Long Island Med. Anesthesiology, P.C. v Long Island Med. & Gastroenterology Assoc., P.C.
2018 NY Slip Op 33521(U)
July 31, 2018
Supreme Court, Nassau County
Docket Number: 600098-17
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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LONG ISLAND MEDICAL ANESTHESIOLOGY, P.C. and RICHARD GABAY, M.D., individually, and on behalf of MOCHA REALTY ASSOCIATES, LLC and DAY OP OF NORTH NASSAU, INC.,

Plaintiffs,

-against-

LONG ISLAND MEDICAL & GASTROENTEROLOGY ASSOCIATES, P.C., JAY G. MERKER, M.D., STEWART A. ROBBINS, M.D. and NATHAN D. SCHULMAN, M.D.,

Defendants.

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TRIAL/IAS PART: 11

NASSAU COUNTY

Index No. 600098-17
Motion Seq. Nos. 2 and 3
Submission Date: 7/13/18

Papers Read on these motions:

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This matter is before the court on 1) the motion by Plaintiffs Long Island Medical Anesthesiology, P.C. ("LIMA") and Richard Gabay, M.D. ("Gabay"), individually and on behalf of Mocha Realty Associates, LLC ("Mocha") and Day Op of North Nassau, Inc. ("Day Op") ("Plaintiffs") filed May 24, 2018, and 2) the cross motion by Defendants Long Island Medical & Gastroenterology Associates, P.C. ("LIMGA"), Jay G. Merker, M.D. ("Merker"), Stewart A.

Robbins, M.D. ("Robbins") and Nathan D. Schulman, M.D. ("Schulman") ("Defendants") filed June 15, 2018, both of which were submitted on July 13, 2018. For the reasons set forth below, the Court 1) denies Plaintiffs' motion; and 2) grants Defendants' cross motion to the extent that the Court dismisses the first, second and third causes of action in the complaint, but denies Defendants' motion to dismiss the fourth cause of action in the Complaint.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR § 3212, granting partial summary judgment in favor of LIMA 1) on the first and third causes of action in the Verified Complaint (the "Complaint") for breach of contract; 2) on the second cause of action in the Complaint for breach of the implied duty of good faith; and 3) on the fourth cause of action in the Complaint for tortious interference with contractual relations, with the amount of damages to be determined at trial.

Defendants cross move for an Order, pursuant to CPLR § 3212, granting partial summary judgment dismissing the first, second, third and fourth causes of action in the Complaint.

B. The Parties' History

The parties' history is set forth in prior decisions of the Court regarding the above-captioned action ("Instant Action") as well as related actions before the Court, specifically *Long Island Medical & Gastroenterology Associates, P.C. and Jay G. Merker, M.D. v. Mocha Realty Associates, LLC and Richard Gabay, M.D.*, Index No. 604173-14 and *Long Island Medical Anesthesiology, P.C. and Richard Gabay, M.D., individually and on behalf of Mocha Realty Associates, LLC and Day Op of North Nassau, Inc. v. Long Island Medical & Gastroenterology Associates, P.C., Jay G. Merker, M.D., Stewart A. Robbins, M.D. and Nathan D. Schulman*, M.D., Index No. 604894-14 ("Related Actions"). In its July 9, 2018 decisions in the Instant Action and Related Actions, the Court granted the motions by LIMGA and the defendant doctors to strike the jury demands filed by LIMA and Gabay in the Instant and Related Actions.

As noted in those prior decisions, this litigation involves the breakdown of a business relationship between Drs. Merker, Schulman and Robbins, who are gastroenterologists, and Dr. Gabay, who is an anesthesiologist. This litigation followed the termination of an exclusivity agreement ("Exclusivity Agreement") pursuant to which LIMA, Gabay's entity, had the

exclusive right to perform anesthesiology procedures at the offices of Day Op, an entity then owned equally by the four doctors. Simultaneously with the termination of the Exclusivity Agreement, Gabay was removed as an officer and director of Day Op, based on the termination of the Exclusivity Agreement and other conduct. This further required Gabay's ownership interest in Day Op to be redeemed according to a valuation methodology set forth in Day Op's shareholder agreement. The parties' disputes involve several issues, including the propriety of the termination of Gabay and which lease governs the relationship between the parties concerning LIMGA's occupancy of the medical building at issue which is located in Great Neck, New York. The issue of whether Gabay's removal as an officer and director, and subsequently as a shareholder, of Day Op was proper is also in dispute.

The Complaint in the Instant Action (Ex. A to Bock Aff. in Supp.) alleges as follows:

The members of Mocha are Gabay, Merker, Robbins and Schulman, each of whom has a 25% interest. The business of Mocha is ownership and operation of a medical building at 192 East Shore Drive, Great Neck, New York (the "Building"). On or about January 1, 2006, the members of Mocha entered into a Limited Liability Company Agreement regarding the management and operation of Mocha (the "Mocha Agreement"), and that agreement remains in effect. Pursuant to the Mocha Agreement, Mocha agreed to lease approximately 53.125% of the Building to Day Op for use as an ambulatory surgery center with ancillary administrative and executive offices (the "Day Op Center"). That lease was dated January 1, 2006 and was superseded by a lease dated December 1, 2008.

Since its formation, the business of Day Op has been the operation of a free standing ambulatory surgery center, to provide gastroenterology and other procedures for residents of Nassau County. Day Op does business as the Ambulatory Surgery Center of North Nassau (the "Day Op Center" or "ASC"), and has at all times conducted business at the Building. In filings in or about 1998 to obtain a license from the State of New York (the "State") to operate an ambulatory surgery center, Merker, Robbins and Schulman (the "GI Doctors" or "LIMGA Shareholders") represented to the State that there was a need for the facility in the community, and they represented that they would perform their gastroenterology procedures in the ASC. After the ASC was licensed, the GI Doctors performed all of their gastroenterology procedures at

the ASC under the LIMGA practice.

The shareholders of Day Op are Gabay and the GI Doctors, each having 25% of the issued and outstanding shares. On or about January 1, 2006, the Day Op shareholders entered into a Shareholders Agreement regarding the management and operation of Day Op (the "Day Op Agreement"), and that agreement remains in effect. The business of LIMGA is to provide gastroenterology and other medical services, and the sole shareholders of LIMGA are the GI Doctors.

LIMA is a professional corporation that provides anesthesiology services, whose sole shareholder is Gabay. In or about 1998, LIMA began to provide all anesthesia services for LIMGA's patients. To assure efficient functioning of the ASC, and to assure appropriate resources for patients, Day Op entered into an agreement on or about January 1, 2006 with LIMA for the provision of anesthesiology services. The agreement provides, *inter alia*, that LIMA shall be the exclusive provider of anesthesiology services (the "Exclusivity Agreement"). The Exclusivity Agreement was to be in effect through December 31, 2015, and to automatically renew for two five-year terms thereafter. After entering into the Exclusivity Agreement, LIMGA performed all of its gastroenterology procedures in the ASC, and LIMA provided anesthesiology services for all such procedures.

Beginning in or about 2009, LIMGA and the LIMGA Shareholders began scheduling and conducting a limited number of gastroenterology procedures in LIMGA's Office Space rather than the ASC. This scheduling and performance of gastroenterology procedures in LIMGA's Office Space ("Office Procedures") was, and is, in violation of the New York Public Health Law ("PHL") and applicable rules and regulations which prohibit an office-based surgery ("OBS") practice on the same site as an ambulatory surgery center. From 2010 through 2012, LIMGA and the LIMGA Shareholders relocated up to a maximum of 21% of procedures from the ASC to LIMGA's offices.

From the inception of services at the Building, LIMA provided anesthesiology services throughout the Building pursuant to the Exclusivity Agreement. The LIMGA Shareholders made improper demands to Gabay that they receive a portion of the fees received by LIMA for providing anesthesia. After LIMA did not accede to these demands, the LIMGA Shareholders

unilaterally decided to conduct more than 75% of all procedures in their offices in 2013, and almost all procedures in their offices during 2014, in contravention of applicable law. The LIMGA Shareholders engaged in this diversion of procedures from the ASC to LIMGA's offices to enrich LIMGA and to depress Day Op's earnings and stock value.

