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IN THE FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

Advance America, Cash Advance Centers, Inc.,

CASE NO: 4D08-2739

Appellant,

vs.

Gerald Betts and Donna Reuter, on behalf of themselves and others similarly situated,

Appellees.
_______________________________________/

On Non-Final Appeal from the Fifteenth Judicial Circuit,
in and for Palm Beach County, Florida
Case No. 004-CA-008164 MB-AG

**ANSWER BRIEF OF APPELLEES
GERALD BETTS AND DONNA REUTER**

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STATEMENT OF CASE AND FACTS

Appellees/Plaintiffs, Donna Reuter and Gerald Betts, brought a class action against: 1) Advance America, Cash Advance Centers, Inc. (appellant in this case), a Delaware corporation; 2) its subsidiary, Advance America, Cash Advance Centers of Florida, Inc.; and 3) individuals who acted as officers, directors, and/or employees of one or both of the corporate Defendants, namely Steve A. McKenzie and Brenda McKenzie[1] (appellants in case no. 4D08-2738), and George D. Johnson, Jr.; William Webster, IV; James W. Whatley; Monica L. Allie; Wayne W. Hall; and David Gallen (appellants in case no. 4D08-2740), in response to the Defendants' unlawful scheme of charging and collecting unconscionably usurious interest on consumer "payday" loans. (Appellees' Appendix ("A"), Tab 4). Pursuant to written agreements, Defendants advanced money to Florida consumers in exchange for checks made out in amounts greater than the cash advances with the understanding that Defendants would not cash the checks for a certain period of time, usually two weeks or until the customer's next payday. (A4 ¶¶21, 24). Defendants collected exorbitant, usurious interest on these loans,[2] ranging upward from annual percentage rates of 260%. (A4 ¶¶22, 31).

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[1] Since the filing of Plaintiffs' lawsuit, Steve and Brenda McKenzie divorced and Brenda McKenzie is now known as Brenda Lawson. (A 28, p. 8; A 29, p. 10).

[2] The Florida Supreme Court has held that such transactions, called "deferred presentment" transactions, constitute loans subject to Florida's prohibitions against

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In the class action, Plaintiffs allege that by making these loans to Florida consumers, Defendants acted in violation of both Chapter 687 of the Florida Statutes, particularly the prohibition against loan sharking in section 687.071, and the Florida Deceptive and Unfair Trade Practices Act. (A4, pp. 13-15). Plaintiffs also allege that the parent Advance America corporation and the individual Defendants conspired and participated with each other to operate the subsidiary corporation, which is an illegal enterprise, in order to intentionally engage in the criminal enterprise of collecting on these unlawful debts and are all, therefore, liable under the Florida Civil Remedies for Criminal Practices Act ("civil RICO Act"). (A4, pp. 15-16).

The individual Defendants and the parent corporation moved to dismiss, *inter alia*, for lack of personal jurisdiction. (A6; A7; A15). Discovery limited to the issue of jurisdiction has revealed that each Defendant has significant contacts with Florida, sufficient to subject each Defendant to personal jurisdiction in the state.

The parent Advance America corporation was the brainchild of Defendants Webster and Johnson who decided to start a cash advance business after holding discussions in Ft. Lauderdale, Florida, where Johnson lived. (A8, p. 13; A17, pp. 7-8; A23, p. 93; A24, pp. 15-16; A27, p. 24). Both of them made a capital

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usury. *See McKenzie Check Advance of Florida, LLC v. Betts*, 928 So. 2d 1204, 1211 (Fla. 2006).

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investment in the parent company, along with Defendants Steve and Brenda McKenzie, who were already engaged in the payday loan business in Florida. (A9; A10; A22, p. 24; A23, pp. 29, 56; A25, p. 24; A27, pp. 10-11, 18-19; A28, pp. 13-15, 17-18, 19, 26-27, 31, 33, 40-41, 44-45, 54, 59-60, 62-63, 67-68; A29, pp. 38, 80). Initially, Johnson invested between 3 to 3.5 million dollars, the McKenzies invested about 1.5 million dollars, and Webster invested about 1 million dollars in the parent company. (A24, pp. 67-69, 72). Their plan was to use this initial investment to create a "national footprint" and open about 200 cash advance stores in various states, including Florida. (A24, p. 70; A26, p. 9).

The Advance America founders were undoubtedly confident that they would be able to quickly implement this plan because two members of their team, Steve and Brenda McKenzie, possessed extensive expertise in the area of payday lending. The McKenzies owned and operated a payday lending company called McKenzie Check Advance, which ran check cashing stores in various states, including Florida, and was eventually purchased by Advance America. (A28, pp. 13-15, 17-18, 19, 31, 33, 40-41, 44-45, 54, 59-60, 62-63, 67-68). This expertise was likely the reason that Defendant Johnson met with Steve McKenzie prior to deciding to enter the payday lending business. (A27, pp. 6-7). Defendants Johnson and Webster benefited from the McKenzies' expertise by observing operations at National Cash Advance, one of the McKenzies' payday lending

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businesses (which was later purchased by Advance America), in preparation of operating Advance America. (A17, pp. 9-10, 13; A18, pp. 82-84; A27, pp. 6-7; A28, pp. 23-24, 43).

