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Re: *Bennett v. Lally*
C.A. No. 9545-VCN
Date Submitted: June 30, 2014

Dear Counsel:

Plaintiffs, A. Judson Bennett ("Bennett"), Jeffrey Siskind ("Siskind"), and Delaware Compassionate Care, Inc. ("Delaware Compassionate Care," and collectively with Bennett and Siskind, the "Plaintiffs"), initiated efforts to become licensed to operate a medical marijuana facility in the State of Delaware[1] after the

[1] The facts are drawn from Plaintiffs' Amended Verified Complaint (the "Complaint" or "Compl."). Bennett and Siskind began this quest in 2011. Delaware Compassionate Care was not incorporated until later.

General Assembly passed the Delaware Medical Marijuana Act (the "Act").[2] The Act authorized the creation of compassionate care facilities, selling marijuana to patients with serious medical conditions, in Delaware's three counties, but was suspended while its legality was questioned by the United States Department of Justice. The suspension was lifted in August 2013, and the number of care centers was reduced from three to a single pilot center. On December 26, 2013, the State of Delaware Department of Health and Social Services ("DHSS") sought proposals (the "RFP") for the registration and operation of a compassionate care center.

Plaintiffs, through Sussex County Compassion Care Center, Inc., a different entity which was later dissolved,[3] hired Defendant Mark S. Lally ("Lally"), a Delaware resident with a governmental affairs and consulting business, to assist in their endeavors. Specifically, Lally was to serve as a "spokesperson and lobbyist" and to "undertak[e] any and all means necessary to assist . . . in obtaining all necessary licenses to cultivate and distribute medical marijuana in the State of

[2] 16 *Del. C.* ch. 49A.
[3] Defs.' Mot. to Dismiss, Ex. D.

Delaware."[4] This agreement (the "Initial Agreement") provided for Lally to be paid an initial fee and then a monthly stipend for the next twelve months.[5] Lally allegedly met with Delaware officials during this time, including the Secretary of DHSS, and through these meetings gathered information about Delaware's marijuana licensing requirements and information necessary to operate a marijuana dispensary. Lally also provided DHSS's Secretary with information, supplied by Plaintiffs, relating to the successful bid for New Jersey's medical marijuana facility which was used by DHSS in composing its RFP.

The delays in pursuing the license resulting from the suspension of the Act required the parties to consider extending Lally's engagement. Discussion commenced in December 2012, and Bennett promised additional payments to Lally to continue helping Plaintiffs obtain the DHSS license. These negotiations culminated on January 14, 2013, in the execution of the Agreement to Continue Representation (the "Amended Agreement") with Bennett and Siskind.[6]

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[4] Compl., Ex. A.
[5] *Id.*
[6] Compl., Ex. D.

The Amended Agreement provided Lally additional monthly payments for six months, and Bennett and Siskind had the option to renew or extend that agreement to have the benefit of Lally's continued representation. It set aside $500 each month which would be paid to Lally upon receipt of a license and granted Lally the right to receive 10% of the profits of the medical marijuana facility. It also provided that "Lally shall refrain from assisting others in a similar enterprise unless and until Siskind and Bennett withdraw from pursuing said licensing, and in the event that Lally receives 10% participation as above."[7] When Lally apparently sought to continue his representation, but limited to a six-month term, Bennett informed him that his continued representation and consent not to assist another entity in obtaining a license was a "sticking [or sticky] point."[8]

While Plaintiffs and Lally waited for the RFP's release, Lally continued to work for Plaintiffs through the end of 2013. He submitted comments and questions on behalf of Delaware Compassionate Care to a DHSS representative[9] and wrote to Plaintiffs to keep them updated on the RFP process and other parties

[7] *Id.*
[8] Compl. ¶ 19 & Ex. C.
[9] Compl., Ex. E.

seeking the license.[10] On December 28, 2013, Lally sent the just released RFP to Plaintiffs and, at the suggestion of Plaintiffs, agreed to attend a pre-proposal meeting with them at the end of January 2014, and to meet with them in Florida to finalize their proposal. In February, Plaintiffs and Lally discussed the bidding requirements, their strategy for addressing those items, and other information they would include in a proposal to distinguish their proposal from competing proposals. Although the proposal had not yet been completed, Lally executed the signature page representing that he was Delaware Compassionate Care's Executive Director and predated it in advance of the submission date.[11]

Also at that time, Lally notified Plaintiffs that he had been contacted by Sigal Consulting ("Sigal"), which operates a medical marijuana facility in Rhode Island. Sigal asked if Plaintiffs would partner with it to submit a proposal. Lally thought they should meet and, because Plaintiffs needed additional financing to pursue their efforts, they agreed to a meeting, which Lally subsequently arranged.

[10] Compl., Ex. F.
[11] Compl., Ex. H.

Between February 19 and 21, 2014, Bennett and Lally met with Sigal at the Rhode Island dispensary to discuss a medical marijuana facility's needs and whether a partnership could be formed. Plaintiffs allegedly told Sigal that they intended for Lally to manage their Delaware facility. Plaintiffs and Lally continued to plan for a possible partnership, and in late February, Lally, on Plaintiffs' behalf, met with Sigal once again in Delaware. He showed Sigal's representatives Plaintiffs' proposed locations for the facility, including the one they had identified as the best possible site (the "Property"). Afterward, the parties again discussed partnership terms, but were unable to agree on the proportionate interest which Plaintiffs should receive. Negotiations broke down, and Plaintiffs abandoned the idea.

Plaintiffs allege that Lally soon thereafter tried to distance himself from Plaintiffs, presumably to initiate a relationship with Sigal. On March 6, 2014, Bennett reminded Lally of Lally's earlier agreement not to work with another party and warned that if he violated his agreement, Bennett would pursue legal action.[12] Plaintiffs contend that Lally contacted Sigal to pursue a proposal, and offered it a

[12] Compl., Ex. K.

Delaware representative, an RFP requirement, as well as information he learned while working for Plaintiffs. Lally was appointed President and Director of Defendant First State Compassion Center, Inc. ("First State"), Sigal's entity created to operate its dispensary in Delaware.

Plaintiffs assert that they were unaware that Lally had become employed by Sigal, and Bennett therefore wrote to Lally on March 20, 2014 to inform him that Plaintiffs had located financial backing which allowed them to meet the RFP's requirements. Bennett informed Lally that he would be their CEO; however, Lally did not accept the position. Plaintiffs also sought to lease the Property. Although they were informed that no other offers for it had been made, they later learned that Sigal had leased the Property. With limited inquiry, they found a request for a zoning certification for the Property, dated April 2, 2014, submitted by Lally on behalf of First State.[13] Soon thereafter and not long before the deadline to submit a proposal to DHSS, Plaintiffs contend, Lally informed them that he no longer intended to represent them and would not supply information and data he collected while working for Plaintiffs.

[13] Compl., Ex. L.

Plaintiffs "had to scramble to address matters" Lally previously had managed and they had to find a new location, since First State had leased the Property.[14] Nonetheless, they were able to submit a proposal. Because of the RFP's residency requirement, Bennett reestablished his Delaware residency. Defendants also submitted a bid, which Plaintiffs contend could not have been done in such a limited time frame, without Lally's sharing and using confidential information gained from working for Plaintiffs. Plaintiffs sent Lally a cease and desist letter on April 10, 2014, demanding that he withdraw the competing proposal. First State did not withdraw its proposal, and First State has been granted a license to operate the medical marijuana facility.

Plaintiffs sued Lally and First State. They seek injunctive relief against Lally preventing him from working for First State and using confidential information obtained as Plaintiffs' representative. They also accuse Lally of having breached fiduciary duties owed to them by using confidential information and taking a corporate opportunity from them and accuse First State of aiding and abetting Lally's breaches. Plaintiffs allege that First State interfered with their

[14] Compl. ¶ 36.

contractual relations and with a prospective business relationship, in addition to engaging in unfair competition.

Defendants have moved to dismiss the Complaint. For the reasons that follow, their motion is granted in part and denied in part.

* * *

Defendants seek dismissal of Plaintiffs' claims under Court of Chancery Rule 12(b)(6). All well-pleaded facts will therefore be treated as true and the Court will draw all reasonable inferences in favor of the non-moving parties.[15] If Defendants were provided notice of the claim, even vague allegations in the Complaint will be accepted as well-pleaded.[16] The Court will deny the motion to dismiss if Plaintiffs' well-pleaded factual allegations would entitle them to relief under a reasonably conceivable set of circumstances: in other words, if Plaintiffs have a possibility of recovery.[17] Conclusory allegations that are unsupported by

[15] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).
[16] *Id.*
[17] *Id.* at 537 & n.13.

specific facts and unreasonable inferences drawn in favor of Plaintiffs may be rejected by the Court.[18]

A. *The Fiduciary Duty Claims*

Defendants argue that Plaintiffs' fiduciary duty claims fail as a matter of law because their claims are duplicative of claims arising from a contractual relationship and because arm's length commercial relationships do not give rise to fiduciary duties.[19] Presumably, they rely on the Initial Agreement and the Amended Agreement. Their analysis is somewhat cursory, and it is not clear that Plaintiffs' claims fall wholly within the scope of either contract. Moreover, given the confusion and informality of the contracts, not to mention the question of whether either (or any) contract is enforceable, it is reasonably conceivable that an agency relationship was created outside of them which could result in Lally's owing to Plaintiffs certain duties.

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[18] *Price v. E.I. duPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

[19] Defs.' Mot. to Dismiss at 1-2 (citing *Nemec v. Shrader*, 991 A.2d 1120, 1128-29 (Del. 2010) and *Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2007 WL 2982247, at *10 (Del. Ch. Oct. 9, 2007)).

Defendants' theory that no fiduciary duty could arise in this case is also unavailing. They assert that "a straightforward, arm's-length commercial relationship arising from contract does not give rise to fiduciary duties,"[20] but do not acknowledge that no absolute rule on the matter exists. Whether he was nominally an independent contractor or subject to an employment agreement, Lally's arrangements with Plaintiffs went far beyond the bounds of any written agreement or, for that matter, any express oral agreement. Plaintiffs and Lally had a shared interest in a specific objective. Plaintiffs discussed strategy with Lally and appear to have brought him into their inner working circle. All of this was based in part—one can infer from the Complaint—on mutual trust. Out of that trusting relationship, it is reasonably conceivable that fiduciary duties may have evolved. Because of the sketchy nature of their relationship, it cannot be said, at this stage, that any contract precluded the formation of (or displaced) fiduciary duties.

[20] *Forsythe*, 2007 WL 2982247, at *10.

In short, factual questions are present concerning Lally's relationship with Plaintiffs and the amount of trust reposed in him. Lally's relationship with Plaintiffs was initially that of a spokesperson and lobbyist; however, at some point he signed a signature page (which ultimately was not used) as the Executive Director of Delaware Compassionate Care and referred to building their businesses "as [Plaintiffs'] partner."[21] The Amended Agreement contemplated that Lally would share in profits from the enterprise. Thus, it is reasonably conceivable that Plaintiffs reposed special trust in Lally or that Lally had a special duty to protect their interests.[22] It follows that Defendants' argument that First State cannot be

[21] Compl., Ex. C.

[22] Although not argued by the parties, the Delaware Supreme Court in *Wal-Mart* considered three factors when evaluating whether a party was a fiduciary: 1) an alignment of interests between the parties, 2) allegations supporting an inference that the party asserted control or dominion over an entity, and 3) allegations supporting an inference of self-dealing. *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 113 (Del. 2006) (citation omitted). Although the Court does not have the benefit of briefing, it seems that an alignment of interests was created through the future profit sharing of the Amended Agreement. Furthermore, Lally's execution of documents as Delaware Compassionate Care's Executive Director permits an inference of control over the entity, and the allegations of Lally's use of information gathered while working with Plaintiffs supports an inference of self-dealing. Defendants, in reply, emphasize that Lally was not serving as Executive Director at the time of the alleged self-dealing. Yet, document execution may

liable for aiding and abetting because no fiduciary duties have been violated also fails. Thus, Defendants' motion to dismiss these claims is denied.[23]

B. *Defendants' Attempts to Show That the Amended Agreement Was Invalid and No Breach of It Was Alleged*

Defendants next assert that the Amended Agreement is invalid because it violates Delaware law and that various deficiencies exist in Plaintiffs' pleadings concerning breaches of the agreements between the parties. Defendants assert that "[a]s a general rule, agreements against public policy are illegal and void,"[24] but do not acknowledge that "courts are averse to voiding agreements on public policy grounds unless their illegality is clear and certain."[25] Furthermore, courts exercise this authority with caution, and only in cases that are free from doubt."[26]

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permit an inference that Lally was functioning in a variety of capacities on behalf of Plaintiffs, one of which might have been as Executive Director or as other managing or authorized representative.

[23] Defendants also raise a new argument in their reply brief specifically targeting Plaintiffs' claim that a corporate opportunity was usurped. Their argument is therefore not timely.

[24] Defs.' Mot. to Dismiss at 3 (citing *Sann v. Renal Care Ctrs. Corp.*, 1995 WL 161458, at *5 (Del. Super. Mar. 28, 1995)).

[25] *Sann*, 1995 WL 161458, at *5.

[26] *Id.*

Defendants contend that the Amended Agreement violates 29 *Del. C.* § 5834, prohibiting any "compensation agreement that permits more than half of the compensation to be paid to . . . a lobbyist to be dependent upon the outcome of any legislative or administrative action."[27] The Amended Agreement provides for a monthly payment of $1,000, for at least six months, but also provides for a bonus of $500 to be placed aside each month, which Lally would receive once Plaintiffs obtained the license.[28] Lally's interest in 10% of the enterprise was also contingent upon Plaintiffs' obtaining the license.[29]

Plaintiffs argue that Lally was employed both as a spokesman and a lobbyist. Neither party refers to the statutory definition of lobbyist, but as the Court reads it, Lally's activities were encompassed by it.[30] Plaintiffs also assert that the

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[27] 29 *Del. C.* § 5834.
[28] Compl., Ex. D.
[29] *Id.*
[30] *See* 29 *Del. C.* § 5831(a)(5) ("'Lobbyist' means any individual who acts to promote, advocate, influence or oppose any matter pending before the General Assembly . . . or any matter pending before a state agency by direct communication with that state agency, and who in connection therewith either: a. [h]as received or is to receive compensation in whole or in part from any person; or b. [i]s authorized to act as a representative of any person who has as a substantial purpose the influencing of legislative or administrative action; . . . ."). Lally

compensation Lally received was solely based on his salary, because they did not receive the license. However, this argument, and Plaintiffs' variations on it, are contrary to the legislative language which contemplates that an offending compensation agreement could *permit* such a scheme. Here, because of the 10% interest in the enterprise, the compensation agreement appears to permit such a result.[31] Thus, the compensation provisions appear to run afoul of the statute.

Where an employment (or independent contractor) arrangement covers a range of responsibilities (as did Lally's agreement with Plaintiffs), including some lobbying function, whether the entire agreement should be declared invalid, or only the portion that offends the statute, has not clearly been addressed by the Defendants. In addition, it appears that the Plaintiffs contemplated that Lally's responsibilities were in the process of evolving away from (or expanding beyond)

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sought to influence a matter pending before DHSS and receive compensation, at least in part, from Plaintiffs. Additionally, Lally appears to have been authorized to act as the representative of the Plaintiffs who hired him to influence DHSS's RFP process.

[31] These amounts are unknown, although Plaintiffs assert that damages from the loss of the opportunity to operate the center could be measured in millions of dollars. Ten percent of millions would easily exceed the fixed sums mentioned in the agreement.

the lobbying function. Moreover, the agreement is incomplete and its scope is uncertain. Thus, the Court cannot conclude as a matter of law whether any of it survives.

Defendants also argue that the non-competition provision is unenforceable because independent contractors cannot be prevented from engaging in similar enterprises.[32] They invoke *EDIX Media Group, Inc. v. Mahani*, in which this Court distinguished independent contractors from employees and noted concern that "enforcement of 'substantially similar' provisions in non-competition clauses will be both inequitable to the contractor and against public policy."[33] However, *EDIX* is not dispositive of this motion to dismiss for at least two reasons. First, whether Lally was an independent contractor or employee is uncertain as a factual matter. Second, the Court in *EDIX* narrowed (but did not strike out) an overly-broad clause to prohibit only activities which directly competed with EDIX's business activities.[34] The provision in Lally's agreement prevents competition in "a similar enterprise unless and until Siskind and Bennett withdraw from pursuing

[32] Defs.' Mot. to Dismiss at 5.
[33] 2006 WL 3742595, at *8 (Del. Ch. Dec. 12, 2006).
[34] *Id.*

such licensing."[35] In this context, the agreement may be read to restrict competition in helping to obtain medical marijuana licenses.[36]

Defendants next argue that no breach of the Amended Agreement has been alleged, in large part because any contract had expired. What compensation after August 1, 2013, had been foreclosed is not clear from the Complaint. More importantly, however, Lally is alleged to have continued to work with the Plaintiffs. That work included, for example, developing the proposal, looking for a suitable site for the dispensary, and traveling to Florida and Rhode Island. Lally's conduct, as alleged, demonstrates that the working relationship continued well into 2014. Accordingly, it is a reasonable inference from the Complaint that Lally's professional involvement, either as an employee or as an independent contractor, with Plaintiffs did not terminate in the summer of 2013.[37]

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[35] Compl., Ex. D.

[36] Defendants also contend that no temporal limitation exists in the Initial Agreement, discussed further below. They accurately describe the agreement, but a second basis for preventing Lally's competitive activities exists under the Amended Agreement which provides a basis for Plaintiffs' claims.

[37] Defendants argue that the Amended Agreement contains no survival clause evidencing the parties' intent for non-competition provisions to remain effective

Defendants then contend that because the RFP process, by October 1, 2013, required that a Delaware resident pursue a license, and because Bennett and Siskind were not Delaware residents, they were disqualified from the bidding process and had therefore withdrawn. Plaintiffs allege that they believed Lally was their representative until at least March 20, 2014, and thus they reasonably believed that they could meet the RFP's residency requirement up until that time. These allegations preclude the argument that they withdrew from bidding. Thus, the claim related to Lally's alleged breach of the Amended Agreement survives.

C. *The Initial Agreement and its Confidentiality Provision, and the Tortious Interference Claim*

Defendants also attack the validity of the Initial Agreement and its confidentiality provision. They first argue that because the entity which signed the Initial Agreement was dissolved, no claim for breach of confidentially may be sustained. Defendants are correct that the dissolved entity is a non-party and no assignment of the agreement was alleged.

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after the termination of the agreement. That argument, however, begs the question of whether the agreement was extended.

Plaintiffs argue that the Amended Agreement incorporates the terms of the earlier agreement. However, the Amended Agreement states in a series of "WHEREAS" clauses that Lally "represented Bennett and Siskind as a lobbyist and legislative liazon [sic]" and that the "parties desire to continue said representation."[38] They then agree to pay Lally "in consideration of his continuing his representation."[39] The resolutions preceding what appears to be the operative portion of the agreement only acknowledge the capacity in which Lally worked for Bennett and Siskind. There is no evidence of the parties' intent to draw forward the confidentiality provision from that earlier agreement. Thus, Plaintiffs' confidentiality claims premised on contractual terms rooted in the Initial Agreement and the Amended Agreement are dismissed.[40]

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[38] Compl., Ex. D.
[39] *Id.*
[40] Thus, Plaintiffs cannot prevail on those portions of Count I and Count V predicated upon sharing confidential information. *See* Compl. ¶¶ 43(2), 73. Defendants' additional arguments directed to the confidentiality provision also need not be considered.

D. *Plaintiffs' Interference with Contractual Relations, Interference with a Prospective Business Relationship, and Unfair Competition Claims Against First State*

Defendants also contend that they have demonstrated that the agreements are invalid, and thus Plaintiffs' tortious interference claim must be dismissed. As noted above, Plaintiffs cannot recover on their claim based on the Initial Agreement's confidentiality provision and thus a tortious interference claim based on that provision does not lie. Otherwise, Defendants have not prevailed on the majority of their theories and they therefore do not prevail here.

Similarly, Defendants assert that the only grounds for Plaintiffs' interference with a prospective business relationship and unfair competition claims are the restrictive covenants. They contend that because those covenants fail to allow the stating of a claim, Plaintiffs' claims on these grounds are left unsupported. Again, the bulk of Plaintiffs' claims have survived. Neither Count VI nor VII appears to be based on the unenforceable confidentiality provision.

* * *

For the above reasons, Defendants' motion to dismiss Plaintiffs' claims based upon the alleged confidentiality provision is granted. However, the balance of Defendants' motion is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K