

restore his rights and distributions. Until a judgment of reinstatement and restitution is entered the Plaintiff seeks for the Court to delay PLLC transactions and distributions, and perform an accounting of the profits and distributions of which the Plaintiff claims he is being deprived. The Plaintiff also seeks recovery of attorneys fees and damages.

The case is presently before the Court on the Defendants' Motion to Dismiss. It has two parts. The first aspect of the Motion is that to the extent the *Verified Amended Complaint* asserts a derivative cause of action on behalf of the PLLCs, it should be dismissed for: insufficient pleading of harm to the PLLCs, Plaintiff's lack of standing, and Plaintiff's failure to comply with the prelitigation notice of Tennessee Code Annotated section 48-249-802. As to the Plaintiff's individual/direct claims, the Defendants assert they fail to state a claim.

After studying the briefs and the law, and considering argument of Counsel at the November 18, 2015 hearing, the Court grants part of the Motion to Dismiss. The Court dismisses any derivative claims asserted by the Plaintiff for lack of standing. As to Plaintiff's individual/direct claims, the Court denies the Motion to Dismiss.

In dismissing any derivative claims, the Court adopts the analysis and legal authorities of the Defendants and concludes that under Tennessee law, derivative claims can only be brought by an LLC member. This conclusion is based upon the text of Tennessee Code

Annotated section 48-249-801(b) that “a member or holder of financial rights of a member-managed LLC” may bring a derivative claim. The Court also relies upon the following Delaware cases cited by the Defendants in the absence of Tennessee case law: *see CML V, LLV v. Bax*, A.3d 238, 241 (Del. Ch. 2010) *aff’d*, 28 A.3d 1037 (Del. 2011), *as corrected* (Sept. 6, 2011) (“In a derivative action, the plaintiff must be a member or an assignee of a limited liability company interest at the time of bringing the action . . .”); *Reid v. Siniscalchi*, No. CV 2874-VCN, 2014 WL 6589342, at *12 (Del. Ch. Nov. 20, 2014) (“In order to bring derivative claims on behalf of a limited liability company, the plaintiff must be a member or an assignee of a limited liability company interest at the time of bringing the action and: (1) At the time of the transaction of which the plaintiff complains . . .”).

Applying the foregoing law to the face of the pleadings as the Court is required to do in ruling upon a motion to dismiss, the Court sees that at paragraph 29 of the *Verified Amended Complaint*, the Plaintiff acknowledges that the Defendants have refused to reinstate him, and he has not been treated as a member since July 2015. From this, the Court concludes that on the face of the pleadings it is established that the Plaintiff’s status is that he is not presently a member of the three PLLCs and will not be a member unless he obtains a court ruling to that effect. Such a ruling is not a foregone conclusion for the Plaintiff must not only prove that his removal was wrongful, but he must also prove that the remedy of reinstatement is possible, practical and the appropriate remedy as opposed to other remedies in the Court’s discretion such as a buy-out and/or damages. Critically, though, at this

juncture, the Plaintiff is not presently a member of the three PLLCs; therefore, he does not have the statutory right to bring a derivative claim. Accordingly, it is ORDERED that to the extent the Plaintiff is asserting derivative claims on the part of the PLLCs, those claims are dismissed as premature and not ripe for, until Plaintiff is reinstated as a member, the Plaintiff lacks standing to assert a derivative action on behalf of the PLLCs.

With respect to the second aspect of the motion to dismiss regarding Plaintiff's direct claims, these consist of claims for breach of contract, accounting, breach of fiduciary and other duties, and conversion. On these claims, the Court denies the Motion to Dismiss.

Beginning with the breach of contract claim and the subclaim that the Defendants breached the Operating Agreement by failing to give notice to or obtain consent of the Plaintiff on the upcoming vote of removal, the briefing established that disposition of this subclaim depends upon disputed constructions of the Operating Agreement and facts outside of the record. Under these circumstances, the Court cannot grant the Motion to Dismiss the breach claims regarding the voting procedures.