The plan of the Advance America founders to open payday lending stores throughout the country was quickly implemented. Advance America first opened stores in North Carolina and then Ohio. (A17, p. 13; A23, p. 59; A24, pp. 65-66). Florida stores were opened within 3 to 4 months of the creation of the parent Advance America corporation, and within a year about 60 stores were operating in Florida. (A17, p. 13; A24, pp. 65-66; A25, pp. 18-19, 43; A26, p. 8). That number increased to 96 stores by the following year. (A25, pp. 19, 43). The objective of operating these stores was to make money for the shareholders of the parent Advance America corporation. (A28, p. 78). Profits from the Florida stores were ultimately transferred to bank accounts maintained by the parent company. (A8, p. 8; A26, p. 76).

The parent corporation hired Defendant Gallen, a Florida resident, specifically to open the Florida stores. (A19, ¶5; A21, p. 60; A24; p. 65; A25, pp. 4, 13). Gallen was hired in September of 1997 as regional director of Florida even though Advance America's first Florida store was not opened until March of 1998. (A25, pp. 16-18, 40). He helped open the company's Florida stores by investigating the laws of Florida at the request of Defendant Whatley, specifically

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laws regarding debt collection. (A21, pp. 18, 24; A25, p. 12). Gallen obtained legal advice and copies of Florida laws from Defendant Allie as part of this endeavor. (A21, pp. 25, 59).

As regional director, Gallen supervised eight divisional directors and 88 branch managers, all of whom were located in Florida. (A18, pp. 28, 30-31; A21, 35-37; A25, p. 12). Along with Defendant Whatley, the executive vice president of operations for the parent Advance America corporation, Gallen participated in the decision to open new Florida stores by reviewing sites recommended by the real estate department and signing off on those locations. (A18, p. 40; A21, p. 38; A25, p. 14; A26, p. 8). Defendant Gallen also hired district managers and store personnel in Florida, advised the divisional directors of the company's policies and procedures, oversaw employee training and store operations, and visited each of the Florida stores within his district approximately once per quarter to talk with the store managers. (A18, p. 31; A21, pp. 81-82; A25, p. 14). Eventually, Gallen was promoted to vice president of the parent company and given oversight of operations in both Florida and South Carolina. (A25, p. 42).

The operation and growth of Advance America's payday loan business is demonstrated by the parent company's prospectus, which states:

> With 2,290 payday cash advance centers as of September 30, 2004, we operate the largest network of payday cash advance centers in the United States. Our payday cash advance centers are marketed through local payday cash advance center marketing, supplemented by

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> television and print advertising, direct mail marketing, yellow pages advertising and through other media. . . . We try to locate our payday cash advance centers in highly visible, accessible locations and attempt to operate during convenient hours for our customers. Normal business hours of our payday cash advance centers are from 10:00 a.m. until 6:00 p.m., Monday through Friday, and, in most states, from 10:00 a.m. until 3:00 p.m. on Saturday. We typically locate our payday cash advance centers in middle-income shopping areas with high retail activity. Other tenants in these shopping areas typically include grocery stores, discount retailers and national video rental stores. By using consistent signage and design at our payday cash advance centers, we hope to increase our brand recognition. As of September 30, 2004, we operated 2,182 payday cash advance centers under the "Advance America" brand and 108 payday cash advance centers under the "National Cash Advance" brand. We intend to rebrand the remaining 108 "National Cash Advance" brand payday cash advance centers as "Advance America" brand payday cash advance centers, although we have no specific timetable for doing so.

(A30). This prospectus demonstrates that the parent company controls the operations of its subsidiaries that run the payday lending stores throughout the country, including where those stores are located, how they are marketed, and what hours they keep. The parent company also “monitor[s] compliance by [its] payday cash advance centers with applicable federal and state laws and regulations” by conducting “unannounced audits of [its] payday cash advance centers” at least once per year. (A30). And the parent company covered expenses for the Florida subsidiary and profits from the Florida subsidiary flowed to the parent. (A21, p. 147; A26, pp. 76, 79; A32, p. 10).

It was easy for the parent Advance America corporation to control the operations of the Florida subsidiary because the same individuals ran both

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companies. (A25, pp. 40-41). The shareholders of each company were the same, (A24, pp. 131-132), as were most members of the boards of directors. (A32, p. 10). Defendant Johnson was on the board of directors of both the parent and subsidiary corporations, serving as the initial chairman of the board. (A9; A23, p. 58; A24, p. 58; A32, p. 10). Defendant Webster was president, CEO, and on the board of directors of both the parent and subsidiary corporations. (A10; A17, pp. 11, 21-22; A18, pp. 18, 20, 28, 31, 53, 72; A21, p. 85; A23, p. 155; A24, p. 58; A32, p. 10). Defendant Whatley served as both vice president of operations and executive vice president of operations of the parent company and he was responsible for the management and operations of the subsidiary. (A9; A10; A11, pp. 5-7; A12; A13; A32, p. 10). Defendant Hall was vice president and secretary of both the parent and subsidiary corporations. (A14, p. 5; A26, p. 14; A32, p. 10). Defendant Allie was vice president of legal affairs for the parent company and assistant secretary of the subsidiary. (A13; A16, pp. 71-72; A32, p. 10). And Defendant Gallen was regional director of operations for the parent company and responsible for the operations and management of the subsidiary. (A9; A10; A11; A12; A13; A25, p. 45; A32, p. 10).