The LIMGA Shareholders also planned to force LIMA and Gabay from the Building, and in late 2013 and 2014 negotiated with other anesthesia providers. In March 2014, the LIMGA Shareholders spoke with Anesthesiology Associates of Boro Park LLP ("AABP") with the objective of replacing LIMA and Gabay. On or about April 28, 2014, LIMGA entered into a license agreement which called for AABP to pay $10,000.00 per month to LIMGA for the exclusive right to perform anesthesiology services for impermissible Office Procedures for three (3) years (the "License Agreement"). The terms of the AABP License Agreement contravened the terms and meaning of the Exclusivity Agreement. Plaintiffs allege that this arrangement violated applicable law and constituted an attempt by Defendants to "auction the exclusive rights of LIMA to perform anesthesia" (Comp. at ¶ 34). On or about May 16, 2014, LIMGA notified LIMA that it would no longer permit LIMA to provide anesthesiology services for Office Procedures. On May 19, 2014, and continuing to date, LIMGA has prevented LIMA from providing anesthesiology services in LIMGA's offices.

On or about May 19, 2014, Defendants signed a retainer agreement with Rosenberg, Fortuna & Laitman LLP ("RFL") which stated that RFL would simultaneously represent LIMGA, the LIMGA Shareholders, Day Op and Mocha, as against LIMA and Gabay (the "RFL Retainer Agreement"). Plaintiffs allege that this retention occurred without the formal authorization of Day Op and Mocha, or the knowledge or consent of Gabay, and presented an improper conflict of interest. The LIMGA Shareholders allegedly consulted with RFL attorneys about "fabricating a scenario whereby the LIMGA Shareholders would claim that LIMA was in breach of the Exclusivity Agreement" (Comp. at ¶ 52).[1]

RFL drafted a Notice of Special Meeting of Day Op dated October 22, 2014 (the "Day Op Notice"), allegedly containing false allegations regarding breaches of the Exclusivity Agreement,

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[1] These allegations against RFL were the subject of a lawsuit titled *LIMA et al. v. RFL et al.*, Nassau County Supreme Court Index Number 600200-17. By decision dated June 7, 2017, the Court dismissed the complaint in that action.

which called for a meeting to be held on November 5, 2014 (the "Day Op Meeting"). RFL also drafted a Notice of Special Meeting for Mocha dated October 22, 2014 (the "Mocha Notice") regarding an alleged need for additional capital contributions, which called for a meeting to be held on November 5, 2014 (the "Mocha Meeting"). RFL improperly sought to represent Day Op in fabricating these claims against LIMA and Gabay, and improperly sought to represent Mocha regarding capital contributions sought by the LIMGA Shareholders. A 30-day prior notice to cure was never served, as required by the Exclusivity Agreement, prior to issuing the Day Op Notice.

When the Day Op Notice was created, the LIMGA Shareholders had entered into an agreement with another anesthesiology provider without advising LIMA or Gabay. At that time, the LIMGA Shareholders were aware that LIMA and Gabay had commenced an action on September 18, 2014 (the "LIMA Action"). As the LIMA Action had been served upon LIMGA and its Shareholders in September 2014, LIMA and Gabay objected to the holding of any meeting on November 5, 2014, and communicated their objection to RFL. Plaintiffs allege that the Day Op Notice did not comply with provisions of the Day Op by-laws and other governing documents. They allege, further, that the Mocha Notice did not comply with provisions of the Mocha operating agreement and other governing documents. Despite the opposition by LIMA and Gabay, and the absence of a basis for holding a meeting on November 5, 2014, the meetings were held on November 5, 2014 and presided over by RFL attorneys. Plaintiffs allege that the meetings were "pre-scripted and intended solely for the three LIMGA Shareholders to oppress and falsely testify about LIMA and Gabay, and to improperly adopt resolutions wherein the LIMGA Shareholders had decided to vote as a block of three against one (*i.e.* Gabay)" (Comp. at ¶ 64).

It was resolved at the Day Op Meeting that LIMA's Exclusivity Agreement was terminated for reasons created by the LIMGA Shareholders. This purportedly formed the basis for the termination of Gabay as a Director of Day Op, which required a redemption of Gabay's shares in Day Op, at a price of $0 (the "Day Op Resolution"). It was resolved at the Mocha Meeting that each member of Mocha was to make a capital contribution of $25,000.00 (the "Mocha Resolution"). The actions at these meetings were allegedly taken solely to oppress and harm Gabay, and benefit the LIMGA Shareholders.

On or about January 21, 2015, LIMGA and the LIMGA Shareholders entered into a

Memorandum of Understanding ("MOU") with AABP. Pursuant to the MOU, the payments to LIMGA were to increase by $6,000 per month, to $16,000.00 per month. This coincided with AABP's commencement of anesthesia services in the ASC. Plaintiffs allege that this arrangement violated applicable law and constituted an attempt by Defendants to further auction the exclusive rights of LIMA to perform anesthesia.

The Complaint contains fourteen (14) causes of action. As the instant motion and cross motion are addressed solely to the first through fourth causes of action, the Court will solely set forth the specifics of those causes of action, which are as follows:

First Cause of Action

LIMA justifiably relied on the described course of conduct and course of dealing as confirming its exclusive right to perform anesthesia in the Building. Defendants were not permitted, under the PHL, to relocate procedures to their offices. Defendants never had any right to relocate procedures to their offices, nor was any such relocation anticipated under the Exclusivity Agreement. By virtue of the following, Defendants are estopped from claiming that the Exclusivity Agreement did not apply to the furnishing of anesthesia in their offices. By virtue of the foregoing, LIMA is entitled to a declaration that it had the exclusive right to perform anesthesia throughout the Building. In addition, LIMA is entitled to recover damages from Defendants for wrongful exclusion of LIMA from performing anesthesia at the Building, and for causing a breach of the Exclusivity Agreement, as encompassing all procedures at the Building.

Second Cause of Action

Defendants' diversion of procedures from the ASC to LIMGA's offices was a breach of the implied duty of good faith of the Exclusivity Agreement. LIMA is entitled to recover damages from Defendants for the wrongful diversion of procedures, and for breach of the Exclusivity Agreement as encompassing all procedures at the Building.

Third Cause of Action

It was implied and understood that LIMA had the exclusive right to perform anesthesia services throughout the Building. Defendants breached the aforesaid agreement by wrongfully excluding LIMA from performing anesthesia in the Building, by wrongfully excluding LIMA from the Building, and by wrongfully receiving the described payments from AABP. By virtue of the foregoing, Defendants have harmed LIMA and unjustly

enriched themselves.

Fourth Cause of Action

Defendants were aware of the Exclusivity Agreement. Defendants intentionally interfered with the Exclusivity Agreement, thereby intentionally frustrating performance of the Exclusivity Agreement. By virtue of the foregoing, Defendants intentionally induced a breach of the Exclusivity Agreement, damaging LIMA.

In support of Plaintiffs' motion, Gabay affirms that he began practicing medicine in 1998 and started performing anesthesia services for patients of the LIMGA Shareholders in or about 1991. In or about 1994, Gabay suggested to the LIMGA Shareholders that they establish an ASC to service the Great Neck, New York area. The opening of such a center required the approval of the State, under Article 28 of the PHL. It also required significant time, effort and capital. The application to the State required a showing that there was a need in the community for an ASC, and the LIMGA Shareholders each represented to the State that they would perform their procedures in the ASC upon its approval. At the time of the application, Gabay formed LIMA as the entity to be the provider of anesthesia services.

In 1998, the application for the ASC was approved and Day Op was formed to own and operate the ASC. Consistent with the amounts invested, Gabay was a 40% shareholder in Day Op, and the LIMGA Shareholders were each 20% shareholders. A lease was signed for the Building, which included an option to purchase. In or about 1999, Mocha was formed to acquire the Building, pursuant to the option. Mocha is owned equally by Gabay and the LIMGA Shareholders, and Mocha purchased the Building in 1999. The arrangement at the Building is that the ASC occupies approximately 4,356 square feet, with the remainder of the Building (3,844 square feet) being occupied by LIMGA's office space.

