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| DAVID M. NAMEROW, M.D.,<br><br>Plaintiff,<br>v.<br><br>PEDIATRICARE ASSOCIATES, LLC; SCOTT W. ZUCKER, M.D.; JEFFREY M. BIENSTOCK, M.D.; and MELISSA CHISM, M.D.<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>CHANCERY DIVISION: BERGEN COUNTY<br>DOCKET No. C-273-17<br><br>**OPINION** |

Argued: November 13, 2018
Decided: November 29, 2018

Appearances: Robert Novack, (Bressler, Amery & Ross, P.C., attorneys) for plaintiff

Steven D. Gorelick, (Garfunkel Wild, P.C., attorneys) for defendants

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**HON. EDWARD A. JEREJIAN, P.J.Ch.**

This matter having been tried before the Court on November 13, 2018 for determination of a single remaining issue – the Retirement Purchase Price to be paid to Dr. David Namerow (hereinafter "Plaintiff") pursuant to his June 30, 2017 retirement from PediatriCare Associates, LLC (hereinafter "Defendants").

## BACKGROUND

The Parties entered into an original Operating Agreement on or about January 1, 2000, to form PediatriCare as a limited liability company, with the purpose of owning and operating a medical practice. See October 9, 2018 Opinion, p. 1. On or about March 12, 2001, the Parties entered

into an Amended Operating Agreement (hereinafter "the Agreement"), which is the operative document that governs the relationship. Id.

The root of the pertinent issues in this matter is the interpretation of Section 10 of the Agreement, which states in full:

> The total value of the Company ("Company Value") shall be the last dated amount set forth on the Certificate of Agreed Value, attached hereto as Exhibit G and made part hereto, executed by the Members. The Members shall exercise their best efforts to meet not less than once per year for the purpose of considering a new Value but their failure to meet or determine a value shall not invalidate the most recently executed Certificate of Agreed Value setting forth the Company Value then in effect. If the Parties fail to agree on a revaluation as described above for more than two (2) years, the Company Value shall be equal to the last agreed upon Value, adjusted to reflect the increase or decrease in the net worth of the Company, including collectible accounts receivable, since the last agreed upon Value. The value of a Member's Interest ("Value") shall mean the Company Value multiplied by the percentage interest held by said Member and being purchased hereunder, less any indebtedness that the Selling or Disabled Member, the Decedent, or a Member departing for any other reason contemplated hereunder may have to the Company or to the other Members, whichever the case may be. Plt's. Trial Ex. 1, at p. 30-31.

The most recent Certificate of Agreed Value attached to the March 2001 Operating Agreement stated the "Value of the Company" to be $2.4 million, and was signed by Dr. Namerow, Dr. Zucker, Dr. Bienstock, and Dr. Chism, dated January 1, 2000. Id. at Ex. G.

Plaintiff announced his intention to retire in January 2016, triggering the application of Section 10 of the Agreement. October 9, 2018 Opinion, p. 3.

## PROCEDURAL HISTORY

Plaintiff filed the initial Complaint in the instant matter on October 11, 2017.

On October 9, 2018, this Court granted partial summary judgment in favor of Defendants, finding that there were no genuine issues of material fact as to the proper method for determining the Retirement Purchase Price. Specifically, this Court held that Section 10 of the Agreement

unambiguously provides for a Net Worth valuation as the clear method for calculating the buyout price. October 9, 2018 Opinion, p. 9.

Specifically, Section 10 of the Operating Agreement, effectively, requires that the "Company Value" used to determine the Retirement Purchase Price for Plaintiff's twenty-five percent (25%) interest is to be determined by applying the $2.4 million "Company Value" last agreed upon and certified in 2000, and subsequently adjusting it by the "increase or decrease in the *net worth* of the Company, including collectible accounts receivable, since the last agreed upon Value." See id.

With the October 9, 2018 partial summary judgment narrowing the scope of trial to the sole remaining issue, the parties were tasked with calculating the Retirement Purchase Price in accordance with Section 10 of the Agreement. Accordingly, the parties each retained expert witnesses who submitted reports and provided testimony at trial. The Court made findings as to the adequacy and precision of both expert reports, which are outlined below.

