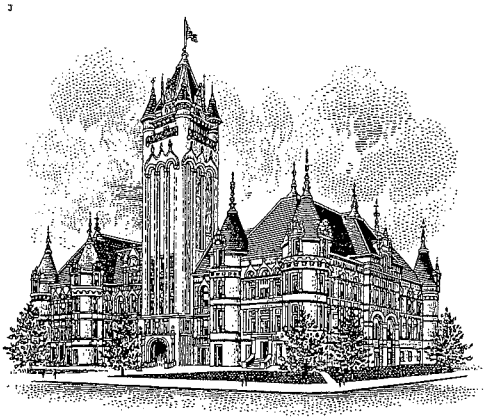

SPOKANE COUNTY COURT HOUSE

Superior Court of the State of Washington
for the County of Spokane

Department No. 9

John O. Cooney

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April 26, 2017

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Re: Orthopaedic Specialty Clinic of Spokane, PLLC, et al. v. Providence Health & Services,

Case No. 2014-02-03843-1

Dear Counsel:

I apologize for the delay in sending this letter decision. However, due to the large amount of documentation provided, a substantial amount of time was needed to review it. This matter came before the Court on March 24, 2017, on Defendant, Providence Health & Services' (hereinafter "Providence"), motion for summary judgment dismissal of Plaintiffs' Orthopaedic Specialty Clinic of Spokane, PLLC (hereinafter "OSC") and Rocky Mountain Venture's (hereinafter "RMV") causes of action for tortious interference, unlawful maintenance of monopoly power in violation of RCW 19.86.040, unlawful attempted monopolization in violation of RCW 19.86.040, and unfair or deceptive acts or practices in violation of RCW 19.86.020. Following oral arguments, the Court took this matter under advisement. This letter serves as the Court's decision on Providence's motions. In deciding these motions, the Court reviewed the following:

- Providence's Motion for Summary Judgment;
- Memorandum in Support of Providence's Motion for Summary Judgment;

- Declaration of Scott O'Brien in Support of Providence's Motion for Summary Judgment;
- Declaration of Sean M. May in Support of Providence's Motion for Summary Judgment;
- Declaration of Douglas C. Ross in Support of Providence's Motion for Summary Judgment;
- Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment;
- Declaration of J. Craig Whiting, M.D.;
- Declaration of Dr. David Scott in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment;
- Declaration of Erin E. Pounds in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment;
- Reply in support of Providence's Motion for Summary Judgment;
- Declaration of John Goldmark in Support of Providence's Motion for Summary Judgment;

Summary judgment is proper if the records on file with the trial court show "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." CR 56(c). A material fact is one on which the outcome of the litigation depends. Graham v. Concord Construction, Inc., 100 Wn.App. 851, 854, 999 P.2d 1254, 1266 (2000) (*citing* Doe v. Department of Transp., 85 Wn.App. 143, 147, 931 P.2d 196 (1997)). The trial court must construe all evidence and reasonable inferences in the light most favorable to the nonmoving party. Id. at 854. If the moving party meets this initial showing, the burden then shifts to the moving party to raise an issue of material fact. Young v. Key Pharmaceutical, Inc., 112 Wn.2d 216, 225, 770 Wn.2d 182, 187 (1989). Summary judgment is proper when the only question before the court is one of law. McFarling v. Evaneski, 141 Wn.App. 400, 403, 171 P.3d 497, 499 (2007).

Tortious Interference

To prove a claim of tortious interference, a plaintiff is required to prove the following five elements:

> (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage.

Leingang v. Pierce Cnty. Med. Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997) *citing* Commodore v. University Mechanical Contractors, Inc., 120 Wn.2d 120, 137, 839 P.2d 314 (1992).

With respect to RMV's claim for tortious interference, Providence does not challenge that OSC and RMV had a valid contractual relationship and business expectancies of which Providence

was aware. If Project Orlando proved successful, OSC would suffer the loss of numerous employees resulting in decreased revenues and eventually an inability to comply with its obligations under its lease agreement with RMV; thus, RMV would suffer the loss of rent. For these reasons, genuine issues of material fact exist precluding the Court from granting Providence's motion for summary judgment dismissal of RMV's claim of tortious interference.

With respect to the first element of OSC's claim for tortious interference, Providence does not challenge that OSC had business expectancies which included a well-established and profitable orthopedic practice group; a fully employed staff including revenue-generating ancillary service providers; and a business plan to hire a spine surgeon, develop an ambulatory surgical center, and a satellite clinic in the Spokane Valley. Providence also does not challenge that OSC had legitimate and enforceable contractual covenants with Drs. Mitchell, Anderson, Barrow, and Page (hereinafter the "Orlando Group").

As far as the second element of OSC's tortious interference claim is concerned, Providence does not challenge that OSC and RMV had valid contractual relations and business expectancies. Further, Providence does not challenge that it had knowledge of the relationships and business expectancies.

The third element of the tortious interference claim requires OSC to prove an intentional interference that induced or caused a breach or termination of the relationship or expectancy. As to Dr. Barrow, Providence concedes that a genuine issue of material fact exists. As far as Dr. Mitchell and Dr. Page are concerned, the records show they may have been induced into performing medically related tasks and functions by Providence in violation of their one-year noncompetition clauses. The record also shows that Providence may have employed deceit, misrepresentation, and defamation, which would satisfy the intentional interference element of the claim. This is based upon evidence showing that Project Orlando may have been a deceptive scheme as Providence may have mislead OSC into believing it was negotiating in good faith while secretly planning Project Orlando behind the scenes. The record also shows that Providence may have entered into employment agreements with Dr. Barrow, Dr. Page, and Dr. Mitchell in violation of their noncompetition clauses and may have directed negative propaganda towards Dr. Scott.

The record shows the Defendant may have interfered for an improper purpose or used improper means. In deciding this factor, there are seven elements for the Court to consider:

> (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other party; (4) the interests sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (6) the proximity or remoteness of the actor's conduct to the interference; and (7) the relations between the parties.

Restatement 2nd of Torts § 767 (1979).

Here, the record shows that Providence may have pressured OSC to abandon its business expectancies and business plans. Dr. Scott testified that he was duped into believing that Providence was interested in affiliating with OSC and directed OSC not to advance these competing business interests.

A violation of a statute or the inducement of a breach of contract satisfies the improper purpose or means requirement. Restatement 2nd of Torts § 767 (1979). Project Orlando may have been unleashed to advance anticompetitive objectives. Providence may have been aware of the Orlando Groups' contractual covenants, provided financial protection and assistance to induce breaches, and revoked the financial benefits it previously offered. This may constitute an inducement to breach a contract for purposes of this element. Once the elements are established, the Defendant bears the burden of justifying the interference or showing that its actions were privileged. Because of Providence's conduct, OSC potentially lost the reasonable business expectancies of adding a spine surgeon, developing an ambulatory surgical center, and developing a satellite clinic. Providence also lost the opportunity to affiliate with CHS and lost nine of its staff, including revenue-generating physician assistants, occupational therapists, and an X-ray technician. These losses may well be a direct result of Project Orlando.

There exists genuine issues of material fact precluding the Court from granting Providence's motion for summary judgment dismissal of OSC's claim for tortious interference.

Unlawful Maintenance of a Monopoly

The Sherman Act makes it unlawful for a business to monopolize. 15 U.S.C. § 2. To succeed on a claim for unlawful maintenance of a monopoly, a plaintiff is required to prove: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of monopoly power through the use of anticompetitive actions. United States v. Microsoft Corp., 253 F.3d 34, 50 (D.C. Cir. 2001) *citing* United States v. Grinnell Corp., 384 U.S. 563, 570–71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). Additionally, a private plaintiff bears the additional burden of proving that its injuries were a result of the defendant's anticompetitive conduct. Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1070 (10th Cir. 2013) *citing* Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

Here, for purposes of the summary judgment motion only, Providence does not dispute the fact that it possesses monopoly power in the relevant market. Providence claims the Plaintiffs are unable to show genuine issues of material fact as to the second and third elements of its cause of action for unlawful maintenance of a monopoly. With respect to the second element, that being the willful acquisition or maintenance of monopoly power through the use of anticompetitive actions, the Plaintiffs have provided evidence showing that genuine issues of material fact exist. Specifically, Plaintiffs have shown that Providence engaged in plans to acquire Northwest Orthopaedic Specialists (hereinafter "NWOS") and OSC. Providence then used these perceived acquisitions as a means of integrating NWOS. Although not successful, by doing so, Providence increased, by forty-three percent, NWOS's referrals to its hospitals.

Additionally, evidence has been provided showing Kevin Sweeny, the Chief Medical Officer of Providence, engaged in discussions with OSC's Dr. Anderson, Dr. Page, Dr. Mitchell, and Dr. Barrow concerning their potential employment with Providence. Certain offers of indemnification were extended, only to later be rescinded. Information concerning the recruitment of these physicians may have been leaked in an effort to reinvigorate negotiations between Providence and NWOS. At a minimum, these actions create a genuine issue of material fact as to whether Providence was using anticompetitive practices to either acquire and/or maintain a monopoly.

Next, Providence argues the absence of any issue of material fact exist concerning the third element – injury caused by the anticompetitive actions. The exhibits presented show the contrary. OSC lost two former doctor-owners, two employee-doctors, one spine surgeon, four revenue-generating staff members, and five administrative staff potentially as a result of Project Orlando. Not surprisingly, with the loss of these employees, OSC's revenue declined dramatically. The record shows that OSC may have been specifically targeted by Providence as part of its efforts to acquire or maintain a monopoly.

For the foregoing reasons, the Court concludes that genuine issues of material fact exist precluding Providence from being granted summary judgment dismissal of the Plaintiffs' cause of action for unlawful maintenance of a monopoly.

Claim of Anticompetitive Conduct / Unlawful Attempted Monopoly

Anticompetitive conduct is conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way. Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3rd Cir. 2007). As was the case in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L.Ed.2d 467 (1985), when considering whether specific conduct is anticompetitive, the Court is required to engage in fact finding. Findings of fact are inappropriate on summary judgment. Oltman v. Holland Am. Line USA, Inc., 163 Wn.2d 236, 249 n. 10, 178 P.3d 981 (2008); Hemenway v. Miller, 116 Wn.2d 725, 731, 807 P.2d 863 (1991).

Without engaging in such fact finding, the Plaintiffs have provided evidence showing genuine issues of material fact exist. When the conduct of Providence is taken as a whole, the records shows Providence may have engaged in anticompetitive practices in an attempt to consolidate the market for physician orthopedic services. Specifically, the records show Providence may have secretly negotiated offers of employment to OSC employees, leaked information to NWOS to put pressure on NWOS to align with Providence, pushed Dr. Anderson out of Spokane County in order to increase its market share for orthopedics, allowed it to acquire three other OSC doctors at a lower cost, and engaged in referral practices that would injure competition.

Genuine issues of material fact exist showing that the Defendant possibly engaged in anticompetitive conduct in furtherance of an attempted monopoly. Specifically, the attempted consolidation likely would have impacted consumers by driving up prices. Evidence suggests

Providence knew of this since the Federal Trade Commission earlier blocked their efforts of acquiring NWOS.

Unfair or Deceptive Acts or Practices in Violation of RCW 19.86.020

In regards to the fourth cause of action, Plaintiffs' Consumer Protection Act (hereinafter "CPA") claim, the Court will grant summary judgment dismissal. The Plaintiffs fail to show an actionable "unfair" act under the Washington CPA. RCW 19.86.020. Under the CPA, the Plaintiffs must show an unfair or deceptive practice. The Plaintiffs acknowledge that a deceptive practice must have the capacity to deceive a [substantial] portion of the public. *See* Robinson v. Avis Rent A Car Sys., 106 Wn.App. 104, 115, 22 P.3d 818 (2001). Courts emphasize the CPA's consumer-centric focus because the concern of Washington courts has been to rule out those deceptive acts and practices that are unique to the relationship between plaintiff and defendant. Behnke v. Ahrens, 172 Wn.App. 281, 292-93, 294 P.3d 729 (2012). Before consumer injury can be found to be unjustified, it must be substantial and cannot be outweighed countervailing factors; and the injury to consumers could not have been reasonably avoided. Id. Plaintiffs are not consumers and have not suffered a consumer injury; they are businesses. Plaintiffs CPA claims rest on the idea that Providence tortuously interfered with physician noncompetition contraction before – though there is no evidence to support such an assertion. Rather, Providence required the physicians to comply with their noncompetition contracts.

In this case, the Plaintiffs' dispute with Providence does not impact the public interest. A breach of private contract affecting the parties is not an act or practice affecting the public interest. Id. at 292-93. Conduct that is not directed at the public, but rather at a competitor, lacks the capacity to impact the public in general. Evergreen Moneysource Mortg. Co. v. Shannon, 167 Wn. App. 242, 261, 274 P.3d 375 (2012). The hiring of physicians from another practice is not a consumer transaction. Even if the Court were to find it a consumer transaction, the Plaintiffs are unable to show a real and substantial potential repetition as opposed to an isolated incident.

Based upon the absence of any genuine issues of material fact existing as to Plaintiffs' CPA claim, summary judgment dismissal of the claim is warranted. The Court will therefore grant Providence's motion for summary judgment dismissal of Plaintiffs' fourth cause of action. Counsel for Providence is directed to prepare an order reflecting this letter decision. In deciding this motion, the Court did not find any facts. Rather, this letter is intended to explain why summary judgment dismissal was or was not granted as to each cause of action. A presentment date is scheduled for Friday, May 19, 2017, at 8:30 a.m.

Sincerely,

JOHN O. COONEY