As to the sufficiency of another of Plaintiff's breach of contract subclaims regarding Plaintiff's allegations that he has not breached the Operating Agreement but the Defendants have, the allegations of the *Verified Amended Complaint* are sufficient. Filed of record on November 19, 2015, in the nature of a Tennessee Civil Procedure Rule 10 attachment to the pleadings, are the Actions By Written Consent of each LLC taken by the Defendants stating

that the Plaintiff is removed as a member of the three PLLCs for violating Article XVI (the noncompetition provision of the Operating Agreement). There is however, no attendant description or explanation of the facts and conduct the Plaintiff allegedly committed to violate the noncompetition provisions. Under these circumstances and applying *Webb v. Tennessee Habitat for Humanity, Inc.*, 346 S.W.3d 422 (Tenn. 2011), the Court sees that paragraphs 26, 27, 28 and references in paragraph 30b and 35a of the *Verified Amended Complaint* to the Plaintiff's "improper exclusion" are sufficient to state a claim for breach. Until more details are known by the Plaintiff about the particular violative conduct the Defendants claim he engaged in, for all the Plaintiff knows it is sufficient for him to allege he is not in violation or breach, and therefore the Defendants' removal of the Plaintiff constitutes a breach.

As to the Plaintiff's claim that the noncompetition provision is ambiguous and unenforceable, this is sufficiently demonstrated on the pleadings by the quotation of the text and the allegation that the provision could refer to alternative geographic scope (section 16.2 or 16.03 of the agreement) for competition during the term of the agreement. That is enough to state a claim that the noncompetition agreement is susceptible to more than one construction.

On Plaintiff's claims for: an accounting, being prevented from practicing dentistry, loss of profits and distributions, and conversion, these are all proper as contingent claims.

That is, if the Plaintiff proves his removal was wrongful, these claims are remedies and damages that flow from that wrongful removal.

As to the breach of fiduciary duty claims, the Defendants assert it should be dismissed because under Tennessee law, the members of a member-managed limited liability company owe fiduciary duties to the company, not to the individual members. *Pravak v. Meyer Eye Grp., PLC*, No. 07-2433-JPM-DKV, 2008 WL 2951101 at *7 (W.D. Tenn. July 25, 2008); *McGee v. Best*, 106 S.W.3d 48 (Tenn. Ct. App. 2002).

In opposition, the Plaintiff cites to the exception, stated in *ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.3d 1, 23 (Tenn. Ct. App. 2005), that a majority LLC shareholder owes a fiduciary duty to a minority shareholder. From *ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.3d 1, 23 (Tenn. Ct. App. 2005), this Court gleans that the more complicated circumstance of oppression of a minority LLC member by a majority member is actionable for breach of fiduciary duty; whereas breach of uncomplicated contractual duties by an LLC member against the other is not actionable as breach of fiduciary duty.

The Defendants' reply is that there are no majority shareholders in the three PLLCs in issue because the *Verified Amended Complaint* at paragraphs 13, 14 and 15 states that each member owns the exact same percentage. In other words, the Plaintiff owns the same percentage as each one of the Defendants.

The Plaintiff's rejoinder is the principle that when individual shareholders, who cannot exert control over the corporation, form a control group, that group owes fiduciary

duties to their fellow shareholders. *Pepper v. Litton*, 308 U.S. 295, 306 (1939) (citing *Southern Pacific Company v. Bogert*, 250 U.S. 483, 492 (1919)); see also *Dubroff v. Wren Holdings, LLC*, No. 3940-VCN, 2009 WL 1478697, at *3 (Del. Ch. May 22, 2009).

Several questions of law emerge from the foregoing competing arguments. First, the control group theory, asserted by the Plaintiff, derives from cases involving corporations; no control group LLC case has been cited to the Court. Nevertheless, there is a rationale to apply the corporate control group analogue to this PLLC case.

“The typical LLC act is usually a hybrid of provisions culled from the state’s partnership statutes and business corporation law.” *Anderson v. Wilder*, 2003 WL 22768666 *4 (November 21, 2003) (quoting Annotation, *Construction and Application of Limited Liability Company Acts*, 79 A.L.R. 5th 689, 698). The *Wilder* quotation of A.L.R. further explains that in interpreting an LLC act or agreement, if the particular problem originates from the corporate aspect of the LLC, then the court should use precedent of corporate law. If the problem originates from the partnership aspect of the LLC, partnership precedent should be used.

Application of this analytical model of linking the LLC problem in issue to the corporate or partnership aspect of the LLC led the *Wilder* court to conclude that finding that a majority shareholder of an LLC stands in a fiduciary relationship to a minority shareholder was appropriate in the case. *Id.* at *6. Moreover, although it is not clear, *Wilder* seems to be somewhat analogous to the facts of the case at bar where some of the *Wilder* members,

who allegedly wrongfully expelled the plaintiffs, had the same percentage interest as some of the plaintiffs. In other words, it appears that it was only by forming a group that some of those defendant members in *Wilder* were dominant.

The facts, then, of *Wilder* support the conclusion of law that in Tennessee a control group of a member-managed LLC can, under certain circumstances, owe a fiduciary duty to their fellow members—the theory espoused by the Plaintiff in this case.

In light of the facts in *Wilder*, it appears that Tennessee law may recognize that a control group of LLC members owes a fiduciary duty to a member not in control under certain circumstances. At the Motion to Dismiss preliminary phase of this case, the Court may not, then, dismiss Plaintiff's breach of fiduciary duty claim as a matter of law.

Turning next to the sufficiency of Plaintiff's pleading of control group breach of fiduciary duty, the Court is guided by *Dubroff v. Wren Holdings, LLC*, 2009 WL1978697, 35 Del. J. Corp. L. 1093, cited by the Plaintiff. *Dubroff* explains that in the control group analogue of corporations law, allegations of shareholders with "parallel interests" is insufficient to support an inference that a control group exists. *Id.* at *3. To constitute a control group, there must be allegations of a legally significant tie or link such as an agreement to work together to effect a self-dealing transaction or have a contractual agreement to work together. *Id.* at *4.

Reviewing the *Verified Amended Complaint*, the Court sees that at paragraphs 30(a) and (b) a control scheme among the Defendants, to receive a greater share of distributions

that lawfully belong to the Plaintiff, is alleged. These allegations suffice to withstand the Motion to Dismiss.

It is therefore ORDERED that Defendants' Motion to Dismiss is granted in part: any derivative claims are dismissed as premature due to Plaintiff's lack of standing. The remainder of the pleading withstands the Motion to Dismiss, and the claims are pending.

In the face of these pending claims, the next step of this case is to conduct a Tennessee Civil Procedure Rule 16.02 Case Litigation Plan Conference. At that hearing, the Court will confer with Counsel to set deadlines on any additional preliminary dispositive motions, amending pleadings, adding parties, discovery needs and the most efficient way to conduct discovery, mediation, and a trial date. The Court will also seek input from Counsel on whether there are any pure questions of law whose disposition can be prioritized, such as the contract subclaim that Plaintiff's removal did not comply with the notice and consent provisions of the Operating Agreement, or the enforceability of the Noncompete Agreement; or whether these claims should await disposition until discovery is complete.

It is therefore ORDERED that by January 7, 2016, Counsel shall contact the Docket Clerk (615-862-5719) and tell her the availability of Counsel on these dates and times for a one-hour Rule 16.02 conference: January 20, 21 or 26, 2016 at 9:30 a.m.



ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: Paul Davidson
Frances Fenelon
Russell Morgan
Alex McFall

 MAILED
12-22-15