advocated by plaintiffs, a competing corporation would be prevented from hiring a corporate officer without incurring liability for inducing breach of his or her employment contract with the existing employer. Corporate recruiters, presumably, could also be liable for facilitating such a change of employment. The stifling effect on employment mobility that would result from the threat of liability in such circumstances demonstrates the unacceptability of the rule proposed by plaintiffs.

We emphasize we do not mean to suggest the fiduciary nature of a partnership is of no significance in determining what constitutes permissible

conduct by a competitor seeking to hire its rival's partner. By virtue of their confidential relationship with one another, partners enjoy access to trade secrets and other sensitive information that, if disseminated to a competitor, could have a disastrous effect on the partnership's ability to conduct its business. Hiring away a competitor's partner for the purpose of gaining access to such material, or soliciting the partner to bring such material with him or her upon changing employment, should and would be actionable notwithstanding the *Buxbom-GAB* rule of general nonliability. That rule, as discussed, is predicated on the absence of any independently wrongful conduct on the part of the hiring entity. Using the occasion of an employment change to secure an unfair advantage over a competitor would constitute such wrongful conduct and bring the case outside the purview of the general rule. We hold only that *absent* such conduct, the hiring of a competitor's employee -- including one occupying a partnership position -- cannot support liability for interference with contract. We turn, therefore, to the question of whether plaintiffs adequately raised a triable issue whether defendants engaged in such independent wrongful conduct.

The text of new footnote 2 is as follows:

[2] Section 16602 states: "(a) Any partner may, upon or in anticipation of any of the circumstances described in subdivision (b), agree that he or she will not carry on a similar business within a specified

geographic area where the partnership business has been transacted, so long as any other member of the partnership, or any person deriving title to the business or its goodwill from any such other member of the partnership, carries on a like business therein. [¶] (b) Subdivision (a) applies to either of the following circumstances: [¶] (1) A dissolution of the partnership. [¶] (2) Dissociation of the partner from the partnership."

3. The last sentence in the last paragraph on page 17 is modified to read:

Given DeVall's feelings of dissatisfaction, the conclusion seems virtually inescapable that she eventually would have terminated the partnership even without any involvement on the part of defendants.[3]

The text of new footnote 3 is as follows:

[3] This is not to say that the fact DeVall had the right to terminate the partnership agreement at will meant defendants could not be liable under any circumstances for interfering with the agreement. "It is well established that the at-will nature of a contract does not preclude a tortious interference claim." (*GAB, supra*, 83 Cal.App.4th at p. 426.) The fact a party to a contract has the right to cause its termination without liability does not give a third party the same right. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1127.) It is the lack of independently actionable conduct, not the at-will nature of the partnership agreement, that creates the impediment to plaintiffs' interference claim.

4. All subsequent footnotes are renumbered accordingly.

Except for these modifications, the opinion remains unchanged. These modifications do not effect a change in the judgment.

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RICHLI
J.

I concur:

HOLLENHORST
Acting P.J.