STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

JAMES MCDONNELL, D.O., and NORTHWEST MICHIGAN SURGICAL GROUP, P.C.,

Plaintiffs/Counter-Defendants,

v

File No. 07-26179-CK
HON. PHILIP E. RODGERS, JR.

MICHAEL COLBURN, M.D., CARA COLBURN, and NORTHERN MICHIGAN VASCULAR CENTER, P.C. dba NORTHERN MICHIGAN VASCULAR LAB and dbs (sic) NORTHERN MICHIGAN VEIN CENTER,

Defendants,

and

MICHAEL COLBURN, M.D.,

Defendant/Counter-Plaintiff

and

MICHAEL COLBURN, M.D.,

Third-Party Plaintiff,

v

NWMSG PROPERTIES, L.L.C., a Michigan Limited Liability Company and JAMES R. MCDONNELL, D.O.,

Third-Party Defendants.
/

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DECISION AND ORDER

This case was tried over a six-day period. The proofs closed on December 23, 2008 and closing arguments were submitted in writing on January 15, 2009. The Court took the matter under advisement to review the parties' written submissions and its notes and now will provide its findings of fact and conclusions of law. MCR 2.517.

I. Findings of Fact

Drs. McDonnell and Colburn are physicians who practiced together in Traverse City, Michigan. They were co-owners of the limited liability company whose only asset was the real estate where their practice was located. They were also co-owners of their professional corporation, Northwest Michigan Surgical Group, P.C. (NWMSG).

The issues in this case arise out of the termination of the McDonnell/Colburn practice and include Plaintiffs' claims that the Defendants' tortiously interfered with the business relationship and committed both common law and statutory breaches of fiduciary duty as well as a claim of shareholder oppression. The Defendants deny these claims and Dr. Colburn seeks compensation for his monetary interest in both the professional corporation and the limited liability company.[1]

Unfortunately, the history of NWMSG is a combination of professional success and an unrelenting series of lawsuits - - with former partners and with Munson Medical Center. At the time NWMSG was formed, Dr. McDonnell practiced with Robert Dotterrer, M.D. and they decided to hire the Defendant Michael Colburn.

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[1] While there are multiple Defendants, the references to the "Defendant" shall refer to Dr. Colburn. Other Defendants shall be described by name. Similarly, the "Plaintiff" shall refer to Dr. McDonnell. The professional corporation shall be described as "NWMSG."

Consistent with their plan, the Defendant was hired and assisted the Plaintiff and Dr. Dotterrer as he built his own practice. However, less than a year after Defendant was hired, Dr. Dotterrer chose to leave the practice. The Defendant was not yet generating enough revenue to cover his guaranteed salary, and Dr. Dotterrer was apparently unwilling to pay his share of this cost.

The Plaintiff's response was to gift the Defendant a 10% interest in NWMSG and to make him an officer in the professional corporation. The Defendant was subsequently gifted an additional 40% in NWMSG and although the concept of a buy-in was discussed, no contract was ever signed and no payments were ever made. The parties did enter into a cross-purchase agreement which would prevent the dissolution of the practice and set the value of NWMSG at $50,000. No allocation was made for goodwill.

Dr. Dotterrer's decision to leave the practice also generated a lawsuit where Dr. Dotterrer as Plaintiff sued Dr. McDonnell and NWMSG. The fees for this litigation were borne by NWMSG. The litigation with Dr. Dotterrer was resolved in 2004 and $120,000 was borrowed to fund the settlement. This loan became a NWMSG liability. The loan was rolled into a much larger note for purposes of obtaining additional funds to finance the start up costs of The Vein Center.[2] The result was a total corporate obligation of $266,000 which the parties have referred to as the "PC debt."

