Gordon Grado M.D. Incorporated v. Phoenix Cancer and Blood Disorder Treatment Institute PLLC e

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Gordon Grado M.D., Inc. d/b/a Southwest Oncology Centers,

Plaintiff, v. Phoenix Cancer and Blood Disorder Treatment Institute PLLC; and Steven L. Rosinski,

Defendants.

No. CV-21-02052-PHX-DGC ORDER

Defendants Phoenix Cancer and Blood Disorder Treatment Institute, PLLC and Steven L. Rosinksi, M.D. have moved to dismiss Plaintiff Gordon Grado, M.D., Inc.,

second amended complaint. Doc. 18. The motion is fully briefed (Docs. See LRCiv 7.2(f). For reasons stated below, the Court will deny the motion in part. I. Background.

Dr. Gordon Grado is a physician specializing in radiation oncology and the founder, director, and president of Plaintiff Southwest Oncology Centers, which provides radiation and medical oncology services to cancer patients in Scottsdale, Bullhead City, and Yuma, Arizona. Doc. 14 ¶¶ 3-5. Defendant Dr. Steven Rosinski is a physician specializing in internal medicine, hematology, and oncology and founder of Defendant PCI, which provides radiation and medical oncology services to cancer patients in Bullhead City, Arizona. Id. ¶¶ 7-10.

Plaintiff alleges that in 2017, Defendant Rosinski was practicing medicine in Spokane, Washington, and planning to move to Arizona. Id. ¶¶ 34-35. In November 2017, Plaintiff and Defendant Rosinski began communications and employment negotiations. Id. ¶ 37. In March 2018, Plaintiff and Defendant Rosinski entered into a locum tenens ant Rosinski would work part time as an independent contractor for Plaintiff in its Bullhead City location. See id. ¶¶ 44-46. After approximately ten months, Defendant Rosinski gave notice of his intent to terminate the Agreement, stopped providing services for Plaintiff, and opened Defendant PCI, where he continued to provide cancer treatment services to patients in Bullhead City. Id. ¶¶ 46, 63.

Plaintiff alleges that prior to entering into the Agreement, Defendant Rosinski had a plan to establish his own partnership and medical practice in Arizona. Id. ¶ 35. Plaintiff alleges that, unbeknownst to it, Defendant Rosinski sought employment with it in order to learn about the medical oncology care market in Arizona, establish a name presence in Arizona, identify and hire away experienced employees, and identify and persuade away patients, all in furtherance of his desire to open his own medical practice in the area. Id. ¶ 36. Despite this, Plaintiff alleges that Defendant Rosinski, personally and through a letter Id. ¶¶ 42-

Rosinski under the Agreement. Id. ¶ 44. Plaintiff alleges that Defendant Rosinksi conti Id. ¶¶ 47,

51-53, 59-60, 74.

While continuing to

id. ¶ 39); filed articles of inc id. ¶ 48); registered a national provider

identification number for the Phoenix Cancer and Blood Disorder Treatment Institute with the Centers for Medicare and Medicaid Services (id. ¶ employees to work for Defendant PCI (id. ¶¶ 54-55 medical records in order to persuade patients to cease treatment with Plaintiff (id.

¶¶ 56- Plaintiff, to tell patients that Plaintiff might close and that they should obtain their medical records in order to convince them to seek treatment with Defendant PCI (id. ¶ 58); and filed applications with the U.S. Patent and Trademark Office to trademark the phrase id. ¶ 62).

Plaintiff alleges that Defendant Rosinski gave a 30-day notice of termination as required under the Agreement on January 4, 2019, but that his last day of employment was on January 18, 2019. Id. ¶¶ 61, 69. Plaintiff alleges that in communications regarding the termination of D open a competing oncology practice in Bullhead City, asserting instead that he was unsure of his future employment plans. Id. ¶¶ 63, 64, 69. In the time between giving his notice and the end of his employment, Plaintiff alleges that Defendant Rosinski asked for and received a print-out of his next two weeks of appointments, which included patient phone numbers and insurance inform continue care with Defendant PCI. Id. ¶¶ 64-67. Ultimately, Plaintiff alleges, Defendant

Rosinski used misappropriated confidential information to successfully solicit 41 of to transfer their care to Defendant PCI. Id. ¶ 68.

Plaintiff sues Defendants Rosinski and PCI for fraudulent inducement under Arizona common law (Count I), misappropriation of trade secrets under A.R.S. § 44-401 (Count II) and 18 U.S.C. § 1832 (Count III), and tortious interference with business relationships under Arizona common law (Count V). Plaintiff also brings claims against Defendant Rosinski for breach of contract (Count IV) and breach of the implied covenant of good faith and fair dealing (Count VI) under Arizona common law.

II. Legal Standard.

When analyzing a complaint for failure to state a claim for relief under Rule 12(b)(6), the well-pled factual allegations are taken as true and construed in the light most favorable to the nonmoving party. Cousins v. Lockyer, 568 F.3d 1063, 1067 (9th Cir. 2009). A successful motion to dismiss under Rule 12(b)(6) must show either that the complaint lacks a cognizable legal theory or fails to allege facts sufficient to support its theory. Balistreri v. Pacifica Police Dep t, 901 F.2d 696, 699 (9th Cir. 1990). A complaint that sets forth a cognizable legal theory will survive a motion to dismiss as long as it

plaus Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). III. to Dismiss.

Defendants argue that the Court lacks jurisdiction over the only federal claim asserted in federal law) and the Court therefore lacks jurisdiction over the entire lawsuit. Defendants

tortious interference claim (Count V) claims for relief.

A. Misappropriation of Trade Secrets. 1. Under Federal Law (Count III).

The Court will first consider Defe federal misappropriation of trade secrets because it is the only claim upon which to base

supplemental jurisdiction. a. Jurisdiction.

Defendants argue that there is no basis for original federal jurisdiction over sufficiently related to interstate commerce as required by 18 U.S.C. § 1836(b)(1). Doc. 18

at 4. 1

Citing no authority, Defendants argue that this jurisdict

Id. in a small Arizona town most by each state in which Id. Defendants that patient billing and payment is done across state lines, thereby implicating interstate

information actually at issue Id. Defendants assert that only patient names and contact information are at issue in this case, arguing that Plaintiff has not sufficiently supported its allegations that billing and insurance information was also improperly obtained by Defendants. Id. billing or insurance records because they would have received that information directly from patients that switched their care to Defendant PCI. Id. at 5. Defendants finally argue tha that it receives payments for the services it renders from out-of- to support federal jurisdiction. Id.

Plaintiff responds that the allegations in its complaint adequately allege a connection to interstate commerce because it alleges that the records taken by Defendants included financial and insurance records used to bill out-of-state entities for services and that some of the patients whose records were taken were Nevada residents. Doc. 20 at 6. Plaintiff also argues that the jurisdictional statute does not require that the trade secrets themselves be transmitted in interstate commerce, but only that they are related to a product or service used in interstate commerce. Id. at 6-7. The records at issue, Plaintiff argues, were related to both medical services provided in interstate commerce and financial services that is,

1 Defendants also argue that Plaintiff cites an inapplicable statute as the basis for federal jurisdiction. Doc. properly cites § 1836(b) and (c) as the basis for federal jurisdiction. See Doc. 14 ¶ 1.

insurance billing provided in interstate commerce. Id. at 7. Finally, Plaintiff argues that inappropriate for resolution on a 12(b)(6) motion but that, even if Defendants had no need to take financial records specifically, the information was still valuable to Defendants because it indicated who Defendants should solicit. Id. at 7-8.

Defendants respond by acknowledging case law stating that the product or service, not necessarily the trade secret itself, must be related to interstate commerce, but argue that must be 21 at 3 (emphasis in original), id. at 4. Defendants also argue that any records obtained from Plaintiff were not used for billing purposes because such information was provided by patients at the time of treatment. Id. at 4. Defendants assert that the records would not have provided leads on which patients to solicit because Defendant Rosinski was already aware of the identities of patients he was treating when he schedule which included patient phone numbers. Id.

2

t is misappropriated may bring a civil action . . . if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce. § 1836(b)(1). The statute confers original jurisdiction on U.S. district courts. Id. § 1836(c).

There is some dispute among courts about whether the interstate-commerce requirement is jurisdictional or merely an element of a misappropriation claim brought under DTSA. See, e.g., Providence Title Co. v. Truly Title, Inc., 547 F. Supp. 3d 585, 598 (E.D. Tex. 2021) (concluding that the interstate-commerce requirement is not jurisdictional but acknowledging contrary findings among other district courts and collecting cases). This 2

In briefing, the parties primarily refer to this provision as the Economic Espionage Act . The EEA creates federal criminal liability for the misappropriation of trade secrets and § 1836 is its civil analogue. While § 1836 is codified within the EEA, it is more commonly referred to as the DTSA.

circuit. 3

District courts in this circuit have tended to treat the interstate-commerce requirement as jurisdictional. See, e.g., Islands Hospice, Inc. v. Duick, No. 19-00202-JMS- WRP, 2019 WL 4620369, at *3 (D. Haw. Sept. 23, 2019) (citing Agrawal); ReBath LLC v. HD Sols. LLC, No. CV-19-04873-PHX-JJT, 2020 WL 7000071, at *2 (D. Ariz. Sept. 18, 2020). Defendants assert that the interstate-commerce requirement of the DTSA is jurisdictional. Doc. 18 at 3-4. Plaintiff does not dispute that assertion. Doc. 20 at 6. The Court therefore will assume for purposes of this order that the requirement is jurisdictional.

Plaintiff has sufficiently pled a nexus between its federal misappropriation claim and interstate commerce. Plaintiff alleges that some of its patients and indeed three of the patients it alleges were solicited by Defendants using misappropriated information were Nevada residents. Doc. 14 ¶¶ 33(a), 68. from [Nevada] into [Arizona] to use [its] services and therefore those services are used in

Yager v. Vignieri, No. 16cv9367(DLC), 2017 WL 4574487, at *2 (C.D. Cal. Aug. 7, 2018); see also Officia Imaging, Inc. v. Langridge, No. SA CV 17-2228- DOC (DFMx), 2018 WL 6137183, at *7 (C.D. Cal. Aug. 7, 2018) (holding allegation that services were coordinated and processed in Nevada for Calif). Defendant neither

acknowledges this allegation nor explains why interstate commerce is not involved when citizens of Nevada travel across state lines to receive medical services in Arizona.

Defendants argue that because physicians must in which they wish to practice medicine, . must be 21 at 3 (emphasis in original). But these conclusory assertions are belied by caselaw, some

of which is cited below, acknowledging that the provision of medical services can be and often is in interstate commerce. Defendants proffer nothing be it caselaw or information

3 The Second Circuit in United States v. Agrawal, 726 F.3d 235 (2d Cir. 2013), found that the interstate-commerce requirement of a prior version of the EEA was Id. at 244 n.7.

that the Court could take judicial notice of to show that medical licensing schemes remove physicians from interstate commerce. Plaintiff, on the other hand, pleads with specificity that it treats out-of-state patients in its Arizona facility and that Defendants successfully solicited several of its out-of-state patients. This is sufficient to satisfy the interstate-commerce requirement of the DTSA.

Further, courts routinely hold in other Wound Care Concepts, Inc. v. Vohra

Health Servs., P.A., No. 19-62078-CIV-SMITH, 2022 WL 320952, at *12 (S.D. Fla. Jan. 28, 2022)

(considering interstate commerce in Lanham Act context); see also Summit Health, Ltd. v. Pinhas ophthalmological services affects interstate commerce because both physicians and hospitals serve nonresident patients and receive reimbursement through Medicare GGNSC Louisville Hillcreek, LLC v. Warner, No. 3:13-CV-752-H, 2013 WL 6796421, at *8 (W.D. Ky. Dec. 19, 2013) (holding that plaintiff has also alleged that it received payments through Medicare and Medicaid and, of the

patients it alleges were successfully solicited by Defendants using misappropriated information, 20 were Medicare beneficiaries, four were enrolled in Medicare Advantage plans, and nine were Medicaid recipients. Doc. 10 ¶¶ 33(c)-(e), 68.

illing is

Doc. 18 at 4. Defendants assert that the information at issue is only patient names and e tiniest shred of support for its naked and conclusory allegations that any Defendant at any time misappropriated billing Id. Plaintiff specifically alleges, however, that Defendants Doc. 10 ¶¶ 30, 56-58, 65.

inappropriate for resolution on a motion to dismiss. Such issues should be resolved on summary judgment or at trial when both parties can submit evidence to support their allegations. On this -pled factual allegations as true. Cousins, 568 F.3d at 1067. b. Failure to State a Claim.

To state a claim under the DTSA, Plaintiff must allege (1) that it owns a trade secret, (2) that was misappropriated by Defendants, (3) causing damages. ReBath LLC, 2020 WL 7000071, at *2. Defendant motion to dismiss does not argue that Plaintiff failed to allege that it owns a trade secret or suffered damages, focusing instead on whether Plaintiff has adequately alleged misappropriation. Docs. 18 at 7, 21 at 6. 4

Misappropriation under the DTSA is defined as: (A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (B) disclosure or use of a trade secret of another without express or implied consent by a person who--

(i) used improper means to acquire knowledge of the trade secret; (ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was--

(I) derived from or through a person who had used improper means to acquire the trade secret;

(II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or 4 Defendants hint that the information at issue does not constitute a trade secret, but do not develop that argument as a ground for dismissal, focusing entirely on the argument that Plaintiff did not assert any act of misappropriation. See Docs. 18 at 7-11; 21 at 7. Defendants also state briefly obligation to maintain the secrecy of this information in order to qualify it as a trade secret under A.R.S. § 44- because Plaintiff did not keep passwords

sufficiently secure. Doc. 18 at 10. This argument is premised on a factual issue inappropriate for resolution on summary judgment. See Wound Care Concepts, 2022 WL 320952 information constitutes a trade secret is a question of fact normally resolved by a jury after ing Penalty Kick Mgmt. Ltd. v. Coca Cola Co., 318 F.3d 1290, 1291 (11th Cir. 2003)); Leoni Fiber Optics, Inc. v. Kaus, No. CV-13-562-PHX- SMM, 2013 WL 12106942, at *4 (D. Ariz. June 14, 2013) (considering misappropriation under Arizona state law and finding that arguments as to secrecy of alleged trade secret .

(III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or (iii) before a material change of the position of the person, knew or had reason to know that--

(I) the trade secret was a trade secret; and (II) knowledge of the trade secret had been acquired by accident or mistake[.] 18 U.S.C. § 1839(5)(A)-(B). include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means, but not reverse engineering, independent derivation, or other lawful means of acquisition. § 1839(6)(A)-(B).

Defendants argue that Plaintiff has failed to allege any wrongful conduct that could constitute misappropriation. Doc. 18 at 7. Defendants emphasize that paragraphs 56-58 5 exclusively by thir Id. at 8 (emphasis omitted).

Defendants assert Id. Defendants also assert that Defendant Rosinski directed the conduct Id. at 9. came to work for Defendant PCI and question whether the employees would have had any

Id. Defendants also heavily nstrates conclusively

that the transfer of their records and care was handled in the appropriate and proper Id. at 9-10. Defendants also emphasize that one of s

5 employ and downloaded patient records, and that another employee, while still employed by Plaintiff, falsely told patients that Plaintiff might be closing and encouraged patients to obtain copies of their medical records. Doc. 14 ¶¶ 56-58.

voluntarily provided Defendant Rosinski with a list of patients for him to call and inform Id. at 10. nts about lab results

does not show that he misappropriated records, but rather that Plaintiff failed to remove Defendant Rosinski from the paperwork generated for lab orders. Id.

Plaintiff has plausibly pled acts of misappropriation by Defendant Rosinski. The employees to access

proprietary systems and download patient information that Plaintiff

alleges are trade secrets. Doc. 14 ¶¶ 56-57. Plaintiff also alleges that Defendant Rosinski

stop providing medical services in order to induce them to give him access to their confidential information. Id. ¶ 58. Defendants cite no authority to suggest that these actions could not fall within the statutory definition of misappropriation. And, despite the parties, the factual allegations of the complaint must be taken as true at this stage and the

definition of misappropriation set out above clearly contemplates the involvement of third parties in acts of misappropriation.

former employees took these

(Doc. 14 ¶ 57), which is sufficient at the pleadings stage, especially where other factual allegations support an inference of direction. See NW Monitoring LLC v. Hollander, 534 F. Supp. 3d 1329, 1338 (W.D. Wash. 2021) (information and belief allegations can support misappropriation where additional facts support adequate inferences). Defendants make many factual arguments against the inference of direction by Defendant Rosinski,

Defendant PCI, whether the employees had motives to misappropriate information on

through the patients themselves. But these factual arguments cannot be resolved on a motion to dismiss where the Court is confined to the pleadings, must accept them as true, and must draw inferences in favor of the non-moving party.

c. Defendant PCI. Defendants argue that Defendant PCI is not an appropriate defendant for two reasons: first, because it was not formed until July 13, 2018, -to- 2018, when the alleged acts of misappropriation happened; and second, because the

complaint does not allege any affirmative conduct on the part of Defendant PCI, but only by Defendant Rosinski and other third parties. Doc. 18 at 14. 6

Plaintiff responds that Defendant PCI is liable for the acts of Defendant Rosinski taking place after its formation because he acted not only on his own behalf but on behalf of Defendant PCI, of which he was one of two members. Doc. 20 at 13-14. Plaintiff asserts that Defendant PCI is liable under a vicarious liability theory. Id.

dinarily make principals or employers vicariously liable for the acts of their agents or employees in the Meyer v. Holley, 537 U.S. 280, 285 (2003). A business entity may be liable for intentional torts committed by an agent or employee, such as misappropriation of trade secrets, even if the business

has not authorized the activity, so long as the activity falls within the scope of the agency or employment. of Cal. v. Yari, No. CV 19-5912-MWF (JCx), 2020 WL 3643482, at *6 (C.D. Cal. Apr. 30,

2020). Conduct is considered within the scope of employment when it is performed, at least in part, to benefit the employer. Id. at *5.

Plaintiff has plausibly pled misappropriation liability of Defendant PCI. It is undisputed that Defendant PCI came into existence on July 13, 2018. See Docs. 18 at 14, 14 ¶ 48, 14-2 at 2 (articles of incorporation). The alleged acts of misappropriation took

6 Defendants make these arguments once in their brief, but apply them to each count Plaintiff brings against Defendant PCI. Doc. 18 at 14-15. The Court therefore addresses these arguments separately for each claim brought against Defendant PCI.

place in November and December of 2018, months after it was formed. Doc. 14 ¶¶ 56-58. 7 Plaintiff alleges that Defendant Rosinski directed the acts of misappropriation for the their treatment to Defendant PCI. Doc. 14 ¶¶ 57-58. Plaintiff also alleges that Defendant Rosinski acted on behalf of Defendant PCI. See id. ¶¶ ion. See, e.g., Brain , 2020 WL 3643482, at * lleged that Yari Cisco Sys., Inc. v. Chung,

n that Plantronics and Plaintiff operate in the same industry, the court may reasonably infer that Puorro acquired the information purportedly taken by Williams to benefit Plantronics. As a result, plaintiff adequately alleged that Plantronics misappropriated the information purportedly taken by

2. Under Arizona Law (Count II).

that it fails to allege any acts of misappropriation by Defendants. See Doc. 18 at 7-12. AUTSA is the same as under the DTSA. See A.R.S. § 44-401(2). For the reasons stated

above, Plaintiff has sufficiently stated its claim under the AUTSA against Defendants Rosinski and PCI. SinglePoint Direct Solar LLC v. Curiel, No. CV-21-1076-PHX-JAT, 2022 WL 331157, at *14 (D. Ariz. Feb. 3, 2022).

TSA should be dismissed as a matter of policy. Doc. 18 at 10-12. the right of those patients to continue their treatment with their physician of choice, 7

-to- can conclude that an entity that is legally formed but not yet providing services to the public cannot be liable for the actions of its members.

that policy is incompatible with treating patient contact information as trade secrets and prohibiting doctors from informing patients they have moved offices. Id. at 11.

This policy argument does not show solely moved offices. Doc. 18 at 11-12. But as discussed above, Plaintiff supports its

misappropriation claim with plausible allegations that Defendants improperly obtained trade secret information concerning patients. Patients remain free to be treated by their physician of choice even when physicians must abide by misappropriation laws. B. Fraudulent Inducement (Count I).

Und concealment, and non- Wells Fargo Bank v. Ariz. Laborers, 38 P.3d 12, 34

n.22 (Ariz. 2002) . . lies against one who fraudulently makes a misrepresentation of fact for the purpose of inducing another to act Id. (internal quotations and alterations omitted). A claim of fraudulent inducement under Arizona law requires proof of the nine elements of actionable fraud. Meritage Homes Corp. v. Hancock, 522 F. Supp. 2d 1203, 1218 (D. Ariz. July 3, 2007) (quoting Lundy v. Airtouch Comm., Inc., 81 F. Supp. 2d 962, 968 (D. Ariz. 1999)). 8 The nine elements are: (1) a representation; (2) its falsity; (3) its materiality; (4) the

be acted upon by the recipient in the manner reasonably contemplated; (

8 Fraudulent inducement under Arizona law is a type of fraudulent misrepresentation and is sometimes See, e.g., Gerard v. Kiewit Corp., No. 1 CA-CV 19-0479, 2020 WL 3422844, at *3 (Ariz. Ct. App. June 23, 2020). The elements of fraudulent misrepresentation and fraudulent inducement are the same. Compare Meritage Homes Corp., 522 F. Supp. 2d at 1218 with Wells Fargo Credit Corp., 803

Id. (quoting Wells Fargo Credit Corp. v. Smith, 803 P.2d 900, 905 (Ariz. 1990)). 9 1. Defendant Rosinski.

that occurred after Defendant Rosinski was formed. Doc. 19 at 15. 10 Given this timing, Defendants argue that Plaintiff could not have justifiably relied on Id. (citing Comerica Bank v. Mahmoodi, 229 P.3d 1031, 1033-34 (Ariz. Ct. App. 2010)). The only allegation that predated the Agreement, Defendants argue, is that Defendant Rosinski misled Plaintiff as to his intentions to open a competing practice, and Id. at 15-16. Defendants also argue that Defendant to Plaintiff because Plaintiff could have included a non-compete clause in the Agreement, but chose not to do so. Id. at 16.

be proven merely by unfulfilled promises or expressions concerning

Id. (emphasis omitted) (citing McAlister v. Citibank, 829 P.2d 1253 (Ariz. Ct. App. 1992)). Defendants assert that Plaintiff does not . . that would in any way support a claim that Id. Defendants acknowledge that Plaintiff alleges that Defendant Rosinski registered the 9

Claims grounded in fraud are subject to a heightened pleading standard requiring P. 9(b). Defendants

do not argue that Plaintiff has not met this standard. The Court notes that Plaintiff does allege throughout its complaint particular statements made by Defendant Rosinski on particular dates giving rise to its fraud claim. See, e.g., Doc. 14 ¶¶ 42-43, 47, 49, 52-53, 63-64.

10 entered into the Agreement in March 2018. See Docs. 14 ¶ 45, 14-1 at 2-3. Defendant alleges that they entered into the Agreement on March 4, 2018. Doc. 18 at 15.

Id. at 18 n.16.

and kept him employed, with access to its patients, records, and employees, for ten months

and paid him approximately $200,000 during that period. Doc. 20 at 15. Plaintiff argues that it was induced to hire Defendant Rosinski on the basis of these representations, which were material to it, but tha Plaintiff long term, as shown in part by the registration of the phoenixcancer.com domain

in December 2017. Id. at 16. Plaintiff also alleges that, following formation of the Agreement, Defendant Rosinski fraudulently induced it to maintain his employment by continuously making Plaintiff believe in his long-term commitment despite secretly pursuing plans to open Defendant PCI by filing articles of organization, registering for a national provider misappropriate patient information, and applying for trademark protection for marks of

Defendant PCI. Id. Plaintiff also argues that the absence of a non-compete clause in the Agreem to it because it is not suing for breach of such a clause but rather inducement of employment

Id. at 17.

Plaintiff only relies on acts that occurred after Plaintiff hired Defendant Rosinski and Plaintiff may not rely exclusively on unfulfilled promises or expressions concerning future events to prove fraud. Doc. 21 at 11. Defendants assert that the only act that Plaintiffs allege prior to entry of the Agreement is the registration of the phoenixcancer.com domain name, an allegat Id. Defendants attach to their reply brief an exhibit, which appears to be a receipt sent from GoDaddy.com, of domain

registration fees for phoenixcancerinstitute.com and phoenixcancer.com on September 24, 2018. See id. at 15. Defendants argue that this receipt is a source whose accuracy cannot reasonably be questioned, and the domain registration date can be accurately and readily determined from it and therefore the Court must take judicial notice of the document as Id. at 2. Defendants argue that, with this date established, Plaintiff has no evidence

Id. at 3.

The Court declines to take judicial notice of the receipt offered by Defendants. First, Defendants made this request only in their reply brief and thereby deprived Plaintiff of an opportunity to be heard on its propriety. See Fed. R. Civ. P. 201(e); id., note to subdivision

Reynolds v. Hedgpeth, (9th Cir. 2012) (finding abuse of discretion where court failed to give party opportunity to respond to request for judicial notice). Second, the earliest date that Defendants registered the domain phoenixcancer.com does not appear readily determinable from the receipt because it is not clear whether this purchase could have been, for example, a renewal of the domain name or a purchase of it from another person or entity affiliated with Defendant PCI. See Wright & Miller, Federal Prac. & Proc. § 5106.1 (2d ed. 2011) (can only be used through an intermediary such as an expert witness or an interpreter, the court does not really rely on the source but on the . Moreover, even if the Court were to take judicial notice of the receipt and consider it conclusi claim for fraud would not be required because the date of domain registration does not conclusively disprove any element of the claim, but appears merely to be one way that Plaintiff intend

Defendants cite Comerica Bank v. Mahmoodi for their assertion that allegedly inducing behavior must predate conduct in reliance on that behavior. See Docs. 18 at 15,

21 at 11. It is true that the Comerica court relied in part on this temporal issue in reversing See undisputed that by the time Hadi [submitted the allegedly false representation,] Xeba had

compel dismissal of le instances of allegedly false representations prior to the effective date of the Agreement. The complaint alleges that in 2017 Defendant Rosinski and his wife planned to move to Arizona and establish their own medical practice and that Defendant Rosinski reached out to Plaintiff seeking employment in order to solicit away its employees and patients. Doc. 14 ¶¶ 35-37. Plaintiff also alleges that Defendant Rosinski registered the phoenixcancer.com domain name on December 12, 2017. Id. ¶ 39. Plaintiff alleges that, with these intentions, Defendant nonetheless represented to Plaintiff during a meeting in January 2018 that he and arranged to have a letter of recommendation sent to Plaintiff that Id. ¶¶ 42-43. Based on these representations of long term intent, Plaintiff

alleges that it agreed to employ Defendant Rosinski under the Agreement. Id. ¶ 44. All of this allegedly happened before the effective date of the Agreement, and Plaintiff specifically incorporated these acts into its pleading of the fraudulent inducement claim. See id. ¶ 74 (referencing paragraphs 35-43 and alleging materiality). This is therefore not a case where no conduct that could have induced reliance took place before the date of reliance.

Nor does McAlister v. Citicorp compel a different result. In McAlister, the court affirmed a grant of summary judgment for the defen

expressions concerning future events only if s Id. T

alleges that Defendant Rosinski had a plan to open his own practice and, prior to initiating contact with Plaintiff, decided to seek employment with an established facility in order to learn about the market, establish a name presence, identify experienced employees to hire away, and identify patients to persuade to leave the established facility. Doc. 14 ¶¶ 35-36. These factual to Plaintiff were made with the present intent not to perform. 11 2. Defendant PCI.

Defendants argue that the claim for fraudulent inducement cannot be brought against PCI because the actions on which the claim is based predate its formation on July 13, 2018, and because the complaint does not allege any affirmative action by it. Doc. 18 at 14.

Plaintiff does not dispute that Defendant PCI is liable only for actions taken after its formation. See Doc. at CI] is liable

for each payment made . . . therefore need not decide whether Defendant PCI could plausibly be liable for the alleged

torts of its incorporator prior to its creation. To the liability of Defendant PCI prior to its formation, it will be dismissed.

allegedly inducing Plaintiff to continue his employment will not be dismissed. Defendants

provide no authority upon which the Court can conclude this is not a viable theory of fraud. vicarious liability is available if the actor acts within the scope of employment. Baker ex

rel. Hall Brake Supply, Inc. v. Stewart Title and Trust of Phoenix, Inc., 5 P.3d 249, 256

11 Defend representations of his long term commitment after his hiring induced it to keep the Agreement in effect, instead focusing solely on whether Plaintiff was fraudulently induced to enter into the Agreement in the first place.

(Ariz. Ct. App. 2000) (vicarious liability of employer available where fraudulent conduct furthered its business). C. Tortious Interference (Count V).

Defendants do not contend that Plaintiff has failed to adequately plead the elements of a tortious interference claim, arguing instead that the claim is barred by a two-year statute of limitations. Doc. 18 at 6. They argue that even the latest conduct alleged by Plaintiff took place on March 19, 2019, two years and nine months before Plaintiff filed this lawsuit on December 4, 2021. Id.; see also Doc. 1. Defendants also argue that Plaintiff knew of the conduct more than two years before filing suit because Plaintiff retained an attorney and sent a demand letter to Defendants on February 1, 2019, which made the same allegations as the complaint. Doc. 18 at 6-7.

Plaintiff responds that the tortious interference did not occur only at the time when Defendants allegedly misappropriated patient records but continued each time Defendants treated and billed its former patients. Doc. Plaintiff argues, that causes its Id.

Plaintiff asserts that the doctrine of continued violations should apply. Id. Plaintiff argues that Arizona law disfavors statute of limitations defenses, preferring to resolve cases on their merits, and when an injury is continuing in nature, the applicable statute of limitations begins to run only when the injury ends. Id. at 9.

In reply, Defendants argue that application of the continuing violation doctrine is inappropriate because, although Plaintiff may suffer an ongoing injury, once a patient terminated their care with Plaintiff there is no longer any relationship with which Defendants could interfere. Doc. 21 at 5. Because Plaintiff merely suffers ongoing damages as a result of discrete acts, Defendants argue, application of the continuing violations doctrine is not warranted. Id. (citing , 536 U.S. 101, 114 (2002)).

ye 12-542; Clark v. Airesearch Mfg. Co.

of Ariz., Inc. interference accrues when the plaintiff knew or reasonably should have known of the

Vazirani & Assocs. Fin., LLC v. Advisors Excel, LLC, No. 1 CA CV 12 0449, 2013 WL 3009363, at *3 (Ariz. Ct. App. June 13, 2013) (quoting Dube v. Likins, 167 P.3d 93, 98 (Ariz. Ct. App. 2007)). A statute of limitations defense may be raised by a motion to dismiss if the running of the statute is apparent on the face of the complaint. Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980). But the complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim. Hernandez v. City of El Monte, 138 F.3d 393, 402 (9th Cir. 1998). Because a statute of limitations defense is an affirmative defense, the defendant bears the burden of proof in establishing its applicability. Est. of Page v. Litzenburg, 865 P.2d 128, 135 (Ariz. Ct. App. 1993).

relationships with its patients primarily between November 2018 and March 2019. But for statute of limitations purposes, the relevant inquiry is not simply when the interfering

alleged conduct had caused [its patients] to terminate [their] business relationships with See Vazirani & Assocs. Fin., LLC, 2013 WL 3009363, at *3. The statute of

caused the termination. While the demand letter Defendants argue they received from

Plaintiff in February 2019 could bear on this question, the letter itself is not before the Court. necessarily quest Dube, 167 P.3d at 99 (quoting Doe v. Roe, 955 P.2d 951, 961 (Ariz. 1998)). The Court will not dismiss the claim at this juncture.