Gabay affirms that operations continued from 1998 through 2004. The LIMGA Shareholders performed their procedures in the ASC, and LIMA provided all anesthesia services. In or about 2005, it was discovered that Day Op's administrator had been misapplying funds, and not properly billing insurance companies. The LIMGA Shareholders were also not happy that Gabay owned more shares in Day Op, even though this was the arrangement that they agreed to when Day Op was formed. To resolve issues with the administrator, and to address the discontent of the LIMGA Shareholders, certain agreements were entered into effective January 1, 2006. Gabay agreed to reduce his ownership in Day Op to the same level as the LIMGA

Shareholders, and a formal agreement among the shareholders was completed (Shareholders' Agreement at Ex. C to Gabay Aff. in Supp.).

Gabay affirms that it was also confirmed that LIMA was to be the exclusive provider of anesthesia services, and that the contract for this arrangement would initially run through December 31, 2015, with LIMA having two options to renew for five years intervals, *i.e.* through 2025. Gabay affirms that this was designed to ensure that Gabay would be able to practice until retirement. Gabay provides a copy of the Exclusivity Agreement (Ex. D to Gabay Aff. in Supp.). Gabay affirms that when the agreements were made, every medical procedure was performed in the ASC, as contemplated under the agreements and filings with the State.

In or about 2008, it was discovered that Robbins had permitted an employee to use his credit card, and the employee incurred charges of over $400,000.00. To aid Robbins in extricating himself from this situation, the LIMGA Shareholders advised Gabay that Mocha would be borrowing against the Building. Gabay objected, but could not overcome the vote of three against one. Mocha borrowed $1.3 million on December 18, 2008, when the existing mortgage had an outstanding balance of approximately $172,292.

In or about 2009, the LIMGA Shareholders unilaterally decided to construct a procedure room in their LIMGA office space. Gabay affirms that this was not contemplated when the ASC was formed. The LIMGA Shareholders stated that the office space would be used only for certain patients who would incur significant out-of-pocket expenses by having a procedure performed in the ASC. LIMGA used Day Op funds to complete the construction, and conducted a limited number of procedures in 2009 on the office side of the Building. There was no formal approval of this plan. The number of procedures increased somewhat from 2010 to 2012.

In 2013, the LIMGA Shareholders constructed a second procedure room on the LIMGA office side, and began to remove a vast majority of the procedures from the ASC, and procedures in the ASC dropped from 2,235 in 2012 to 733 in 2013. Although Gabay did not have the ability to stop this process, the LIMGA Shareholders "continued to respect the sanctity of the Exclusivity Agreement" (Gabay Aff. in Supp. at ¶ 11), which applied to all procedures in the Building, including the two procedure rooms that were an extension of the ASC.

Under the Exclusivity Agreement, LIMA was able to engage qualified professionals to supply services. Numerous doctors and nurses were needed to attend to patients every day, and the Exclusivity Agreement recognized this. On or about July 23, 2013, upon notice to Defendants and without objection, LIMA entered into an agreement with a company called Five

Boroughs Medical Associates, P.C. ("FBMA"). This related to the failure of the LIMGA Shareholders to provide a schedule of cases one month in advance, as required by the Exclusivity Agreement. The agreement with FBMA provided that FBMA would provide professionals for procedures to be specified by LIMA. From that time through the spring of 2014, FBMA handled certain designated cases in the ASC and LIMGA's offices. The doctors primarily assigned by FBMA were Alexander Nash, M.D. ("Nash") and Louis Stein, M.D. ("Stein"), with Nash treating over 1,000 LIMGA patients in the procedure rooms, and approximately 240 LIMGA patients in the ASC, during this period.

In 2014, the number of cases scheduled for the ASC were reduced to less than 225, which significantly reduced the revenue in 2014. In 2014, the LIMGA Shareholders proposed the acquisition of Day Op by individuals with "questionable qualifications" (Gabay Aff. in Supp. at ¶ 14). The LIMGA Shareholders advised Gabay that he would need to compromise about LIMA's right to be the exclusive provider of anesthesia. At a board meeting of Day Op on or about April 1, 2014, the administrator and the LIMGA Shareholders insisted that Gabay needed to surrender the Exclusivity Agreement to ensure that a sale could be effectuated. Gabay affirms that he was unwilling to do us without further assurances as to what LIMA's status would be.

At the beginning of 2014, LIMA continued to supply anesthesia for procedures throughout the Building without issue. In April 2014, however, Gabay received a letter from the LIMGA Shareholders, as Majority of the Board of Day Op, which falsely claimed that there had been improper billing by LIMA, and stated that Gabay had to personally perform anesthesia in the ASC. Gabay provides a copy of that March 31, 2014 letter (Ex. F to Gabay Aff. in Supp.) which reads as follows:

> Dear Dr. Gabay.
>
> It has come to our attention that [FBMA] and not Long Island Medicine and Anesthesia is providing and billing for all the anesthesia services at the ASC of North Nassau. This is in clear violation of both the letter and meaning of your Anesthesia contract. You were informed of this matter several months ago. Your reply was that it was simply a clerical error and that the anesthesia papers were inadvertently stamped with [FBMA] instead of LIMA. In fact, the paper work was indeed changed back to LIMA letterheads. Then on more recent investigation, we realized that only the letterhead was changed to LIMA, however, the body of the document clearly states that anesthesia services and all financial reimbursement including Medicare payments were to go directly to [FBMA].
>
> This selfish and irresponsible act was clearly an attempt to deceive your partners and [c]ircumvent your contracted obligations. Since the ASC does not even have a

> contract with [FBMA], your reckless maneuvering has actually jeopardized the continued legitimacy of our ASC.
>
> In addition, your anesthesia contract with the ASC states that you must be physically present for at least 70% of the working hours of the ASC. For the last 6 months you have never been present even once during operating hours.
>
> All of this must be rectified immediately.

Gabay affirms that the issues raised in this letter had not been raised at any Day Op board meeting, and Gabay considered the complaints to be without merit. Gabay, nonetheless, confirmed the propriety of billing and personally attended cases going forward in the ASC. To that end, beginning on April 1, 2014 and continuing through the termination of the Exclusivity Agreement, LIMA performed all of the anesthesia serves at the ASC. In addition, Gabay was present for more than 70% of the working hours of the ASC. On May 16, 2014, however, the LIMGA Shareholders terminated the performance of anesthesia by LIMA, with assistance by FBMA, in the two procedure rooms that LIMGA had built on the LIMGA side of the Building. The limited number of procedures continued in the ASC, and Gabay was available for all of those procedures.

On October 3, 2014, Nash was at the ASC to administer anesthesia to a patient. Despite the fact that Nash had administered anesthesia to hundreds of patients in the procedure rooms and the ASC, the LIMGA Shareholders, specifically Schulman, deemed Nash "non-credentialed" (Gabay Aff. in Supp. at ¶ 18). Gabay submits that this assertion was without merit, as all credentialing materials had been submitted for Nash. Gabay contends that the LIMGA Shareholders attempted to use this incident, as well as the billing issue that they raised, as justification for terminating the Exclusivity Agreement. These claims were set forth in the Day Op Notice (Ex. H to Gabay Aff. in Supp.). Gabay sought a temporary restraining order directing that the meeting not go forward, but that application was denied. At the Day Op Meeting, the LIMGA Shareholders voted to terminate the Exclusivity Agreement and forfeit Gabay's shares in Day Op.

Gabay affirms that, as a result of discovery that has been conducted in this litigation, he has learned about other conduct by Defendants of which he had not been aware. In or about February 2014, the LIMGA Shareholders asked FBMA to replace LIMA as the provider of anesthesia in the LIMGA procedure rooms. Under the proposed agreement, FBMA would pay LIMGA $7,000.00 per month, which would be characterized as rent. Gabay submits that this

characterization was inaccurate, as the professionals only needed to be present in the procedure rooms designated by LIMGA, and there was no need for FBMA to rent additional space. This arrangement, which Gabay submits is prohibited by law, was set forth in a draft agreement (Ex. J to Gabay Aff. in Supp.).

