

Exhibit 5

1 IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
2 IN AND FOR NEW CASTLE COUNTY

3 BRADLEY BAKOTIC and JOSEPH) C.A. No.
4 HACKEL,) N17-C-12-337 WCC
5 Plaintiffs.)
6 V.)
7 BAKO PATHOLOGY LP and BPA)
8 HOLDING CORP.,)
9 Defendants.)

9 BEFORE: THE HONORABLE WILLIAM C. CARPENTER, JR., J.

10 APPEARANCES:

11 MCCORMICK & PRIORE, P.C.
12 BY: ROBERT J. CAHALL, ESQ.

13 -and-
14 ICHTER DAVIS LLC
15 BY: CARY ICHTER, ESQ.
16 For the Plaintiffs

17 YOUNG CONAWAY STARGATT & TAYLOR, LLP
18 BY: LAUREN E.M. RUSSELL, ESQ.

19 -and-
20 JACKSON LEWIS P.C.
21 BY: ROBERT W. CAPOBIANCO, ESQ.
22 ADRIANA R. MIDENCE, ESQ.
23 For the Defendants

24 MOTION FOR JUDGMENT ON THE PLEADINGS
25 APRIL 30, 2018

26 PAMELA MADRACK, CSR RPR
27 SUPERIOR COURT REPORTERS
28 500 N. KING STREET, SUITE 2609
29 WILMINGTON, DE 19801
30 302-255-0561

1 MR. ICHTER: I'll make it much briefer than I
2 planned.

3 So, it's not the first time we heard argument
4 about what we didn't tell the Court in our complaint.
5 Unfortunately, complaints try to be rather limited
6 documents and don't try and tell everything there is
7 under the sun. The amount of compensation that was
8 given to my clients for selling their business isn't
9 relevant to the question of is a noncompete enforceable
10 or not, that's why it wasn't mentioned. We're not
11 trying to hide anything from the Court.

12 You are absolutely right. One of the problems
13 here is everybody is mad as hell at each other, and so
14 they are not talking, and they suspect each other of
15 every nefarious and diabolical intention that they can
16 imagine and they sit up at night thinking about these
17 things and it is unhealthy, it's bad.

18 Rhett Diagnostics, Rhett is my client's dog.
19 Rhett Diagnostics, as I understand it, I don't have a
20 complete understanding, I'm not making representation
21 but I'm just giving you an example of what they think
22 they know versus what I know from the source, which is
23 one of the business plans of Rhett Diagnostics is

1 veterinary pathology, not human pathology, vet
2 pathology; hence, the name Rhett, Dr. Bakotic's dog.
3 That is not a business line that --

4 THE COURT: Dogs have feet problems, too?

5 MR. ICHTER: They probably have twice as many
6 as we do.

7 THE COURT: I'm trying to envision an orthotic
8 for a dog but it doesn't work very well in my head.

9 MR. ICHTER: I will tell you that counsel's
10 indication that we don't know what they are doing is a
11 concession that Count II of the counterclaim ought to be
12 dismissed, as I said, because there are all kinds of
13 allegations about what they are planning to do and that
14 sort of thing, but if you take a look at the actual
15 allegations there's not a single allegation that says
16 that Dr. Bakotic and Dr. Heckel are currently in breach
17 of their noncompete, because they have avoided doing
18 exactly that. They filed this case to make sure that
19 they had a judicial order indicating what their rights
20 and what their obligations were prior to taking any
21 steps in the direction of actually competing. They are
22 not actually competing.

23 I absolutely agree with you that what counsel

1 should do is sit down and see if we can come up with an
2 interim order. This is not going to solve all the
3 problems with all of the noncompetes, but if we can come
4 up with an interim order that says that these defendants
5 can practice medicine and here's what that means, and it
6 goes into detail so that everybody understands what it
7 is that they are forbidden to do and what it is that
8 they are allowed to do and what it is that puts them at
9 risk, because \$30 million penalties are pretty stout.

10 So if we get that kind of clarity, I am sure
11 that my clients would be in favor of something along
12 those lines and I think that they may very well wind up
13 with a lab that does veterinarian pathology and other
14 things that Bako does not do. They don't -- they are
15 not interested in competing with Bako, at least not in
16 the short term. They are not interested in violating
17 their agreements.

18 So, I would suggest that the Court tell us go
19 home, sit down, work on it for the next two weeks, and
20 then let me know what you come up with and I'll decide
21 what to do about this motion if you guys don't work it
22 out. We ought to be able to work it out because if
23 everybody agrees that they ought to be able to practice

1 medicine, then all we have to do is come up with
2 reasonable definitions. And there are statutes, by the
3 way, in Delaware that describe what the practice of
4 medicine entails, so it shouldn't be that hard.

5 In terms of -- I don't really need to talk
6 about that. So that's the noncompete.

7 Going quickly through the counterclaims, I've
8 talked about the breach of contract claim. There are
9 actually three restrictive covenants that are described
10 in Count II. One is a noncompete, the other has to do
11 with confidential information and the misappropriation
12 of it. The allegations concerning misappropriation are
13 in paragraphs 49, 54, 65 and 78 of the counterclaim and
14 each of those in terms of providing detail concerning
15 the misappropriation of confidential information say no
16 more than just that, they have used and misappropriated
17 confidential information. They don't provide any
18 information about what information. They don't provide
19 any information about what data is contained in any
20 documents that were taken. They don't provide any
21 information or any allegations about how that
22 information was used. They do not provide any
23 information about any kind of damage that was visited

1 upon the defendants as a consequence of the use of
2 confidential information.

3 In short, the only thing they say is they did
4 it. That is not enough to state a claim. The Delaware
5 Supreme Court declared in *Ward v Southern*, this is a
6 2000 decision where allegations are merely conclusory;
7 however, i.e. and this is a definition of a conclusory
8 allegation, "Without specific allegations of fact to
9 support them, they may be deemed insufficient to
10 withstand a motion to dismiss."

11 If there's anything that is a conclusory
12 allegation, it is saying that someone has
13 misappropriated and used confidential information
14 without so much as even a hint of what they are talking
15 about. At least tell us what kinds of information we
16 supposedly misappropriated.

17 The core argument with respect to Count III of
18 the counterclaim is that the plaintiffs breached a duty
19 of loyalty. We pointed out that all of the allegations
20 surrounding that particular claim involved conduct of
21 the plaintiffs that occurred post termination, and as a
22 consequence, the duty of loyalty had vanished. We made
23 that point in our papers and the defendants responded as

1 follows at page 36 of their brief, quote, "Defendants
2 allege that plaintiffs as former officers of defendant's
3 business and limited partnership owe a duty of loyalty
4 to defendants."

5 Oddly absent from that argument was any
6 citation to authority that somehow a duty of loyalty
7 outlives the relationship that creates it. And that is
8 the key premise of their duty of loyalty argument. We
9 cite authority for the proposition that an agent's duty
10 of loyalty only lasts as long as the agency relationship
11 that creates it. That is the *Feeley* case that we cited
12 in our paper.

13 Unjust enrichment is Count IV of the
14 counterclaim. And that's where they posit the notion
15 that if the noncompete is enforceable that the Court
16 should require the plaintiffs to return all of the
17 compensation that they received in connection with the
18 sale of the business.

19 The problem with that is if you take a look at
20 the merger agreement which is at Tab B of the materials
21 I supplied to the Court, it's Tab 10 B, the first thing
22 that you notice is who the buyer is. The buyer is Bako
23 Pathology Holdings, they are not a party. As buyer they

1 provided the consideration to support the merger
2 agreement. And, by the way, the unjust enrichment claim
3 is just about the merger agreement as best I can detect
4 because it's the only agreement that is referenced in
5 that count.

6 So under the merger agreement Bako Pathology
7 Holdings is the buyer; i.e., provided the money but it's
8 not a claimant here. Hence, these particular
9 defendants, even if there's an unjust enrichment claim
10 that lies, have no standing to assert a claim for the
11 return of any of the consideration that was paid in
12 connection with the merger.

13 Again, Delaware law is clear that invalid terms
14 of an otherwise valid contract are severable and will
15 not defeat the contract. We have severance agreements
16 or covenants in the merger agreement; hence, this
17 particular agreement should survive the fact of the
18 noncompete being set aside. We are not looking in
19 setting aside the entire agreement.

20 Now, if they consider and you probably will
21 hear that the merger agreement talks about how the
22 noncompete is such a core and material portion of the
23 agreement. Well, if that was true, then you would

1 expect that they would have made some attempt to rescind
2 the agreement in connection with this unjust enrichment
3 claim because you ought not to in equity and fairness
4 get to keep millions of dollars worth of assets that you
5 purchased after having all of consideration returned to
6 you because of a purported violation by the other side
7 of one invalid term of an agreement. And they cite the
8 *Great Hill Equity Partners* case, which is inapplicable
9 because in that case that's what the claimant did, it
10 sought to set aside the entire agreement, it sought
11 rescission of a merger as a consequence of fraud in the
12 inducement. And if you, in fact, set aside the entire
13 agreement it makes perfect sense that unjust enrichment
14 would be a remedy available to you in connection with
15 having done that because at that point there's the
16 absence of a contract, and that's when unjust enrichment
17 is an appropriate remedy.

18 With respect to slander, this is kind of a
19 two-fer argument because slander is the only real
20 wrongful act that they identify as a predicate act for
21 their tortious interference claim, and it is our
22 contention that none of the comments that are made by
23 Dr. Bakotic that are identified in the response brief

1 are actually slanderous.

2 One of the reasons is, and we focus on this in
3 our papers, in order for a comment to be capable of
4 being defamatory and slanderous it has to be objectively
5 verifiable, it cannot be just the expression of an
6 opinion. The Court in the *Image Hair* case that we cited
7 said factual statements are uniquely capable of
8 objective proof of truth or falsity while opinion
9 statements generally are not since they reflect the
10 maker's state of mind. Expressions of opinion are given
11 broad protection under the First Amendment by requiring
12 that a statement be verifiable in order to be
13 defamatory. Courts can ensure that defendants are not
14 punished for exercising First Amendment rights of free
15 speech.

16 They claim that Dr. Bakotic saying that the
17 revenue volume of the company has plunged without him is
18 somehow defamatory but they do not allege to whom that
19 was said or how they were damaged. They claim that Dr.
20 Bakotic said that the company was, quote, "shit" without
21 him. Of course, that comment is an opinion, cannot
22 possibly be taken literally. It would be also taken as
23 hyperbole by anyone who heard it, so it likewise cannot

1 be defamatory.

2 Dr. Bakotic is claimed to have said the
3 defendants or their board members are lying, conspiring,
4 clouding and/or manipulating for money or excessive
5 leverage. And while they cite paragraphs 58 and 59 in
6 the counterclaim in support of the allegation that Dr.
7 Bakotic said that, those words appear nowhere in those
8 allegations. Those paragraphs do not contain that
9 language, nor are they found anyplace else in the
10 complaint. I got it in a pdf, and there's a great
11 little search function that Adobe has now with pdf, the
12 word "leverage" doesn't come up anyplace and the other
13 word in that comment, "manipulated" doesn't come up
14 anyplace. Perhaps the most important thing to bear in
15 mind because it is so clear, though, is that none of the
16 statements identified in their response to the slander
17 claim or in the slander portion of the motion or in the
18 counterclaim identified Dr. Hackel as a source. So Dr.
19 Hackel should definitely be dismissed with respect to
20 the slander claim.

21 THE COURT: Slander is only referenced to the
22 one plaintiff.

23 MR. ICHTER: Yes, sir.

1 THE COURT: So it's not even charged against
2 Hackel.

3 MR. ICHTER: But Hackel is charged, I believe,
4 with the tortious interference portion and Hackel, they
5 say that there are four particular things that give rise
6 to the tortious interference claim. One is soliciting
7 employees, that's a breach of contract claim because
8 there are non-solicitation provisions under the terms of
9 various agreements. Secondly, dissuading employees for
10 working for or continuing to work for defendants, there
11 is nothing wrongful about that. You can go to people
12 who are considering working for somebody who is a former
13 employer of yours and say not a good place to work. You
14 can't get sued for that.

15 THE COURT: You are wasting my time now at this
16 point in time. So this is what we're going to do. You
17 are going to go back to your clients and figure out with
18 them what they want to do, what businesses they would
19 like to open and what that business is going to do.

20 MR. ICHTER: Yes, sir.

21 THE COURT: You are going to go back once you
22 get that information and say to your clients this is
23 what they've told us they are going to do, this is all

1 they are going to do, at least for the time period that
2 they would be under the noncompete agreement, because I
3 think there is some reference to a time, or at least you
4 all can agree to a time, and your clients need to get
5 over being mad that they are badmouthing them, and work
6 on a document that, see if your two clients can't work
7 it out. Tell your clients it's an order of the Court to
8 do it so they don't have a choice.

9 Second, tell them the Court's advice to them is
10 whatever money they think they are going to recover will
11 pale in comparison to the amount of attorneys' fees that
12 they are going to have expended in resolving this
13 dispute, which to the Court should be easily solved.

14 Now, I have said that many times here and had
15 clients and attorneys ignore it. I understand. But it
16 helps periodically to go back and say I had a really
17 unhappy judge who saw through all of what is going on
18 here. And I have two people who are very mad at each
19 other. I understand. I understand why they are mad,
20 but if they are true business people, it doesn't make
21 any sense. Neither one of the clients make any sense
22 from a business point of view.

23 You've represented to me what they'd like to

1 do. It seems that's a reasonable course of action if
2 that's truly what they want to do.

3 MR. ICHTER: Yes, sir.

4 THE COURT: And if that's truly what they want
5 to do, it seems to me that the defendants would say I
6 don't think it competes with us, and as long as it
7 doesn't compete with us, we're okay. And you need to
8 sit down and slap these clients on the side of the head
9 and knock sense into them and tell them this is what we
10 need to do, see if we can't work it out. Because I
11 can't tell you at the moment if 2707 applies, it's not a
12 perfect fit, I don't think anyone disagrees, but whether
13 it does or not, I would be more than happy at some point
14 in time if you can't agree to decide that, I'll be more
15 than happy over time to decide whether or not, although
16 I'm not -- it's not in the right kind of format, as to
17 whether or not they are violating the noncompete
18 agreement in a corporate world, I'm okay with that.

19 I'm not okay in a world of have they stolen
20 secrets, have they stolen clients, have they slandered
21 us, have they made bad comments, are they stealing
22 clients. I don't know if it's true or not, but that's
23 not what the State is paying me the minuscule amount,

1 the one percent of one half or one percentage of
2 whatever they got for the deal.

3 If you are going to the slander world, take it
4 to some judge in Atlanta where both of you are and beat
5 your head against the wall. I'm here to solve corporate
6 disputes, not pissing contests between two people. I'll
7 say it frankly, because I can. I just think you need to
8 go talk to them. Now that you've come, made your pitch
9 and I've said what I want to say. It's not either of
10 you, please don't leave here thinking I have any
11 disregard or disrespect for either one of you, I don't.
12 You are representing your clients, you are doing what
13 they've asked you to do, you are doing it both very well
14 and you are both very articulate, both very respectful
15 to the Court, I don't have any problem with either one
16 of you.

17 MR. ICHTER: Thank you.

18 THE COURT: I just need you to go back and tell
19 your clients this is just not making any sense, people.
20 The judge told us it doesn't make any sense. He's
21 already beating me up and we're just starting the
22 litigation. This is going to be unpleasant years of
23 litigation because this judge is not real happy about