

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION

CHARLESTON AREA MEDICAL CENTER, INC.,  
Plaintiff,

vs.

Civil Action No.: 22-C-359  
Presiding: Judge Nines  
Resolution: Judge Akers

WEST VIRGINIA UNITED HEALTH SYSTEM,  
INC., d/b/a WEST VIRGINIA UNIVERSITY  
HEALTH SYSTEM, and WVU HEALTH SYSTEM;  
THOMAS HEALTH SYSTEM, INC. d/b/a  
THOMAS HEALTH; HERBERT J. THOMAS  
MEMORIAL HOSPITAL;  
CHARLESTON HOSPITAL, INC. d/b/a SAINT  
FRANCIS HOSPITAL; THS PHYSICIAN  
PARTNERS, INC.; PULMONARY ASSOCIATES  
OF CHARLESTON PLLC, d/b/a CRITICAL  
CARE, PLLC, TRAKE, LLC; PHILLIP COX, D.O.,  
an individual; KEVIN EGGLESTON, M.D., an  
individual; ROBBY KEITH, M.D., an individual;  
JAMES D. PERRY, III, D.O., an individual;  
TAMEJIRO "TOM" TAKUBO, D.O., an individual;  
RYAN WADDELL, D.O., an individual; and W.  
ALEX WADE, M.D., an individual,  
Defendants.

**ORDER DENYING DEFENDANT TRAKE'S MOTION TO DISMISS PLAINTIFF'S  
COMPLAINT AND DEFENDANT PAC'S MOTION TO DISMISS PLAINTIFF'S  
COMPLAINT**

This matter came before the Court this 12<sup>th</sup> day of May 2023, upon Defendant  
Pulmonary Associates of Charleston, PLLC's (hereinafter "PAC") Motion to Dismiss Plaintiff's  
Complaint and Defendant Trake, LLC's (hereinafter "Trake") Motion to Dismiss Plaintiff's  
Complaint. The parties have fully briefed the issues necessary. The Court dispenses with oral  
argument because the facts and legal contentions are adequately presented in the materials before  
the court and argument would not aid the decisional process. So, upon the full consideration of  
the issues, the record, and the pertinent legal authorities, the Court rules as follows.

## **FINDINGS OF FACT**

1. This civil action arises from an agreement between Plaintiff Charleston Area Medical Center, Inc. (hereinafter “Plaintiff” or “CAMC”) and Defendants Trake and PAC wherein CAMC negotiated with PAC and Trake and sought to acquire substantially all of the assets of PAC and to lease, with an option to purchase, the building owned by Trake in which PAC operated its business. *See* Def’s Mem., p. 1, 2; *see also* Compl.

2. Relevant to the instant motion to dismiss by PAC are CAMC’s five contract claims against PAC contained in Counts I-V, and CAMC’s two tort claims against PAC contained in Counts VIII and IX of the Complaint. *See* Def’s Mem., p. 1-2, 7, 14, and 19-20; *see also* Pl’s Resp., p. 2. Relevant to the instant motion to dismiss by Trake are CAMC’s two tort claims against Trake contained in Counts VIII and IX of the Complaint, and CAMC’s breach of contract and declaratory judgment claim against Trake contained in Count X. *See* Def’s Mem., p. 1-2, 7, 14, and 19-20; *see also* Pl’s Resp., p. 2.

3. In 2020, CAMC and PAC entered into negotiations, and on or about February 16, 2021, CAMC and PAC signed a Letter of Intent for this transaction, which involved CAMC acquiring substantially all of the assets of PAC, leasing the building owned by Trake in which PAC operated its business, and employing PAC’s doctors. *See* Def’s Mem., p. 2-3; *see also* Pl’s Resp., p. 2-3.

4. In general, a health care facility “may not be acquired, offered, or developed within [West Virginia] except upon approval and receipt of a certificate of need.” W. Va. Code § 16-2D-8(a)(1). An entity may request that the West Virginia Health Care Authority determine “whether a proposed health service is subject to the certificate of need or exemption process”. W. Va. Code § 16-2D-7. On March 8, 2021, CAMC filed a Request for Determination of

Reviewability, asking the Authority to determine that the transaction was not subject to a Certificate of Need. *See* Def's Mem., p. 3; *see also* Compl., ¶28 and Pl's Resp., p. 4.