Gabay affirms that this monthly payment was discussed at a meeting of the LIMGA Shareholders with Steven Ackerman ("Ackerman"), an owner of FBMA. The LIMGA Shareholders also privately met with representatives of AABP, as reflected by emails exchanged on March 13, 2014 (Ex. L to Gabay Aff. in Supp.). The LIMGA Shareholders then entered into a License Agreement with AABP with a start date of May 12, 2014 (Ex. M to Gabay Aff. in Supp.), which called for payment of $10,000.00 per month. The LIMGA Shareholders also demanded an additional $30,000.00, which AABP paid on May 2, 2014, as reflected by the check provided (Ex. N to Gabay Aff. in Supp.). After the LIMGA Shareholders terminated the Exclusivity Agreement, they signed a new agreement with AABP for payment of $16,000.00 per month (MOU at Ex. O to Gabay Aff. in Supp.). Gabay provides a copy of a May 20, 2014 AABP email (Ex. P to Gabay Aff. in Supp.) which, he submits, reflects AABP's desire that the LIMGA Shareholders dismiss Gabay from the ASC.

Section 8.1.3 of the Exclusivity Agreement provides as follows:

> 8.1 Right of Center to Terminate. The Center shall have the right to terminate this Agreement for cause (in accordance with the terms of this Section 8.1) at any time upon the occurrence of any of the following events, with such termination to be effective upon the giving of such notice or the effective date of termination in such notice, whichever is later:
>
> ***
>
> 8.1.3 LIMA's material breach of its obligations or representations hereunder; provided that such breach is not cured to the reasonable satisfaction of the Center within thirty (30) days following LIMA's receipt of written notice specifying such acts of breach, or if not capable of cure within thirty (30) days, failure to cure within a reasonable time thereafter, not to exceed ninety (90) days from Center's initial notice to LIMA;

Gabay submits that Defendants' conduct, as described in his affidavit, resulted in the wrongful termination and breach of the Exclusivity Agreement by the LIMGA Shareholders and Day Op. Gabay affirms that 1) he was not given notice and an opportunity to cure, as required by Section 8.1.3 of the Exclusivity Agreement; 2) even assuming that some notice was given of the FBMA claim, by way of the March 31, 2014 letter, it was cured the following day, and none of

LIMGA's claims regarding Nash were material given the long duration of the Exclusivity Agreement and relationship of the parties; 3) even assuming that the allegations were material, the claims were baseless and, therefore, the cancellation of the Exclusivity Agreement was unjustified; and 4) under the spirit and intent of the 2006 agreements, the LIMGA Shareholders never had a right to independently sell to the highest bidder the right to perform anesthesia in any part of the building, and their doing so constituted an independent breach and repudiation of the Exclusivity Agreement.

In opposition to the motion, and in support of Defendants' cross motion, Merker submits that Defendants' actions were proper and justified, and often engaged in with Gabay's full knowledge and consent. Merker submits that Gabay "caused his own undoing by breaching the Exclusivity Agreement and breaching his fiduciary duty to Day Op" (Merker Aff. at ¶ 2).

Merker affirms that the Exclusivity Agreement is confined to Day Op and its ambulatory surgery center, referred to herein as the ASC. While Gabay is correct that LIMGA's office based surgery center (the "OBS") is in the same Building, the Exclusivity Agreement does not grant Gabay any right to be the exclusive provider of anesthesia in the OBS, and it does not prohibit LIMGA from using any other anesthesia provider in its own suite. Merker also affirms that all of the operative agreements made as of January 1, 2006 were prepared by David Manko, Esq. ("Manko"), whom Gabay recommended, and whom Gabay had retained on prior occasions.

Merker affirms that from 2009 to the present, Gabay was aware of, and never objected to, the addition of procedure rooms in LIMGA's offices. Gabay and the LIMGA Shareholders discussed the need for the OBS based on the "site-of-service differential" (Merker Aff. at ¶ 5). That term refers to the fact that patients were required to pay a much higher deductible for procedures in the ASC than in the OBS, and Defendants were concerned that patients would go elsewhere if they were paying unnecessarily high deductibles. In addition, Day Op was required to pay for a certified registered nurse anesthetist and for anesthesia procedures, which were expenses that would not necessarily apply in the OBS. Gabay never objected to directing cases to the OBS, and was present for many discussions regarding the site-of-service differential. The minutes from the Day Op meeting on February 11, 2013 (Ex. B to Merker Aff.), which Gabay attended, reflect that the parties were discussing this concern. The document provided includes the following, under "Budget Review:"

> Reimbursements continue to fall for "in-network" patients; however it is difficult to get an out of network patient into the Center because the co-pay and minimums are so high..

****

> Site of service differential increasing - which is deincentivizing ASC use and promoting use of OBS facilities, which is harming the ASC's ability to remain solvent.

Merker affirms that this concern is also addressed in the minutes from Day Op's meeting on May 7, 2014 (minutes at Ex. E to Ps' motion). Those minutes include the following:

> This [decrease in ASC cases] is due to several factors, not least is which the reimbursement environment in which the physician's patients are being charged much more to have their cases performed in the ASC rather than in an OBS setting.

Merker affirms that although Defendants decided to use LIMA to provide anesthesiology services in the OBS, they were not required to do so under the Exclusivity Agreement, which was only between Day Op and LIMA. Prior to 2014, Gabay never expressed the view that he had exclusivity rights with respect to the OBS. The patients were always patients of LIMGA, of which Gabay was not a member, and LIMGA was free to perform procedures wherever it was more efficient or better for patients.

Merker affirms that Gabay, himself, has routed cases to the OBS. Gabay had purchased a gastroenterology practice called Great Neck Medical Care P.C. ("GNMC") in or about 2010, and Gabay referred many GNMC cases to the OBS instead of ASC for the same reasons that LIMGA did so. As long as Gabay was being paid for the anesthesiology services, he did not object to cases being routed to the OBS, even if it adversely affected Day Op's revenue. Thus, Merker submits, there is no merit to Gabay's contention that the routing of cases to the OBS was solely for the benefit of LIMGA.

Merker also disputes Gabay's contention that, in connection with Day Op's application for approval from the State, the LIMGA Doctors represented that they would perform their procedures in the ASC upon the approval. Merker affirms that there is no such obligation. Rather, to obtain a Certificate of Necessity, Day Op was required to demonstrate a need for the ASC. This was done by demonstrating that Day Op had doctors or patients willing to use the facility. During discovery, dozens of pages were exchanged concerning this application process, and none of those documents is inconsistent with the LIMGA Doctors' right to perform procedures in an OBS located within the Building, or elsewhere. Merker submits that Gabay has failed to produce any proof that there is such a restriction.

Merker affirms that LIMA breached the Exclusivity Agreement by assigning the services

to FBMA. As outlined by counsel for Defendants in his affirmation, documents produced during discovery confirm that every procedure requiring anesthesiology performed in the ASC between August 1, 2013 and April 3, 2014 was performed by FBMA, and not by LIMA (*see* Exs. C and D to Merker Aff.). Although new anesthesiologists were appearing at the ASC for procedures, the LIMGA Shareholders believed that Gabay had hired them through LIMA, as this is what the Exclusivity Agreement required. The LIMGA Shareholders were unaware that Gabay and LIMA had assigned LIMA's rights under the Exclusivity Agreement to FBMA in July 2013. They did notice, however, that Gabay was not present in the ASC as often as required under the Exclusivity Agreement. Paragraph 3.2.2 of the Exclusivity Agreement provides, in pertinent part, as follows:

> Dr. Gabay shall be required to be present at the Center to provide Services at least seventy percent (70%) of the Center's regular business hours...

Merker notes that this issue was raised in the March 13, 2014 letter. Defendants then learned that the procedures being performed by FBMA were being billed under FBMA's provider number instead of LIMA's provider number. In the March 13, 2014 letter, Defendants advised Gabay that his use of the FBMA number was improper. Gabay attempted to cure this issue by changing the letterhead on the billing documents, but not the provider number. Defendants also mentioned this issue in the March 13, 2014 letter.

Merker was not aware of LIMA's relationship with FBMA until December 2014 [2] when he learned that FBMA was paying approximately $7,700 in rent to LIMA. At that time, LIMA was renting a small office from LIMGA for $2,791.67 per month. Merker was surprised to learn of the rental payment, as Merker was unaware that FBMA was paying rent, or that FBMA was paying $5,000 more than the fair market value. LIMA was not permitted to sublet its office, or assign the Exclusivity Agreement to FBMA. Moreover, there was no legitimate basis for LIMA to charge FBMA more than the fair market value of $2,791.67 per month. As Defendants learned in discovery, the extra $5,000 was characterized as "Mocha rent" as reflected in the documentation provided (Ex. F to Merker Aff.). Merker submits that if that $5,000 was to be paid to anyone, it should have been paid to LIMGA or Mocha, as it was LIMGA and/or Mocha's resources that FBMA was using. Instead, Merker submits, LIMA pocketed that money and failed

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[2] In his reply Affidavit, Merker affirms that this is a typographical error, and that he intended to state that he learned of LIMA's relationship with FBMA in or about December 2013 (Merker Reply Aff. at ¶ 2).

to account for it. Merker provides copies of FBMA's canceled checks deposited into LIMA's account (Ex. F to Merker Aff.). In addition, Merker has learned that Gabay advised FBMA that the additional rent was being paid to LIMGA. Merker refers to deposition testimony of Ackerman (Ex. G to Merker Aff.) which includes Ackerman's testimony that Gabay "told me that the [LIMGA Doctors] had agreed on a certain rental amount and we should pay that rent each month..." Merker submits that these rent payments could be construed as kickbacks, and subjected the entire ASC to regulatory exposure. He contends, further, that these payments are further proof that LIMA had improperly assigned the Exclusivity Agreement to FBMA, and that LIMA had not hired the various anesthesiologists to work for LIMA, as Defendants believed. Merker disputes Gabay's affirmation that Gabay entered into an agreement with FBMA upon notice to Defendants and without objection. Merker affirms that Defendants did not learn about this relationship until December 2013, and suggests that the purported notice dated July 23, 2013, which Merker affirms he never received, was created after this litigation commenced.

When Defendants learned of Gabay's improper assignment to FBMA, and his collection of rent from FBMA, LIMGA sought to locate another anesthesiology outfit to work at the OBS, where the Exclusivity Agreement does not apply. LIMGA was not, as Gabay suggests, shopping for the highest bidder but, rather, was seeking to replace Gabay and LIMA because LIMGA no longer trusted Gabay. Merker disputes Gabay's allegation that LIMGA secretly asked FBMA to replace LIMA. Rather, FBMA approached LIMGA in early 2014 and proposed an agreement to provide services in the OBS, with the knowledge that the Exclusivity Agreement did not apply to the OBS. LIMGA rejected FBMA's proposal because, by that time, LIMGA had learned that FBMA was paying rent to Gabay. LIMGA feared that FBMA was "in cahoots" with Gabay (Merker Aff. at ¶ 16), but now realizes, after reviewing FBMA's testimony, that it was not.

After LIMGA sent Gabay the default notice dated March 31, 2014, Gabay continued to use Steven Golub ("Golub"), a certified registered nurse anesthetist ("CRNA"). While Gabay was technically the anesthesiologist for these procedures, Golub was administering the anesthesia, as a CRNA is permitted to do in New York, and Gabay was supervising him from his office in the LIMGA part of the Building, which is not connected to the procedure room. Golub testified that he stopped working for LIMA in mid-2013, the time of the assignment to FBMA, and has since been working for FBMA, with the exception of a hiatus in May and June of 2014. Merker recalls Golub performing procedures in the summer and fall of 2014, when he was an employee of FBMA and not LIMA. Thus, Merker submits, from July 2014 until LIMA's

termination in November 2014, LIMA was still in violation of the Exclusivity Agreement long after the 30 day cure period expired. Merker also affirms that Gabay was rarely in the Building between July 2013 and April 2014, and was "largely out of sight" when he was in the Building (Merker Aff. at ¶ 19). Merker submits that this was confirmed by Gabay in his deposition testimony, which included his testimony that "I don't have to be actually in the suite supervising them" (Ex. H to Merker Aff. at p. 129).

Merker submits that Gabay was aware that LIMA's exclusivity would expire upon the sale of Day Op. Merker affirms that in 2006, Plaintiffs agreed to a "drag-along" provision (Merker Aff. at ¶ 20), which required Gabay, in the event that Day Op was to be sold, to surrender LIMA to any purchaser of Day Op for no additional consideration. In support, Merker provides correspondence dated "As of January 1, 2006" (Ex. J to Merker Aff.) which is addressed to Day Op and signed by Gabay on behalf of LIMA. That letter includes the following:

> Gentlemen:
>
> Dr. Gabay hereby agrees to cooperate in any Center Liquidity Event (defined below) and, in furtherance thereof, hereby agrees to sell, and/or cause the sale (for no additional economic consideration) of LIMA, to any third party designated in the transaction documents governing such Center Liquidity Event...
>
> For purposes hereof, a "Center Liquidity Event" shall mean (i) the sale or transfer of a majority of the outstanding equity interests of the Center to persons other than those holding such equity interests immediately prior to such transaction; (ii) the merger of the Center with or into any other entity which results in the outstanding equity interests of the Center being held by persons other than those who hold such interests prior to such transaction; or (iii) the sale of all or substantially all of the assets of the Center.

Merker disputes Gabay's assertion in his affidavit that Defendants were devious or secretive with Gabay regarding the proposed acquisition of Day Op. Rather, Merker affirms, Defendants simply reminded Gabay of an obligation that he had committed to, in writing, years earlier. Moreover, there were prior discussions regarding the acquisition of Day Op and although those discussions did not lead to a closing, Gabay was aware of all the prospective purchases, which included potential transactions with Quantum from Canada, and Jason Polette. This is confirmed in the minutes from Day Op's May 7, 2014 meeting (Ex. E to Ps' motion), which include the following:

> For this reason, the Center is pursuing offers to allow new buyers to take advantage of the Center's multi-specialty license, and bring new cases and new physicians, and

even new owners to the Center.

Merker also disputes Gabay's claim that, since LIMA's termination, "the majority of procedures, if not all, have been returned to the ASC" (Gabay Aff. in Supp. at ¶ 31), calling that assertion a "gross distortion" (Merker Aff. at ¶ 22). Merker affirms, first, that all Medicare procedures are performed at the OBS because the ASC is no longer certified to perform Medicare procedures, as Gabay is aware. A review of procedures for 2018 (*see* chart at ¶ 22 to Merker Aff.) reflects that a slight majority of cases are performed in the OBS, and the main reason for this is the Medicare patients who must have their procedures performed in the OBS for Medicare to pay for them. LIMGA has been providing monthly interim reports to Plaintiffs' Counsel, pursuant to the Court's directive, since December 2014. Thus, Merker submits, it is inaccurate and misleading for Gabay to assert that the majority if not all cases are performed in the ASC.

In May 2015, LIMGA entered into a License Agreement with AABP for a fee of $10,000 per month. Merker submits that this agreement was entirely proper, affirming that the $10,000 monthly payment was reviewed by attorneys specializing in healthcare law, to ensure that the payments were properl Merker cites deposition testimony of Mark Kronefeld, a principal of AABP, confirming that the arrangement was entered into after consultation with counsel (*see* Ex. K to Merker Aff. at pp. 38-39). In addition, the $30,000 payment that Gabay contends was improper was merely the first month's fee, plus two months security deposit, for a total of $30,000. The License Agreement with AABP gave it the right to office space, photocopying, facsimile machines, the use of a receptionist and staff members, and the use of equipment and supplies.

Merker submits that it was Gabay's own conduct that led to the instant litigation. When LIMGA advised Gabay that LIMA would no longer be performing procedures in the OBS, as was LIMGA's right, Gabay began to allege that LIMGA was in default of its monthly rental obligations to Mocha. Gabay retained counsel, the law firm of Rosenberg Calica & Birney LLP ("RCB") to institute a proceeding to terminate LIMGA's lease and evict LIMGA from the Building. RCB thereafter ceased its representation of Gabay, but only after LIMGA was compelled to commence an action seeking a declaratory judgment that the rent being paid by LIMGA was proper. Merker affirms that LIMGA's rent had been reduced to approximately $7,000 per month since January 2008, and Gabay raised no objection until 2014, after LIMA was terminated.