Plaintiff and Defendant next chose to hire a third surgeon, Dr. Amalfitano, to assist Dr. Colburn in his vascular surgery practice. Dr. Amalfitano encountered problems in obtaining staff privileges at Munson Medical Center and the legal fees associated with these issues were paid by NWMSG. It was Dr. Amalfitano who first brought to Drs. McDonnell and Colburn the opportunity to pursue vein work and develop a "vein center." Dr. Amalfitano began work with the parties and The Vein Center d/b/a was created in November 2004. Earlier that year, Dr. Colburn became a director of NWMSG.[3]

As The Vein Center began operations, Dr. Amalfitano provided services to it while he continued to deal with his staff privileges issue at Munson Medical Center. Dr. Colburn also

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[2] The Vein Center is an assumed name of NWMSG.

[3] Also in 2004, the parties formed the LLC for the purpose of acquiring the professional office space wherein NWMSG and The Vein Center continue to be located. Defendant's LLC equity equals $86,436.94. This figure was stipulated to by the parties.

had staff privileges issue which, like those of Dr. Amalfitano, were being handled by legal counsel at the expense of the professional corporation.

Less than a year after the business loan was obtained and The Vein Center created, Dr. Amalfitano and his bookkeeper were fired. Drs. McDonnell and Colburn discovered that they were setting up a competing vein center. Dr. Amalfitano and his bookkeeper canceled The Vein Center's advertising and legal counsel became involved to undo their wrongful acts. Not surprisingly, Dr. Amalfitano's firing also generated litigation, the settlement and legal expenses for which were paid by NWMSG. And, with Dr. Amalfitano's termination in December 2005, Dr. McDonnell began performing procedures in The Vein Center.

Although the parties agreed they would not get into the substance of the so-called "Munson matter," the Court understands that Munson Medical Center was going to take action adverse to both Drs. McDonnell and Colburn arising out of demands made on Munson in connection with the staff privileges issue associated with Drs. Colburn and Amalfitano. Monica Navarro was retained to represent Dr. McDonnell and the Defendant agreed to her engagement and the payment of the initial $25,000 retainer. Subsequently, a dispute arose between the parties regarding legal fees for the "fair hearing" and Munson's appeal.

Within months after Dr. Amalfitano was fired, the Defendant proposed and Plaintiff agreed to revise their compensation formula so that they split expenses equally but each received only those revenues they generated as individuals. A written agreement associated with this change was never executed by all parties due to the dispute regarding attorney's fees.

While the fee dispute was simmering in the summer of 2006, Plaintiff discussed with Defendant the concept of expanding The Vein Center to include an in-house vascular lab. The concept also was discussed with corporate counsel in the fall of 2006, and the parties advertised for a full-time vascular technician in December 2006. Although there were replies to the advertisement, no one was hired to fill this position.

On January 23, 2007, barely a year after Dr. Amalfitano was fired, the Defendants retained NWMSG's corporate counsel, Thomas Pezzetti, to create Northern Michigan Vascular Center P.C. Mr. Pezzetti testified that he believed the Colburns took this action on behalf of NWMSG. Oddly, when the annual meeting of NWMSG was held at corporate counsel's office a week later, neither the Defendant nor Mr. Pezzetti discussed with Dr. McDonnell the creation of the Northern Michigan Vascular Center. Communication issues were discussed and the

parties agreed to work together and meet weekly to improve communication. The Plaintiff testified that at no time was the creation of Northern Michigan Vascular Center disclosed to him. Mr. Pezzetti did not do so and his partner, corporate counsel for NWMSG, Joseph Fisher, was unaware that the entity had been created. Defendant Cara Colburn made no such disclosure and the Defendant Michael Colburn did not testify.

The Colburns' preparations to form a competing practice continued into February 2007. Attorney Pezzetti reserved two assumed names and obtained an employer identification number. The Defendant Cara Colburn was the registered agent for the competing corporation and its address was the Colburns' home. Also in February, a proposal was obtained from a contractor to develop an office at Cedar Run Commons. As the spring unfolded, elevation and floor plans were received and building specifications prepared. A discussion took place with Mr. Pezzetti and the Colburns in June 2007 which led to the incorporation of a real estate holding company to own the land where the new practice was to be built. Financing was also obtained in July 2007 and a real estate purchase agreement signed. The real estate transaction closed on October 28, 2007.

At least from January 23, 2007 forward, it is evident that the Defendants were preparing to separate from the Plaintiff and open an independent office. No disclosure was made to the Plaintiff. The Defendants were officers of NWMSG and Michael Colburn was also a director. Neither Defendant resigned their position as an officer nor did Dr. Colburn resign as a director at any time material to this litigation.

As the fee dispute continued to percolate, the CPA for NWMSG, Dale Vanderwal, testified that Cara Colburn directed him to reclassify the attorney's fees on the NWMSG's books as loans to Dr. McDonnell rather than as corporate expenses. He had no conversation with the Plaintiff regarding this reclassification and Cara Colburn admitted that she did not disclose it to the Plaintiff. Dale Vanderwal testified that all changes he made in the corporate records with respect to the attorney's fees as a personal expense or loan of Dr. McDonnell were at the direction of the Defendant Cara Colburn.

The parties disputed whether the Defendant Michael Colburn made it clear he was going to separate from Plaintiff in a meeting held on July 3, 2007 or a subsequent meeting held on July 17, 2007. The date is irrelevant. Assuming that it was July 3, 2007, such an announcement would not have provided authorization for the Defendant Cara Colburn to delete

corporate e-mails, cancel corporate advertising or remove corporate marketing materials from the office. All of this was done without notice to Dr. McDonnell and without disclosure of the substantial efforts which were underway to create a separate practice. Once the "divorce" was announced, the parties agreed to work together with a proposed departure date of May 2008 for Dr. Colburn. At this point, corporate counsel Joe Fisher became involved and along with his partner, Tom Pezzetti, he tried to facilitate a transition that would be as smooth and amicable as possible.

While the parties were negotiating the sharing of advertising costs pending their actual separation, the Defendant Michael Colburn did not disclose to either attorney or to the Plaintiff that he had directed the Defendant Cara Colburn to terminate all NWMSG advertising and she had done so. Also, without notice to Plaintiff, Dr. Colburn instructed the staff to make inquiries of self-referred patients regarding their physician preference, the logical result of which was to have them choose him over Dr. McDonnell.

With Cara Colburn's departure from the practice in July 2007, Plaintiff hired Sue Giles in August to manage The Vein Center's advertising and learned from her on August 21 that it had been canceled. Ms. Giles was immediately instructed to reinstate as much of the advertising as was possible. A prime piece of that advertising, a spot on the Ron Jolly morning talk radio show, had been taken by the Defendants Colburn and held in the account of their new corporation.

As the fall of 2007 unfolded, Dr. Colburn withheld his billings on two different occasions and sought increased draws. He also set up a separate bank account to deposit monies received for his previous work at NWMSG and instructed NWMSG staff to deposit those monies into the second account. The Defendant did so after he surreptitiously caused all NWMSG advertising to be canceled and after reserving one significant radio spot for himself.[4] The Defendant was not making any contribution towards advertising expenses, and he had surreptitiously directed the staff to effectively steer patients to him.

The Court became involved in October 2007 and the parties physically separated by agreement on November 15, 2007. Wayne Phassen, a respected CPA, was appointed by the Court as a Receiver to make certain that all billings by both physicians were processed,

[4] The Defendants placed this spot in the account of their new professional corporation and used it for charitable ads. It did not return to NWMSG until February 2008.

NWMSG bills paid and an accounting provided so that revenues could be properly divided. The Court also escrowed funds for the attorneys' fees at issue and marketing expenses through November 15, 2007. The Defendant Michael Colburn discontinued payments on the NWMSG debt and the LLC debt as of November 15, 2007.

The monetary issues between the parties are relatively narrow. Plaintiffs seek a 50% reimbursement for both the PC and LLC debt as of November 15 as well as the interest he paid on the Defendant's portion on that debt. Plaintiffs also seek a 50% contribution towards the disputed attorneys' fees and a 50% contribution for all advertising expenses incurred between the restart of advertising in late August and September and the Defendant Michael Colburn's departure on November 15, 2007.

The Plaintiffs' greatest claim for damages sought is for lost revenue associated with the cancellation of advertisements. It is upon this issue that a significant portion of the trial focused.

From the Defendants' perspective, they seek compensation for Michael Colburn's interest in the LLC and a payment for the goodwill associated with the NWMSG professional corporation.

II. Conclusions of Law

The Plaintiffs have made four separate but related claims against the Defendants. These include tortious interference with contracts of NWMSG (Count I), breach of both common law and statutory fiduciary duties owed to NWMSG (Counts II and III), and shareholder oppression by the Defendant Michael Colburn directed against the Plaintiff (Count IV). With respect to each of these counts, it is the Plaintiff's obligation to prove his claims by a preponderance of the evidence. Further, for those claims that are proven, the Court may award damages so long as they are neither speculative nor conjectural and are grounded in competent evidence.

A. Tortious Interference

In order to prove a claim for tortuous interference of a contract or business relationship, a plaintiff needs to demonstrate that the acts of the defendant were either per se wrongful *or* a lawful act done with malice and unjustified in law for the purpose of invading Plaintiff's contractual rights or business relationships. *Feldman v Green*, 138 Mich App 360, 360 NW2d

881 (1984). In *Woody v Tamer*, 158 Mich App 764, 775, 405 NW2d 213 (1987), the Michigan Court of Appeals adopted the Restatement (Second) of Torts §767 which sets forth various factors to be considered in determining whether specific conduct constitutes improper interference which include the following:

1. The interferor's conduct;
2. The interferor's motive;
3. The injured party's interests,
4. The interferor's interests;
5. The societal interests in protecting the freedom of action of the interferor and the contractual interests of the other;
6. The relationship of the interferor's conduct to the interference; and
7. The parties' relationship to each other.

There is no dispute that the Defendant Michael Colburn directed the Defendant Cara Colburn to cancel the advertising contracts then existing between NWMSG and its various media outlets. This was done without notice to the Plaintiffs and was clearly detrimental to the best interest of NWMSG. All the parties well understood the importance of advertising to their increased business revenues.

When Dr. Amalfitano left the practice and surreptitiously attempted to cancel advertising and usurp corporate opportunities, Drs. McDonnell and Colburn sued him. Cara Colburn was brought in to clean up the mess left by Dr. Amalfitano and his office manager. As a NWMSG officer and employee, Cara Colburn put the practice house in order, strengthened its media relationships and increased its marketing to the financial benefit of both physicians.

The Defendants' cancellation of these ads and appropriation of the Ron Jolly morning talk radio spot (a corporate opportunity) to themselves and their new corporation is legally indefensible. They did so as NWMSG officers and, in the Defendant Michael Colburn's case, as a director of the corporation they were harming. They also were acting in their own self interest and in that of their new professional corporation. See, *Steven D. Enterprises, Ltd v Fonzi*, 438 F Supp 161, 163-164 (ED Mich 1977).

With the discovery of the wholesale cancellation of all NWMSG media promotions, Plaintiff took immediate action to reinstate the advertisements and to mitigate his loss. The Plaintiff continues to advertise extensively and the Defendant does so in his new business. The cancellation was wrongful and malicious and the Defendants are responsible for it. Michael Colburn is responsible because as an officer and director of NWMSG, he provided the order to

cancel the advertising. Cara Colburn is responsible because as an officer of the corporation she also had independent fiduciary duties to it and caused the actual cancellation to occur. Northern Michigan Vascular Center, PC is responsible because its agents caused the wrongful cancellations, in part, to benefit it. Malice is implicit in the following facts: (a) no Defendant disclosed the fact of cancellation to the Plaintiffs, (b) the Ron Jolly radio spot was held in the account of the new corporation, (c) advertising is the lifeblood of the practice, and (d) Plaintiff and Defendant sued Dr. Amalfitano for similar behavior.