**PLAINTIFF'S EXPERT: TED CARNEVALE**

Plaintiff's Expert Ted Carnevale (hereinafter "Plaintiff's Expert") began his June 4, 2018 report by providing the New York Society of Certified Public Accountants ("NYSCPA") definition of "net worth" as "similar to equity, the excess of assets over liabilities." See Plt.'s Trial Ex. 2, p. 1. He then went on to assume that because the doctors agreed upon a $2.4 million valuation of the practice in 2000, the doctors must have "[agreed] there was $1,426,942-1,810,293 of *value beyond the net tangible assets on the books at that time*. This *intangible value*, although unrecorded, is an asset of the company that would be considered goodwill." Id. at p. 2 (emphasis added).

From there, Plaintiff's expert proceeded to apply various metrics resulting in ratios of the relationships between the physician owners' compensation figures in the year 2000 and the Company's revenues in the year 2000 which were subsequently juxtaposed to similar measures in

2016. See id. at p. 2-3. Plaintiff's expert opined that this was the proper way to generate the value of the Company's intangible assets in 2016. As a result, Plaintiff's expert concluded the "Company Value" range to be between $5,620,500 and $6,750,901. Id. at p. 3.

**DEFENDANTS' EXPERT: THOMAS HOBERMAN**

Defendants' Expert Thomas Hoberman's (hereinafter "Defendants' Expert") report dated July 17, 2018 provided both an independent company valuation in accordance with the Court's instruction, as well as a rebuttal and critique of Plaintiff's Expert decision to include various "intangible values" in his valuation of the Company.

As an initial matter, Defendants' Expert prepared his own calculation of the net worth of PediatriCare *based upon the terms contained in the Operating Agreement*. See Plt.'s Trial Ex. 3, at p. 1 (emphasis added). Specifically, Defendants' Expert executed his valuation of PediatriCare under a very different assumption than that of Plaintiff's Expert as to exactly what "total assets" encompasses. Specifically, it is Defendants' Expert's position that "net worth" is "the total amount of all assets minus all liabilities, *as stated in the balance sheet*." See id. at p. 3 (emphasis added). In sum, Defendants' Expert performed a net worth valuation based solely on assets and liabilities as recorded on the financial statement of the Company.

Based on the terms contained in Section 10 of the Agreement, Defendants' expert provides the following calculation of value of PediatriCare as of December 31, 2016:

**Agreed Value as of January 1, 2000 ("Effective Date")**

**Minus**: Net Worth as of January 1, 2000, including collectible A/R

**Plus**: Net Worth as of Effective Date, including collectible A/R

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**Equals**: Practice Value as of Effective Date.

Defendants' expert made the following adjustments to the Company's balance sheets:

> (1) Collectible accounts receivable – As stipulated in Section 10 of the Agreement, [he] adjusted the balance sheet to reflect the values of collectible A/R; (2) CSV Life Insurance – This is the cash surrender life insurance policy, which is not part of the operations of the company and therefore [they] have removed it from the balance sheets; (3) Goodwill – As per the Practice, this payment of $100,000 was made by the Company to a Retiring Member in 2015 as an advance of the amount due to the Retiring Member pertaining ot his retirement. It appears that this prepayment was characterized for tax purposes as "goodwill." Goodwill is generally recorded when a business acquisition takes place, which was not the case with the Practice. Accordingly, [he] removed the "goodwill" amount from the balance sheets. Id. at p. 9.

As a result, Defendants' expert established a "Company Value" range between $2,839,765 and $3,223,16. Id. at p. 11.

Of particular significance, Defendants' Expert takes issue with Plaintiff's Expert's decision to incorporate intangible assets into his valuation. As will be discussed below, it is clear that the decision to incorporate "intangible assets" and "goodwill" significantly drives up the Company Value in a manner that the Court finds inconsistent with the explicit language of the Operating Agreement.

**ANALYSIS**

The clear distinction between the two Expert testimonies presented at trial was the determination of whether or not the calculation of the Company Value in accordance with the "net worth" approach in Section 10 of the Agreement should include "intangible assets" such as goodwill.

The Court finds the definition of "net worth" provided by Defendants' Expert to be correct, and thus applicable to calculating the Retirement Purchase Price for Plaintiff. It is clear to this Court, as Defendants' Expert points out on multiple occasions, that "net worth" is represented by "the total amount of all assets minus liabilities, *as stated in the balance sheet."* Plt.'s Trial Ex. 3, at p. 3 (emphasis added).

As stated above, Plaintiff's expert relies on a definition from the NYSCPA that defines "net worth" simply as "similar to equity, the excess of assets over liabilities." Plt's Trial Ex. 2, at p. 1. Although this definition does not significantly deviate from Defendants' Expert's definition in substance, it is both limited and vague in a manner that allows Plaintiff's Expert to manipulate the Company Value calculation for the benefit of Plaintiff. Plaintiff's Expert himself even concedes that "it is important to note that lenders often ask for intangibles to be excluded from Net Worth when evaluating borrowers . . . ." Id. at p. 3.

Further, Defendants' Expert expands on this concession by noting that the Generally Accepted Accounting Principles (hereinafter "GAAP") developed by the Financial Accounting Standards Board specifically mandate that intangible assets such as "good will" are "*not* recorded on the balance sheet of an entity unless it is the product of an acquisition or some other type of business combination." See Plt.'s Trial Ex. 3, at p. 4 (emphasis added). In fact, the inclusion of intangible assets on a balance sheet, *even in an acquisition or business combination*, is the exception, *not* the rule. See id. (emphasis added). Thus, the Court finds that it was improper to include intangible assets such as goodwill in the net worth calculation.

From there, Plaintiff's Expert's flawed approach lead to further argument and speculation as to the original intent of the parties, rather than expert opinion. Specifically, the only explicit exception and adjustment pointed out in the Agreement calls for the net worth to be adjusted for "collectible accounts receivable." Plt's. Trial Ex. 1, at p. 30-31. However, based on the $2.4 million original Certificate of Value for purposes of the Operating Agreement, and a range of $589,707 to $973,058 of *tangible* assets appearing on the PediatriCare's books, Plaintiff's expert blindly *assumes* that the difference between the two figures *must* account for intangible assets. This assumption is

nothing more than a self-serving conjecture of the Parties intent in 2000 designed to inflate the 2016 Company value.

Further, Plaintiff's Expert achieves the objective outlined *supra* by subsequently creating a ratio between the physician owners' compensation figures in 2000, the company's revenues in 2000, and the company's *purported* intangible assets, which he then converts to an inflated figure for the year 2016. However, the Agreement clearly does not reference any other specific adjustment aside from "collectible accounts receivable." It is perfectly reasonable to conclude that if the owners intended to include goodwill or any other intangible assets, the Agreement would have expressly called for it. Without such explicit intent to include intangible assets in the net worth calculation, the Court cannot find Plaintiff's Experts calculation to be representative of an accurate net worth evaluation for the purposes of determining the Retirement Purchase Price.

This Court is mindful that Plaintiff, as the first member of PediatriCare to retire, may feel as though his efforts as one of the founding members and an established physician for thirty-eight years are being shortchanged, and this Court to some extent does not disagree. However, based on the language of the operating agreement and the lack of any updates to the Certificate of Agreed Value, the Court is left with little discretion but to apply the appropriate formula as was agreed upon in 2001.

In providing a range, the Net Worth calculation provided by Defendants' Expert gives the Court discretion as to what would be the suitable amount, and the Court finds that Plaintiff should be entitled to the higher amount possible under the calculation.

## CONCLUSION

The Agreement clearly states that the net worth be adjusted for "collectible accounts receivable" and does not reference *any* other specific adjustment. Accordingly, Defendants' Expert's net worth calculation does exactly that. Specifically, Defendants' Expert's calculation establishes a Company Value range between $2,839,765 and $3,223,116.

The Court thus finds the $3,223,116 figure to be an accurate 2016 Company Value for determining the Retirement Purchase Price, which would accordingly result in a $805,779 buyout of Plaintiff. This Purchase Price, of course, is in accordance with the Section 10 of the Operating Agreement in that it represents Plaintiff's twenty-five percent (25%) interest of the $2.4 million Company Value last agreed upon and certified by the four members in 2000, adjusted by increasing the net worth of the Company, including collectible accounts receivable.