With respect to the stolen credit card to which Gabay makes reference, Merker affirms

that the card was a company credit card used by Day Op's administrator for years, and not Robbins' personal credit card. The loan that Mocha obtained was not for the purposes of paying back the embezzled funds, but rather was obtained because Day Op was having difficulty meeting its financial obligations and was seeking to broaden its facilities for multi-specialty purposes. In addition, although American Express offered to settle for a significant discount, Gabay insisted that the full amount be repaid to avoid any negative effect on his personal credit rating. Schulman provides an affidavit in which he adopts, ratifies and affirms the statements made by Merker in his affidavit.

In reply Gabay submits, *inter alia*, that 1) the motion papers demonstrate that there was no formal notice and opportunity to cure, as required by the Exclusivity Agreement; 2) even assuming that there was a notice, any alleged billing improprieties and improper use of Nash was cured, and there was no breach; 3) Defendants admit that any breach was cured, as evidenced by Merker's concession that work by FBMA was performed only from August 1, 2013 through April 3, 2014, which establishes that Gabay provided all anesthesia to patients in the ASC after April 3, 2014; 4) there is no merit to Defendants' claim that LIMA's engagement of Golub was improper, as LIMA is permitted to obtain staffing under the Exclusivity Agreement, including medical doctors and CRNAs; 5) Defendants have no proof in support of their allegation that the Exclusivity Agreement was assigned, and there never was any such assignment; 6) Gabay did not object to cases being performed in the LIMGA offices if there was a bona fide reason, and LIMA was the anesthesia provider, but Defendants violated these understandings by moving every procedure to their office as of August 2013 and by terminating LIMA's services in May 2014; 7) Merker was aware of the arrangement between LIMA and FBMA, in part because Gabay provided Robbins with a July 9, 2013 letter which stated that FBMA would be assisting LIMA in providing anesthesia; 8) the $5,000 monthly payment by FBMA was necessitated by LIMGA's refusal to pay the rent required by the lease, and that payment went directly to Mocha; and 9) there is no merit to Defendants' contention that the payments by FBMA violated any law, and it is LIMGA that entered into a "pay-for-play" arrangement (Gabay Reply Aff. at ¶ 15) with AABP.

C. The Parties' Positions

Plaintiffs submit that they have established their right to partial summary judgment on the first through fourth causes of action. Plaintiffs contend that they have demonstrated their right to judgment on the first and third causes of action in the Complaint by establishing that Defendants had no basis to terminate the Exclusivity Agreement because LIMA performed all of its obligations under the Exclusivity Agreement to provide anesthesia services at the ASC as requested and as required. Plaintiffs submit that the purported grounds for Defendants' termination of the Exclusivity Agreement were fabricated and, if true, could not constitute cause for termination because LIMA was not provided proper notice to cure any alleged violations. Moreover, the alleged violation pertaining to FBMA, which was the first purported ground for termination, had already been cured without further violation on April 1, 2014, after LIMA received the March 31, 2014 correspondence. In addition, the March 31, 2014 correspondence did not constitute a proper notice to cure because it did not warn LIMA that the Exclusivity Agreement might be terminated due to alleged violations, and did not provide any date by which the alleged violations were to be cured. Additionally, the March 31, 2014 correspondence did not address the alleged violation regarding Nash, and no other notices were served on LIMA regarding Nash. Therefore, Plaintiffs submit, any termination based on that ground was in violation of the notice provision in the Exclusivity Agreement. Plaintiffs contend, further, that Defendants' objections to Nash are baseless in light of the fact that Nash performed over 1,000 procedures for LIMGA without objection by Defendants. In light of the foregoing, Plaintiffs submit that they have established their right to summary judgment on liability on the first and third causes of action in the Complaint.

With respect to the second cause of action, Plaintiffs contend that the Exclusivity Agreement contemplated that LIMA had the right to be the exclusive provider of all anesthesia services performed in the Building. Thus, LIMA has met its *prima facie* burden of establishing that Defendants' conduct, aimed solely at enriching Defendants to the detriment of LIMA and in contravention of the Exclusivity Agreement, violated Defendants' implied duty of good faith and fair dealing. Plaintiffs submit, further, that Defendants cannot raise any triable issue of fact that would rebut LIMA's entitlement to summary judgment on the second cause of action.

Plaintiffs submit, further, that they have established their right to summary judgment on the fourth cause of action, tortious interference with contractual relations, by demonstrating that Defendants intentionally induced Day Op to breach its contract without justification, and that

Day Op breached the contract. Plaintiffs submit that they have established that Defendants caused Day Op to terminate the Exclusivity Agreement, which could only be terminated upon cause and with proper notice, without cause or proper notice, for their own financial gain. Moreover, LIMA has been damaged by that wrongful termination because it has been prevented from receiving revenue from services in the procedure rooms since May 16, 2014, and from the ASC since November 7, 2014.

In opposition to Plaintiffs' motion and in support of Defendants' motion, Defendants note that the Exclusivity Agreement (Ex. A to Zinner Aff.) is between Day Op and LIMA, not between LIMA and LIMGA. Thus, Defendants submit, the first and third causes of action in the Complaint are not viable because Defendants are not a party to the Exclusivity Agreement. Moreover, Defendants contend, the breach of contract claim cannot be properly asserted against the LIMGA Doctors, as agents of Day Op, both because they acted on behalf of a disclosed principal, and because they are protected by the business judgment rule. Defendants contend, further, that the second cause of action, alleging a breach of the covenant of good faith and fair dealing, fails for the same reason, specifically that this claim can be maintained only against a party to the contract. Moreover, even if Defendants were parties to the Exclusivity Agreement, which they are not, Plaintiffs would still be unable to assert this claim because it is duplicative of the first and third causes of action for breach of contract.

Defendants also submit that the tortious interference claim fails because Day Op did not breach the Exclusivity Agreement. Moreover, even if Day Op was determined to have breached the Exclusivity Agreement, Defendants did not intentionally procure that breach, or do so without justification. Defendants contend that Day Op's termination of LIMA under the Exclusivity Agreement was justified based on several material breaches by LIMA of the Exclusivity Agreement. Moreover, they argue, there is no merit to Plaintiffs' contention that Defendants breached the Exclusivity Agreement by diverting cases from the ASC to the OBS because LIMGA was free to direct its patients to any facility it deemed appropriate, and it had valid reasons for doing so.

Defendants submit that LIMA's assignment to FBMA justified the termination by Day Op. LIMA entered into the FBMA Agreement (Ex. L to Zinner Aff.) which describes an assignment of obligations from LIMA to FBMA. Specifically, paragraph 1 of the FBMA Agreement provides that: "LIMA hereby engages FBMA to provide services of licensed anesthesiologists for as much of the Anesthesia Services as are assigned by LIMA..." The

FBMA Agreement provides, *inter alia*, that FBMA shall arrange for adequate staffing, that patients shall be billed in the name of FBMA and that FBMA shall maintain records for all such cases. In addition, as reflected by the list of cases provided by FBMA and an excerpt from a spreadsheet of LIMA's cases provided by LIMA (*see* Exs. C and D to Zinner Aff.), every procedure requiring anesthesiology performed in the ASC located in Day Op's suite between August 1, 2013 and April 3, 2014 was performed by FBMA, not LIMA.

Defendants contend that, because LIMA cannot dispute that it assigned its Exclusivity Agreement, Plaintiffs instead argue that LIMA had the right to use FBMA's staff to perform LIMA's obligations. Defendants submit, however, that this assertion is belied by numerous provisions of the Exclusivity Agreement, including the following:

> At paragraph 1:
>
> The Center hereby engages LIMA as the exclusive provider of professional anesthesiology services to the Center (the "Services"), and LIMA desires to render such Services as the exclusive provider...
>
> At Section 3.1:
>
> It is expressly acknowledged by the parties hereto that LIMA is an "independent contractor" of the Center, and nothing in this Agreement is intended or shall be construed to create with the Center an employer/employee relationship or a joint venture relationship or to permit LIMA or any of its professionals to incur any obligation ro enter into any agreement on behalf of the Center...or to allow the Center to exercise control or direction over the manner or method of this Agreement; provided that the services to be provided hereunder by LIMA and each of its professionals shall be provided in a manner consistent with professional standards governing such services and the provisions of this Agreement....
>
> At Section 3.2.1:
>
> LIMA shall have the exclusive right and responsibility to provide all Services which the Center makes available to its patients. LIMA shall ensure coverage of the Center as required herein by LIMA's physicians, physicians' assistants and certified registered nurse anesthetists (CRNA") who shall collectively provide those Services on an exclusive basis.

Defendants contend that Plaintiffs' reliance on Section 3.2.2 of the Exclusivity Agreement is misplaced. That Section, titled "Staffing," provides as follows:

> The Center shall provide LIMA the Operating Room schedule, in writing, at least one-month in advance...LIMA shall provide professionals such that the Center is adequately staffed to meet patient-care needs. Dr. Gabay shall be required to be present at the Center to provide Services at least seventy percent (70%) of the Center's regular business hours, determined on an annual basis, during the Term and any renewal term(s), unless Dr. Gabay is determined to suffer from a Disability...

Defendants submit that this provision clearly states that LIMA shall provide professionals, and does not authorize LIMA to use third parties such as FBMA. Thus, Defendants contend, to the extent that LIMA required additional professionals to perform the services required under the Exclusivity Agreement, LIMA was compelled to hire those professionals directly as employees, to ensure that LIMA was the exclusive provider. Notably, this is what LIMA did from January 1, 2006, when the Exclusivity Agreement went into effect, until mid-2013 when LIMA assigned the Exclusivity Agreement to FBMA. Defendants submit that it is inconsistent with the notion of exclusivity that LIMA would be permitted to contract with any outside anesthesiology practice that was unknown to Day Op, and could have them perform professional procedures at the ASC.

Defendants submit that Section 7.1 of the Exclusivity Agreement, which addresses billing, provides further evidence that LIMA was not permitted to use professionals from third parties. Section 7.1 provides, in pertinent part, as follows:

> Billing for the professional component of Services rendered by LIMA shall be the responsibility of LIMA and shall be separate and apart from any billing made to patients or other payors by the Center for its services. Except as otherwise provided herein, LIMA shall be solely responsible for charging patients for Services rendered by LIMA hereunder and for the billing, coding and collection of such charges. LIMA shall perform such billing, coding and collection in its name and provider number, or the names and provider numbers of its professionals...

Defendants submit that this language does not permit LIMA to bill under the name and provider number of a third-party employer of an anesthesiologist, which is what LIMA did. In response to a subpoena, FBMA provided a sample of the billing statements that it used during the period in question, with notations to identify whose provider numbers were used (Ex. M to Zinner Aff.). Defendants contend that this documentation reflects that it was FBMA's provider number, name and tax identification number submitted on the billing statements, which Defendants submit was in violation of Section 7.1 of the Exclusivity Agreement.

Defendants also contend that the FBMA Agreement violated the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), which prohibits the payment of remuneration to induce or reward

patient referrals of business involving any item of service payable by the Federal health care programs, and carries criminal penalties including fines and incarceration. Under the FBMA Agreement, LIMA was referring cases to FBMA, which performed the anesthesiology services from August 1, 2013 to April 3, 2014 and, in return, FBMA was paying LIMA half of the net revenues. Defendants submit that this agreement constituted a "textbook" violation of the Anti-Kickback Statute (Zinner Aff. at ¶ 18).

Defendants submit, further, that LIMA, through Gabay, breached its fiduciary duty to Mocha and the LIGMA Doctors by collecting $5,000, ostensibly in rent, by charging FBMA rent that was $5,000 more than the fair rental value of $2,791.67. Gabay testified that he used the extra $5,000 to cover his own obligation to Day Op, as reflected by the following deposition testimony (Ex. H to Zinner Aff. at p. 226):

> Q: So you told [FBMA] they owed you $8,000 a month for rent?
>
> A: The two rents. The rent I had to pay to the center [Day Op] and the rent for the – for the office.

Defendants submit, however, that LIMA had no legitimate basis to charge FBMA for Gabay's personal obligation to Day Op, and that any amount charged to FBMA in excess of the actual rent expense should have been paid to LIMGA for the use of its offices, or to Mocha, its landlord. As Merker has affirmed, Defendants were not aware of the arrangement between LIMA and FBMA until December 2013, when they learned that FBMA was paying additional rent to LIMA.

Defendants submit that Defendants' diversion of cases to the OBS did not constitute a breach of the Exclusivity Agreement. Plaintiffs' allegation that LIMA has the right to be the exclusive provider of anesthesia services at the Building is "simply false" (Zinner Aff. at ¶ 21). Defendants submit that the Exclusivity Agreement expressly states that it is confined to Day Op, referred to in the Exclusivity Agreement as the "Center." Moreover, the Exclusivity Agreement clarifies that it pertains to the PHL Article 28 ASC, providing as follows at page 1:

> WHEREAS, the Center is duly licensed under Article of the [PHL] as the operator of a day op ambulatory surgery center in Great Neck, New York;

Defendants assert that the OBS inside LIMGA's suite is not, and has never been, an Article 28 facility. Thus, Defendants contend, the exclusivity clearly applies only to the ASC, and not to the OBS or any portion of LIMGA's suite. Moreover, the referral of cases to the OBS could not constitute a breach by Day Op because Day Op was not the party who made the determination as

to where cases would be directed; LIMGA made that determination. In light of the foregoing, Defendants submit, LIMGA's referral of procedures to the OBS did not constitute a breach of the Exclusivity Agreement.

Defendants also submit that there is no merit to Plaintiffs' contention that even if LIMA's conduct constituted a default under the Exclusivity Agreement, LIMA had a 30-day period after notice to cure the default. Defendants submit that they provided LIMA with notice of its default in the March 31, 2014 letter. Upon receiving that letter, Gabay attempted to cure part of his default by changing the letterhead on the billing documents, but not the provider number. In addition to the fact that LIMA continued to use FBMA well past the cure period, Defendants submit that LIMA's breaches were incapable of being cured and, therefore, that Day Op did not need to comply with the notice and cure provision. Defendants submit that Plaintiffs' conduct, which violated the Anti-Kickback Statute and placed the Day Op in jeopardy, remains true irrespective of whether LIMA thereafter terminated its relationship with FBMA. At a minimum, Defendants submit, an issue of fact exists as to whether Plaintiffs' conduct amounts to an incurable default.

Finally, Defendants submit that Plaintiffs have not provided any evidence that the LIMGA Doctors acted outside the scope of their authority as officers and directors of Day Op, or otherwise committed independent tortious acts. In addition, the submissions establish that Day Op's termination of LIMA under the Exclusivity Agreement was justified, and that LIMGA was permitted to direct its procedures to the OBS. Under these circumstances, Defendants submit, there is no basis for Plaintiffs' claims against the LIMGA Doctors for tortious interference with contract.

In reply, Plaintiffs submit *inter alia* that 1) as Defendants acted in their own self interest, they can be held individually liable for their own actions in connection with the breach of the Exclusivity Agreement; and 2) the second cause of action is not duplicative of the breach of contract claim because the conduct and resulting injury is not identical; the second cause of action is based on Plaintiffs' contention that the Exclusivity Agreement contemplated that LIMA had the right to be the exclusive provider of all anesthesia services performed in the Building, and Defendants' conduct had the effect of destroying or injuring LIMA's right to receive the benefits of the Exclusivity Agreement.

In response, Defendants submit that none of the case law cited by Plaintiffs supports the conclusion that a claim for breach of contract can be asserted against a party that is not a party to

the subject contract. Thus, Defendants contend, the Court must dismiss the first and third causes of action because LIMA contracted with Day Op in the Exclusivity Agreement, and not any of the Defendants.

RULING OF THE COURT

A. Summary Judgment

On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 N.Y.3d 40, 49 (2015), quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action. *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 N.Y.3d at 49, citing *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012), quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324. Viewing the evidence in the light most favorable to the non-moving party, if the nonmoving party, nonetheless, fails to establish a material triable issue of fact, summary judgment for the movant is appropriate. *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 N.Y.3d at 49, quoting *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 339 (2011).

B. Breach of Contract

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach. *El-Nahal v. FA Management, Inc.*, 126 A.D.3d 667, 668 (2d Dept. 2015) citing, *inter alia*, *Dee v. Rakower*, 112 A.D.3d 204, 208-209 (2d Dept. 2013).