5. According to the Complaint, Defendant Thomas Health System participated in this public process as an "affected person" and opposed CAMC's request, filing briefs with the Authority arguing a Certificate of Need was required for the transaction. *See* Def's Mem., p. 3; *see also* Compl., ¶¶32, 34 and Pl's Resp., p. 4.

6. On May 7, 2021, the West Virginia Health Care Authority issued its decision that CAMC did not need to obtain a Certificate of Need to proceed with the transaction. *See* Def's Mem., p. 3. Thomas Health appealed the decision to the Office of Judges, and then to the circuit court, in a case assigned to Judge Tabit. *Id.* On November 9, 2021, Thomas Health asked Judge Tabit to stay the West Virginia Health Care Authority's decision. *Id.* On December 16, 2021, Judge Tabit's office emailed counsel for CAMC informing them she was entering an order granting the motion to stay. *Id.* at 6-7.

7. Meanwhile, PAC and CAMC continued to move forward with the transaction. *See* Def's Mem., p. 3 (*quoting* Compl., ¶35); *see also* Pl's Resp., p. 5. On October 1, 2021, the PAC physicians, on behalf of Trake, leased the building to CAMC, pursuant to a written lease agreement. *See* Def's Mem., p. 3; *see also* Pl's Resp., p. 5. This lease provided that from October 1, 2021 to December 31, 2021, CAMC would lease space for a retail pharmacy, for a one-time rent payment of \$2,966. *See* Def's Mem., p. 4. Then, for the period beginning January 1, 2022, CAMC would pay a monthly rent payment of \$42,166.67, and would have the exclusive use of the demised premises including the entire building and the exclusive right to use the adjoining parking and accesses for ingress and egress. *Id.*

8. On October 11, 2021, PAC and CAMC executed an Asset Purchase Agreement (hereinafter “APA”) the specified a Closing Date, Effective Date, and several conditions precedent. *See* Def’s Mem., p. 4. According to the Complaint, the transaction was set to close on or about December 16, 2021. *Id.* at 6; *see also* Pl’s Resp., p. 6. The APA could be terminated by either party or after December 31, 2021 if the contemplated transactions had not been closed. *See* Pl’s Resp., p. 6.

9. Also on December 16, 2021, as mentioned above, Judge Tabit’s office emailed counsel for CAMC informing them she was entering an order granting the motion to stay. *Id.* at 6-7; *see also* Pl’s Resp., p. 6-7.

10. The parties did not close the transaction by December 31, 2021. *Id.* at 7.

11. On February 22, 2022, PAC sent a notice of termination of the APA to CAMC. *See* Def’s Mem., p. 7. Trake responded with a letter acknowledging the notice of termination. *See* Def’s Mem., Ex. A.

12. In March 2022, Trake allegedly did not permit CAMC to occupy the building on a full time and exclusive basis. *See* Def’s Mem., p. 7. On March 28, 2022, Trake sent CAMC a Notice to Cure a default under the lease, that CAMC had not paid Trake the monthly rent payment that took effect on January 1, 2022. *Id.* On April 5, 2022, Trake avers that it withdrew the Notice to Cure and substituted it with a Notice of Termination. *Id.*

13. On July 13, 2022 Trake filed the instant Motion to Dismiss Plaintiff’s Complaint, seeking dismissal of Plaintiff’s Complaint, arguing the APA and the Lease must be construed together as they are part of the same transaction, and as such, CAMC’s claims related Trake’s alleged breach of the lease must be dismissed because the entire transaction failed. *See* Def’s Mem., p. 9-12. In addition, it argues CAMC’s claim that Trake breached the lease must be

dismissed because CAMC accepted PAC's Notice of Termination. *Id.* at 16-17. Also, with regard to the tort causes of action, it argues they must be dismissed because they concern Trake's own contractual relations and simply restate contract claims. *Id.* at 17-18.

14. This civil action was referred to the Business Court Division and assigned to the undersigned as Presiding Judge. On December 16, 2021, an initial case management hearing was held.

15. On December 22, 2022, Plaintiff filed its Omnibus Response to both the motion to dismiss Plaintiff's complaint filed by PAC and the motion to dismiss Plaintiff's complaint filed by Trake, responding to the motions' arguments and averring dismissal was not appropriate at this stage of the proceedings.

16. Also on December 22, 2022, Defendants West Virginia United Health System, Inc., d/b/a West Virginia University Health System and WVU Health System (hereinafter "WVU Health"), Thomas Health System, Inc. d/b/a Thomas Health (hereinafter "Thomas Health"), Herbert J. Thomas Memorial Hospital Association d/b/a Thomas Memorial Hospital (hereinafter "Thomas Memorial"), Charleston Hospital, Inc. d/b/a Saint Francis Hospital (hereinafter "St. Francis"), THS Physician Partners, Inc. (hereinafter "THSPP")<sup>1</sup>, filed their Response, supporting and concurring in the motions' arguments "as they apply to CAMC's allegations against WVU Health and the Thomas parties. *See* Defs' Resp., p. 2.

17. On January 17, 2023, Defendants PAC and Trake filed their Omnibus Reply to Plaintiff's Omnibus Response to both motions to dismiss, arguing CAMC's Response "does nothing to change the fact that all causes of action against PAC and Trake should be dismissed in this matter". *See* Reply, p. 3.

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<sup>1</sup> Defendants THSPP, Thomas Health, Thomas Memorial and St. Francis are collectively referred to hereinafter as "the Thomas parties" or "the Thomas Defendants".

18. The Court now finds the instant Motion is ripe for adjudication.

### **STANDARD OF LAW**

First, this matter comes before the Court upon a motion to dismiss under Rule 12(b)(6). “The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530 (1977). “Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true.” *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008). “We recognized, however, that liberalization in the rules of pleading in civil cases does not justify a carelessly drafted or baseless pleading.” *Par Mar v. City of Parkersburg*, 183 W.Va. 706, 711 (1990).

A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits.” *Williamson v. Harden*, 214 W.Va. 77, 79 (2003).

### **CONCLUSIONS OF LAW**

In the instant motions, PAC and Trake argue Plaintiff’s Complaint should be dismissed. The claims at issue are: Breach of contract against PAC regarding confidentiality provisions of the Letter of Intent and Asset Purchase Agreement (Count I); breach of contract against PAC regarding exclusivity provisions of the LOI and APA (Count II); breach of contract against PAC for alleged bad faith termination of the APA (Count III); breach of contract against PAC based on noncompete clauses in the APA, and the various contracts of employment for the PAC physicians (Count IV); express indemnification under the APA (Count V); aiding and abetting tortious conduct against PAC and Trake (Count VIII); civil conspiracy against PAC and Trake

(Count IX); and declaratory judgment/breach of contract against Trake regarding the Lease Agreement (Count X). *See Reply*, p. 1-2. The Court will take up the issues in turn.

**Breach of Contract Claims**

19. First, Defendant Trake seeks dismissal of the breach of contract causes of action because the APA and the Lease must be construed together as they are part of one, same transaction. *See Trake's Mem.*, p. 9-11. Further, Trake argues if the APA did not incorporate the lease, it superseded it. *Id.* at 11.

20. On the other hand, CAMC argues that the APA did not supersede the LOI, and that Defendants' argument presents a "false dichotomy predicated on a deliberately narrow reading of the Complaint". *See Pl's Resp.*, p. 9, 10. Instead, CAMC argues the LOI's and APA's provisions coexist. *Id.* at 10.

21. The Court finds dismissal on this ground would be premature. The Court considers that West Virginia is a notice pleading jurisdiction and that at this stage, the Complaint must be read in the light most favorable to the Plaintiff. The Court also considers that it has been proffered to the Court that the LOI was executed on February 16, 2021, and the APA was not executed until October 11, 2021, and that this stage, it would be premature to dismiss alleged breaches that may have occurred within that seven month period. *See Pl's Resp.*, p. 10.

22. Further, with regard to the breach of contract claims based on the noncompete clause and exclusivity provision (Counts I and II), the Court considers Plaintiff has proffered that Paragraph 6 of the letter of intent includes language dictating that the terms contained in Paragraphs 2-4, which encompass the exclusivity and noncompete provisions, shall remain in full force and effect, notwithstanding termination. *See Pl's Resp.*, p. 10. While the Court is not

making any rulings on the contracts as a matter of law, the Court does find this to be further evidence that dismissing these causes of action at this stage would be premature.

23. A motion to dismiss must be denied “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”. Syl. Pt. 3, in part, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977). The Court finds, based on the considerations discussed above, it does not appear so here. For this reason, the instant motion must be denied on this ground.

#### **Breach of Lease - Conditions Precedent Failed**

24. Next, Defendant Trake seeks dismissal of Count X, which involves CAMC’s claim that Trake breached the lease, arguing the conditions precedent to the APA failed, causing the lease to become void and unenforceable. *See* Trake’s Mem., p. 12, 16.

25. The Court finds this argument to be premature. As an initial matter, the Court considers that Plaintiff argues the distinction between a condition precedent to the formation of a contract and to performance under an existing contract. *See* Pl’s Resp., p. 14. It argues each of the subsections of the APA which Defendants argue are conditions precedent to formation are actually conditions precedent to performance, the consideration of which would depend on the intention of the parties. *Id.* At this early stage in the proceeding, the Court finds more discovery is needed as to the issues. Further, “[w]hether a thing stipulated to be done is a condition precedent depends upon the intention of the parties...”. *Adams v. Guyandotte Valley Ry. Co.*, 64 W. Va. 181, 61 S.E. 341 (1908). More discovery is needed as to the intention of the parties and other issues surrounding any alleged conditions precedent.

26. West Virginia is a notice pleading jurisdiction. *Roth v. DeFeliceCare, Inc.*, 700 S.E.2d 183, 189 n.4 (W. Va. 2010)). Under West Virginia law, a complaint need only contain a



short and plain statement of the claim showing that the pleader is entitled to relief. W. Va. R. Civ. P. 8(a). At this juncture, Plaintiff's breach of contract claims have satisfied this burden, and the Court cannot find that the subject contract agreement fails (and in turn finding the lease to be void) for performance of conditions precedent at this stage. The Court notes that additionally, Plaintiff avers that plain language of Section 11.4 and Section 11.18 imposed obligations upon Defendants that predated the closing date, and that additionally, the closing date is ambiguous on its face. *See* Pl's Resp., p. 15. In short, more discovery is needed. The instant motion is denied on this ground.

#### **Breach of Lease – Termination Acceptance**

27. Next, Defendant Trake seeks dismissal of Count X, which involves CAMC's claim that Trake breached the lease, arguing CAMC accepted PAC's Notice of Termination. *See* Trake's Mem., p. 16-17. The Court notes Defendants rely on a Notice of Termination letter dated February 22, 2022, attached to the instant motion as Exhibit 1, which is not attached to the Complaint.

28. The West Virginia Supreme Court of Appeals has held: This Court has previously held that "[o]nly matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b) R.C.P., and if matters outside the pleading are presented to the court and are not excluded by it, the motion should be treated as one for summary judgment and disposed of under Rule 56 R.C.P. if there is no genuine issue as to any material fact in connection therewith...." Syl. pt. 4, *United States Fid. & Guar. Co. v. Eades*, 150 W.Va. 238, 144 S.E.2d 703 (1965), *overruled on other grounds by Sprouse v. Clay Communication, Inc.*, 158 W.Va. 427, 211 S.E.2d 674 (1975). *Accord* Syl. pt. 1, *Poling v. Belington Bank, Inc.*, 207 W.Va. 145, 529 S.E.2d 856 (1999). *See also* Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr.,

*Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(6)[3], at 354 (3d ed. 2008) (“Only matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b)(6). However, if matters outside the pleading are presented to the court and are not excluded by it, the motion must be treated as one for summary judgment and disposed of under Rule 56.”).

29. However, the West Virginia Supreme Court of Appeals has also recognized that “[n]otwithstanding this general rule, it has been recognized that, in ruling upon a motion to dismiss under Rule 12(b)(6), a court may consider, in addition to the pleadings, documents annexed to it, and other materials fairly incorporated within it. This sometimes includes documents referred to in the complaint but not annexed to it. Further, Rule 12(b)(6) permits courts to consider matters that are susceptible to judicial notice. *Id.* § 12(b)(6)[2], at 348 (footnote omitted).

30. The West Virginia Supreme Court of Appeals has analyzed and discussed this rule and exception as follows:

“In general, material extrinsic to the complaint may not be considered on a Rule 12(b)(6) motion to dismiss without converting it to a Rule 56 motion for summary judgment, but there are certain exceptions this rule. As the Second Circuit has explained:

*The complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference. Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint.*

... [G]enerally, the harm to the plaintiff when a court considers material extraneous to a complaint is the lack of notice that the material may be considered. Accordingly, where plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated.... [O]n a motion to dismiss, a court may consider documents attached to the complaint as an exhibit or

incorporated in it by reference, ... matters of which judicial notice may be taken, or ... documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit. Because this standard has been misinterpreted on occasion, we reiterate here that a plaintiff's reliance on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough.”

*Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152–53 (2d Cir.2002) (citations, alterations in original, and internal quotation marks omitted); *see also New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am.*, 18 F.3d 1161, 1164 (4th Cir.1994) (citing *Cortec Indus. v. Sum Holding, L.P.*, 949 F.2d 42, 47–48 (2d Cir.1991)); *Miller v. Pac. Shore Funding*, 224 F.Supp.2d 977, 984 n. 1 (D.Md.2002); 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1327 & n. 7 (3d ed. 2004) (citing cases). *cited by Forshey v. Jackson*, 222 W. Va. 743, 748, 671 S.E.2d 748, 753 (2008).

31. At this stage, the Court declines to consider evidence that is not attached to the Complaint in deciding the instant motions to dismiss. The letter was not attached to the Complaint, nor was it referenced in it. The fact that it may be relevant to a substantive defense of Defendants does not make it integral to the Complaint. This Court also declines to convert the motion into a motion for summary judgment at this juncture. At this stage in the proceeding, the Court prefers to have more discovery be completed, including discovery regarding correspondence and circumstances surrounding any purported termination or acceptance of termination.

32. For this reason, the Court does not find Defendant's argument regarding termination acceptance causing dismissal of Count X to be persuasive. The motion is denied as to this argument.

### **Tort Claims – Gist of the Action**

33. Next, Defendant Trake seeks dismissal of the tort causes of action against it (Counts VIII and IX), claiming they must be dismissed because they concern Trake's contractual relations and simply restate the contract claims in this cause of action. *See* Trake's Mem., p. 17-19. Specifically, first, Trake argues the tortious interference claim must be dismissed because a party cannot tortiously interfere with its own contract or business relationship, and that the conspiracy count against Trake must be dismissed because one can be liable for conspiracy only if one is liable for the underlying tort. *Id.* at 17-18. Then, Trake argues the tort claims must be dismissed because they simply restate the contract claims in this cause of action, violating the gist of the action doctrine. *Id.* at 18-19.

34. On the other hand, Plaintiff CAMC argues that the gist of the action doctrine is inapplicable at this stage, as it requires fact-intensive judgments as to the true nature of a claim. *See* Pl's Resp., p. 27.

35. In seeking to prevent the recasting of a contract claim as a tort claim, courts apply the "gist of the action" doctrine. Under this doctrine, recovery in tort will be barred when any of the following factors are demonstrated:

(1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.

*Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, W.Va.586, 746 S.E.2d 568, 577 (2013) (internal citations omitted). Succinctly stated, whether a tort claim can coexist with a contract claim is determined by examining whether the parties' obligations are

defined by the terms of the contract. *Id. citing Goldstein v. Elk Lighting, Inc.*, No. 3:12–CV–168, 2013 WL 790765 at \*3 (M.D.Pa.2013).

1. Further, Rule 8 of the West Virginia Rules of Civil Procedure governs the general rules of pleading. Rule 8(a) provides, in pertinent part: “A pleading which sets forth a claim for relief, whether an original claim [or] counterclaim...shall contain (1) a short a plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. *Relief in the alternative or several types may be demanded.*” W. Va. R. Civ. P. 8(a) (emphasis added).

2. Also, Rule 8(e) provides, in pertinent part: “A party may set forth two or more statements of a claim...alternately or hypothetically, either in one count...or in separate counts....A party may also state as many separate claims...as the party has regardless of consistency and whether based on legal or on equitable grounds or on both.” W. Va. R. Civ. P. 8(e)(2).

3. Additionally, the West Virginia Supreme Court of Appeals has stated that alternative claims or defenses are allowed. Specifically, the West Virginia Supreme Court of Appeals has held that “[t]his rule gives parties considerable latitude in framing their pleadings and expressly permits claims or defenses to be pled alternatively...”. *Arnold Agency v. West Virginia Lottery Comm’n*, 206 W. Va. 583, 526 S.E.2d 814 (1999).

4. In *Highmark W. Va., Inc. v. Jamie*, the West Virginia Supreme Court of Appeals found that although a physician could not recover twice for the same injury in a dispute with a health insurance company, he was not precluded from pleading more than one theory of recovery; in fact, Rule 8 specifically authorized alternative pleading. 221 W. Va. 487, 655 S.E.2d 509 (2007).

36. Here, the Court agrees with Plaintiff that a decision pursuant to the gist of the action doctrine would be premature at this stage in the litigation. More discovery is needed as to nature of the alleged wrongful acts which occurred. Further, the Court is cognizant of a litigant's right to seek relief in the alternative.

37. In light of Rule 8 and the relevant case law, the Court finds Plaintiff has validly pled its tort claims, at the very least, in the alternative. A review of the Amended Complaint confirms this claim meets the pleading requirements of Rule 8. *See Barker v. Traders Bank*, 152 W. Va. 774, 166 S.E.2d 148 (1981)(This rules contemplates a succinct complaint containing a plain statement of the nature of the claim...). For this reason, the instant Motion to Dismiss is denied on this argument.

#### **Contract Claims – APA Superseding Letter of Intent**

38. With regard to Defendant PAC's arguments, first, PAC seeks dismissal of the contract causes of action against it, claiming they must be dismissed because all claims based on the letter of intent must be dismissed because the APA superseded it. *See PAC's Mem.*, p. 8.

39. For the same reasons discussed, *supra*, in Paragraphs 19-23 of this Order with regard to Trake's argument that the APA superseded the LOI, the Court finds this argument has been rejected and the motion shall be denied as to this argument.

#### **Breach of Contract Claims - Conditions Precedent Failed**

40. Next, Defendant PAC seeks dismissal of Counts I, II, III, IV, and V, CAMC's breach of contract claims, arguing the conditions precedent to the APA failed, causing the lease to become void and unenforceable. *See PAC's Mem.*, p. 9-13.

41. For the same reasons discussed, *supra*, in Paragraphs 24-26 of this Order with regard to Trake's argument certain conditions precedent were not met, the Court finds this argument has been rejected and PAC's motion shall be denied as to this argument.

**Breach of Contract Claims – Termination Acceptance**

42. Next, Defendant PAC seeks dismissal of Counts I, II, III, IV, and V, CAMC's breach of contract claims, arguing CAMC accepted PAC's Notice of Termination. *See* PAC's Mem., p. 13-17. For the same reasons as described above, the Court finds PAC's motion shall be denied as to this argument.

**Breach of Noncompete Clause**

43. Next, Defendant PAC seeks dismissal of Count IV, arguing because the transaction did not close, the covenant not to compete did not begin. *See* PAC's Mem., p. 14. The Court notes CAMC proffered in its Response that it withdraws Count IV to the extent it "alleges a breach of contract claim premised upon the noncompetition covenant contained in each Employment Agreement, except for that of Dr. Takubo". *See* Pl's Resp., p. 21. With this in mind, the Court finds as follows.

44. The Court finds more discovery is needed at this stage. Defendants apparently claim Takubo's subsequent employment agreement superseded his earlier one. *Id.* at 22. Further, they argue the subsequent employment agreement never took effect because of the aforementioned conditions to its effectiveness being on the closing, which did not occur by December 31, 2021. *Id.* The Court finds more discovery is needed into which employment agreement, if any, applies. Further, the Court, consistent with its earlier findings in this Order, finds more discovery is needed into the issue of applicability of alleged conditions precedent. The Court notes Plaintiff has alleged that the closing date is ambiguous. *See* Pl's Resp., p. 15.

At this stage, Plaintiff has stated a sufficient factual basis for its claim of a breach of the covenant not to compete. A review of Count IV reveals that the detail in the allegations are indisputably sufficient to meet the notice pleading requirement. For these reasons, the motion is denied as to this argument.

#### **Reasonable Discretion Claim**

45. Next, Defendant PAC seeks dismissal of Count III, arguing CAMC's allegation that PAC breached the parties' agreement by terminating the APA in bad faith must be dismissed for the additional reason that the claimed breach did not cause the damages. *See* PAC's Mem., p. 17-18. PAC argues it sent the notice of termination on February 22, 2022, after the closing date of December 31, 2021 wherein the closing did not occur and PAC alleges the conditions precedent had "already failed". *Id.* at 17.

46. The Court considers that CAMC alleged detailed factual support in support of each of its claims, including Count III, and for the Court make a ruling, as a matter of law, on causation, would be premature. More discovery is needed to flesh out the issues claimed, including the claim that the alleged bad faith termination of the APA caused the claimed damages. For this reason, the motion is denied as to this argument.

#### **Exclusivity Provision**

47. Next, Defendant PAC seeks dismissal of Count II, arguing that even if the exclusivity provision were enforceable, it is limited in time by/restricts what PAC Could do only until the closing date, which it argues is no later than December 31, 2021. *See* PAC's Mem., p. 18-19.

48. However, Plaintiff has averred that Defendants have not disputed that Section 11.4 of the APA prohibited them from soliciting, entertaining, or accepting a conflicting offer



prior to December 31, 2021, and that as such, Plaintiff's allegation of a breach occurring on or subsequent to February 16, 2021, is sufficient to state a breach of contract claim. *See* Pl's Resp., p. 24. Defendants' Reply does not dispute that the allegations in the Complaint encompass this time period; however, the Reply merely argues that this includes a time period beyond the scope of the provision. *See* Reply, p. 12. The Court agrees with Plaintiff that at this stage, these allegations are sufficient as a matter of law to state a cognizable breach of contract claim in Count II.

### **Tort Claims Against PAC**

49. Finally, Defendant PAC seeks dismissal of Counts VIII, IX, and X, arguing the same arguments as Trake regarding aiding and abetting, tortious interference and conspiracy, and also regarding gist of the action. *See* PAC's Mem., p. 19-20.

50. The Court again references its conclusions above regarding denial of the instant motion on the basis of the gist of the action doctrine. Further, the Court considers the following:

51. Persons having similar individual contracts with a third person who conspire together to breach them, and do breach them in pursuance of such conspiracy, whether for personal gain or sinister motives, are liable therefor in an action for tort in the nature of a conspiracy. *Hendricks v. Forshey*, 81 W. Va. 263, 94 S.E. 747 (1917). The Court considered Defendants' Reply brief, in which it discusses and differentiates *Hendricks*, averring that here, we have only a single transaction and in *Hendricks*, there existed a number of persons who had conspired together to breach multiple, individual contracts. *See* Reply, p. 13. The Court is not persuaded. At this stage, Plaintiff has sufficiently pled an allegation that a party to the contract conspired with another to induce a breach. For these reasons, the Court concludes Counts VIII,

IX, and X shall not be dismissed on these grounds, as the instant motion is denied as to this argument.

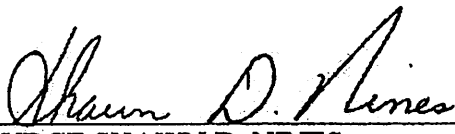
**CONCLUSION**

**WHEREFORE**, it is hereby **ORDERED** and **ADJUDGED** that Defendant Pulmonary Associates of Charleston, PLLC's Motion to Dismiss Plaintiff's Complaint and Defendant Trake, LLC's Motion to Dismiss Plaintiff's Complaint are hereby **DENIED**.

This **ORDER** shall be sealed and only available to the parties hereto, as the information therein is related to those facts already sealed by Court Order.

The Court notes the objections of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

05-12-2023  
date of entry

  
JUDGE SHAWN D. NINES  
JUDGE OF THE WEST VIRGINIA  
BUSINESS COURT DIVISION

Date: 5/15/23  
Certified copies sent to:  
☒ counsel of record  
☐ parties  
☐ other Aug. Ct  
(please indicate)  
By: ☒ certified/1st class mail  
☐ fax  
☐ hand delivery  
☐ interdepartmental  
Other directives accomplished:  
Att. 10/15/23  
Circuit Court Clerk

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 15th  
DAY OF May 2023  
Cathy S. Gatson CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA