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Case No. N17C-12-337 WCC

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

BRADLEY BAKOTIC and JOSEPH HACKEL,	)	
Plaintiffs,	)	
v.	)	C.A. No. N17-C-12-337 WCC
BAKOTIC PATHOLOGY LP and BPA HOLDING CORP.,	)	
Defendants.	)	

DEFENDANTS' ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND COUNTERCLAIMS

Defendants Bakotic Pathology LP1 and BPA Holding Corp. ("BPA") (collectively "Defendants") file this Answer to Plaintiffs' Complaint for Declaratory Judgment ("Plaintiffs' Complaint") and Counterclaims. Defendants answer the individually numbered paragraphs of Plaintiffs' Complaint as follows:

PRELIMINARY STATEMENT

The Plaintiffs' Complaint is missing material facts, is misleading, and creates the false impression that they are two regular doctors who simply want to treat patients, but are uncertain as to whether they can in light of the restrictive covenants agreed to with their former employer. This is not even half the story.

[1] Bako Pathology LP ("Bako") is misidentified in Plaintiffs' Complaint as "Bakotic Pathology LP," an entity which does not exist. By responding herein as if it was properly named and served, Bako does not waive any and all defenses available to it as a result of Plaintiffs' misnomer.

Plaintiffs hide from this Court the fact that they were not just employees of Defendants (and their predecessors), but rather co-founders and senior members of the management team who held and hold significant equity interests in Bako. Plaintiff Bakotic was the Chief Executive Officer ("CEO") and a member of the Board of Directors; Plaintiff Hackel was a Vice President and the Medical Director.

Plaintiffs further fail to mention that, since signing the 2011 employee agreement that is the subject of their Complaint, they sold certain interests in Defendants (and their predecessors) for millions of dollars. In fact, from the most recent of these sales, which took place in 2016, Plaintiff Bakotic and Plaintiff Hackel received $30,400,768.51 and $14,357,043.92, respectively, in cash and equity as part of the sale of shares in Defendants (and their predecessors). As part of that most recent transaction, Plaintiffs entered into an Agreement and Plan of Merger dated December 3, 2015, in which, in return for the consideration received, they agreed to further restrictive covenants, including non-competition and non-solicitation provisions—curiously though, Plaintiffs' Complaint makes no reference to the transaction, the substantial sums that Plaintiffs derived from it, the agreement resulting from the transaction, or the non-competition and non-solicitation restrictive covenants contained in that agreement. The buyer in that transaction, and current majority shareholders of Defendants, placed significant

value in those restrictive covenants, without which the transaction would not have occurred.

Perhaps unsurprisingly, the Complaint also makes no mention of the unprofessional and destructive conduct that Plaintiffs engaged in after receiving their cash and equity—conduct which demonstrates a reckless disregard for Defendants' rights. Notwithstanding Plaintiffs' equity interests, their destructive conduct continues to this day. Accordingly, as explained in more detail below, this action is not about two regular doctors who simply want to resume treating patients; rather, this action is about a failure by equity holders to abide by their contractual and legal obligations to Defendants, and their attempts to build a competing business and solicit Defendants' employees and customers—conduct warranting the return of Plaintiffs' substantial compensation and other benefits to Defendants to offset the damage that has already been done to the Company.

ANSWER TO COMPLAINT

1. Defendants admit that Plaintiffs' Complaint speaks for itself. Defendants deny that any covenants not to compete identified in Plaintiffs' Complaint are unenforceable. Defendants deny all remaining allegations in Paragraph 1 of Plaintiffs' Complaint.

Parties, Jurisdiction and Venue

2. Defendants are without knowledge or information sufficient to form a belief as to the allegations in Paragraph 2 of Plaintiffs' Complaint and, therefore, deny such allegations.

3. Defendants are without knowledge or information sufficient to form a belief as to the allegations in Paragraph 3 of Plaintiffs' Complaint and, therefore, deny such allegations.

4. Defendants deny the allegations in Paragraph 4 of Plaintiffs' Complaint.

5. Defendants admit BPA is a Delaware corporation. Defendants deny all remaining allegations in Paragraph 5 of Plaintiffs' Complaint.

6. Defendants admit that this Court has jurisdiction over this action. Defendants further admit that Plaintiffs' claims speak for themselves. Defendants deny all remaining allegations in Paragraph 6 of Plaintiffs' Complaint.

7. Defendants admit that this Court has jurisdiction over Defendant BPA. Defendants deny all remaining allegations in Paragraph 7 of Plaintiffs' Complaint.

8. Defendants admit the allegations in Paragraph 8 of Plaintiffs' Complaint.

Defendants' Relationship

9. Defendants deny the allegations in Paragraph 9 of Plaintiffs' Complaint.

10. Defendants admit the allegations in Paragraph 10 of Plaintiffs' Complaint.

11. Defendants admit the allegations in Paragraph 11 of Plaintiffs' Complaint.

Plaintiff Bakotic

12. Defendants deny the allegations in Paragraph 12 of Plaintiffs' Complaint.

13. Defendants admit the allegations in Paragraph 13 of Plaintiffs' Complaint.

14. Defendants admit the allegations in Paragraph 14 of Plaintiffs' Complaint.

15. Defendants deny the allegations in Paragraph 15 of Plaintiffs' Complaint.

16. Defendants deny the allegations in Paragraph 16 of Plaintiffs' Complaint.

17. Defendants deny the allegations in Paragraph 17 of Plaintiffs' Complaint.

18. Defendants deny the allegations in Paragraph 18 of Plaintiffs' Complaint.

19. Upon information and belief, Defendants admit the allegations in Paragraph 19 of Plaintiffs' Complaint and state further that Plaintiff Bakotic has already formed a pathology laboratory to perform medical functions.

Plaintiff Hackel

20. Defendants admit the allegations in Paragraph 20 of Plaintiffs' Complaint.

21. Defendants admit that Plaintiff Hackel signed an Employee Confidentiality, Non-Solicitation and Non-Competition Agreement (the "Non-Competition Agreement"), a true and correct copy of which is attached as Exhibit 1. Defendants deny all remaining allegations in Paragraph 21 of Plaintiffs' Complaint.

22. Upon information and belief, Defendants admit the allegations in Paragraph 22 of Plaintiffs' Complaint.

Count I: Declaratory Judgment

23. Defendants incorporate Paragraphs 1 through 22 above as if set forth fully herein.

24. Defendants are without knowledge or information sufficient to form a belief as to the allegations in Paragraph 24 of Plaintiffs' Complaint and, therefore, deny such allegations.

25. Defendants admit the allegations in Paragraph 25 of Plaintiffs' Complaint.

26. Defendants admit the allegations in Paragraph 26 of Plaintiffs' Complaint.

27. Defendants admit that this Answer speaks for itself. Defendants deny all remaining allegations in Paragraph 27 of Plaintiffs' Complaint.

28. Defendants deny the allegations in Paragraph 28 of Plaintiffs' Complaint.

29. Defendants deny the allegations in Paragraph 29 of Plaintiffs' Complaint.

30. Defendants deny the allegations in Paragraph 30 of Plaintiffs' Complaint.

31. Defendants deny the allegations in Paragraph 31 of Plaintiffs' Complaint.

32. Defendants deny the allegations in Paragraph 32 of Plaintiffs' Complaint.

33. Defendants deny the allegations in Paragraph 33 of Plaintiffs' Complaint.

Prayer for Relief

34. Defendants deny that Plaintiffs are entitled to any relief, whether stated in this paragraph, in subparagraphs (a) through (c), or otherwise.

Except as specifically admitted above, Defendants deny all remaining allegations in Plaintiffs' Complaint. Defendants further deny that Plaintiffs have any valid claim or are entitled to any remedy or relief in this action.

First Affirmative Defense

Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

Plaintiffs' claims are barred, in whole or in part, by the doctrines of consent, waiver, estoppel, unclean hands, and/or accord and satisfaction.

Third Affirmative Defense

Plaintiffs are not entitled to any of the relief requested in Plaintiffs' Complaint.

Fourth Affirmative Defense

Plaintiffs' Complaint should be dismissed due to insufficiency of service of process and/or insufficiency of process.

Fifth Affirmative Defense

Defendants reserve the right to amend this Answer, to add affirmative or other defenses, or to withdraw defenses as deemed appropriate after reasonable opportunity for discovery.

WHEREFORE, Defendants request the Court dismiss Plaintiffs' Complaint with prejudice and award Defendants their costs, expenses, attorneys' fees, and such other relief as may be just and proper.

COUNTERCLAIMS

1. For their counterclaims, the responses contained in Paragraphs 1 through 34 above are incorporated by reference as if fully set forth herein and Defendants further allege and state the following.

Parties, Jurisdiction, and Venue

2. Plaintiffs filed their Complaint with this Court; therefore, venue of Defendants' Counterclaims is proper in this Court and this Court has jurisdiction over Plaintiffs.

Factual Allegations

A. Background and Plaintiffs' Other Restrictive Covenants

3. Bako, BPA, Bako Pathology Holdings Corp., BPA Merger Corp., and Ampersand 2011 Limited Partnership are parties to a December 3, 2015 Agreement and Plan of Merger ("Merger Agreement").

4. This merger closed on January 5, 2016 (the "Closing Date").

5. A true and correct copy of the Merger Agreement is attached as Exhibit 2.

6. Plaintiffs are parties to the Merger Agreement solely for purposes of its Section 5.11, Section 9.3, and Article 11.

7. Pursuant to Section 5.11, Plaintiffs agreed that, for a period of five (5) years from the Closing Date, they would not "hire or solicit for employment any employee of the Company or any of its Subsidiaries or any Person who has been an employee of the Company or any of its Subsidiaries in the preceding twelve (12) months, except for any employee of the Company or any of its Subsidiaries who, following the Closing, has been involuntarily terminated by the Company or Buyer for a six (6) month period prior to commencement of employment with such Person" or "induce or encourage" any employee of the Company "to no longer be employed by the Company[.]" (Ex. 2 § 5.11(a)(i), hereinafter referred to as the "Non-Solicitation of Employees Covenant.")

8. Pursuant to Section 5.11, Plaintiffs agreed that, for a period of five (5) years from the Closing Date, they would not: (A) "engage in the Competing Business in any manner or capacity (whether as an officer, director, employee, consultant, owner, investor or otherwise with respect to any Competing Business)"; (B) "own any equity interest, or operate, control or participate (including as a joint venture partner, agent, representative, consultant or lender) in

any Person that engages directly or indirectly in the Competing Business"; (C) "solicit any direct or indirect investors, agents, providers/suppliers, distributors or other similar parties of the Company or any of its Subsidiaries, in each case, in respect of a Competing Business"; or (D) "intentionally interfere with the business relationships between the Company or any of its Subsidiaries and any of its investors." (Ex. 2 § 5.11(a)(ii), hereinafter referred to as the "Non-Competition Covenant.")

9. Pursuant to Section 5.11, Plaintiffs agreed that a "Competing Business" means "any business in which the Company or any of its Subsidiaries is engaged, or has specific plans (as evidenced by documentation of the Company) to become engaged, in each case, as of the Closing Date." (Ex. 2 § 5.11(a).)

10. Pursuant to Section 5.11, Plaintiffs agreed and acknowledged that these covenants were "an essential element" of the merger and "that, but for these covenants," the merger would not have occurred. (Ex. 2 § 5.11(c).)

11. Pursuant to Section 5.11, in the event these covenants are in any way too broad, Plaintiffs intended this Court would "construe and interpret or reform this Section 5.11 to provide for a covenant having the maximum enforceable geographic area, time period and other provisions (not greater than those contained in this Section 5.11) that would be valid and enforceable[.]" (Ex. 2 § 5.11(d).)

12. As a result of the Merger Agreement, and in consideration for these covenants, Plaintiffs received a portion of the purchase price; specifically, Plaintiff Bakotic received $30,400,768.51 in cash and stock and Plaintiff Hackel received $14,357,043.92 in cash and stock.

13. Shortly after the merger, Plaintiffs entered into an Amended and Restated Limited Partnership Agreement of Bako Pathology LP (the "Partnership Agreement"). A copy of the Partnership Agreement is attached as Exhibit 2 to Plaintiffs' Complaint.

14. Pursuant to the Partnership Agreement, Plaintiffs Bakotic and Hackel have an ownership interest in Bako equal to approximately 11.6% and 3.4% of the Defendants, respectively. Plaintiffs currently retain their respective interests in Bako.

15. Pursuant to the Partnership Agreement, Plaintiffs agreed that they would not have "any business interests or engage in business activities in addition to those relating to [Bako], including, without limitation, business interests and activities in direct competition with [Bako] or any of its Subsidiaries." (*See* Partnership Agreement § 6.5.1.)

16. Pursuant to the Partnership Agreement, Plaintiffs recognized and acknowledged that, as Limited Partners of Bako, they would receive "certain confidential and proprietary information and trade secrets of [Bako]"

("Confidential Information"), which Confidential Information "constitutes valuable, special and unique property of [Bako.]" (*Id.* § 6.8.)

17. Pursuant to the Partnership Agreement, Plaintiffs recognized and acknowledged that Bako's Confidential Information included all information of any sort that is "(a) related to [Bako's] business and (b) is not generally or publicly known other than through a breach of the terms set forth [in the Partnership Agreement]." (*Id.*)

18. Pursuant to the Partnership Agreement, Plaintiffs agreed "not to disclose or use for [their] own account or the account of any other Person . . . any Confidential Information[.]" (*Id.*)

19. Pursuant to the Partnership Agreement, Plaintiffs agreed that, following any dispute between the parties to the Partnership Agreement, "the prevailing party in such dispute shall be entitled to recover from the other party all reasonable fees, costs and expenses of enforcing any right of the prevailing party, including without limitation, reasonable attorneys' fees and expenses, all of which shall be deemed to have accrued upon the commencement of such action and shall be paid whether or not such action is prosecuted to judgment." (*Id.* § 12.12.)

20. After execution of the Merger Agreement, Plaintiff Bakotic served as President and Chief Executive Officer and as a Director on BPA's Board of

Directors. Plaintiff Bakotic's job duties included responsibilities for marketing, regulatory matters, management, sales, lecturing, and supervision.

21. After execution of the Merger Agreement, Plaintiff Hackel served as a Vice President and Medical Director for Defendants. Plaintiff Hackel's job duties included responsibilities similar to those of Plaintiff Bakotic.

B. Plaintiff Bakotic is Accused of Sexual Harassment, Inappropriate Sexual Relationships with Employees, Assault and Battery of an Employee, and Illegal Drug Use

22. On July 26, 2017, BPA's Board of Directors received a letter from an attorney representing a female employee ("Jane Doe").

23. In the letter, the attorney made several disturbing allegations against Plaintiff Bakotic, including: (a) he had sexually harassed Jane Doe; (b) this harassment culminated in an "attack" at Jane Doe's home in which Plaintiff Bakotic "brutally struck" Jane Doe in the face with such force that Plaintiff Bakotic "drew blood and knocked [Jane Doe] to the ground;" (c) he had previously hired a private investigator to track Jane Doe's whereabouts; and (d) he had engaged in a sexual relationship with another subordinate female employee ("Mary Smith").

24. Included with the letter were two photographs of Jane Doe, allegedly taken immediately following the "attack" described in the letter. The photographs show blood in Jane Doe's mouth and running down her chin. The attorney alleged

these injuries were the result of Plaintiff Bakotic's "attack" on Jane Doe. Redacted copies of the received letter and photographs are attached as Exhibit 3.

25. This was BPA's first indication of Plaintiff Bakotic's allegedly destructive behavior. Upon receipt of the letter, a Special Committee of BPA's Board was immediately formed and retained the law firm of Latham & Watkins LLP ("L&W Counsel") to investigate the serious and disturbing allegations made against Plaintiff Bakotic in the attorney's letter. This Special Committee also put Plaintiff Bakotic on immediate administrative leave during the entirety of this investigation.

26. As part of the investigation, L&W Counsel interviewed Plaintiff Bakotic for several hours, with his personal criminal defense attorney present.

27. As part of the investigation, L&W Counsel interviewed Jane Doe with her attorney present.

28. As part of the investigation, L&W Counsel interviewed another employee who was identified as a witness by Jane Doe.

29. During his interview, Plaintiff Bakotic **admitted** to L&W Counsel that, among other things, he had: (a) engaged in sexual relationships with multiple subordinate female employees, including Jane Doe; (b) hired a private investigator to follow Jane Doe on a work trip; and (c) been at Jane Doe's home on the night referenced in her attorney's letter and hit her in the face with his hand with enough

force that she fell to the ground, at which point Plaintiff Bakotic said he left her home.

30. During the investigation, witnesses also told L&W Counsel that: (a) Plaintiff Bakotic used cocaine at work events, including at a conference in Nevada; (b) Plaintiff Bakotic provided cocaine to two female employees during a work conference in Nevada; (c) Plaintiff Bakotic consumed marijuana edibles at a work conference in California and distributed marijuana edibles to an employee at the conference; (d) Plaintiff Bakotic routinely bullied and yelled at employees, including in work email[2] and in front of clients; (e) Plaintiff Bakotic was so distracted by his personal life that his work performance and, therefore, the performance of Defendants, suffered; (f) Plaintiff Hackel engaged in sexual relations with a subordinate female employee[3]; and (g) Plaintiff Hackel used cocaine at a work conference.

[2] For example, Plaintiff Bakotic sent emails to Jane Doe in which he wrote, "[l]ook at your life cunt" and "[y]ou lied about being pushed into a wall to my best friend (the same man you have fucked twice) and refused to apologize for it."

[3] In fact, Plaintiff Bakotic informed L&W Counsel that Plaintiff Hackel engaged in sexual relations with a subordinate female employee and Plaintiff Hackel subsequently admitted to L&W Counsel that he engaged in sexual relations with a subordinate female employee.

C. Plaintiff Bakotic is Terminated upon the Recommendation of L&W Counsel and Solicits Plaintiff Hackel and Others

31. Following these witness interviews, L&W Counsel reached the following factual conclusions: (a) Plaintiff Bakotic had a consensual, albeit tumultuous, sexual relationship with Jane Doe; (b) during the course of this relationship, Plaintiff Bakotic and Jane Doe were at Jane Doe's home, had an argument, and Plaintiff Bakotic struck Jane Doe in the face with his hand, drawing blood and knocking Jane Doe to the ground; (c) on at least one occasion, Plaintiff Bakotic hired a private investigator to follow Jane Doe at a work event without her knowledge or consent; (d) Plaintiff Bakotic had sexual relations with another subordinate female employee (Mary Smith); (e) on at least one occasion, Plaintiff Bakotic distributed cocaine to employees at a work event; (f) on at least one occasion, Plaintiff Bakotic had used cocaine at a work event; (g) on at least one occasion, Plaintiff Bakotic had used marijuana edibles at a work conference; (h) on at least one occasion, Plaintiff Bakotic had distributed marijuana edibles to an employee; (i) Plaintiff Bakotic frequently yelled at and bullied employees; (j) Plaintiff Bakotic's work performance was erratic and suffered as a result of his personal dealings and extracurricular activities; (k) Plaintiff Hackel had engaged in sexual relations with at least one subordinate female employee; and (l) Plaintiff Hackel had used cocaine at a work event.

32. Following the investigation, L&W Counsel recommended, *inter alia*, the termination of both Plaintiffs.

33. As a result of the investigation, the Special Committee decided to remove Plaintiff Bakotic as CEO on September 8, 2017; a redacted copy of the letter informing him of same is attached as Exhibit 4. This decision was based on L&W Counsel's recommendation, Plaintiff Bakotic's admissions during the investigation, Plaintiff Bakotic's recent performance, Defendants' performance under Plaintiff Bakotic's leadership, and other information obtained during the investigation.

34. The Special Committee had lost confidence in Plaintiff Bakotic's ability to continue as CEO. At this time, Plaintiff Bakotic remained on Defendants' Board of Directors. The Special Committee also indicated a desire to find a future role for Plaintiff Bakotic in an advisory capacity. However, before this could happen, the Special Committee asked Plaintiff Bakotic to step away from Defendants, not represent Defendants in any way, and, either through counseling or otherwise, demonstrate to the Special Committee that Plaintiff Bakotic could be a good company citizen going forward. Plaintiff Bakotic ultimately rejected this offer despite numerous attempts by the Special Committee to engage in a constructive conversation.

35. Before the Special Committee decided whether to terminate Plaintiff Hackel, he announced his immediate "retirement" on September 30, 2017.

36. In reality, Plaintiff Bakotic was encouraging employees to terminate their employment with Defendants and solicited Plaintiff Hackel to leave his employment and work with Plaintiff Bakotic. This encouragement and solicitation occurred while Plaintiff Bakotic was still on the Board of Directors of BPA and Bako.

37. On September 29, 2017, Plaintiff Bakotic's Executive Assistant, Kristen Paoli, abruptly resigned her employment.

38. In reality, Plaintiff Bakotic solicited Ms. Paoli to leave her employment to work with him. This solicitation occurred while Plaintiff Bakotic was still on the Board of Directors of BPA and Bako.

39. During this timeframe, Defendants recruited an individual to become its Director of Podiatric Medicine, which individual accepted the position.

40. Plaintiff Bakotic directly and/or indirectly campaigned to dissuade this individual from serving as Director of Podiatric Medicine. This occurred while Plaintiff Bakotic was still on the Board of Directors of BPA and Bako.

41. This individual rescinded his acceptance of the offer to serve as Director of Podiatric Medicine as a direct result of Plaintiff Bakotic's efforts.

D. Plaintiffs Prepare to Compete Unlawfully and Use Defendants' Confidential Information

42. On October 3, 2017, Plaintiffs formed the Rhett Foundation for Podiatric Medical Education, Inc. (the "Rhett Foundation"); upon information and belief, the Rhett Foundation is prepared to compete against Defendants as Defendants also engage in educational activities and a residency program.

43. On October 23, 2017, Plaintiff Bakotic resigned from the Board of Directors of BPA and Bako, and his counsel stated he had no intention of violating the terms of his restrictive covenants.

44. That same day, Plaintiff Bakotic publicly announced the formation of the Rhett Foundation and stated that he had established it with Plaintiff Hackel. Plaintiff Bakotic represented that the Rhett Foundation was an educational institution, not a for-profit business.

45. Ms. Paoli works at the Rhett Foundation as a Director.

46. In Plaintiffs' Complaint, Plaintiff Bakotic alleges that he "intends to form a pathology laboratory and perform both executive and medical functions on its behalf." (*See* Pl. Compl. ¶ 19.)

47. In reality, Plaintiff Bakotic has already formed such a laboratory. On December 28, 2017, Plaintiff Bakotic registered Rhett Diagnostics, LLC ("Rhett Diagnostics"), a medical laboratory, with the Georgia Secretary of State. The individual who rescinded his acceptance of the offer to serve as Director of

Podiatric Medicine is now affiliated with the Rhett Foundation and/or Rhett Diagnostics.

48. Upon information and belief, Plaintiff Bakotic has begun advertising this medical laboratory to Defendants' clients, soliciting clients and employees for it, obtaining investors for it, and boasting that other individuals will operate it for him to circumvent his restrictive covenants.

49. Indeed, on at least one occasion, Plaintiff Bakotic boasted that he intends to use Defendants' Confidential Information, which he obtained as CEO to "**put Bako out of business**."

50. Similarly, in Plaintiffs' Complaint, Plaintiff Hackel now alleges that he "intends to continue to provide pathology services in his capacity as a physician."

51. Plaintiff Hackel is not actually retired, despite his false representation to the contrary, and is instead preparing to violate his restrictive covenants.

E. Plaintiff Bakotic Tortiously Interferes with a Contract

52. On or about September 3, 2014, Defendants entered into a Medical Director Services Agreement with the Ankle and Foot Centers of Georgia ("AFCG").

53. Pursuant to this contract, AFCG engaged Defendants to serve as its exclusive Medical Director, and Defendants agreed to provide AFCG with medical director services.

54. Initially, Defendants designated Plaintiff Bakotic to serve as the Medical Director of AFCG pursuant to this contract.

55. Since his termination from the Company, Plaintiff Bakotic has continued to serve as Medical Director of AFCG and has refused to step down despite Defendants' repeated attempts to appoint a new director under the terms of the contract with AFCG.

F. Plaintiff Bakotic Begins a Campaign of Slander

56. Following the termination of his employment and his resignation from the Board, Plaintiff Bakotic began a campaign of slander against Defendants by knowingly making false and unprivileged statements designed to harm Defendants and their reputation with clients and in the industry.

57. For example, Plaintiff Bakotic has stated Defendants "unjustly" and "immediately termed him for no cause whatsoever" despite the fact he "demanded to go to Court" against Jane Doe, he "did nothing wrong," he "committed no violence against [Jane Doe]," and L&W Counsel found "nothing to support what [Jane Doe] said."

58. On other occasions, Plaintiff Bakotic falsely stated that he chose "to step down" as CEO "as the result of principled differences with the company."

59. On other occasions, Plaintiff Bakotic falsely stated that Defendants' "volume [revenue] is plunging without me."

60. On other occasions, Plaintiff Bakotic falsely stated, "The company is shit without me."

61. On other occasions, Plaintiff Bakotic falsely stated, "Six million Jews were gunned down, gassed, or incinerated because of German generals with the integrity of [two employees of Defendants]."

62. Plaintiff Bakotic knows all of these statements are patently false.

63. Plaintiff Bakotic made all of these false statements with the intent to harm Defendants' reputation with their employees and clients and in the industry.

Count I: Declaratory Judgment (Both Plaintiffs)

64. Defendants incorporate by reference each of the foregoing Paragraphs of their Counterclaims, as if set forth fully herein.

65. The parties are uncertain and insecure with respect to whether the restrictive covenants in the Non-Competition Agreement, the Partnership Agreement, and/or the Merger Agreement are enforceable and preclude Plaintiffs' actions with the Rhett Foundation and/or Rhett Diagnostics, Plaintiffs' use of

Defendants' Confidential Information, and/or Plaintiffs' solicitation of Defendants' clients and/or employees.

66. There is a controversy involving the parties' respective rights in this regard.

67. As evidenced by Plaintiffs' Complaint and Defendants' Answer and Counterclaims, this controversy is real.

68. Whether the aforementioned restrictive covenants are operative and enforceable is ripe for judicial determination. Defendants have a legitimate interest in enforcing such covenants, which requires prompt resolution of these issues. Failure to do so would work a hardship on Defendants as Plaintiffs are competing and/or planning to compete, using and/or planning to use Confidential Information, and soliciting and/or planning to solicit clients and employees.

69. Thus, Defendants seek a judicial determination from this Court that the aforementioned restrictive covenants are operative and enforceable between the parties.

Count II: Breach of Contracts (Both Plaintiffs)

70. Defendants incorporate by reference each of the foregoing Paragraphs of their Counterclaims, as if set forth fully herein.

71. Pursuant to Section 5.11 of the Merger Agreement, Plaintiffs agreed to the Non-Solicitation of Employees Covenant.

72. Pursuant to Section 5.11 of the Merger Agreement, Plaintiffs agreed to the Non-Competition Covenant.

73. Pursuant to Section 6.5 of the Partnership Agreement, Plaintiffs agreed not to engage in any business activities that are competitive with those of Bako.

74. Pursuant to Section 6.8 of the Partnership Agreement, Plaintiffs agreed not to disclose or use Bako's Confidential Information for any purpose other than Bako's business.

75. Pursuant to the Non-Competition Agreement, Plaintiffs agreed not to perform certain duties as described therein, disclose and/or use certain information as described therein, and solicit certain customers, prospective customers, and employees as described therein; upon information and belief, since leaving employment with Defendants, Plaintiffs have engaged in all of the foregoing prohibited activities.

76. Upon information and belief, since leaving employment with Defendants, Plaintiffs have solicited employees in breach of the Non-Solicitation of Employees Covenant in the Merger Agreement and the Confidential Information clause in the Partnership Agreement.

77. Since leaving employment with Defendants, Plaintiffs have created and own an entity and/or entities that will, if it/they do(es) not already, engage in a

Competing Business in breach of the Non-Competition Covenant in the Merger Agreement and the competitive activities clause in the Partnership Agreement.

78. Upon information and belief, since leaving employment with Defendants, Plaintiffs have used Bako's Confidential Information in breach of the Confidential Information clause in the Partnership Agreement.

79. All conditions precedent to Plaintiffs' obligations to perform have been performed by the parties to such agreements or waived by Plaintiffs.

80. Defendants have been harmed as a direct result of Plaintiffs' conduct and are entitled to recover their actual damages from Plaintiffs.

81. Defendants have incurred unnecessary attorneys' fees and expenses as a direct result of Plaintiffs' conduct and are entitled to recover such attorneys' fees and expenses from Plaintiffs pursuant to the Partnership Agreement.

Count III: Breach of Duty of Loyalty (Both Plaintiffs)

82. Defendants incorporate by reference each of the foregoing Paragraphs of their Counterclaims, as if set forth fully herein.

83. Plaintiffs owed Defendants a common law duty of loyalty.

84. As described herein, Plaintiffs breached that duty of loyalty by, *inter alia*, (1) soliciting employees to cease working for Defendants and/or to work for a Competing Business; (2) convincing a person to revoke his acceptance to serve as Director of Podiatric Medicine for Defendants; (3) utilizing and disclosing

Confidential Information to build a Competing Business; and/or (4) soliciting customers and/or other prohibited parties to a Competing Business.

85. As a direct result of Plaintiffs' conduct, Defendants have been damaged and are entitled to recover their actual damages from Plaintiffs.

86. In addition, Defendants are entitled disgorgement of any benefits that Plaintiffs received from Defendants while they were in breach of their common law duties to Defendants.

87. As described herein, Plaintiffs' conduct evidences an evil motive, malice, and a reckless/careless disregard for Defendants' rights. Therefore, Defendants are entitled to punitive damages.

Count IV: Unjust Enrichment (Both Plaintiffs)

88. Defendants incorporate by reference each of the foregoing Paragraphs of their Counterclaims, as if set forth fully herein.

89. Pursuant to the Merger Agreement, Plaintiffs were paid millions of dollars for their interests in Defendants that has significant value; specifically, Plaintiff Bakotic received $30,400,768.51 in cash and stock and Plaintiff Hackel received $14,357,043.92 in cash and stock (the "Merger Consideration").

90. Following payment of the Merger Consideration, Plaintiffs have repeatedly engaged in the gross misconduct alleged herein, thereby attempting to devalue Defendants for which they were paid the Merger Consideration.

91. Plaintiffs have been unjustly enriched by the Merger Consideration.

92. While employed, Plaintiffs were paid compensation that has significant value.

93. While employed and receiving such significant compensation, Plaintiffs repeatedly engaged in the gross misconduct alleged herein, which distracted from their abilities to perform their jobs and put Defendants at legal and financial risk.

94. Plaintiffs have been unjustly enriched by such compensation.

95. As described herein, Plaintiffs' conduct evidences an evil motive, malice, and a reckless/careless disregard for Defendants' rights. Therefore, Defendants are entitled to punitive damages.

Count V: Tortious Interference with Business, Contractual, and Employment Relations (Both Plaintiffs)

96. Defendants incorporate by reference each of the foregoing Paragraphs of their Counterclaims, as if set forth fully herein.

97. Defendants have business and contractual relations with their clients, prospective clients, and employees.

98. Plaintiffs have acted improperly and without privilege by, for example, using their prior positions to unlawfully solicit employees, dissuading a potential employee from accepting employment, dissuading employees from continuing to work for Defendants, and/or slandering Defendants to its clients.

99. Furthermore, Plaintiff Bakotic has acted improperly and without privilege by continuing to act as Medical Director of AFCG.

100. Plaintiffs have taken such actions purposefully and with malice in an attempt to injure Defendants in their business relations, knowing of said business relations.

101. Plaintiffs' tortious interference has damaged Defendants, and Plaintiffs are liable for such acts.

102. Plaintiffs have acted willfully, maliciously, and recklessly. Thus, Defendants are entitled to punitive damages.

Count VI: Slander (Plaintiff Bakotic)

103. Defendants incorporate by reference each of the foregoing Paragraphs of their Counterclaims, as if set forth fully herein.

104. As described herein, Plaintiff Bakotic has knowingly made false and defamatory statements regarding Defendants in an attempt to discredit and damage Defendants in the eyes of their clients.

105. These false and defamatory statements were made without privilege.

106. As a direct result of Plaintiff Bakotic's conduct, Defendants have been damaged and are entitled to recover their actual damages from Plaintiff Bakotic.

107. Plaintiff Bakotic has acted willfully, maliciously, and recklessly. Thus, Defendants are entitled to punitive damages.

PRAYER FOR RELIEF

WHEREFORE, Defendants pray for the following:

a. that this Court dismiss Plaintiffs' claim for declaratory judgment;

b. that this Court enter judgment that the restrictive covenants in all of the underlying contracts are operative and enforceable;

c. that Defendants recover their compensatory damages in an amount to be proven at trial;

d. that Defendants recover the Merger Consideration and other consideration paid to Plaintiffs;

e. that this Court order disgorgement of all compensation and other benefits paid to Plaintiffs while they were in breach of their common law duties of loyalty to Defendants;

f. that Defendants recover punitive damage in an amount to be proven at trial;

g. that Defendants recover their attorneys' fees, costs, and expenses;

h. that Defendants shall seek a permanent injunction against Plaintiffs from the Court of Chancery as needed; and

i. all other such relief as this Court may deem just and proper.

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