A goal of the parent Advance America corporation was to open as many Florida stores as feasible, (A25, pp. 19-20), and it controlled and profited from the operation of those Florida stores. Although Defendant Gallen was paid by the

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parent company, his job duties were strictly limited to working with the Florida stores. (A21, p. 60; A25, pp. 17-18, 45). And Defendant Whatley, who also received his salary from the parent company, established the operational procedures for the Florida stores. (A18, p. 53; A21, pp. 38, 67-68). Daryl Weaver, vice president of operations for the parent company, developed the application form used by Florida consumers requesting payday loans and provided Defendant Gallen with the repayment formula to be used—i.e., that the company would loan a customer 80% of his weekly gross income for repayment within two weeks. (A21, pp. 21, 41, 71-73, 77). Whatley provided Gallen with updated forms when the company changed the terms and conditions under which it would make payday loans. (A21, pp. 131-132).

Further, officers and directors of the parent corporation frequently traveled to Florida and communicated with Florida residents in the operation of their business, and even lobbied in Florida in an attempt to obtain favorable laws and legalize their lending business. Defendant Webster traveled to Florida to inspect business locations for the subsidiary corporation and signed numerous leases for Florida properties. (A17, p. 17-18; A21, pp. 89-90). He attended meetings with regulatory and licensing agencies in Florida, traveled to Florida to meet with employees of the Florida Department of Banking and Finance, and communicated with employees of the Department via telephone and in writing. (A10; A17, pp.

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15-16). Additionally, Defendant Webster met or spoke with Florida legislators and their staff during 1997 and 1998, appeared in Florida to testify before legislative committees regarding pending legislation on three separate occasions, and was otherwise involved in the parent company's effort to lobby for favorable laws in Florida. (A10; A16, Plaintiffs' Exhibits 5-6; A24, pp. 189-197).

Defendant Whatley at one time was responsible for the operations of the company in Florida and traveled to Florida approximately once per quarter to supervise those operations. (A11; A18, pp. 18, 20, 28, 31, 41, 53, 72, 93). During these visits, he conducted "a multitude of operational duties" like making sure the stores were open and staffed, making sure the staff was dressed appropriately, and making sure the staff knew how to operate the system. (A18, p. 93). On occasion, Whatley also talked to Florida state officials that visited the Florida store locations. (A18, pp. 91-93).

Defendant Johnson lived in Florida at the time the company was formed and discussed company business with Defendant Webster and management personnel while he was in Florida. (A23, pp. 94-95).

Defendant Hall, who was initially hired as the parent company's chief financial officer, and served at various times as the company's vice president, secretary, comptroller, and director of finance, filed regulatory forms in Florida required by the state for the issuance of business licenses and attended an Advance

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America regional meeting held by the company in Marathon, Florida. (A14, pp. 5-6; A26, pp. 6, 13, 40, 42).

Defendant Allie worked as the parent Advance America corporation's Director of Government and Legal Affairs and served as its general counsel. (A8; A13; A16, pp. 3-5, 11-12). Her job duties consisted of ensuring the company had the state licensing necessary for its operations, which included securing licenses for the operation of the subsidiary Advance America of Florida. (A13; A16, p. 12). In carrying out these duties, Allie communicated with Florida regulators, met with officials of Florida's Department of Banking and Finance regarding licensing issues during periodic visits to Florida, and met with lobbyists while in Florida. (A13; A16, pp. 17, 19, 35-36). She also approved the company's payment to Florida lobbyists, periodically attended meetings and participated in telephone calls with Florida legislators and their representatives, went on site visits in Florida with lobbyists and legislators, and attended industry conferences in Florida. (A13; A16, pp. 41-42, 56-58, 65-68). Allie executed leases in the state of Florida in her corporate capacity and participated as outside counsel for the Florida subsidiary, as well as serving at its assistant secretary. (A13).

The parent Advance America corporation's involvement with Florida did not end with the opening of stores in the state. The objective of operating these stores was to make money for the shareholders of the parent Advance America company.

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(A28, p. 78). In furtherance of this objective, the parent company held meetings in Spartanburg, South Carolina, about once every other month at which each of the regional directors was present, including directors of the subsidiary company and directors of regions other than Florida. (A21, p. 165-166; A25, pp. 21-22). These meetings were usually attended by Defendants Gallen, Webster, Whatley, and Allie. (A21, p. 174; A25, p. 22). The parent company also retained a lobbyist, which it paid between $10,000 and $15,000 a month, to work on behalf of Advance America before the Florida legislature and cabinet and with the Comptroller's office to develop rules and legislation favorable to the company's business in Florida. (A16, Plaintiffs' Exhibits 1-9).

Several of the individual Defendants have also had contacts with Florida in their private capacities. Defendant Whatley has owned a home in Florida, held a bank account in Florida, and entered into personal contracts in the state of Florida. (A11). Defendant Gallen is a Florida resident that has owned a home, held bank accounts, paid taxes, and entered into personal contracts in Florida. (A12; A24, p. 4). Defendant Johnson resided in Fort Lauderdale, Florida at the time the parent company was formed, and he paid Florida property taxes and held a Florida bank account. (A9, p. 6).

With the foregoing evidence in the record, the trial court held a one-hour hearing on Defendants' motions to dismiss at which the parties argued the relevant

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legal issues at length. Rather than rule from the bench, the Honorable Judge Hoy took the matter under advisement. (A35, p. 52). A little more than a month later, the trial court entered a written order denying Defendants' motions to dismiss. (A1). Thereafter, the parent Advance America corporation, Steve and Brenda McKenzie, and the remaining individual Defendants took separate non-final appeals under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i), which permits interlocutory appeals of non-final orders that determine "the jurisdiction of the person." (A2; A35; A36).

Plaintiffs' motion to consolidate the three appeals, even just for record purposes, was denied, but the Court ordered *sua sponte* that the appeals be assigned to the same panel.

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SUMMARY OF ARGUMENT

I. Plaintiffs' allegations and the record evidence demonstrate that the parent Advance America corporation is subject to personal jurisdiction in Florida because it has been engaged in a general course of business activity in Florida for pecuniary benefit, subjecting it to jurisdiction under Florida statute section 48.193(1)(a); it has committed a "tortious act" in Florida, subjecting it to jurisdiction under 48.193(1)(b); and it has engaged in substantial and not isolated activity within Florida, subjecting it to jurisdiction under 48.193(2).

II. Plaintiffs' allegations and the record evidence demonstrate that the parent Advance America corporation engaged in substantial activity in the state of Florida by virtue of its interactions with and operational control of the subsidiary corporation whose business it was to make payday loans to Florida consumers, well-exceeding the minimum contacts required by due process. Subjecting the parent company to personal jurisdiction in Florida, therefore, comports with due process of law.

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ARGUMENT

THE TRIAL COURT CORRECTLY DETERMINED THAT THE PARENT ADVANCE AMERICA CORPORATION IS SUBJECT TO PERSONAL JURISDICTION IN FLORIDA.

Plaintiffs' allegations and the record evidence demonstrate that the parent Advance America corporation is subject to personal jurisdiction in Florida under the long-arm statute because it conducted business in Florida, subjecting it to jurisdiction under section 48.193(1)(a), Florida Statutes; committed a tortious act in Florida, subjecting it to jurisdiction under 48.193(1)(b); and engaged in substantial and not isolated activities in Florida, subjecting it to jurisdiction under 48.193(2). Furthermore, the company has sufficient minimum contacts with Florida to satisfy the due process clause. Thus, the Court should affirm the trial court's denial of the parent Advance America corporation's motion to dismiss for lack of personal jurisdiction.

When determining whether it has jurisdiction over a nonresident defendant, a Florida court must conduct a two-step analysis. *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989). First it must find that there are sufficient facts to bring the case within the purview of Florida's long-arm statute. *Renaissance Health Pub., LLC v. Resveratrol Partners, LLC*, 982 So. 2d 739, 741 (Fla. 4th DCA 2008). Then it must determine "whether there are sufficient 'minimum contacts' to satisfy due process requirements." *Id.*

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"Initially, the plaintiff may seek to obtain jurisdiction over a nonresident defendant by pleading the basis for service in the language of the statute without pleading the supporting facts." *Venetian Salami*, 554 So. 2d at 502 (citations omitted). By filing a motion to dismiss on the ground of lack of personal jurisdiction, a defendant does nothing more than raise the legal sufficiency of the pleadings. *Id*. (citing *Elmex Corp. v. Atl. Fed. Savs. & Loan Ass'n*, 325 So. 2d 58 (Fla. 4th DCA 1976)). "A defendant wishing to contest the allegations of the complaint concerning jurisdiction or to raise a contention of minimum contacts must file affidavits in support of his position." *Id*. Allegations not countered by evidence presented by the defendant are accepted as true. *Nida Corp. v. Nida*, 118 F. Supp. 2d 1223, 1227 (M.D. Fla. 2000) (citing *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1215 (11th Cir.1999)).

A. Plaintiffs' allegations and the record evidence demonstrate that the case against the parent Advance America corporation falls within the purview of Florida's long-arm statute.

Plaintiffs' allegations and the record evidence demonstrate that the parent Advance America corporation is subject to personal jurisdiction in Florida because it has been engaged in a general course of business activity in Florida for pecuniary benefit, subjecting it to jurisdiction under Florida statute section 48.193(1)(a); it has committed a "tortious act" in Florida, subjecting it to jurisdiction under

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48.193(1)(b); and it has engaged in substantial and not isolated activity within Florida, subjecting it to jurisdiction under 48.193(2).

1. § 48.193(1)(a), Fla. Stat.—Conducting business in Florida

One way that a nonresident defendant can be subject to personal jurisdiction in Florida is by "[o]perating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state." § 48.193(1)(a). If the collective actions of a defendant "show a general course of business activity in the State for pecuniary benefit" the requirements of this statute are satisfied. *Dinsmore v. Martin Blumenthal Assocs., Inc.*, 314 So. 2d 561, 564 (Fla. 1975).

Appellant is correct that "a parent corporation is not subject to jurisdiction in Florida solely because its subsidiary does business here." *Dev. Corp. of Palm Beach v. WBC Const., L.L.C.*, 925 So. 2d 1156, 1161 (Fla. 4th DCA 2006) (citing *Qualley v. Int'l Air Ser. Co.,* 595 So. 2d 194, 196 (Fla. 3d DCA 1992)). An exception to this general rule is made, "however, where 'the subsidiary is merely an agent through which the parent company conducts business in a particular jurisdiction or its separate corporate status is formal only and without any semblance of individual identity.'" *Al-Babtain v. Banoub*, 2008 WL 3982880, *5 (M.D. Fla. Aug. 26, 2008) (quoting *Meier, v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1272 (11th Cir. 2002)). In such cases, the business of the subsidiary is "'viewed as

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that of the parent and the [parent] will be said to be doing business in the jurisdiction through the subsidiary for purposes of asserting personal jurisdiction.'" *Meier*, 288 F.3d at 1272 (quoting Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1069.4 (3d ed. 2002)). Because Plaintiffs allege and the record evidence demonstrates that the parent Advance America corporation exerted management and control over the operations of its Florida subsidiary, such that the subsidiary was merely an agent of the parent, jurisdiction over the parent Advance America corporation is proper under section 48.193(1)(a).

The parent filed an affidavit in which it attempts to prove that it and the subsidiary are independent companies. (A19). Although they are separate entities, the record evidence demonstrates that these companies do not act independent. The officers and board of directors of the parent and subsidiary companies were virtually identical, *see* page 7, *supra*, the parent company covered expenses for its subsidiary, and profits from the subsidiary flowed to the parent. (A21, p. 147; A26, pp. 76, 79; A32, p. 10). And, not only did the parent company control the subsidiary in that it decided where to open new stores in Florida, what the hours of those stores would be, and how the marketing of those stores would be handled, (A30), it spent $10,000 to $15,000 a month in an attempt to develop laws in Florida that would be more favorable to the subsidiary's payday lending business. (A16, Plaintiffs' Exhibits 1-9). The following record evidence demonstrates that

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the parent (and individual Defendants) also controlled the daily operations of its subsidiary.

Defendants Whatley and Gallen, who are professionally affiliated with and work for only the parent company, (A19, ¶5; A32, p. 10), were the persons actually responsible for the daily operations of the subsidiary. (A11; A12; A13; A14). Whatley was the parent company's vice president of operations and ultimately responsible for the operation of the Florida stores, which required him to travel to Florida approximately once per quarter to oversee those operations. (A11; A18, pp. 18, 20, 28, 31, 41, 53, 72, 93). During these visits, he conducted "a multitude of operational duties" like making sure the stores were open and staffed, making sure the staff was dressed appropriately, and making sure the staff knew how to operate the system. (A18, p. 93). Defendant Whatley also established the operational procedures for the Florida stores, including the requirement that customers provide postdated checks when getting a payday loan. (A18, p. 53; A21, pp. 38, 67-68). On occasion, he talked to Florida state officials that visited the Florida store locations. (A18, pp. 91-93). He also participated in the decision to open new Florida stores. (A18, p. 40; A21, p. 38; A25, p. 14; A26, p. 8).

Defendant Gallen, a Florida resident, was the parent company's regional director of Florida whose job it was to open the Florida stores, staff those stores, and make sure the employees were properly trained and running the stores

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according to company policy, which required that he visit each store quarterly. (A18, pp. 31, 40; A19, ¶5; A21, pp. 38, 60, 81-82; A24, p. 65; A25, pp. 4, 13-14, A26, p.8). Gallen, who was responsible for the operations and management of the subsidiary, even recognized that there is no real distinction between the parent Advance America corporation and the subsidiary. (A9; A10; A11; A12; A13; A21, p. 62; A25, p. 45; A32, p. 10).

Because the parent Advance America corporation controlled the operations of its subsidiary, whose business it was to make payday loans to Florida consumers, the parent engaged in a general course of business activity in the state for pecuniary benefit, and is thereby subject to personal jurisdiction in Florida under 48.193(1)(a). *See Universal Caribbean Establishment v. Bard*, 543 So. 2d 447, 447-48 (Fla. 4th DCA 1989) (finding parent engaged in substantial activity in Florida through its subsidiary because president of parent made loan to capitalize subsidiary and approved and helped work on subsidiary's advertising brochures, parent approved of brochures and stationery used by subsidiary, parent and subsidiary used the same logo, and subsidiary acted as booking agent for parent); *Pappalardo v. Richfield Hospitality Servs., Inc.*, 790 So. 2d 1226, 1228 (Fla. 4th DCA 2001) (using agency theory to maintain jurisdiction where parent and subsidiary "were a confusing conglomerate, and were essentially one and the same company both financially and structurally"); *Sehringer v. Big Lots, Inc.*, 532 F.

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Supp. 2d 1335, 1343 (M.D. Fla. 2007) (finding parent subject to jurisdiction in Florida where executives of parent company visited subsidiary's stores, parent company compensated some employees of subsidiary, parent company's documents revealed that parent controlled displays and presentations within subsidiary's stores, and parent had power to decrease number of retail locations).

2. § 48.193(1)(b), Fla. Stat.—Committing a tortious act in Florida

Another way that a nonresident defendant can be subject to personal jurisdiction in Florida is by committing a tortious act within the state. § 48.193(1)(b). This section of Florida's long-arm statute is broadly construed. *Future Tech Intern., Inc. v. Tae Il Media, Ltd.*, 944 F. Supp. 1538, 1558 (S.D. Fla. 1996).

Appellant claims that it is impossible for the parent Advance America corporation to be subject to jurisdiction under this subsection of the long-arm statute because the civil RICO Act is not a "tort" and, therefore, Defendants' violation of this act cannot amount to "committing a tortious act." The broad construction the Florida Supreme Court has given the term "tort," however, demonstrates that Plaintiffs' allegations that the Defendants acted in violation of the civil RICO Act is sufficient to subject the Defendants, including the parent company, to personal jurisdiction in Florida under 48.193(1)(b).

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In *Execu-Tech Business Systems, Inc. v. New Oji Paper Co. Ltd.*, 752 So. 2d 582, 585 (Fla. 2000), the Florida Supreme Court found that allegations that defendants "deliberately conspired to fix the wholesale price of their product throughout the United States, including Florida[, in] violation of the Florida Deceptive and Unfair Trade Practices Act" alleged a "tortious act" under 48.193(1)(b). It explained that, "'Broadly speaking, a tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages.'" *Id.* at 585 n.8 (quoting Prosser and Keeton on The Law of Torts 2 (W. Page Keeton, general ed., 5th ed. 1984)).[3] Appellant cites *Brown v. Nova Information Systems, Inc.*, 903 So. 2d 968 (Fla. 5th DCA 2005), in support of its argument that Plaintiffs' allegations under the civil RICO Act are not sufficient to allege a tortious act. In that case, the fifth district found that a claim of fraudulent conveyance under Florida's Uniform Fraudulent Transfer Act is not a tort because the act does not allow for damages. *Id.* at 969 (citing *Beta Real Corp.*

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[3] Several other courts have found that allegation of a statutory violation can satisfy the "tortious act" requirement of 48.193(1)(b). *See Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 856-57 (11th Cir. 1990) (finding violations of federal copyright and communications laws to be sufficient to trigger jurisdiction under 48.193(1)(b)); *Williams Elec. Co., Inc. v. Honeywell, Inc.*, 854 F.2d 389, 394 (11th Cir. 1988) (finding violations of federal antitrust laws to be sufficient to trigger jurisdiction under 48.193(1)(b)); *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1146 (N.D. Fla. 1994) (finding violation of Comprehensive Environmental, Response, Compensation and Liability Act constitutes a "tortious act" under 48.193(1)(b)).

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v. Graham, 839 So. 2d 890 (Fla. 3d DCA 2003); *Freeman v. First Union Nat'l Bank*, 865 So. 2d 1272 (Fla. 2004)). *Brown* is distinguishable from the instant case, however, because the civil RICO Act does provide for damages. *See* § 772.104(1), Fla. Stat. ("Any person who proves . . . that he or she has been injured by reason of any violation of the provisions of s. 772.103 shall have a cause of action for threefold the actual damages sustained and, in any such action, is entitled to minimum damages in the amount of $200. . . ."). Thus, by alleging that the parent Advance America corporation conspired with and participated with the other Defendants in order to create and operate the illegal enterprise/subsidiary Advance America corporation in Florida in violation of 772.103 of the civil RICO Act, Plaintiffs have alleged that the parent company committed a "tortious act," bringing it within the personal jurisdiction of Florida pursuant to section 48.193(1)(b) of the long-arm statute.

Appellant argues that Plaintiffs have failed to sufficiently allege that the parent corporation, rather than the subsidiary corporation, committed a tortious act within the state of Florida. A review of the complaint demonstrates that Plaintiffs have pled a cognizable cause of action against the parent company for violation of the civil RICO Act, and that such allegations satisfy the requirements of 48.193(1)(b). Plaintiffs specifically allege that the subsidiary corporation is an "enterprise" under the civil RICO Act, (A4, ¶66 (citing § 772.103, Fla. Stat.)), and

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that the parent company and the individual Defendants operated this enterprise in order to collect unlawful debt in violation of section 772.103(2). (A4, ¶¶ 67-68). The civil RICO Act, like its federal counterpart (the Racketeer Influenced and Corrupt Organizations Act), permits civil causes of action against individuals that establish or operate a criminal enterprise, thereby making the individuals, rather than the enterprise, the liable party. Under the civil RICO Act, liability attaches to those persons who: 1) derive proceeds from a pattern of criminal activity or the collection of an unlawful debt and who use or invest those proceeds in the establishment or operation of an enterprise, § 772.103(1), Fla. Stat.; 2) through a pattern of criminal activity or the collection of an unlawful debt acquire or maintain any interest or control in an enterprise, § 772.103(2); 3) are employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of criminal activity or the collection of an unlawful debt, § 772.103(3); or 4) conspire or endeavor to violate any of the above provisions. § 772.103(4).

Plaintiffs not only allege that the parent company and the individual Defendants operated the subsidiary/enterprise in order to collect unlawful debt in violation of section 772.103(2), (A4, ¶¶ 67-68), they further allege that the parent company and the individual Defendants conspired and endeavored to engage in this unlawful behavior and directly or indirectly participated in or conducted this

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illegal enterprise in violation of the civil RICO Act. (A4, ¶¶ 69-70). These allegations are supported by the depositions and other record evidence, which show that the parent Advance America corporation was not only associated with the subsidiary/enterprise, but was also deeply involved in the establishment and operations of the subsidiary's payday loan activities in Florida. *See* pages 2 to 11, *supra*. Thus, not only did Plaintiffs sufficiently allege that parent corporation was "associated with" the enterprise, and participating in the operation of the enterprise, making their claim under the civil RICO Act viable, but the record evidence supports these allegations. As Plaintiffs' allegations and the record evidence demonstrate that the parent Advance America corporation acted in violation of the civil RICO Act, and thereby committed a tortious act in Florida, it is subject to personal jurisdiction under 48.193(1)(b). *See Renaissance Health Pub., LLC v. Resveratrol Partners, LLC*, 982 So. 2d 739 (Fla. 4th DCA 2008) (holding allegations that president wrote article disparaging plaintiff's product, which was published on defendant company's website, amounted to allegations that president committed a tortious act subjecting the president to personal jurisdiction in Florida); *Edelstein v. Marlene D'Arcy, Inc.*, 961 So. 2d 368 (Fla. 4th DCA 2007) (finding allegations that New York accountant failed to follow regulations and failed to pay plaintiff monies due in sale of Florida venture were sufficient to subject accountant to jurisdiction in Florida for the commission of a

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tortious act); *Thorpe v. Gelbwaks*, 953 So. 2d 606 (Fla. 5th DCA 2007) (holding allegations that defendant stockholder misrepresented financial condition and expected sales and profits of Florida franchise in order to induce its sale amounted to allegations that stockholder committed a tortious act in Florida).

Appellant also contends that Plaintiffs have failed to properly plead a count for civil RICO and have failed to properly allege a conspiracy involving the parent company. These issues, however, are not reviewable in this non-final appeal. Here, the Court's jurisdiction is limited by Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i) to a review of non-final orders that determine "the jurisdiction of the person." *See Kountze v. Kountze*, 2008 WL 5191571, *3 (Fla. 2d DCA Dec. 12, 2008) (noting there is "no rule permitting review of nonfinal orders that determine whether a complaint states a cause of action"). Review of the trial court's denial of the parent Advance America corporation's motion to dismiss for failure to state a claim is not proper until plenary appeal.

3. §48.193(2), Fla. Stat.—Substantial activities within Florida

Nonresident defendants are also subject to personal jurisdiction in Florida if they engage in "substantial and not isolated activity within this state, whether such

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activity is wholly interstate, intrastate, or otherwise, [and] whether or not the claim arises from that activity." §48.193(2), Fla. Stat.[4]

As discussed at pages 16 to 19, *supra*, the parent company has engaged in substantial and not isolated activity within Florida through the operation and control of the subsidiary corporation, which is sufficient to subject it to personal jurisdiction in Florida. *See Future Tech Intern., Inc. v. Tae Il Media, Ltd.*, 944 F. Supp. 1538, 1557-58 (S.D. Fla. 1996) (finding corporation and its president were subject to personal jurisdiction in Florida under 48.193(2) where, over course of a year, president and other members of corporation met in Miami with representatives of Florida company in "furtherance of their existing business relationship and in order to procure additional business"); *Noury v. Vitek Mfg. Co., Inc.*, 730 F.Supp. 1573, 1574 (S.D. Fla. 1990) (concluding that § 48.193(2) was satisfied where defendant engaged in sales activity for a period of several years by taking telephone orders from Florida and shipping directly to Florida, advertised in national publications reaching Florida, and attended professional conference in Florida); *Universal Caribbean Establishment v. Bard*, 543 So. 2d 447, 447-48 (Fla. 4th DCA 1989) (finding parent engaged in substantial activity in Florida through

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[4] Although Plaintiffs did not raise this argument below, the Court can affirm the trial court's ruling on this basis pursuant to the tipsy coachman doctrine. *See Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) ("[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record.").

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its subsidiary because president of parent made loan to capitalize subsidiary and approved and helped work on subsidiary's advertising brochures, parent approved of brochures and stationery used by subsidiary, parent and subsidiary used the same logo, and subsidiary acted as booking agent for parent); *Pappalardo v. Richfield Hospitality Servs., Inc.*, 790 So. 2d 1226, 1228 (Fla. 4th DCA 2001) (using agency theory to maintain jurisdiction where parent and subsidiary "were a confusing conglomerate, and were essentially one and the same company both financially and structurally"); *Sehringer v. Big Lots, Inc.*, 532 F. Supp. 2d 1335, 1343 (M.D. Fla. 2007) (finding parent subject to jurisdiction in Florida where executives of parent company visited subsidiary's stores, parent company compensated some employees of subsidiary, parent's company documents revealed that parent controlled displays and presentations within subsidiary's stores, and parent had power to decrease number of retail locations); *Future Tech Intern., Inc. v. Tae Il Media, Ltd.*, 944 F. Supp. 1538, 1557-58 (S.D. Fla. 1996) (finding corporation and its president were subject to personal jurisdiction in Florida under 48.193(2) where, over course of a year, president and other members of corporation met in Miami with representatives of Florida company in "furtherance of their existing business relationship and in order to procure additional business").

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C. The parent Advance America corporation has sufficient minimum contacts with Florida to satisfy due process requirements.

Plaintiffs' allegations and the record evidence demonstrate that the parent Advance America corporation engaged in substantial activity in the state of Florida through its control and operation of its subsidiary corporation, well-exceeding the minimum contacts required by due process. Subjecting the parent corporation to personal jurisdiction in Florida, therefore, comports with due process of law.

"Due process requires that a nonresident has sufficient minimum contacts with the forum state such that the maintenance of a suit does not offend 'traditional notions of fair play and substantial justice.'" *Carib-USA Ship Lines Bahamas Ltd. v. Dorsett*, 935 So. 2d 1272, 1275 (Fla. 4th DCA 2006) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "In analyzing whether a nonresident has the requisite minimum contacts with a forum state to justify personal jurisdiction, courts should determine whether the nonresident's 'conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). In order for a nonresident defendant to anticipate being haled into a Florida court, it is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within Florida, thus invoking the benefits and protections of its laws. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985)).

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If a defendant is subject to personal jurisdiction in Florida under section 48.193(2) of the Florida Statutes, then the constitutional due process burden is necessarily satisfied. *Id.* as 1275-76 (citing *Woods v. Nova Cos. Belize Ltd.*, 739 So. 2d 617, 620 (Fla. 4th DCA 1999)). For purposes of this due process analysis, a defendant's contacts with the forum state are "assessed over a period of years prior to the filing of the complaint." *Id.* at 1276 (citing *Woods*, 739 S. 2d at 621).

As demonstrated throughout, the parent Advance America corporation controlled the operations of its subsidiary. Thus, the subsidiary's business of making payday loans to Florida consumers is imputed to the parent corporation. *See Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1272 (11th Cir. 2002). To reiterate, the parent company, which shared most officers and directors with its subsidiary, covered expenses for its subsidiary and received the subsidiary's profits. (A21, p. 147; A26, pp. 76, 79; A32, p. 10). The parent also decided where to open new stores in Florida, what the hours of those stores would be, and how the marketing of those stores would be handled. (A30). Furthermore, it paid a lobbyist between $10,000 and $15,000 a month in the hopes of developing rules and legislation favorable to the subsidiary's payday lending business in Florida. (A16, Plaintiffs' Exhibits 1-9).

And, most importantly, the parent company controlled the operations of the subsidiary through two of its employees—Defendants Whatley and Gallen. (A19,

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¶5; A32, p. 10). Whatley and Gallen were the persons actually responsible for the daily operations of the subsidiary. (A11; A12; A13; A14). They made sure the Florida stores were open and properly staffed; that the staff was dressed appropriately, properly trained, and following company policy; and they established the operational procedures for the Florida stores. (A11; A18, pp. 18, 20, 28, 31, 40-41, 53, 72, 93; A21, pp. 38, 60, 67-68, 81-82; A24, p. 65; A25, pp. 4, 13-14; A26, p.8). Conducting these operational activities over the subsidiary required Whatley and Gallen to make frequent trips to and within Florida. (A10; A17, p. 15-18; A18, p. 31; A21, pp. 81-82, 89-90; A24, pp. 189-197; A25, p. 14).

These contacts that the parent Advance America corporation had with Florida by controlling the operations of its subsidiary in Florida and the subsidiary's contacts with Florida that are imputed to the parent corporation are sufficient to satisfy due process. *See Universal Caribbean Establishment v. Bard*, 543 So. 2d 447, 447-48 (Fla. 4th DCA 1989) (finding parent engaged in substantial activity in Florida through its subsidiary because president of parent made loan to capitalize subsidiary and approved and helped work on subsidiary's advertising brochures, parent approved of brochures and stationery used by subsidiary, parent and subsidiary used the same logo, and subsidiary acted as booking agent for parent); *Pappalardo v. Richfield Hospitality Servs., Inc.*, 790 So. 2d 1226, 1228 (Fla. 4th DCA 2001) (using agency theory to maintain jurisdiction where parent

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and subsidiary "were a confusing conglomerate, and were essentially one and the same company both financially and structurally"); *Sehringer v. Big Lots, Inc.*, 532 F. Supp. 2d 1335, 1343 (M.D. Fla. 2007) (finding parent subject to jurisdiction in Florida where executives of parent company visited subsidiary's stores, parent company compensated some employees of subsidiary, parent's company documents revealed that parent controlled displays and presentations within subsidiary's stores, and parent had power to decrease number of retail locations); *Future Tech Intern., Inc. v. Tae Il Media, Ltd.*, 944 F. Supp. 1538, 1557-58 (S.D. Fla. 1996) (finding corporation and its president were subject to personal jurisdiction in Florida under 48.193(2) where, over course of a year, president and other members of corporation met in Miami with representatives of Florida company in "furtherance of their existing business relationship and in order to procure additional business"). To hold otherwise would be to hold that Florida consumers injured within Florida by the intentional misconduct of the parent corporation in charging usurious interest on payday loans made through an illegal enterprise that it established and operated in Florida must travel to the parent company's state of residence to obtain a remedy. *See Licciardello v. Lovelady*, 544 F.3d 1280, 1288 (11th Cir. 2008) (holding that "Florida plaintiff, injured by the intentional misconduct of a nonresident [in the unauthorized use of a trademark

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on a website accessible in Florida] expressly aimed at the Florida plaintiff, is not required to travel to the nonresident's state of residence to obtain a remedy”).

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CONCLUSION

Plaintiffs' allegations and the record evidence demonstrate that the parent Advance America corporation is subject to personal jurisdiction in Florida under the long-arm statute because it conducted business in Florida under 48.193(1)(a), committed a tortious act in Florida under 48.193(1)(b), and engaged in substantial and not isolated activities in Florida under 48.193(2). Furthermore, the parent company has sufficient minimum contacts with Florida to satisfy the requirements of due process. Thus, the Court should affirm the trial court's denial of the parent Advance America corporation's motion to dismiss for lack of personal jurisdiction.

Respectfully submitted this 22nd day of December, 2008.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellees' Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that the Initial Brief being submitted is in Times New Roman 14-point font.

s/ Diana L. Martin
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