The Court cannot a continuing tort that persists as long as Defendants continue to treat its former patients. An element of a claim for tortious interference with business relationships is that the relationship was breached or terminated. Id. at 98. Plaintiff alleges that its relationship with the patients in fact ended. Doc. 14 ¶ These facts

do not support a continuing violation theory. See, e.g., McManus v. Am. Exp. Tax & Bus. Servs., Inc., 67 F. Supp. 2d 1083, 1089 (D. Ariz. Sept. 8, 1999) (considering claim for ; see also McNair v. Maxwell & Morgan PC, 142 F. Supp. 2d 859, 867 (D. Ariz. Nov. 4, 2015) . . . do not implicate the continuing- . To the extent that ce by Defendants after its patients transferred their care, it will be dismissed. Defendants can reassert their statute of limitations argument on a more complete record at the summary judgment stage of this case. 1. Defendant PCI.

As with the other counts against Defendant PCI, Defendants argue that PCI is not a -to-be and second, the complaint alleges affirmative conduct only by Defendant Rosinski and third parties, not by PCI. Doc. 18 at 14.

interference claim. The allegedly interfering conduct underlying the claim took place after PCI was legally formed, and entities can be vicariously liable for the tortious acts of their employees or officers. Meyer, 537 U.S. at 285; Carey v. Maricopa Cnty., No. cv-05-2500- PHX-ROS, 2009 WL 750225, at *10-11 (D. Ariz. Mar. 10, 2009) (holding that plaintiff raised genuine issue of material fact as to vicarious liability of entity for tortious

interference). As discussed in more detail above, Plaintiff has adequately pled that Defendant Rosinski was acting on behalf of Defendant PCI. D. Breach of Contract (Count IV).

Under Arizona law, a claim for breach of contract has three elements: (1) the existence of a contract between the plaintiff and defendant; (2) breach of the contract by defendant; and (3) resulting damage to the plaintiff. Frank Lloyd Wright Found. V. Kroeter, 697 F. Supp. 2d 1118, 1125 (D. Ariz. Mar. 15, 2010).

Defendant Rosinski does not argue that Plaintiff has not shown the existence of a contract or damages, and instead focuses only on whether Plaintiff has shown breach. See Doc. 18 at 12-14. Defendant Rosinski argues that because the Agreement did not contain a non-compete or non-solicitation clause, his actions in establishing a competing business and allegedly soliciting employees and patients could not have breached the Agreement. Id. at 12. Defendant Rosinski also argues that the confidentiality clause of the Agreement

ules and regulations, during Id. at 12-13. 12

Defendant Rosinski again emphasizes that Plaintiff does not allege that he personally took medical records, only that third parties did. Id. at 13. Defendant argues that Plaintiff only describes one

federal privacy law, HIPAA, in its complaint and that his

violate HIPPA. Id.

12 The complaint alleges breach of the confidentiality clause of the Agreement, which states as follows:

While providing services to Employer, physician shall abide by all state and federal privacy laws, rules and regulation confidential information regarding the records of Employer, patients, plans, or any other aspect of Employer which it considers to be confidential or secret including compensation rates. Docs. 14 ¶ 90, 14-1 at 2-3.

- compete clause is irrelevant because the breach of contract it alleges is that he, with the help of co- . . . confidential patient fil in violation of the confidentiality clause of the Agreement. Doc. protected by HIPAA and other medical and financial records that [it] maintained as

confidentiality clause. Id.

In reply, Defendant Rosinski argues address his alleged misappropriation of patient records, it cannot also allege that conduct as a breach of the confidentiality clause. Doc. 21 at 7. Defendant reasserts his prior argument that Plaintiff asserted no act of misappropriation by Defendant himself, only by third parties. Id. contra Id.

complaint alleges that the Agreement was in effect between it and Defendant Rosinski.

Doc. 14 ¶ 89. Plaintiff alleges that the confidentiality clause was part of the Agreement and that patient records fell within its scope and were protected by HIPAA. Id. ¶¶ 90-92. Plaintiff also alleges that, by misappropriating the patient records, Defendant Rosinski breached the confidentiality clause of the Agreement. Id. ¶ 93. Finally, Plaintiff alleges damages. Id. ¶ 94.

these facts absent a non-compete or non-solicitation clause misunderstands the conduct Plaintiff alleges breached the Agreement. Plaintiff does not allege in Count IV that

patients itself breached the terms of the contract. Rather, Plaintiff argues that Defendant Rosinski breached the confidentiality clause by improperly obtaining and misappropriating patient records. To the extent that the confidentiality clause only prohibits failing to abide by state and federal privacy laws, Plaintiff alleges that the patient records were protected

by HIPAA . Defendant makes no effort to explain why actions that allegedly violate these federal and state laws would not constitute a breach of the confidentiality clause. Additionally, to the extent that Defendant repeats his unsupported position that he cannot possibly be liable for the acts of third

parties which Plaintiff plausibly alleges were done at his direction, the Court again rejects it.

breach of contract because the confidentiality clause only applied while he was employed by Plaintiff. The acts of misappropriation that form the basis of the claim all appear to Plaintiff alleges that its former employees improperly obta December of 2018. Doc. 14 ¶¶ 56-58. Defendant did not give his notice of termination of

the Agreement until January 4, 2019, and his last day providing services under the Agreement was January 18, 2019. Id. ¶¶ 61, 69.

acts of misappropriation cannot also support a breach of contract claim. It is not clear to the Court, and Defendant cites nothing to explain, why a plaintiff could assert only conduct is prohibited by both a contract and independent statutory law. Indeed, claims for

misappropriation and breach of contract based on the same facts are routinely asserted. See, e.g., Modular Mining Sys., Inc. v. Jigsaw Tech., Inc., 212 P.3d 853, 860-61 (Ariz. Ct. confidentiality clause of an employment agreement and misappropriation of trade secrets

EMP Forwarding LLC v. Prieto, No. 1 CA-CV 19-0392, 2020 WL 1684024, at *5 (Ariz. Ct. App. Apr. 7, 2020) (similar); Firetrace USA, LLC v. Jesclard, 800 F. Supp. 2d 1042, 1054 (D. Ariz. July 30, 2010) (recounting bench trial where the defendant was found liable for misappropriation of trade secrets and breach of a confidentiality agreement based on the same facts).

assertion that the confidentiality clause is does not support its motion to dismiss. Contractual language that is susceptible to more than one interpretation is ambiguous, and giving effect to the intention of the parties in that context may require consideration of extrinsic evidence and fact finding. See In re Est. of Lamparella, 109 P.3d 959, 963 (Ariz. Ct. App. 2005). This type of fact finding is inappropriate on a motion to dismiss. Because the Court has already found that Plaintiff has plausibly pled a claim for breach of contract, however, it makes no findings regarding the ambiguity of the confidentiality clause of the Agreement at this stage of the litigation. E. Breach of the Duty of Good Faith and Fair Dealing (Count VI).

Defendant Rosinski argues that Plaintiff cannot bring a claim for breach of the

upon a breach of the underlying contract, and . . . 18 at 14.

Plaintiff responds that the implied covenant arises by virtue of a contractual relationship and that the implied covenant can be breached even in the absence of a breach of an express provision of the contract if a party is denied the reasonably expected benefits of the agreement. Doc. 20 at 12 (citing IOW, LLC v. Breus, 425 F. Supp. 3d 1175, 1187- 88 (D. Ariz. 2019). Plaintiff alleges that the implied covenant imposed on Defendant Rosinski a duty to exert his best efforts for the services described in

the Agreements for the benefit of Plaintiff, to act honestly in all dealings with Plaintiff in all matters material to the Agreement, and to not engage in any conduct that would harm the financial or reputational interests of Plaintiff. Id. at 11-12. Plaintiff also alleges Defendant Rosinski breached the implied covenant by failing to exert his best efforts on its behalf and instead opening a competing facility and by misleading Plaintiff as to his intentions to do so and to poach its employees and patients. Id. at 12.

In reply, Defendant argues that the duties Plaintiff alleges are imposed on it by the

e for its motion to dismiss. Id. In order to demonstrate a breach, Defendant argues, Plaintiff

would have to demonstrate that he did not actually perform the work required by the Agreement, but that Plaintiff alleges no improper treatment of patients by Defendant. Id. at 9. Defendant also argues that his alleged misleading of Plaintiff is addressed by other claims and therefore should not be the subject of contract claims. Id.

in [t]he law implies a covenant of good faith Rawlings v. Apodaca, 726 P.2d 565, 569-70 (Ariz. 1986). Wells Fargo Bank, 38 P.3d at 28. Id. The implied covenant is breached when a party denies Nolan v. Starlight , 167 P.3d 1277, 1284 (Ariz. Ct. App. 2007); see also Rawlings, 726 P.2d at of the other to receive the benefits which flow from their agreement or contractual Mastro Grp. LLC v. Am. Rest. Enters., Inc., Nos. 1 CA-CV 06-0456, 1 CA- CV 06-0717, 2008 WL 4017948

Diagnostic Lab., Inc. v. PBL Consultants, 666 P.2d 515, 519 (Ariz. Ct. App. 1983)).

Defendant assertion is mistaken. See Doc. 18 at 14. party

may breach the implied covenant even in the absence of a breach of an express provision of the contract by denying the other party the reasonably expected benefits of the Nolan, 167 P.3d at 1284; see also Wells Fargo Bank, 38 P.3d at 2 The duty of good faith extends beyond the written words of the contract. . . . [A] party may

nevertheless breach its duty of good faith without actually breaching an express covenant .

Whether Defendant Rosinski breached the implied covenant depends on what

were. Mastro Grp., LLC, 2008 WL 4017948, at *5; Elec. Payment Providers, Inc. v. Kennedy, No. 1 CA-CV 20-0382, 2021 WL 6087642, at *7 (Ariz. Ct. App. Dec. 23, 2021). Plaintiff has pled specific duties it considers to have been reasonably expected under the Agreement, including that Defendant Rosinski would exert his best efforts for its benefit, act honestly in dealings with it, and not engage in conduct that would harm its financial or reputational interests. Doc. 14 ¶ Plaintiff created these duties , duties of loyalty and honesty have been implied in similar circumstances. See, e.g., nlimited

LLC v. Noder, 314 P.3d 89, 97 (Ariz. Ct. App. 2013) (finding plausible claim for breach of covenant of good faith and fair dealing on basis of duty of loyalty where employee opened a competing business and solicited co-workers to join it while working for employer); Diagnostic Lab., Inc., 666 P.2d § 205, comment (d)). W

Elec. Payment Providers, Inc., 2021 WL 6087642, at *7.

other claims also rest on his allegedly misleading actions, Plaintiff cannot assert another

claim on the same factual basis. See Doc. 21 at 9. This is simply an incorrect assertion of pleading requirements. Plaintiff has plausibly pled a claim for breach of the implied covenant of good faith and fair dealing against Defendant Rosinski. ////////////

IT IS ORDERED that Defendants motion to dismiss (Doc. 18) is granted insofar

formation and Count V against Defendants for actions taken after the relevant business relationships were terminated. In all other respects the motion is denied.

Dated this 16th day of May, 2022.