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Case No. 2018-0520-

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BAKO PATHOLOGY LP and BPA HOLDING CORP.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2018-0520-
BRADLEY BAKOTIC and JOSEPH HACKEL,	)	
Defendants.	)	

PLAINTIFFS' OPENING BRIEF IN SUPPORT OF THEIR MOTION FOR TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Defendants Bradley Bakotic and Joseph Hackel are two of the former founders of a national pathology reference laboratory named after Defendant Bakotic and known as "Bako Diagnostics." Bako Diagnostics provides anatomic and molecular pathology services, microbiology services, and neuropathy-related testing to podiatrists and dermatologists (collectively "Laboratory Services"). Simply put, podiatrists and dermatologists send patient samples (nails, skin, etc.) to Bako Diagnostics for Laboratory Services. Just as a primary care physician sends a patient's blood to a laboratory for a cholesterol screening, a podiatrist or dermatologist sends samples of skin, nails, or wounds to Bako Diagnostics to either confirm or rule out a clinical diagnosis (*e.g.*, melanoma). Bako Diagnostics provides these Laboratory Services to podiatrists and dermatologists in all 50 states.

After founding Bako Diagnostics, Defendants worked to brand it as a nationally recognized provider of Laboratory Services. To do this, Defendants implemented a multi-pronged marketing campaign focused on increasing brand awareness by: (1) providing financial sponsorships to podiatry and dermatology association events; (2) speaking at podiatry and dermatology association events; and (3) administering a fellowship program for podiatry students. The events and fellowship program provided Bako Diagnostics and Defendants with continued

exposure to actual and potential clients that, over time, built Bako Diagnostics into a national brand. Based on the success of this marketing campaign, Defendants sold Bako Diagnostics to Plaintiffs in 2016 for $242,500,000.00, of which Defendants personally received significant sums—Defendant Bakotic received $30,400,768.51 in cash and stock and Defendant Hackel received $14,357,043.92 in cash and stock.

To ensure Plaintiffs received the benefit of their bargain, Plaintiffs included certain restrictive covenants in the Merger Agreement agreed to by Defendants, which prohibit Defendants from engaging in competitive activities with Bako Diagnostics until January 5, 2021. Following the merger, Defendants became Limited Partners of Plaintiff Bako Pathology, LP and, in exchange for such status, agreed they would not have any business interests or engage in any business activities competitive with Bako Diagnostics. Because Defendants continued working for Bako Diagnostics following the merger, they also have similar covenants in their respective Employment Agreements.

In September 2017, Defendant Bakotic was terminated from Bako Diagnostics for gross misconduct and, shortly thereafter, Defendant Hackel announced his "retirement." Since their respective separations, Defendants have informed Plaintiffs that they intend to perform Laboratory Services in direct competition with Bako Diagnostics and have built a laboratory, which they named

Rhett Diagnostics, LLC after Defendant Bakotic's dog. To promote Rhett Diagnostics and themselves, Defendants formed the similarly-named Rhett Foundation for Podiatric Medicine Education, Inc., a name that tracks the name of the foundation established by Defendants while working at Bako Diagnostics—Bako Medical Education Foundation, Inc. Under the guise of "giving back" through their "non-profit foundation," Defendants have begun running the exact same marketing playbook that was part of their job duties while at Bako Diagnostics in order to build "Rhett" into a national brand. That is, Defendants (through the Rhett Foundation) are sponsoring and speaking at podiatry and dermatology association events and announced a fellowship program for podiatry students.

Defendants maintain these are "altruistic educational endeavors" that do not compete with Bako Diagnostics, but in reality this marketing campaign (which Defendants perfected at Bako Diagnostics) is designed to do just that. Further revealing Defendants' competitive motives, Defendants use these sponsorship and speaking opportunities to specifically displace Bako Diagnostics by, for example, requesting Bako Diagnostics' specific booth space or traditional speaking slot or excluding Bako Diagnostics from events entirely. All of this behavior—intended to decrease Bako Diagnostics' market share and build "Rhett" into a national brand—constitutes a breach of Defendants' contractual obligations

by which Plaintiffs have been and continue to be irreparably harmed. Thus, as set forth herein, Plaintiffs seek immediate injunctive relief restraining Defendants from engaging in any competitive activities.

NATURE AND STAGE OF PROCEEDINGS AND STATEMENT OF FACTS

Plaintiff Bako Pathology LP owns Plaintiff BPA Holding Corp. (*See* Compl. ¶ 10.) Plaintiff BPA Holding Corp. is the sole member of Bakotic Pathology Associates, L.L.C., which operates a national pathology reference laboratory known as Bako Diagnostics. (*Id.* ¶ 11.) Bako Diagnostics provides Laboratory Services to podiatrists and dermatologists in all 50 states. (*Id.* ¶ 12.)

I. Defendants Start Bako Diagnostics and Grow It into a Nationally Recognized Provider of Laboratory Services

Defendants are two of the former founders of Bako Diagnostics, which is named after Defendant Bakotic. (*Id.* ¶ 13.) After founding Bako Diagnostics, Defendants grew it into a nationally recognized provider of Laboratory Services. (*Id.* ¶ 14.) Specifically, Defendants grew Bako Diagnostics by increasing the number of podiatrists and dermatologists that would send samples to its central reference laboratory. (*Id.* ¶ 15.) To capture the attention of and gain credibility with the podiatry and dermatology community, Defendants orchestrated and implemented a multi-pronged marketing campaign focused on increasing brand awareness by: (1) providing financial sponsorships to podiatry and dermatology association events; (2) speaking at podiatry and dermatology

association events; and (3) administering a fellowship program for podiatry students. (*Id*.) This was often done via a non-profit foundation started, in part, by Defendants as part of this marketing strategy, known as the Bako Medical Education Foundation, Inc. (*Id.* ¶ 16.) By similarly naming the non-profit foundation, Defendants were able to use the foundation to build brand recognition for the laboratory—Bako Diagnostics. (*Id*.)

Providing financial sponsorships to podiatry and dermatology association events allowed Defendants to advertise and promote the Bako Diagnostics brand and its Laboratory Services to potential and actual clients (*i.e.*, the podiatrists and dermatologists who attended the events). (*Id.* ¶ 17.) In exchange for such financial sponsorships, Bako Diagnostics received, among other things, access to these potential and actual clients through exhibition space (booths or tables which Bako Diagnostics staffed with employees who promoted the Bako Diagnostics brand) and the opportunity to lecture or sponsor lectures to podiatrists and dermatologists attending the event for continuing medical education ("CME") credit. (*Id.* ¶ 18.) To further illustrate this point, between 2010 and 2015, Bako Diagnostics sponsored and/or provided speakers at approximately 150 podiatry and dermatology conferences per year, some of which were attended by 3,500 actual and prospective clients. (*Id.* ¶ 19.) As part of their job duties, Defendants frequently spoke at such podiatry and dermatology association events as the "face"

of Bako Diagnostics. (*Id.* ¶ 19.) Similarly, administering a fellowship program for students of podiatry allowed Bako Diagnostics to create relationships with young podiatrists, all of whom are potential clients for Bako Diagnostics. (*Id.* ¶ 20.) The promotion of this fellowship program also helped establish Bako Diagnostics as a leader in cutting edge Laboratory Services, much like a university. (*Id.*) In fact, between 2010 and 2015, over 200 podiatry students participated in this fellowship program. (*Id*.)

Following Defendants' success in creating the Bako Diagnostics national brand, Defendants sought opportunities to sell Bako Diagnostics by hiring an investment bank to identify potential buyers and market Defendants' success. (*Id.* ¶ 21.) In the ensuing negotiations and Offering Memorandum prepared by Defendants, Defendants highlighted their marketing strategy as part of Bako Diagnostics' value proposition, which sets it apart from other laboratories in the marketplace; specifically, its relationship with podiatrists and dermatologists as cultivated by years of sponsorship/CME and fellowship programs. (*Id.*) These marketing efforts were touted as "uniquely" positioning Bako Diagnostics "atop the growing and profitable podiatric pathology market[.]" (*Id*.) Not surprisingly then, in this Offering Memorandum, Defendant Bakotic's biography and job description highlight his speaking engagements. (*Id*.)

A. Defendants Sell Bako Diagnostics for Substantial Sums

On or about January 5, 2016 (the "Closing Date"), Defendants sold Bako Diagnostics. (*Id.* ¶ 22.) Specifically, Plaintiffs and various non-parties entered into an Agreement and Plan of Merger ("Merger Agreement"), to which Defendants are parties for purposes of Section 5.11, Section 9.3, and Article 11. (*Id.*) As a direct result of the strength of the Bako Diagnostics' brand which Defendants created, the various parties to the Merger Agreement agreed upon a **$242,500,000.00** purchase price. (*Id.* ¶ 23.) In consideration for their obligations under the Merger Agreement, Defendants were personally paid considerable sums; specifically, Defendant Bakotic received $30,400,768.51 in cash and stock and Defendant Hackel received $14,357,043.92 in cash and stock. (*Id*.)

To ensure that Plaintiffs received the benefit of their bargain, the Merger Agreement contains certain restrictive covenants designed to protect the Bako Diagnostics' brand; that is, Bako Diagnostics' reputation as a leading provider of Laboratory Services and the strength of its relationships with podiatrists and dermatologists. (*Id*. ¶ 24.) Specifically and in relevant part, until January 5, 2021, Defendants agreed they would not: (a) engage in a "Competing Business" or (b) have any interest in any person or entity that directly or indirectly engages in a "Competing Business." (*Id.* ¶ 25.) A "Competing Business" means "any business; in which [Bako Diagnostics] or any of its Subsidiaries is engaged,

or has specific plans (as evidenced by documentation of [Bako Diagnostics]) to become engaged, in each case, as of the Closing Date," which includes Laboratory Services. (*Id.* ¶ 26.)

II. Defendants Receive Partnership Interests in Plaintiff Bako Pathology, LP

After the Closing Date, on January 7, 2016, Plaintiff Bako Pathology, LP and, among others, Defendants entered into an Amended and Restated Limited Partnership Agreement (the "Partnership Agreement"). (*Id.* ¶ 27.) Pursuant to the Partnership Agreement, Defendants are Limited Partners of Plaintiff Bako Pathology, LP and, as Limited Partners, Defendants agreed that they shall not "have any business interests or engage in business activities in addition to those relating to the Partnership, including, without limitation, business interests and activities in direct competition with the Partnership or any of its Subsidiaries . . . ." (*Id.* ¶ 28.)

III. Following the Merger, Defendants Remain Employed at Bako Diagnostics Until 2017

Following the merger, Defendant Bakotic remained employed as the CEO of Bako Diagnostics and Defendant Hackel remained employed in various capacities, most recently as the part-time Medical Director. (*Id.* ¶ 30.) As a result, Defendants' substantively identical Employee Confidentiality, Non-Solicitation and Non-Competition Agreements (the "Employment Agreement") with Plaintiff

BPA Holding Corp. remain operative. (*Id.* ¶ 31.) Pursuant to Paragraph 1 of the Employment Agreement, Defendants agreed that, for a period of twenty-four (24) months following their employment with Bako Diagnostics, they would not "perform the same or similar duties" that they performed for Bako Diagnostics on behalf of or for the benefit of "(i) any laboratory and/or health care provider which competes with [Bako Diagnostics], or (ii) any customer or client of [Bako Diagnostics] with whom [Bako Diagnostics] provided services within two years prior to [their] termination" from Bako Diagnostics, in any "territory where [Bako Diagnostics] was doing business at the time of termination." (*Id.* ¶ 32.) Defendants also agreed that any breach by them of this covenant would result in "irreparable injury" to Plaintiff BPA Holding Corp. and its subsidiary Bako Diagnostics and, therefore, in addition to all remedies available at law or equity, Defendants agreed that preliminary and permanent injunctive relief was appropriate to "prevent a breach or contemplated breach" of this covenant. (*Id.* ¶ 33.)

As CEO, Defendant Bakotic remained at the helm of Bako Diagnostics' multi-pronged marketing campaign and, in such capacity, he identified various podiatry and dermatology association conferences for sponsorship by Bako Diagnostics, lectured at such conferences as the face of Bako Diagnostics, and administered Bako Diagnostics' fellowship program. (*Id.* ¶ 35.)

As part-time Medical Director, , and later as a part-time pathologist, Defendant Hackel remained involved in Bako Diagnostics' multi-pronged marketing campaign and, in such capacity, would occasionally speak on Bako Diagnostics' behalf and work with the fellowship program. (*Id.* ¶ 36.) Indeed, during the 20 months between the Closing Date and Defendants' respective separations from Bako Diagnostics, Bako Diagnostics paid almost $2 million in corporate, trade show, and promotional sponsorships as part of this multi-pronged marketing strategy carried out by Defendants. (*Id.* ¶ 37.) During this same timeframe, Defendant Bakotic incurred approximately $80,000.00 in travel expenses related to his speaking engagements on behalf of Bako Diagnostics, while Defendant Hackel incurred approximately $8,500.00 in travel expenses. (*Id.*)

Bako Diagnostics employed Defendant Bakotic as its CEO until on or about September 8, 2017, when Bako Diagnostics terminated Defendant Bakotic for misconduct. (*Id.* ¶ 38.) Bako Diagnostics employed Defendant Hackel until on or about September 30, 2017, when Defendant Hackel purportedly "retired." (*Id.* ¶ 39.)

IV. Defendants Announce Their Intention to Perform Laboratory Services, Which Will Breach Their Agreements

On December 27, 2017, Defendants filed a Complaint for Declaratory Judgment against Plaintiffs in the Superior Court of Delaware (the "Declaratory Judgment Action"), seeking a declaration from that Court that the covenants in the

Employment Agreement are unenforceable. (*Id.* ¶ 40.) On December 28, 2017, after filing the Declaratory Judgment Action, Defendant Bakotic formed Rhett Diagnostics, LLC, a Georgia limited liability company, which is registered with the Georgia Secretary of State as a "medical laboratory." (*Id.* ¶¶ 41-42.) Since filing the Declaratory Judgment Action, Defendants have also secured a physical laboratory from which to operate Rhett Diagnostics, located at 5955 Shiloh Road East, Alpharetta, Georgia 30005. (*Id.* ¶ 43.) As Defendants are aware, Bako Diagnostics is also located on Shiloh Road, approximately 1 mile away. (*Id.*)

At an April 30, 2018 hearing in the Declaratory Judgment Action, counsel for Defendants represented to the Court that he expected his clients would "wind up with a lab that does **veterinarian pathology and other things that Bako does not do**." (*Id.* ¶ 44.) Based on this representation from Defendants' counsel, the Court in the Declaratory Judgment Action ordered the parties to work together and determine whether Defendants could practice medicine without breaching their respective non-competition covenants. (*Id.* ¶ 45.) On May 24, 2018, however, Defendants made their intentions to compete with Plaintiffs and Bako Diagnostics clear. Specifically, Defendants abandoned any pretense of practicing veterinary pathology when their counsel wrote: "If we do not reach resolution of the non-compete issue, I expect Drs. Bakotic and Hackel to begin competing at some point so we can bring the issue to a head and get some direction from the Court." (*Id.*

¶ 46.) On June 28, 2018, Defendants' counsel again wrote that Plaintiffs intend to begin competing "because it appears that forcing Bako [Diagnostics] to seek an injunction is the only way to fast-track a disposition of this issue."[1] (*Id.* ¶ 47.) Performing Laboratory Services (or contemplating the performance of Laboratory Services) constitutes: (1) engaging in a Competing Business in breach of the Merger Agreement; (2) having business interests and performing activities in direct competition with Plaintiff Bako Pathology LP and Bako Diagnostics in breach of the Partnership Agreement; and (3) performing the same or similar duties that Defendants performed for Bako Diagnostics in breach of the Employment Agreement. (*Id.* ¶¶ 49-51.) Defendants' performance of Laboratory Services will irreparably harm Bako Diagnostics through the loss of business and customer goodwill. (*Id.* ¶ 51.)

V. Defendants Have Already Breached Their Agreements by Engaging in Competitive Marketing Activities

Prior to filing the Declaratory Judgment Action, Defendants had incorporated the Rhett Foundation for Podiatric Medical Education, Inc. (the "Rhett Foundation") with the State of Georgia. (*Id.* ¶ 53.) At the time Defendants

[1] Even more concerning, since the April 30, 2018 hearing, Plaintiffs have learned that Defendants' representation to the Court in the Declaratory Judgment Action regarding their intention to practice veterinary pathology was nothing but a ruse to disguise their true intention—circumventing their non-competition covenants and competing with Bako Diagnostics by performing Laboratory Services. (Compl. ¶ 48.)

filed the Declaratory Judgment Action, the website for the Rhett Foundation revealed nothing of the Rhett Foundation's purpose or activities, except that it was named for Defendant Bakotic's dog and was intended as a vehicle through which Defendants could "give back" to the podiatry community. (*Id.* ¶ 54.) Since filing the Declaratory Judgment Action, however, Defendants have started using the Rhett Foundation to promote themselves and the "Rhett" brand by (1) deploying the exact same multi-pronged marketing strategy they conceived of and implemented at Bako Diagnostics, all of which was part of their job duties at Bako Diagnostics, and (2) hiring former Bako Diagnostics' employees to help them in this endeavor. (*Id.* ¶¶ 55-56.) Specifically, since filing the Declaratory Judgment Action, Defendants have:

- announced, on the Rhett Foundation's website, 20 different podiatry and dermatology events that they intend to sponsor through the Rhett Foundation and/or at which they intend to speak through the end of the year;
- announced they intend to start a fellowship program, which will compete directly with Bako Diagnostics' fellowship program;
- knowingly sought sponsorship opportunities and spoken at many of the same podiatry and dermatology associations and conferences as Bako Diagnostics, including, but not limited to, the Ohio Foot & Ankle Scientific Seminar, Western Foot and Ankle Conference, Florida Podiatric Medical

Association, California Podiatric Medical Association, and Georgia Podiatric Medical Association;

- announced that DERMfoot, the "nation's leading dermatology seminar," is "now a part of the Rhett Foundation" and excluded Bako Diagnostics from sponsoring the 2019 DERMfoot conference and/or providing any speakers, which Bako Diagnostics has done for the past 9 years;

- tried to secure booths 1001, 1003, and 1005 at the January 2019 annual New York State Podiatric Medical Association conference on behalf of Rhett Diagnostics for its "huge unveiling," knowing that Bako Diagnostics has reserved and exhibited in these **exact booths** for the past 9 years;

- sought the opportunity to brand the tote bags provided to all attendees at the California Podiatric Medical Association conference with the Rhett Foundation logo, knowing that Bako Diagnostics has traditionally sponsored and provided the tote bags for attendees at this event; and

- used their sponsorship of the American Academy of Podiatric Practice Management conference to exclude Bako Diagnostics from providing a speaker, which it has done for the past 9 years, and secured exclusive sponsorship of the "Cigar With The Stars" event at this conference, which has traditionally been sponsored by Bako Diagnostics.

(*Id.* ¶¶ 57-58, 60-66.)

These are not coincidences. Rather, Defendants are engaged in a concerted campaign to bolster the "Rhett" brand, while diluting the Bako Diagnostics brand. (*Id.* ¶ 67.) While Defendants maintain these activities are "educational" and not "business activities," Defendants are aware that such speaking engagements and sponsorship activities are competitive activities and a central piece of Bako Diagnostics' marketing strategy. (*Id.* ¶ 68.) Indeed, Defendants performed such duties for Bako Diagnostics during their employment and, based on the success of this marketing strategy, were paid tens of millions of dollars for the Bako Diagnostics' brand. (*Id.*) Defendants are now mimicking this exact same competitive strategy on behalf of Rhett Diagnostics and the Rhett Foundation. (*Id.*)

As a result of Defendants' sponsorship and speaking activities, Bako Diagnostics has been irreparably harmed by the loss of customer goodwill it has experienced as a result of lost sponsorship and speaking opportunities. (*Id.* ¶ 69.) Not only has Bako Diagnostics lost the opportunity to speak directly with its clients in attendance at these events, after hearing Plaintiff Bakotic speak, at least one client has informed Bako Diagnostics that it will no longer use Bako Diagnostics for Laboratory Services. (*Id.*)

Defendants' sponsorship and speaking activities and fellowship program constitute business activities in direct competition with Plaintiff Bako

Pathology LP and its subsidiary Bako Diagnostics and, therefore, constitute a breach of the Partnership Agreement. (*Id.* ¶ 70.) Defendants' sponsorship and speaking activities and fellowship program constitute engaging in a Competing Business and, therefore, constitute a breach of the Merger Agreement. (*Id.* ¶ 71.) Defendants' sponsorship and speaking activities and the announcement of its fellowship program constitute a breach of Defendants' respective Employment Agreements as Defendants are engaging in the same or similar duties that they engaged in while employed by Bako Diagnostics, including, but not limited to, identifying sponsorship opportunities, speaking at podiatry and dermatology association events, and administering a fellowship program. (*Id.* ¶ 72.)

ARGUMENT

As set forth herein and in Plaintiffs' Verified Complaint, Defendants' competitive marketing and fellowship activities, as well as the performance of Laboratory Services, have caused and will cause Plaintiffs immediate and irreparable harm to their business. Accordingly, a temporary restraining order is the only relief that will adequately protect Plaintiffs' legitimate business interests until the Court can hold a hearing on Plaintiffs' request for preliminary injunctive relief.

I. Legal Standard

This Court will grant expedited proceedings where the movant (1) demonstrates a "sufficiently colorable claim" and (2) shows a "sufficient possibility of threatened irreparable injury" to justify the costs involved. *Gomi Investors, LLC v. Schimmell Holdings, Inc*., 2006 WL 2304035, at *1 (Del. Ch. July 27, 2006). "Establishing a colorable claim is not necessarily a burdensome task and falls short of demonstrating a reasonable probability of success on the merits." *Am. Messaging Servs., LLC v. DocHalo, LLC*, 2015 WL 1726536, at *2 (Ch. Apr. 9, 2015). A claim is colorable where the movant has asserted facts that, if true, suffice to establish all elements of the claim at issue. *Raymond Revocable Trust v. MAT Five LLC*, 2008 WL 2673341, at *5 (Del. Ch. June 26, 2008). This Court must accept the allegations in the Complaint as true for the purposes of this motion. *See, e.g., id.* In evaluating motions to expedite proceedings, courts have "followed the practice of erring on the side of more [expedited] hearings rather than fewer." *Giammargo v. Snapple Beverage Corp*., 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994).

The standard for entry of a temporary restraining order ("TRO") overlaps significantly with the standard for expedition. Both require a movant to demonstrate a colorable claim and irreparable harm absent the requested relief. *Compare Gomi*, 2006 WL 2304035, at *1, and *CBOT Holdings, Inc. v. Chicago*

Bd. Options Exch., Inc., 2007 WL 2296356, at *3 (Del. Ch. Aug. 3, 2007) ("In assessing whether a temporary restraining order is warranted, the Court is generally guided by three factors: (i) the existence of a colorable claim, (ii) the irreparable harm that will be suffered if relief is not granted, and (iii) a balancing of hardships favoring the moving party."). Plaintiffs can easily satisfy all elements.

II. Plaintiffs Have a "Colorable Claim" for Breach of Contract

To state a colorable claim for breach of contract, Plaintiffs must demonstrate: (1) the existence of a contract, whether express or implied; (2) the breach of an obligation imposed by that contract; and (3) resultant damage to Plaintiffs. *See OptimisCorp. v. Waite*, 2015 WL 5147038, at *73 (Del. Ch. Aug. 26, 2015). Defendants are parties to three separate contracts, each of which contains enforceable restrictive covenants that Defendants have breached, causing irreparable harm to Plaintiffs.

A. The Restrictive Covenants in the Employment Agreement are Valid and Enforceable

Under Delaware law, an enforceable employment-related restrictive covenant must: (1) meet general contract law requirements; (2) be reasonable in scope and duration; (3) advance a legitimate economic interest of the enforcing party; and (4) survive a balancing of equities. *All Pro Maids, Inc. v. Layton*, 2004 WL 1878784, at *5 (Del. Ch. Aug. 9, 2004). The restrictive covenants in

Defendants' Employment Agreement are valid and enforceable under general contract requirements because they manifest assent by Defendants, as evidenced by their signatures, and are supported by adequate consideration, as satisfied by Plaintiffs providing Defendants with employment. *See Faw, Casson & Co. v. Cranston*, 375 A.2d 463, 466 (Del. Ch. 1977) (finding that the defendant's signature provided written confirmation of his agreement not to compete with the plaintiff); *Layton*, 2004 WL 1878784, at *3 ("In Delaware, employment or continued employment may serve as consideration for an at-will employee's agreement to a restrictive covenant"). Further, the covenants are sufficiently limited in scope and duration, as they only prevent Defendants, for a period of two years following their terminations, from performing the same or similar duties they performed for Bako Diagnostics for (1) a competing laboratory or health provider, or (2) a customer or client of Bako Diagnostics in a territory where Bako Diagnostics provided services two years prior to Defendants' terminations. *See*, *e.g.*, *TriState Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886, at *10-11 (Del. Ch. Apr. 15, 2004) (upholding two-year restriction that covered a geographic region where the enforcing party conducted business within three years prior to the date of sale).

Additionally, the restrictions in the Employment Agreement serve Plaintiffs' legitimate business interests by protecting Bako Diagnostics' goodwill

and longstanding relationship with its clients, with whom Defendants regularly interacted during their employment with Bako Diagnostics. *See, L&W Ins., Inc. v. Harrington*, 2007 WL 2753006, at *11 (Del. Ch. Mar. 12, 2007) ("protection of substantial business relationships and goodwill are legitimate business interests whose impairment may give rise to irreparable harm"). Thus, the Employment Agreement is valid and enforceable.

B. The Restrictive Covenants in the Merger and Partnership Agreement are Valid and Enforceable

The inquiry into the enforceability of the restrictive covenants contained in the Merger and Partnership Agreements, which involve the purchase or transfer of shares and/or interests in a business, is far "less searching" than in the employment context. *See Revolution Retail Sys., LLC v. Sentinel Techs, Inc*., 2015 WL 6611601, *10 (Del. Ch. Oct. 30, 2015) ("a 'less searching inquiry' is contemplated, where, as here, sophisticated parties contract to exchange securities") (citing *Kan-Di-Ki, LLC v. Suer*, 2015 WL 4503210, at *19 (Del. Ch. July 22, 2015)).

In *Revolution Retail*, this Court enforced a securities purchase agreement with restrictive covenants similar to those contained in the Merger Agreement. Specifically, like the Merger Agreement in this case, the securities purchase agreement in Revolution Retail restricted the defendant stockholders for a period of three years from the closing date or the expiration of a separate

manufacturing agreement with a five-year term, whichever was later, from directly or indirectly owning, operating, managing, controlling, engaging in, participating in, or investing in (alone or in association with another person), any person that engages in, owns, invests in, operates, manages or controls any venture or enterprise which directly or indirectly engages or proposes to engage in the plaintiff's business. *Id.* at *3. This Court found that, although expansive, the restrictive covenants were enforceable, as they were carefully negotiated by sophisticated parties and a reasonably objective observer would find them clear and unambiguous. *Id.* at *10-11. The restrictions in the Merger Agreement are nearly identical to those at issue in Revolution Retail, and were executed by sophisticated parties represented by counsel. Thus, the Merger Agreement is valid and enforceable.

The Partnership Agreement likewise prevents Defendants from engaging in competitive business activities. (Compl ¶ 28.) This is not uncommon in light of the fiduciary duties owed by partners to each other and the partnership. In fact, in *Insituform Technologies, Inc. v. Insitu, Inc.*, this Court evaluated a partnership agreement with a similar clause preventing partners from engaging in any act detrimental to the best interest of the partnership. 1999 WL 240347, *9 (Del. Ch. Apr. 19, 1999). This Court held that, for so long as the defendant remained a partner, it was bound by its fiduciary duties and the clause in the

partnership agreement prohibiting it from engaging in any acts detrimental to the partnership. *Id.* at *14.

Both the Merger and Partnership Agreements are intended to protect Bako Diagnostics' legitimate business interests—specifically, its goodwill and business relationships with its clients, who view Bako Diagnostics as its partner and a leading provider of Laboratory Services. Defendants helped develop Bako Diagnostics' reputation and client relationships through the multi-pronged marketing strategy they created and executed on its behalf. (Compl. ¶¶ 14-20.) In fact, Defendants relied on the significant value of this goodwill when negotiating the value of Bako Diagnostics in the Merger Agreement by touting their marketing efforts as "uniquely" positioning Bako Diagnostics "atop the growing and profitable podiatric pathology market[.]" (*Id.* ¶ 21.) As a direct result of this goodwill, the parties to the Merger Agreement agreed upon a purchase price of **$242,500,000.00.** (*Id.* ¶ 23.) Thus, the extraordinary value of Bako Diagnostics' customer relationships is irrefutable.

As a result of the merger, and in consideration for the covenants in the Merger Agreement, Defendants were personally paid substantial sums—specifically, $30,400,768.51 in cash and stock to Defendant Bakotic and $14,357,043.92 in cash and stock to Defendant Hackel. (*Id.*) In agreeing to similar restrictions in the Partnership Agreement, they received equally valuable

consideration in the form of shares in the Limited Partnership. (*Id.* ¶ 28.) Accordingly, such restrictions, and the contracts in which they are contained, are clearly enforceable under Delaware law.

C. Defendants Have Breached the Restrictive Covenants in their Agreements

Defendants are in breach of all three of their agreements. First, pursuant to the Employment Agreement, Defendants agreed they would not, for a period of two years following their terminations, perform the "same or similar duties" that they performed for Bako Diagnostics on behalf of a competing laboratory, healthcare provider, or to Bako Diagnostics' customers in the territory which Bako Diagnostics provided these services two year prior to Defendants' terminations. (*Id.* ¶ 32.) As defined in the Employment Agreement, Defendants' responsibilities included **marketing**, sales and other process "incidental to the operations of the Company." (*Id.* Exhibit 4 at 1) (emphasis added). As CEO and Medical Director, Defendants were also responsible for the operations of Bako Diagnostics, a laboratory engaged in Laboratory Services. (*Id.* ¶¶ 13, 35-36.) Defendants have breached and are continuing to breach the Employment Agreement by participating in speaking engagements, sponsoring, and attempting to sponsor, for the benefit of the Rhett Foundation and Rhett Diagnostics, the same conferences and events at which they previously performed these duties for Bako Diagnostics. Further, as evidenced by their recent communications, Defendants

have openly expressed their intentions to breach the Employment Agreement by performing the same or similar duties they performed for Bako Diagnostics at their competing laboratory, Rhett Diagnostics. (*Id.* ¶¶ 46-47.) Therefore, Defendants have and will continue to breach their respective Employment Agreements.

Similarly, Defendants are in breach of the Merger Agreement, which prohibits them from directly or indirectly engaging in any Competing Business in any manner or capacity. (*Id.* ¶¶ 25-26, 71.) By attempting to execute the same exact marketing strategy on behalf of the Rhett brand and in competition with Bako Diagnostics, Defendants are engaged in a Competing Business. (*Id.*) Moreover, any attempt by Defendants to operate a laboratory that performs Laboratory Services, which Defendants have admitted they intend to do, is a clear breach of the Merger Agreement because such an enterprise is in direct competition with Bako Diagnostics. (*Id.* ¶ 49.) Therefore, Defendants have and will continue to breach the Merger Agreement.

Lastly, pursuant to the Partnership Agreement, Defendants agreed they would not have any business interests or engage in business activities in addition to those relating to the Partnership, including, without limitation, business interests and activities in direct competition with the Partnership or any of its Subsidiaries, for so long as they maintain shares in the Partnership. (*Id.* ¶ 28.) Directly and through the Rhett Foundation and Rhett Diagnostics, Defendants have

acted in direct competition with Bako Diagnostics by attempting to displace it at podiatry and dermatology conferences, speaking at such conferences in competition with Bako Diagnostics' speakers, and announcing a competing fellowship program. Furthermore, Defendants' operation of a laboratory that performs Laboratory Services is also in competition with Bako Diagnostics. Thus, Defendants have and will continue to breach the Partnership Agreement.

III. Defendants Have Tortiously Interfered with Plaintiffs' Business Relations

In addition to violating their employment contracts, Defendants have also tortiously interfered with Plaintiffs' business relations. In order to prove a colorable claim for tortious interference with business relations, a plaintiff must demonstrate "(a) the reasonable probability of a business opportunity, (b) the intentional interference by defendant with that opportunity, (c) proximate causation, and (d) damages." *Gen. Video Corp. v. Kertesz*, 2008 WL 5247120, at *29 (Del. Ch. Dec. 17, 2008).

Bako Diagnostics has formed long-standing relationships with several podiatry and dermatology associations. (Compl. ¶¶ 19, 60-66.) As a result of these relationships, Bako Diagnostics has sponsored the annual conferences of many of these associations and, in exchange for such sponsorship, provided speakers for the conferences and branded items for the attendees. (*Id*.) Bako Diagnostics has sponsored these conferences for many years, in some cases for

almost a decade. (*Id*.) Each conference presents a unique and new opportunity for Bako Diagnostics to build its brand, solidify its relationship with attendees who are actual clients, and attract new clients.

Defendants are intentionally interfering with these business opportunities. In addition to sponsoring and speaking at such conferences (which constitutes a breach of Defendants' contractual agreements), Defendants are using such sponsorships to interfere with Bako Diagnostics' long-standing relationships with these conferences, often excluding Bako Diagnostics entirely. (*Id*.) For example, through the Rhett Foundation, Defendants purchased DERMfoot, a leading annual podiatry seminar, and excluded Bako Diagnostics from this annual conference, where it has provided speakers for the last 9 years. (*Id.* ¶¶ 62-63.) Similarly, Defendants tried to secure booths 1001, 1003, and 1005 at the January 2019 annual New York State Podiatric Medical Association conference on behalf of Rhett Diagnostics for its "huge unveiling," knowing that Bako Diagnostics has reserved and exhibited in these **exact booths** for the past 9 years. (*Id.* ¶ 64.) In attempting to build the "Rhett" brand, Defendants are intentionally attempting to dilute the Bako Diagnostics' brand by interfering with its relationship with various podiatry and dermatology associations. Similarly, if Defendants are permitted to own and operate a laboratory that performs Laboratory Services, they will interfere with Bako Diagnostics' long-standing client relationships. Indeed, after hearing

Defendant Bakotic speak at a conference, at least one client has informed Bako Diagnostics that it will no longer use Bako Diagnostics for Laboratory Services. (*Id.* ¶ 69.)

As a result of Defendants' conduct, Bako Diagnostics has lost both existing clients and valuable marketing opportunities for its Laboratory Services. Thus, Bako Diagnostics has a colorable claim for tortious interference.

IV. Absent a Temporary Restraining Order, Plaintiffs Will Suffer Irreparable Harm

Delaware courts have "consistently found a threat of irreparable injury in circumstances when a covenant not to compete is breached, and use injunctive relief as the principal tool of enforce[ment]." *Concord Steel, Inc. v. Wilmington Steel Processing Co., Inc.*, 2008 WL 902406, at *10 (Del. Ch. April 3, 2008) (internal quotations omitted). This is because "after-the-fact attempts to quantify the damages from breaches of this kind involve costly exercises in imprecision, and are therefore incapable of being compensated for through money damages." *Weichert Co v. Young*, 2007 WL 4372823, at *6 (Del. Ch. Dec. 7, 2007) (internal quotation omitted). Moreover, "[t]he public policy of this State permits parties to limit the importance of such counterfactual [damage] inquiries by agreeing that breaches of their contracts will create irreparable harm and should be remedied by injunctive relief." *Hough Assocs., Inc. v. Hill*, 2007 WL 148751, at *18 (Del. Ch.

Jan. 17, 2007) (collecting cases finding that a contractual stipulation alone suffices to establish the element of irreparable harm).

In *Newell Rubermaid Inc. v. Storm*, this Court found that the defendant, Newell, made a significant showing of irreparable harm as a result of the plaintiff's (a former Director of Sales for Graco, Newell's juvenile and infant brand) plans to perform to work for a competitor in light of the fact that the plaintiff was the "face" of the defendant's brand at Target stores and had substantial knowledge of Target's processes. 2014 WL 1266827 *4 (Del. Ch. Mar. 27, 2014). Likewise, Defendant Bakotic (the namesake of Bako Diagnostics) and Hackel were the "faces" of Bako Diagnostics, and have significant knowledge of its marketing strategies, sponsorship contacts, and other valuable information which they are using to compete with Bako Diagnostics.

Additionally, in *Weichert Co. v. Young*, this Court found that the plaintiff had met its burden to show irreparable harm merely on the ground that the defendant had not indicated that he was willing to cease his competitive activities. *See* 2007 WL 4372823, at *6. Not only have Defendants not indicated that they are willing to cease their competitive marketing activities, they have openly announced that they intend to start performing Laboratory Services in competition with Bako Diagnostics. Defendants' conduct is in clear violation of the restrictive covenants contained in the Agreements executed by Defendants. If permitted to

continue, Plaintiffs will certainly suffer the loss of valuable business opportunities, relationships with longstanding clients, and its reputation as a partner to the podiatric and dermatologic industry. *See, In re Digex, Inc. S'holders Litig.*, 789 A.2d 1176, 1215 (Del. Ch. 2000) (finding that the danger of losing valuable revenue-generating relationships is a harm that may not be compensable in any manner other than injunctive relief).

V. The Balance of the Equities Weighs In Favor of Granting Relief

Finally, the harm to Plaintiffs caused by Defendants' continued competitive activities outweighs any hardship a temporary restraining order would impose upon the Defendants. As a result of Defendants' violations of their various restrictive covenants and tortious interference with Plaintiffs' business relationships, Plaintiffs have faced, and will continue to face, the loss of revenue-generating sponsorships, speaking engagements, business relationships, and the resulting customer goodwill. As set forth in their Verified Complaint for Injunctive Relief, Defendants' competitive behavior strike at the very heart of Plaintiffs' business. Plaintiffs spent hundreds of millions of dollars and substantial time to develop Bako Diagnostics' reputation as a leading provider of Laboratory Services. Now, in a matter of months, the Defendants, who were once the "faces" of Bako Diagnostics, have used Bako Diagnostics' goodwill to compete with Plaintiffs in the industry, exclude it from speaking engagements, and target the

clients, associations, sponsorships, and fellowships with which it has had long-standing relationships.

By comparison, Defendants will suffer no harm if the application for a temporary restraining order is granted because they have no reasonable legitimate expectation that they may lawfully compete with Bako Diagnostics, solicit its clients, or interfere with its business relations. Indeed, in *Hough Associates, Inc. v. Hill*, co-defendants—a former employee and his new employer—similarly acted in blatant violation of the former employee's non-competition agreement, prompting the Court's observation that they were "in no position to complain about the equities of an injunction." *Hough Assocs.*, 2007 WL 148751, at *3. Likewise, Defendants' bad acts leave them ill-equipped to complain about the imposition of a temporary restraining order. Thus, the balance of harms weighs in Plaintiffs' favor.

CONCLUSION

As demonstrated by their Verified Complaint for Injunctive Relief, Plaintiffs have been, and will continue to be, irreparably injured by Defendants' conduct. Indeed, Defendants (directly and through the Rhett Foundation) have engaged in a concerted campaign to build the "Rhett" brand at the expense of Bako Diagnostics' brand. To do this, Defendants are mimicking the exact same marketing playbook they conceived of and orchestrated while at Bako Diagnostics.

Even more concerning, Defendants have now confirmed they intend to compete with Bako Diagnostics by performing Laboratory Services.

Thus, Defendants must be temporarily, preliminarily, and permanently restrained from (1) performing all speaking and sponsorship activities at any podiatry or dermatology conference or educational institution; (2) administering a fellowship or similar internship program for podiatry students; (3) interfering with Bako Diagnostics' sponsorship and speaking activities at podiatry or dermatology conferences, associations and educational institutions; and (4) owning or operating any laboratory engaged in performing Laboratory Services.

[Signatures Follow on Next Page]

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