B. Breach of Fiduciary Duty

With respect to the claimed breach of common law and statutory fiduciary duties, it is evident that the Defendants Colburn owed a duty of good faith to the Plaintiff corporation and that it was breached. Defendants could not act for themselves at the expense of NWMSG. The Defendant Cara Colburn would argue that she should not be liable because as an employee she was simply following the orders of her husband who was an officer and director of the corporation. However, Cara Colburn was a NWMSG officer and had her own strict duty of good faith to the entity. *Production Finishing Corp v Shields,* 158 Mich App 479, 405 NW2d 171 (1987) citing *Salvador v Connor*, 87 Mich App 664, 675, 276 NW2d 458 (1978). Further, it is widely recognized that the appropriation of a corporate opportunity by an officer or director will constitute an actionable breach of fiduciary duties. *Id.* The actions which she took harmed NWMSG, were a breach of her fiduciary duty and benefited her husband and her.

The Defendants Colburn were clearly pursuing a separate practice for several months prior to disclosing their intent to do so to the Plaintiff. The Defendant Michael Colburn had every right to practice separately and independently within the same community as Dr. McDonnell. As an at-will employee, Cara Colburn had the right to terminate her employment at any time, resign her position as an officer with the Plaintiff corporation and pursue independent employment. However, the right to compete does not carry with it a concomitant right to unilaterally and secretly cancel advertising, usurp a corporate advertising opportunity, withhold corporate billings or deposit corporate funds into a separate account. Nor does it

confer a license to remove any corporate property including marketing materials and notebooks prepared on site by corporate employees at corporate expense.[5]

C. Shareholder Oppression

Unfortunately, NWMSG historically has been unable to maintain continuity among its physician shareholders with resultant departures and litigation associated with those departures. In the case of Dr. Amalfitano and now Dr. Colburn, departure has also been associated with varying degrees of bad acts.

MCL 450.1489 allows a shareholder to bring an action to show that acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. In 2006, subsection (3) of the statute was amended to read as follows:

> "willfully unfair and oppressive conduct" means a "continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder." **Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interest disproportionately as to the affected stockholder.** [Emphasis added.]

It is the nature of the acts discussed above that causes the Court to find that the Defendants' behavior was oppressive and willfully unfair as those terms are used in MCL 450.1489. The cancellation of advertising, appropriation of a corporate opportunity, withholding of billings and removal of marketing materials were intended to diminish Plaintiff's income and reduce the value of NWMSG. Accordingly, the Court will require that the Defendant Michael Colburn transfer his shares in NWMSG to the Plaintiff. The compensation associated with this transfer will be discussed ahead.

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[5] MCL 450.1541a requires that directors and officers of corporations discharge their duties: (a) in good faith; (b) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (c) in a manner reasonably believed to be in the best interests of the corporation. In essence, this statute merely codifies what has been required of directors and officers under the common law for years. The Colburns owed these statutory duties to NWMSG as fiduciaries through their roles as officers. For the reasons already discussed, the Defendants Colburn have breached their statutory fiduciary duties.

III. Damages

A. General

In tort cases, the general theory of damages is to restore the plaintiff to where he was before the defendant's wrongful conduct injured him. *Detroit Edison Co v NABCO Inc*, 35 F3d 236 (CA 6, 1994). In order to recover any type of damages, the Plaintiff must prove that the damages were the direct and proximate result of the defendant's wrongful conduct. *National Steel Corp v Great Lakes Towing Co,* 574 F2d 339 (CA 6, 1978); *Woodyard v Barnett*, 335 Mich 352; 56 NW2d 214 (1953). NWMSG cannot recover losses that were due to the Plaintiff's own mismanagement or misdeeds, to general market conditions, the conduct of others, or the Defendant's lawful conduct.

The Plaintiff must establish with reasonable certainty the injury, a causal connection between the conduct complained of and the injury, and the appropriate compensation. *Sullivan Industry, Inc v Double Sealed Glass Co*, 192 Mich App 333; 480 NW2d 623 (1991). The Court may not award damages for injuries that are remote, contingent or speculative. However, damages do not have to be proven with mathematical precision. *Woodyard, supra; Thiesen v Knake*, 236 Mich App 249; 599 NW2d 777 (1999).

The Plaintiffs seek damages allocated among five different categories. Principally, those damages are associated with lost revenue occasioned by the cancellation of advertising. Additionally, the Plaintiffs seek damages for advertising expenses incurred in late August through the parties' separation on November 15, 2007, one-half of the professional corporation debt calculated as of the same date, one-half of the disputed attorney's fees and interest paid on the corporate debt. For reasons discussed above, the Court finds that the Defendant Michael Colburn is responsible for one-half of those advertising expenses. He was an officer and director of NWMSG and benefited from the advertising. As described on Plaintiff's Exhibit 175 and reduced only to cover the period through November 15, 2007, Sue Giles' unrebutted testimony was that total advertising expenses were incurred in the amount of $29,649. One-half of these expenses, then, equals $14,824.50.

The Defendant Michael Colburn is also responsible for one-half of the NWMSG professional corporation debt as of November 15, 2007. His share of that obligation equals $61,015. Interest paid on that debt for which he must reimburse the Plaintiff totals $7,469.

With regard to the disputed attorney's fees, it is evident that NWMSG has always borne practice-related attorney's fees as a corporate expense. The fees associated with the departure of Dr. Dotterrer were borne as a corporate expense. The settlement with Dr. Dotterrer was treated as a corporate expense. Fees associated with the departure of Dr. Amalfitano and the litigation with him were booked as corporate expenses. The fees incurred in the staff privileges issues with Munson relating to Dr. Amalfitano and Dr. Colburn also were booked and paid for as corporate expenses.

Indeed, although his position changed from time to time, the Defendant Cara Colburn stated that her husband was willing to pay his share of the attorneys' fees for the Munson "fair hearing" but not for the appeal. The Defendant Michael Colburn offered no testimony. On this issue, the Court agrees with Attorney Fisher. The Defendant Michael Colburn is "out of line." The Plaintiff put forth a significant effort and paid for the expenses associated with Dr. Colburn obtaining staff privileges at Munson. The Plaintiff gifted to the Defendant his 50% interest in their professional corporation. The Plaintiff prevailed at the fair hearing and Munson caused the appeal to occur. The Defendants' parsimony on this issue is inexplicable. The disputed fees are described in Plaintiff's Exhibit 17, a calculation prepared by the Defendant Cara Colburn, and the Defendant's share of those fees is $13, 793.33.

As an offset to the damages the Defendant owes the Plaintiff is Michael Colburn's share of the LLC equity. As of November 15, 2007, the parties stipulated that his share of that equity equaled $86,436.94.

What remains for discussion are the two issues which consumed all of the expert testimony, i.e., NWMSG's revenue losses associated with the canceled advertising and the value of the NWMSG goodwill.

B. Advertising

There is no serious dispute that there is a positive correlation between the NWMSG advertising or marketing and the revenues the physicians derived from that practice. Each physician called a marketing expert. The Plaintiff relied upon Sue Giles and the Defendants utilized Phil Callighan. Sue Giles was initially retained by the Plaintiff upon Cara Colburn's exit from the practice and it was she who discovered that the ads had been canceled. She immediately put a marketing program in place and it is has been successful. Whether measured

in new patients or revenues, the Plaintiff was fully recovered by August 2008. Dr. McDonnell admitted his maximum loss was occasioned between August 2007 and February 2008 which included seven of the nine worst months in NWMSG's history.

Without question, the Plaintiff made every reasonable effort to mitigate his damages. There was no evidence to the contrary. In fact, Mr. Callighan felt it was reasonable to hire Sue Giles, and he did not even attempt to quantify how his proposed marketing plan would have been superior to hers. As Ms. Giles noted, the phones do not start ringing on the day the advertising starts back up. With luck, she hoped that Plaintiff would be successful within three to four months.

Both experts agreed that they seek Top of Mind Awareness (TOMA) in the client base and that any particular advertisement has a relatively short lifespan (two weeks) in the public's memory. A regular ongoing marketing effort is important to maintain client growth and steady revenues.

While no expert could correlate any particular lost advertising source to any specific lost revenue, it was clearly evident that the termination of all advertising had a significant deleterious impact on revenue. The Defendant's wrongful withholding of billings prior to his departure on November 15 also had a deleterious impact on revenue.

Plaintiffs' expert witness proposed a written damage analysis to support an award $855,673.[6] This analysis is extreme, assumes that Dr. McDonnell would retain at least half of the Defendant's patients and ignores several important factors.

First and perhaps most significantly, the Defendant Dr. Colburn and his wife had every right to leave the practice and compete within the same community. Had this been done in a straightforward and honorable way, there still would have been some impact on revenues. Short of the Defendant's retirement or relocation to a different area and absent a covenant not to compete, there is no reasonable basis to believe that Plaintiff would retain any significant portion of Dr. Colburn's patients.

In fact, as will be discussed further ahead, the Defendant left with his patients, their records, his receivables, his personal goodwill, his personal property and the majority of the

[6]Plaintiffs' Exhibit 32. But, in his testimony, John F. Sase, Ph.D., described losses personal to Plaintiff of $358,262 and an additional loss of $402,596 which loss is attributable to Dr. Colburn's patients that he believes Plaintiff would have retained or a total loss of $760,858.

NWMSG staff. He did all of this legally. The Defendant also legally began competing within the same area and instituted his own significant marketing program. The Court finds a damage analysis that would generate $760,000 to $850,000 of lost revenue solely attributable to the Defendants' bad acts to be illogical, unrealistic and in the final analysis wholly unproven.

Conversely, the Defendants' economist finds lost revenue associated with the cancellation of advertising to approximate $100,000. The Defendants' economist simply subtracts the cash revenues from the prior year from those reduced revenues in the succeeding year and arrives at this particular figure. In so doing, he minimizes losses in the relevant time period with gains later in the year.

The Plaintiff's economist uses accrual accounting to substantiate a $358,262 loss that is personal to the Plaintiff without consideration of Dr. Colburn's patients. However, his analysis does not attribute any lost revenue to loss of staff, a new competitor within the market, time lost by Plaintiff to pursue additional board certification or Dr. McDonnell's own failure to renew Yellow Pages advertising. Further, given the replacement of the advertising and its short shelf life, this analysis extends the losses into a time period well past that reasonably associated with any given advertisement.

For example, in Dr. Sase's Report (Plaintiffs' Exhibit 41 at bates number 81), he states that Dr. McDonnell described a "lag" from the point an ad is seen until it generates a patient of one to two months.[7] From the time the patient is seen until revenue is generated an additional one or two months can pass. At the extreme then, the delay or lag between an advertising event and the generation of revenue is four months. The ads were cancelled between July 3 and July 5. Sue Giles testified she discovered this fact on August 21 and immediately replaced all the ads she could. Television was not replaced until September and the Ron Jolly morning talk radio spot was regained in February 2008.[8] Based on Dr. McDonnell's own historical experience with NWMSG advertising, one would expect the revenues associated with lost advertising to have been fully experienced by the end of January, and one would not include lost revenues from August 2007 as July advertising would not generate patients until August and corollary revenue until September.

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[7] Sue Giles also advised Plaintiff it would take three or four months to get patients back.

[8] The Ron Jolly morning talk radio spot was promptly mitigated with an ad on *Mary in the Morning*. The *Traverse City Record-Eagle* "Well-Being" banner ad was replaced with a banner on the front page of the newspaper. No one could quantify the loss from these replacements over their predecessor.

In attempting to calculate a realistic loss associated with the advertising cancellation, the Court has figures from three plausible analyses. The first is Dr. King's pure revenue loss on a cash flow basis from the two competing time periods of $100,000. The second number would be Dr. Sase's loss attributable to Plaintiff's revenues alone of $358,262. Finally, the Court has looked at the gross revenue losses from September 2007 through January 2008 which equal $234,423. See, the chart at bates number 88 in Plaintiff's Exhibit 41. Net profits on those gross losses would equal $210,980.[9]

With the reinstatement of advertising in late August and September, the Court does not find the decreases in revenue from February through the remainder of 2008 can be reasonably correlated with the cancellation of advertising in July 2007. The Court finds that the loss of advertising was a substantial cause of lost revenues but not the sole cause. Accordingly, the Court will award to NWMSG for lost advertising revenues jointly and severally against all Defendants the amount of $158,235 which is 75% of those lost net revenues experienced by NWMSG from September 1, 2007 through January 31, 2008 as described in the aforementioned chart found in Plaintiff's Exhibit 41.

C. Goodwill

The Defendant suggests that the goodwill associated with NWMSG initially totaled $1,188,571. After appropriate revisions, the Defendant reduced this figure to $267,000 which divided by two equals $133,500. The Plaintiff's analysis would have goodwill valued at $9,000. The goodwill is for the PC's name, address and phone number.

The counter-veiling expert opinions should be reviewed in light of the facts. The facts are uncontested. The Defendant paid nothing for his interest in the PC and left with his patients, their records, his personal property, five of the seven staff members, his own personal goodwill and set up a competing business within the same community. NWMSG has been unable to retain professional shareholders and its litigation over the last few years appears unrelenting and to have reached a toxic level. Both experts agree that the TOMA sought with the public needs to be continually reinforced through marketing and that any particular

[9] Under Michigan law, damages for lost profits must reflect net profits, not gross profits. *DXS Inc v Siemens Medical Systems Inc*, 100 F3d 462 (CA 6, 1996). "Net" profits means lost revenue minus costs that were avoided or would have been incurred in obtaining the revenue. Dr. Sase testified that he used a variable cost figure of 10%. Net profits on this gross revenue loss would equal $210,980.

marketing effort has a shelf life as short as two weeks. Referral patterns are physician to physician and referrals from former patients and their family members are to a physician, not to an address or a corporate name. Goodwill can be a significant portion of a business sale where an existing client base is being transferred, the seller is assisting in making a smooth transition and the seller will not be competing with the buyer. None of this is true here.

To the extent that this entity has any goodwill, it would be that nominal amount identified by Plaintiff's expert Kate Thornhill, CPA, of $9,000. However, the Defendant did not leave under honorable circumstances and caused conscious harm to the entity. Having paid nothing for goodwill to begin with and never having valued it during the time that the Plaintiff and Defendant practiced together, it would seem anomalous to award it here. Thus, the Court declines to do so.

Conclusion

The Defendant shall transfer his interest in the professional corporation and the limited liability company to the Plaintiff. The Plaintiff shall be solely responsible for and indemnify the Defendant against all outstanding NWMSG and LLC loans. The Defendants shall be responsible, jointly and severally, to the Plaintiff for those damages described above from which the Defendant Michael Colburn will have an offset of $86,436.94 for his interest in the limited liability company.

A judgment consistent with the foregoing Decision and Order shall be noticed for entry by the parties pursuant to the procedures described in MCR 2.602(B)(3). Written objections to any proposed judgment shall be accompanied by an alternate proposed judgment similarly noticed for entry. No attorneys' fees are ordered. Each party is responsible for their own attorneys' fees but statutory costs and interest may be taxed.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 2/13/09