An agent who signs an agreement on behalf of a disclosed principal will not be held liable for its performance unless the agent clearly and explicitly intended to substitute his personal liability for that of his principal. *Yellow Book of New York, Inc. v. Shelley*, 74 A.D.3d 1333, 1334 (2d Dept. 2010) citing, *inter alia*, *Key Equip. Fin. v. South Shore Imaging, Inc.*, 69 A.D.3d 805 (2d Dept. 2010).

Persons may not be held personally liable on contracts of their corporations, provided they did not purport to bind themselves individually under such contracts. *Stern v. H. DiMarzo, Inc.*, 77 A.D.3d 730 (2d Dept. 2010) quoting *Wiernik v. Kurth*, 59 A.D.3d 535, 537 (2d Dept.

2009). Furthermore, officers, directors or employees of a corporation do not become liable to one who has contracted with the corporation for inducing the corporation to breach its contract merely because they have made decisions and taken actions that resulted in the corporation's breaching its contract. *Stern v. H. DiMarzo, Inc.*, 77 A.D.3d at 731, quoting *Citicorp Retail Servs. v. Wellington Mercantile Servs.*, 90 A.D.2d 532 (2d Dept. 1982). When an officer or director acts on behalf of his corporation, he may not be held liable for inducing the corporation to violate its contractual obligations unless his activity involves separate tortious conduct or results in personal profit. *Stern v. H. DiMarzo, Inc.*, 77 A.D.3d at 731, quoting *Di Nardo v. L & W Indus. Park of Buffalo*, 74 A.D.2d 736 (4th Dept. 1980).

New York law permits a party to terminate a contract immediately, without affording the breaching party notice and opportunity to cure . . . when the [breaching party's] misfeasance is incurable and when the cure is unfeasible. *Giuffre Hyundai, Ltd. v. Hyundai Motor Am.*, 756 F.3d 204, 210 (2d Cir. 2014), citing *Sea Tow Servs. Int'l, Inc. v. Pontin*, 607 F. Supp. 2d 378, 389 (E.D.N.Y. 2009), quoting *Needham v. Candie's, Inc.*, No. 01 Civ. 7184(LTS)(FM), 2002 U.S. Dist. LEXIS 15144, at *11-12, 2002 WL 1896892, at *4 (S.D.N.Y. Aug. 16, 2002), *aff'd*, 65 F. App'x 339 (2d Cir. 2003) (citations omitted).

C. Contract Interpretation

A contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Obstfeld v. Thermo Niton Analyzers, LLC*, 112 A.D.3d 895, 897 (2d Dept. 2013), citing *MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (2009), quoting *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002). A contract is ambiguous if the terms are reasonably susceptible of more than one interpretation. *Obstfeld v. Thermo Niton Analyzers, LLC*, 112 A.D.3d at 897. Whether a contract is ambiguous is a question of law to be resolved by the court. *Id.*, citing *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990) and *JP Morgan Chase Bank, N.A. v. Cellpoint Inc.*, 54 A.D.3d 366 (2d Dept. 2008). Where a contract is ambiguous, extrinsic evidence may be considered to determine the parties' intent. *Obstfeld v. Thermo Niton Analyzers, LLC*, 112 A.D.3d at 897, citing *Greenfield v. Philles Records*, 98 N.Y.2d at 569.

D. Covenant of Good Faith and Fair Dealing

Implicit in all contracts is a covenant of good faith and fair dealing in the course of

contract performance. *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995). The implied covenant of good faith and fair dealing embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Moran v. Erik*, 11 N.Y.3d 452, 456 (2008), citing *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002), quoting *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (additional citations omitted). The implied covenant of good faith and fair dealing will not impose an obligation that would be inconsistent with the terms of the contract. *Adams v. Washington Group*, LLC, 42 A.D.3d 475, 476 (2d Dept. 2007), citing, *inter alia*, *Horn v. New York Times*, 100 N.Y.2d 85, 93 (2003). A cause of action to recover damages for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract. *Deer Park Enterprises, LLC v. Ail Systems, Inc.*, 57 A.D.3d 711, 712 (2d Dept. 2008), quoting *Canstar v. Jones Constr. Co.*, 212 A.D.2d 452, 453 (1st Dept. 1995).

E. Tortious Interference with Contractual Relations

A party claiming tortious interference with contractual relations must establish the following elements: 1) the existence of a valid contract with a third party, 2) defendants' knowledge of the contract, 3) defendants' intentional procurement of the third party's breach of the contract without justification, 4) actual breach of the contract, and 5) damages resulting therefrom. *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (1996). The plaintiff must specifically allege that the contract would not have been breached but for the defendant's conduct. *Ferrandino & Son, Inc. v. Wheaton Bldrs., Inc.*, 82 A.D.3d 1035, 1036 (2d Dept. 2011), quoting *Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dept. 2006) (internal quotation marks omitted).

F. Business Judgment Rule

The business judgment rule bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. *Goldhirsch v. St. George Tower and Grill Owners Corp.*, 142 A.D.3d 1044, 1046-47 (2d Dept. 2016), quoting *Auerbach v. Bennett*, 47 N.Y.2d 619, 629 (1979).

The courts should strive to avoid interfering with the internal management of business corporations. To that end, courts have long adhered to the business judgment rule, which provides that, where corporate officers or directors exercise unbiased judgment in determining that certain actions will promote the corporation's interests, courts will defer to those

determinations if they were made in good faith. *Matter of Kenneth Cole Prods., Inc.*, 27 N.Y.3d 268, 274 (2016), citing *40 W. 67th St. v. Pullman*, 100 N.Y.2d 147, 153 (2003); *Chelrob, Inc. v. Barrett*, 293 N.Y. 442, 459-460 (1944). The doctrine is based, at least in part, on a recognition that: courts are ill equipped to evaluate what are essentially business judgments; there is no objective standard by which to measure the correctness of many corporate decisions, which involve the weighing of various considerations; and corporate directors are charged with the authority to make those decisions. *Matter of Kenneth Cole Prods., Inc.*, 27 N.Y.3d at 274, citing *Auerbach v. Bennett*, 47 N.Y.2d at 630-31. Hence, absent fraud or bad faith, courts should respect those business determinations and refrain from any further judicial inquiry. *Matter of Kenneth Cole Prods., Inc.*, 27 N.Y.3d at 274, citing *Auerbach v. Bennett*, 47 N.Y.2d at 631.

G. Anti-Kickback Statute

The Anti-Kickback Statute ("AKS") prohibits offering, paying, soliciting, or receiving "any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind . . . in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program." *U.S. ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772, 805 (S.D.N.Y. 2017), quoting 42 U.S.C. § 1320a-7b(b)(1)(A). The statute requires intent to induce a referral or recommendation through the use of "remuneration," which is defined as "transfers of items or services for free or for other than fair market value." *U.S. ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d at 805, quoting 42 U.S.C. §§ 1320a-7b(b)(2), 1320a-7a(i)(6).

H. Application of these Principles to the Instant Action

The Court denies Plaintiffs' motion. The Court grants Defendants' cross motion to the extent that the Court dismisses the first, second and third causes of action, but denies Defendants' motion to dismiss the fourth cause of action. The Court so rules based on its conclusion that 1) the first and third causes of action are not viable because Defendants are not parties to the Exclusivity Agreement, and the individual defendants did not purport to bind themselves individually under that agreement; 2) the second cause of action is duplicative of the breach of contract claim, which is itself not viable, given that this cause of action is based on Plaintiffs' allegation that Defendants' diversion of procedures from the ASC to LIMGA's offices was improper, which is also the crux of Plaintiffs' breach of contract claim; and 3) the fourth cause of action, alleging tortious interference with contract, is legally sufficient, in light of evidence supporting Plaintiffs' allegation that Defendants caused Day Op to terminate the

Exclusivity Agreement without cause or proper notice, for their own financial gain; and 4) a trial is required on the fourth cause of action in light of the factual disputes regarding, *inter alia*, whether Gabay/LIMA breached the Exclusivity Agreement and, relatedly, whether the termination of the Exclusivity Agreement was warranted and proper.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a pre-trial conference on September 5, 2018 at 10:30 a.m.

ENTER

DATED: Mineola, NY
July 31, 2018

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
AUG 01 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE