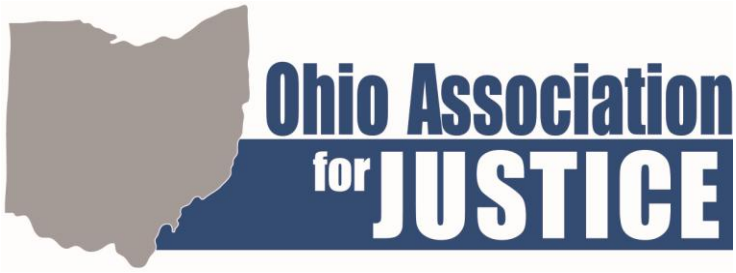

Injunctions (TRO's, Preliminary and Permanent, Mandatory)

Gary Corroto, Esq. Canton, OH

Judge John O'Donnell, Cleveland, OH

Phillip Ciano, Esq. Cleveland, OH

Injunctions (TRO's, Preliminary and Permanent, Mandatory)

Presented by:
The Honorable John O'Donnell
Phillip A. Ciano, Esq.
Gary A. Corroto, Esq.

I. Introduction/Overview

A. Brief overview of the Topic and Presentation Outline.

B. Overview of "sample" test case.

1. Fact pattern: Doctors Proctor and Gamble walk into your office with what they deem to be an "emergency" dilemma. When their respective 25% ownership interests are combined, Drs. Proctor and Gamble comprise 50% of the ownership of a "family" medical practice in Cleveland, Ohio. They have been engaged in a long-term dispute with the two other doctors who comprise their practice - - Doctors Smith and Wesson. Doctors Smith and Wesson also own a combined 50% of the medical practice.

2. Summary of the Dilemma:

a. Although traditionally, all four physician-shareholders of the medical practice received equal salary/draw payments, for the last six months, Drs. Smith and Wesson have unilaterally directed excess salary/draw payments to themselves, which have totaled more than $200,000 combined over the salaries/draws of Drs. Proctor & Gamble.

b. Drs. Smith and Wesson have "justified" their excess in salary/draw payments based on a "production formula" they proposed, but according to Drs. Proctor and Gamble, was never agreed upon by the physician-shareholders of the practice.

c. Although Drs. Proctor and Gamble have expressed, orally and in writing, on numerous occasions that they disagree with Drs. Smith and Wesson's proposed production formula, Drs. Smith and Wesson have ignored this disagreement.

d. Drs. Proctor and Gamble believe there is clear disagreement and deadlock on this proposal, but they have not been able to convince Drs. Smith and Wesson to cease their practice of excess salary/draw allocation.

e. Over the last several weeks, the doctors have met with their accountant and practice manager in order to resolve the deadlock and come up with some compensation formula that is workable for all the physicians involved. Unbeknownst to Drs. Proctor and Gamble, over the last several weeks, Drs. Smith and Wesson have continued to take excess salary draws, despite the parties' acknowledged "deadlock" on implementation of the production formula.

f. Over the weekend, Drs. Smith and Wesson apparently took matters into their own hands. Specifically, the doctors unilaterally (and without

authorization, consent or agreement among the physician-shareholders) withdrew over $400,000 from the medical practice's corporate bank accounts and converted the same for their own personal use and distribution.

g. Drs. Proctor and Gamble learned of Drs. Smith and Wesson's weekend raid of the corporate funds when they attempted to pay practice expenses and learned the account had "insufficient funds".

h. Despite repeated requests by Drs. Proctor and Gamble for Dr. Smith and Wesson to return the corporate funds to the corporate bank account, Defendants have: (i) refused to restore the funds at issue into the corporate account; (ii) unilaterally taken these actions despite the deadlock among the parties and agreement to attempt to resolve same; (iii) jeopardized the quality of care to be administered to the practice's patients; and (iv) otherwise caused irreparable harm for which no adequate remedy at law exists.

3. Based on the above facts, Drs. Proctor and Gamble have now asked you what emergency means of relief, if any, are at their disposal to:

a. Compel the Defendant Doctors to return the corporate funds to a bank account beyond the Defendant Doctors' control.

b. Restrain the Defendant Doctors from further access to corporate funds, both on a temporary, preliminary and ongoing basis.

c. Dissolve and wind-down the medical practice to extricate your clients from the medial practice so that they can start a competing family medical practice across the street.

d. Sue the Defendant Doctors for damages caused by the Defendant Doctors' above-described conduct.

II. A "Blueprint" for Handling This Matter.

A. Overview of Ohio Rule of Civil Procedure 65.

1. Elements to be considered by the Court.

(i) A strong or substantial likelihood of success on the merits;

(ii) That irreparable injury to the Plaintiff would result if a restraining order is not granted;

(iii) That the preliminary injunction will not cause substantial harm to others; and

(iv) That the public interest will be served by issuing the preliminary injunction being sought.

Dexxon Digital Storage, Inc. v. Haenszel (2005), 161 Ohio App.3d 747, 2005-Ohio-3187, 832 N.E.2d 62, ¶ 32. *See also, Corbett v. Ohio Building Authority* (1993), 86 Ohio App.3d 44, 49, 619 N.E.2d 1145.

2. Required standard of proof is "clear and convincing".
Mead Corp., Diconix, Inc., Successor v. Lane (1988), 54 Ohio App.3d 59, 560 N.E.2d 1319.

3. Requirement (or lack thereof) of posting a bond.

   (i) Some Courts have held that a bond is not required under Rule 65(C).
   See, *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co.*(1996), 109 Ohio App.3d 786, 673 N.E.2d 182.

   (ii) Court should always address bond in Preliminary Injunction Order.

   (iii) Some Courts have held that Defendant's damages are limited to amount of bond.
   See, *Professional Investigations & Consulting Agency, Inc. v. Kingsland* (1990), 69 Ohio App.3d 753, 591 N.E.2d 1265.

4. Appealability (or lack thereof) of restraining order.

   (i) A preliminary injunction is a final appealable order **only** if it:

      (a) the order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy; **and**

      (b) the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims and parties in the action.

   See, *Quinlivan v. H.E.A.T. Total Facility Solutions, Inc.* (6th Dist. 2010) 2010-Ohio-1603, 2010 WL 1410996 and R.C. 2505.02(B)(4).

   (ii) Example of case where Preliminary Injunction held not to be final appealable order - *Quinlivan v. H.E.A.T. Total Facility Solutions, Inc.* (6th Dist. 2010) 2010-Ohio-1603, 2010 WL 1410996.

(iii) Example of case where Preliminary Injunction held to be final appealable order - *LCP Holding Co. v. Taylor* (2004), 158 Ohio App.3d 546, 817 N.E.2d 439.

5. Obtaining TRO on "*ex parte*" basis (and requirements to obtain same) and defense of Motion to Dissolve.

6. "Restraining" injunction vs. "mandatory" injunction.

7. Balance of arguing "no adequate remedy at law" when claiming significant "monetary damages" in same suit.

B. Nuances Involved

1. Making sure the Motion for TRO and Verified Complaint is "sworn to" and verified.

a. Risks associated with Verifications, tension between pleading "upon information and belief" and verifying a TRO complaint/motion.

2. Getting a hearing on a TRO (obtaining a judge, notifying the other side, going "on the record," pre-drafting the order).

3. Scope of restraint (14 days, then an additional 14 days, then either an agreed order or PI hearing).

4. Attaching a proposed Order to the Motion (make it easy as possible on the judge to sign).

5. Scope of discovery (two phases: lead-up to the PI hearing, then lead up to trial/permanent injunction).

C. Preparing for and "Winning" the Case at the Preliminary Injunction Hearing.

1. Know your audience (judge, not jury).

2. K.I.S.S. principle rules the day.

3. Plaintiff vs. defense strategy considerations.

4. Save something in the tank for trial.

5. On the restrictive covenant piece, don't overreach; remind the Court of its "blue pencil" powers and stay focused on protecting legitimate business interests. See, *Raimonde v. Van Vlerah* (1975), 42 Ohio St.2d 21, 325 N.E. 2d 544.

6. Mandatory injunction: diminish the "extraordinary" nature of the remedy; limit it to the narrow act complained of; emphasize a return to the "status quo"; convince that without mandatory action, immediate irreparable harm.

III. Sample Pleadings, Motions, Proposed Orders, etc.

A. Handouts from sample case.

IV. Conclusion.

A. Trends in the injunctive practice.

B. Has technology proliferated this arena?

C. Have injunctions become an alternative tool to resolve business disputes?

D. Regular vs. commercial docket: the good and the bad.

V. Questions/Answers (Panel Discussion)

Baldwin's Ohio Revised Code Annotated

Rules of Civil Procedure (Refs & Annos)

Title VIII. Provisional and Final Remedies

Civ. R. Rule 65

Civ R 65 Injunctions

Currentness

(A) Temporary restraining order; notice; hearing; duration

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required. The verification of such affidavit or verified complaint shall be upon the affiant's own knowledge, information or belief; and so far as upon information and belief, shall state that he believes this information to be true. Every temporary restraining order granted without notice shall be filed forthwith in the clerk's office; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed fourteen days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for one like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be set forth in the order of extension. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. When the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(B) Preliminary injunction

(1) Notice. No preliminary injunction shall be issued without reasonable notice to the adverse party. The application for preliminary injunction may be included in the complaint or may be made by motion.

(2) Consolidation of hearing with trial on merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (B)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(C) Security

No temporary restraining order or preliminary injunction is operative until the party obtaining it gives a bond executed by sufficient surety, approved by the clerk of the court granting the order or injunction, in an amount fixed by the court or judge allowing it, to secure to the party enjoined the damages he may sustain, if it is finally decided that the order or injunction should not have been granted.

The party obtaining the order or injunction may deposit, in lieu of such bond, with the clerk of the court granting the order or injunction, currency, cashier's check, certified check or negotiable government bonds in the amount fixed by the court.

Before judgment, upon reasonable notice to the party who obtained an injunction, a party enjoined may move the court for additional security. If the original security is found to be insufficient, the court may vacate the injunction unless, in reasonable time, sufficient security is provided.

No security shall be required of this state or political subdivision, or agency of either, or of any officer thereof acting in his representative capacity.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability as well as the liability of the party obtaining the order or injunction may be enforced by the court without jury on motion without the necessity for an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

(D) Form and scope of restraining order or injunction

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding upon the parties to the action, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of the order whether by personal service or otherwise.

(E) Service of temporary restraining orders and injunctions

Restraining orders which are granted ex parte shall be served in the manner provided for service of process under Rule 4 through Rule 4.3 and Rule 4.6; or in manner directed by order of the court. If the restraining order is granted upon a pleading or motion accompanying a pleading the order may be served with the process and pleading. When service is made pursuant to Rule 4 through Rule 4.3 and Rule 4.6 the sheriff or the person designated by order of the court shall forthwith make his return.

Restraining orders or injunctions which are granted with notice may be served in the manner provided under Rule 4 through Rule 4.3 and Rule 4.6, in the manner provided in Rule 5 or in the manner designated by order of the court. When service is made pursuant to Rule 4 through Rule 4.3 and Rule 4.6 the sheriff or the person designated by order of the court shall forthwith make his return.

Credits
(Adopted eff. 7-1-70)

Editors' Notes

STAFF NOTES
1. Injunctions

2. Temporary restraining order; notice; hearing; duration

3. Preliminary injunction

4. Security

5. Form and scope of restraining order or injunction

6. Service of temporary restraining order and injunctions

1. Injunctions

1970:

Rule 65 is modeled after Federal Rule 65 and incorporates many of its provisions. The rule contemplates three types of orders: the temporary restraining order, the preliminary injunction and the injunction. The *temporary restraining order*, placed first in more logical order than in the federal rule, contemplates the unusual emergency type situation where immediate action is required to maintain the *status quo* until a hearing can be held. The *preliminary injunction* requires reasonable notice for a hearing and applies to maintain the *status quo* until final hearing, unless altered by further court order. The *injunction* contemplates notice and full evidentiary hearing at trial. Rule 65 restates much of current statutory practice regarding preliminary injunctions and injunctions. Finally Rule 65(C) is an adaptation of Federal Rule 65.1, and Rule 65(E) is an adaptation of § 2727.08, R.C.

Rule 65 has limited application in domestic relations matters. See, Rule 75(I)(1) and (2).

2. Temporary restraining order; notice; hearing; duration

1970:

Rule 65(A) follows Federal Rule 65(B) and restricts the duration of temporary restraining orders granted without notice to fourteen days, plus one fourteen day extension period. The rule states what is required if the temporary restraining order is granted without notice. Rule 65(A) makes it clear that a temporary restraining order is to be granted only in an emergency situation and only where irreparable damage would occur before the opposition could be heard. An affidavit or verified complaint must set forth specific facts which clearly present the emergency situation. The attorney seeking the order without notice must certify in writing the reasons for dispensing with notice and must set forth his efforts, if any, to give notice. Once again the rationale is that if there is an opportunity for notice and for the opposition to be heard, the order should not be granted on an *ex parte* basis.

Federal Rule 65(B) does not explain the nature of the verification required. A Rule 65(A) specifies the type of verification required. Verification is retained in temporary restraining order situations though the general requirement of verification is eliminated. See, Rule 11. Rule 65(A) verification is not restricted to "knowledge" since in an emergency situation, a person who can verify the specific facts of his own knowledge is not always available. If affiant verifies on information or belief, he must state that he believes the information to be true.

If a court grants a temporary restraining order without notice the court shall forthwith file the order in the clerk's office and the order shall specify the reasons for granting the *ex parte* order. The order will automatically expire within fourteen days unless within the fourteen day period of the order is extended for *one* other like period.

The philosophy of the rule is that the burden is on the party seeking an emergency *ex parte* order to commence further proceedings if the order is to continue beyond fourteen days. The rule does make provision for the party against whom the temporary order is made, to consent to an extension of beyond the fourteen day period. If the order is obtained without notice, the motion for a preliminary injunction is set for hearing as soon as possible. The order granting the temporary restraining order is automatically dissolved unless the party obtaining the order proceeds with his application for a preliminary injunction.

3. Preliminary injunction

1970:

Rule 65(B) follows Federal Rule 65(a) with an additional sentence in Rule 65(B)(1) which states that the procedure for application may be by motion *or* in the complaint. Rule 65(B)(3) gives the court the discretionary power to advance the trial on its merits and consolidate the trial with the hearing on the preliminary injunction in order to prevent two hearings and save time and expense for the court and parties. In the same vein, even if consolidation is not ordered, admissible evidence is preserved and need not be repeated at the trial on the merits.

Neither Rule 65 nor Federal Rule 65(a) mention the use of affidavits at a preliminary injunction hearing. Presently § 2727.04, R.C., permits reading of affidavits. Federal courts have interpreted Federal Rule 65(a) to allow the use of affidavits in a preliminary hearing because the regular oral testimony would defeat the purposes of a preliminary hearing prior to full trial on the merits. *Ross-Whitney Corp. v. Smith Kline & French Laboratories,* 207 F.2d 190 (9th Cir. 1953), and 7 Moore ¶ 65.04 [3] at 1636 to 1641. Conversely if it would be in the interests of justice to have oral testimony without affidavits, the trial on the merits can be advanced and consolidated with the hearing for the preliminary injunction.

4. Security

1970:

Rule 65(C) is similar to § 2727.07, R.C., in providing that no temporary restraining order or preliminary injunction is operative until the proper bond is obtained or deposit in lieu of bond is made. Bond is discretionary under Rule 75(I)(2). See Rule 75(I)(2). A cashier's check or certified check is made acceptable for deposit in addition to currency or negotiable government bonds. Provision is made for additional security as in § 2727.13, R.C. The last paragraph of Rule 65(C) is similar to Federal Rule 65.1. It modifies the present Ohio law, which requires an independent action against the surety, by making the surety subject to liability in the same action. See, *Benrus Watch Co. v. Weinstein Wholesale Jewelers, Inc.*, 108 Ohio App. 525 (1959). This portion of Rule 65(C) is also similar to § 2325.22, R.C., which is applicable to sureties in probate court. In consequence, the rule permits both the party and his surety to be subject to liability for damages by motion in the same action, consistent with the principle that a court can determine all issues arising in the case.

5. Form and scope of restraining order or injunction

1970:

Rule 65(D) is modeled after Federal Rule 65(d) and requires specific detail in the restraining order or injunction. These provisions are mandatory and should be scrupulously observed. The federal rule borrowed the provision from the Clayton Act. 7 Moore ¶ 65.11 at 1665. The persons bound by the order are the same as those bound under Ohio case law. See, *State ex rel. Bruns Coal Co. v. United Mine Workers of America*, 63 Ohio L. Abs. 531 (C.P. Muskingum County, 1952). Rule 65(C) uses the term "actual notice" rather than "notice" used in § 2727.09, R.C. However, Ohio has interpreted "notice" to mean actual knowledge whether served with the order or not. See, *Rowe v. Standard Drug Co.*, 132 Ohio St. 629 (1937). Therefore, the rule merely clarifies the present Ohio law as developed by case law.

6. Service of temporary restraining order and injunctions

1970:

Rule 65(E) has no federal counterpart but is patterned after § 2727.08, R.C. Like the statute it specifies how *ex parte*--before hearing--orders, and restraining orders or injunctions granted with notice are served. *Ex parte* orders are served in the manner provided for service of process under Rule 4 through 4.3 and Rule 4.6, or in a manner directed by the court. Restraining orders or injunctions granted with notice may be served by the same methods with an additional method provided by Rule 5. Rule 5 service is applicable since after notice the persons sought to be enjoined will generally be parties.

Notes of Decisions (173)

Current with amendments received through 2/1/11.

End of Document

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Thomas Proctor, M.D. 1234 Euclid Avenue Cleveland, Ohio 44114 and David Gamble, M.D. 5678 Superior Avenue Cleveland, Ohio 44114 Plaintiffs v. Jonathan Smith, M.D. 4567 Main Street Cleveland, Ohio 44114 and Timothy Wesson, M.D. 8910 Center Street Cleveland, Ohio 44114 and Dysfunctional Family Practice c/o Statutory Agent Plimy the Elder 5150 Broadway Columbus, Ohio 43215 Defendants.	)	**CASE NO.:** **JUDGE:** **VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF, DISSOLUTION AND DAMAGES (Jury Demand Endorsed Hereon)**

Plaintiffs, Thomas Proctor, M.D. ("Dr. Proctor") and David Gamble, M.D. ("Dr. Gamble") (collectively "Plaintiffs"), for their Verified Complaint against Defendants Jonathan Smith, M.D. ("Dr. Smith") and Dr. Daniel Wesson ("Dr. Wesson") (collectively, "Defendants"), state as follows:

Parties

1. Plaintiff, Dr. Proctor is a resident of Cuyahoga County, Ohio residing at 1234 Euclid Avenue, Cleveland, Ohio 44114.

2. Dr. Proctor is a duly licensed physician in the State of Ohio and a twenty-five percent (25%) physician-shareholder of the Ohio S corporation known as "Dysfunctional Family Practice" ("Dysfunctional").

3. Plaintiff, Dr. Gamble is a resident of Cuyahoga County, Ohio residing at 5678 Superior Avenue, Cleveland, Ohio 44114.

4. Dr. Gamble is a duly licensed physician in the State of Ohio and a twenty-five percent (25%) physician-shareholder of Dysfunctional.

5. Defendant, Dr. Smith is a resident of Cuyahoga County, Ohio residing at 4567 Main Street, Cleveland, Ohio 44114.

6. Dr. Smith is a duly licensed physician in the State of Ohio and a twenty-five percent (25%) physician-shareholder of Dysfunctional.

7. Defendant, Dr. Wesson is a resident of Cuyahoga County, Ohio residing at 8910 Center Street, Cleveland, Ohio 44114.

8. Dr. Wesson is a duly licensed physician in the State of Ohio and a twenty-five percent (25%) physician-shareholder of Dysfunctional.

9. Defendant Dysfunctional is a for-profit, Ohio S corporation, formed pursuant to Sections 1701, et seq. of the Ohio Revised Code. Dysfunctional's principal place business is located at 321 Sesame Street, Cleveland, Ohio 44114.

Jurisdiction and Venue

10. This Court has personal and subject matter jurisdiction over the claims alleged in this Verified Complaint; and Venue is proper in this Court pursuant to Ohio Rule of Civil Procedure 3.

11. With respect to Count V (*Appointment of Receiver*), this Court has jurisdiction pursuant to Ohio Revised Code § 2735.01(A),(E) and (F); as well as Ohio Rule of Civil Procedure 66. With respect to Count VI (*Judicial Dissolution*), this Court has jurisdiction and venue over this dispute pursuant to Ohio Revised Code §1701.91.

Background

12. On or about June 21, 2001, Plaintiffs and Defendants filed the Articles of Incorporation of Dysfunctional as a for-profit, Ohio corporation pursuant to Sections 1701.01, *et seq*. of the Ohio Revised Code.

13. Concurrent with the Dysfunctional incorporation, Drs. Proctor, Gamble, Smith and Wesson became 25% equal shareholders and Directors of Dysfunctional.

14. Dysfunctional was incorporated by Drs. Proctor, Gamble, Smith and Wesson for the purpose of practicing family (a/k/a "primary care") medicine including, but not limited to: the treatment of acute illnesses and injuries, as well as routine preventative medicine. Dysfunctional also provides several ancillary services including phlebotomy, x-ray, lab work and physical therapy.

15. Dysfunctional employs **22** individuals who, along with the physician-shareholders, assist in the provision of patient care to over **5000-6000** patients.

15. As is reflected in the parties' Schedule K-1's (attached to the 1120S Corporate Tax Returns for Dysfunctional) for the years ending 2001, 2002 and 2003, each of the Dysfunctional shareholder-physician's percentage of stock ownership in Dysfunctional was an equal 25%.

16. Consistent with the parties' equal 25% ownership interest in Dysfunctional, each physician agreed to receive equal salary draws from Dysfunctional; and allocate and distribute expenses and losses of the corporation on an equal 25% basis.

17. For fiscal year 2001, none of the Dysfunctional physician-shareholders received a salary draw; and all expenses and net losses of the corporation were allocated on an equal 25%/physician basis.

18. For fiscal year 2002, Drs. Proctor and Smith voluntarily waived their draws from Dysfunctional; Drs. Gamble and Wesson received an $8,300 "one-time" salary draw from Dysfunctional; and the expenses and net losses of the corporation were allocated on an equal 25%/physician basis.

19. For the fiscal year 2003, each of the physician-shareholders received an equal salary draw, and all of the expenses and net losses of the corporation were allocated on a 25%/physician basis

20. From January, 2004 through July 31, 2004, each physician-shareholder received 16 equal salary draw payments of $6,000.00.

21. For the pay period between August, 2004 and December 31, 2004, Plaintiffs continued to receive their previously-agreed upon $6,000/pay period salary draws; however, Defendants Smith and Wesson unilaterally, unlawfully and contrary to the express agreement to the contrary, received excess payments which brought their year-end salary draw totals to

$195,000 (for Dr. Smith) and $171,000 (for Dr. Wesson), as opposed to the $156,000 salaries drawn by Drs. Proctor and Gamble pursuant to the parties' agreement.

22. Defendants' unilateral salary draw increases were based on Defendants' "proposed formula" for allocating profits and losses amongst the physicians which was contrary to the parties' 25%/physician custom, practice and agreement.

23. Upon learning of Defendants unilateral salary draw increases, Plaintiff Dr. Proctor wrote a letter to Defendant Dr. Wesson on August 11, 2004, which advised the following:

(a) "[I] must be honest in saying that in many instances, I either do not understand the method or formula used to allocate income and expenses among the doctors, do not have the detail needed to review or analyze the results and allocations or do not agree with the allocation method applied to that expense category."

(b) "I feel it is necessary that we refer this to a professional accountant, with expertise in medical practice bookkeeping and accounting practices."

(c) "[M]y recollection is that we decided to allocate income, expenses and liabilities equally for the first two years, as we have presented in our tax returns."

(d) "[G]iven the complexity and volume of information, I feel that it would not be appropriate for any of us to make a hasty or inaccurate decision. That is why, in my opinion, it would be prudent for all concerned that we consult with a professional and resolve this once and for all in a January, 2005 roll-out."

(See 8/11/04 Proctor correspondence, attached hereto as Exhibit __).

24. On August 13, 2004, Plaintiff Dr. Gamble wrote to Drs. Proctor, Smith and Wesson stating: "As I have stated before, I do not understand the methods used to determine these figures and cannot agree with them. I still believe in my heart that the best method for a beginning practice is to split both costs and profits for the first two to three years until the firm is stable." (See 8/13/04 Gamble correspondence, attached hereto as Exhibit ___).

25. Following Drs. Proctor and Gamble's August 11th and 13th correspondence, the parties understood and agreed that Plaintiffs (as 50% shareholders of Dysfunctional) and Defendants (as 50% shareholders of Dysfunctional) were in disagreement and deadlocked on how to allocate salary draws, corporate profits and losses in a manner contrary to their 25%/physician custom, practice and agreement.

26. On August 25, 2004, Defendant Dr. Smith wrote to Drs. Proctor, Gamble and Wesson and proposed setting up "separate" physician accounts to receive practice salary and income, which would later be divided on a "per-physician overhead model until [Drs. Gamble, Proctor and Wesson's] accountant can review your numbers and a formal compromise can be obtained." (See 8/25/04 Smith correspondence, attached hereto as Exhibit ____).

25. On August 26, 2004, Plaintiff Dr. Proctor wrote to Defendant Dr. Smith, stating the following:

(a) "I believe that we need to devote focus to resolving the entire issue, rather than continuing with reactionary steps, putting a 'band-aid' on it by adjusting salaries, and allowing the root cause to go on."

(b) "Further, I disagree with your comment that we have 'formally agreed upon' overhead allocation."

(c) "As I have said before, I do not agree with and/or understand the allocation methods used to support the calculations you have suggested as a basis for your opinion of an equality."

(d) "Therefore, your suggestion/request to deposit all income by each doctor each month to a separate bank account for distribution **is in violation of the Indemnity Agreement that we all signed . . . as it would constitute an unlawful transfer of corporate assets to individual doctors**."

(e) "Your suggestion would start us down a path whereby we stop acting as a firm and we would begin to act as four separate practices sharing offices expenses. We cannot allow this breach to occur."

(See 8/26/04 Proctor correspondence, attached hereto as Exhibit ___).

27. On August 30, 2004, Defendant Dr. Wesson wrote to Drs. Proctor, Gamble and Smith, expressly promising, representing and agreeing that the physician-shareholders "don't have to settle on anything without a legal opinion." Dr. Wesson wrote that the physicians needed to "at least clarify the issues (i.e. what specifically do we disagree on?)." (See 8/30/04 Wesson correspondence, attached hereto as Exhibit __).

28. On August 31, 2004, Plaintiff Dr. Proctor responded to Defendant Dr. Wesson's August 30, 2004 correspondence stating "at this time, I need to continue the evaluation [Dr. Gamble] and I have started with [the Dysfunctional corporate counsel, Dewey Cheatham]." (See 8/31/04 Proctor correspondence, attached hereto as Exhibit __).

29. At the close of August, 2004, the parties reaffirmed that they were deadlocked on the issue; would attempt to resolve the issue; and that Defendants would not vary from the 25%/physician allocation agreement between the parties.

30. Despite Defendants Drs. Smith and Wesson's express representations, agreement, and promises, they continued to unilaterally withdraw excess salary amounts from Dysfunctional in violation of the parties' agreement to the contrary.

31. On September 28, 2004, Defendant Dr. Smith wrote to Drs. Proctor, Gamble and Wesson acknowledging that the parties still needed to meet with their corporate attorney in order to resolve the salary and expense allocation deadlock between the parties. (See 9/28/04 Smith correspondence, attached hereto as Exhibit __).

32. On October 12, 2004, Plaintiff Dr. Gamble wrote to Drs. Proctor, Smith and Wesson requesting dates to meet with the Dysfunctional corporate attorney and accountant in order to resolve the parties' deadlock with respect to an appropriate salary and expense allocation.

33. On November 3, 2004, Defendant Dr. Smith wrote to Drs. Proctor, Gamble and Wesson requesting a meeting to discuss the parties' deadlock. (See 11/3/04 Smith correspondence, attached hereto as Exhibit __.)

34. On November 26, 2004, Plaintiffs and Defendants met in order to attempt to break their deadlock concerning the appropriate division of salary, overhead and expenses in a manner which would vary from the previously-agreed-upon 25% /physician allocation. The parties could not reach an agreement at the November 26, 2004 meeting; therefore, they agreed to continue their dialogue and attempt to resolve the deadlock at issue.

35. On December 14, 2004, Defendant Dr. Wesson wrote to Dr. Gamble, confirming: (a) the parties had yet to break their deadlock and reach a substitute agreement regarding the appropriate allocation of revenue and expenses; (b) Dr. Wesson would calculate proposed figures for the various physicians; and (c) that the parties had yet to reach an agreement as to either the exact numerical figures at issue or the appropriate allocation related thereto. (See 12/14/04 Wesson correspondence, attached hereto as Exhibit __).

36. On December 23, 2004, Defendant Dr. Wesson wrote to Drs. Proctor, Gamble and Smith (as well as Dysfunctional corporate counsel, Dewey Cheatham), confirming: (a) the parties had yet to break their deadlock and reach a substitute agreement regarding the appropriate allocation of revenue and expenses; (b) Dr. Wesson would calculate proposed figures for the various physicians; and (c) that the parties had yet to reach an agreement as to either the exact numerical figures at issue or the appropriate allocation related thereto. (See 12/23/04 Wesson correspondence, attached hereto as Exhibit __).

37. On December 26, 2004, Plaintiff Dr. Proctor wrote to Drs. Gamble, Smith and Wesson, stating: (a) Dr. Proctor would not be able to meet to discuss Drs. Wesson and Smith'

unexecuted proposal to modify the parties' 25%/physician salary/expense allocation; (b) "as this issue **must be resolved by all four of us as a corporate entity**, it is categorically **unacceptable** for Drs. Wesson and Smith to 'address the situation' without the other partners' agreement;" and (c) that she "remained committed to work toward resolution in an expedient and cooperative manner and trust that my partners will as well." (See 12/26/04 Proctor correspondence, attached hereto as Exhibit __).

38. On January 5, 2005, Plaintiffs and Defendants met with Dysfunctional corporate attorney, Dewey Cheatham. The purpose of the meeting was again to discuss Defendant Drs. Smith and Wesson's unexecuted, proposed "formula" to allocate shareholder, salaries, profits and losses in a manner contrary to the parties' 25%/physician custom, practice and agreement.

39. During the January 5, 2005 meeting Drs. Gamble and Proctor categorically denied and rejected Defendants' proposal, and the deadlock amongst Plaintiffs and Defendants continued.

40. On January 12, 2005, Defendant Dr. Smith wrote to Drs. Proctor, Gamble and Wesson, again setting forth a proposal to break the parties' deadlock, stating:

> (a) "As you are all aware, a great deal of time has been spent in attempting to **resolve the current dispute** regarding distribution and allocation of corporate profit and expenses."
>
> (b) "Regrettably, **we have failed to achieve a majority consensus and have deadlocked on many important issues**, particularly those related to expense/payroll allocation outstanding debt that is owed directly to me."
>
> (c) "It is my sincere intention to resolve this dispute amicably so that Dysfunctional Family Practice, Inc. may continue to grow and practice medicine . . ."
>
> (d) "The following is a **proposal** that I sincerely believe is a good faith attempt by me, and accepted by all of us to compromise so that we can

> settle this matter amicably and avoid the needless costs and stresses associated with litigation."

See 1/12/05 Smith correspondence, attached hereto as Exhibit __).

41. Included in the January 12, 2005 Smith correspondence was a "**proposal**" which outlined his suggestion as to how the physician-shareholders of Dysfunctional would distribute and allocate "corporate profits and expenses." Dr. Smith' proposal included what he believed to be past due debts "directly owed" to him; as well as a proposed allocation model to be incorporated effective February 1, 2005. (See Exhibit ___).

42. Following the receipt of Dr. Smith' January 12, 2005 correspondence, Plaintiffs retained counsel to represent them with respect to the on-going deadlock between the shareholders.

43. On January 27, 2005, Plaintiffs' counsel wrote to Dr. Smith, stating: (a) "Drs. Gamble and Proctor respectfully reject the terms of your non-negotiable proposal;" and (b) "despite this rejection, Drs. Gamble and Proctor believed that it would serve Dysfunctional Family Practice well to have a 'sit-down with counsel present'." (See 1/27/05 counsel correspondence, attached hereto as Exhibit __).

44. On February 2, 2005, Plaintiffs' counsel received a telephone call from Attorney Garnett Meador who represented himself as counsel for Dr. Smith. During the February 2, 2005 telephone conversation, the parties agreed to meet with their respective legal counsel on February 18, 2005 to attempt to resolve the deadlock and the unexecuted "proposal" asserted by Defendants. (See 2/4/05 counsel correspondence attached hereto as Exhibit ___).

40. On February 14, 2005, Defendants' counsel wrote to Plaintiffs' counsel stating: (a) "we look forward to [the February 18, 2005] meeting and hope that our time together will be productive;" and (b) "we ask that your clients come prepared to present a proposal which would meet their needs." (See 2/14/05 defense counsel correspondence, attached hereto as Exhibit __).

41. On February 16, 2005, Plaintiffs' counsel wrote to defense counsel stating, "although I understand it is your clients' contention that the shareholders of Dysfunctional have a valid and enforceable agreement to allocate and distribute profits and losses pursuant to a formula which is contrary to their 25% interest in the entity, my clients respectfully disagree." Plaintiffs' counsel also outlined a detailed request for "back-up" information regarding Dr. Smith' proposal prior to the parties' February 18th meeting.

42. On February 17, 2005, Defendants' counsel canceled the parties February 18, 2005 meeting since Defendants were unable to produce the responsive information requested in Plaintiffs' counsel's letter of February 16, 2005.

43. During the parties' counsels' February 17, 2005 telephone conference, Defendants' counsel proposed that the parties informally mediate this dispute prior to taking any formal action.

44. In a letter to Defendants' counsel dated February 21, 2005, Plaintiffs' counsel confirmed the February 17, 2005 conversation and advised Defendants' counsel that Plaintiffs would take the mediation proposal under advisement once Plaintiffs received the requested financial information at issue.

45. On Saturday, March 5, 2005, Drs. Smith and Wesson unilaterally (and without authorization, consent or agreement amongst the Dysfunctional shareholders) removed $400,000 from the Dysfunctional checking and savings accounts, and converted the same for their own personal use and distribution (see First Merit Bank withdrawals attached hereto as Exhibit __).

46. On March 8, 2005, Dysfunctional corporate counsel, Dewey Cheatham, wrote to Drs. Gamble, Proctor, Smith and Wesson stating:

> This letter will serve as written notice to each of you that I was informed this morning by an employee of Dysfunctional Family Practice that two debits in the amounts of Two Hundred Thousand Dollars ($200,000.00) and Two Hundred Thousand Dollars ($200,000.00) have been transferred from the Dysfunctional Family Practice, Inc. account.
>
> Before I can advise the shareholders of the proper course of action, I request that if any of you have any information regarding these transfers to contact me immediately.
>
> Please acknowledge your receipt of this letter by signing a copy of same and returning to me by fax as soon as possible.

(See 3/8/05 Dewey Cheatham correspondence, attached hereto as Exhibit __).

47. Defendants never responded to Dewey Cheatham's March 8, 2005 letter.

48. On March 8, 2005, Plaintiffs' demanded -- via their legal counsel -- that Defendants deposit the funds at issue back into the Dysfunctional account by 1:00 p0.m. on March 9, 2005. (See Plaintiffs' counsel's 3/8/05 correspondence, attached hereto as Exhibit __).

49. On March 9, 2005, although Defendants' counsel confirmed that "**our respective clients have not been able to resolve their differences amongst themselves,**" he nonetheless confirmed:

(a) "Upon advice of counsel, Dr. Smith and Dr. Wesson removed $400,000 from their Dysfunctional checking and savings accounts."

(b) "[I] hereby inform you that until a final resolution has been reached between our clients there will be no funds returned to Dysfunctional accounts."

(See Defendants' counsel's 3/9/05 correspondence, attached hereto as Exhibit __).

50. Drs. Smith and Wesson's unilateral and unlawful withdrawal of the funds at issue was malicious, reckless, made with an intentional and conscious disregard for the rights and safety of Plaintiffs and the patients of Dysfunctional, and has jeopardized the operation of Dysfunctional and the ability of the practice to administer patient care.

51. To date, Defendants have refused to restore the unauthorized withdrawal of funds into the Dysfunctional corporate account; have unilaterally taken these actions despite the deadlock between the parties and agreement to attempt to resolve same; have jeopardized the quality of care to be administered to Dysfunctional patients; and have otherwise caused irreparable harm for which no adequate remedy at law exists

COUNT I
Injunctive Relief

52. Plaintiffs restate and incorporate by reference the allegations contained in Paragraphs 1 through 51 above.

53. The practice of "primary care medicine" is a recognized medical field which involves the primary medical treatment of patients of all ages, from pediatrics to geriatrics.

54. Dysfunctional -- as a primary care "family medicine" practice -- provides a wide range of medical services to thousands of patients in Northeast Ohio; including, but not limited to: the treatment of acute illnesses and injuries, diagnosis of potentially life-threatening diseases and medical conditions; as well as routine preventative maintenance. Dysfunctional also provides several ancillary services, including phlebotomy, x-rays, lab work and physical therapy.

55. Dysfunctional employees 4 Physicians, 4 Medical Assistants/Nurses, 1 Physical Therapist, 5 Billers and 8 Clerical Staff.

56. In order to employ the aforementioned individuals, Dysfunctional must meet a bi-weekly payroll obligation of $41,000-45,000.00.

57. In addition to payroll expenses, Dysfunctional has operating expenses, totaling approximately $_____/month.

58. In addition to the aforementioned payroll and operating expenses, Dysfunctional must pay for the medical malpractice insurance premiums for each of the physician-shareholders of Dysfunctional, which totaled $34,344.00 for the First Quarter of 2005.

59. On March 8, 2005, Plaintiff, Dr. Proctor -- in her capacity as the appointed physician-shareholder of Dysfunctional to pay payroll, overhead and malpractice premium expenses -- attempted to write said expenses from the Dysfunctional account; when she learned that Defendants had -- on Saturday, March 5, 2005 -- unilaterally, deceptively and unlawfully withdrawn $400,000 in funds; thus depleting Dysfunctional's checking and savings accounts to: approximately $26,000 in checking and $13,000 in savings.

60. Despite Plaintiffs' demand to Defendants to return the unlawfully withdrawn funds to the Dysfunctional bank accounts (in order to permit Dysfunctional to continue its operations and provide patient care to its thousands of patients), Defendants have expressly and utterly refused to do so.

61. The Defendants' refusal to restore the operating funds to Dysfunctional's corporate bank accounts has rendered Dysfunctional unable to address the immediate payroll, expense and medical malpractice costs of its practice; thus, rendering Dysfunctional unable to meet the critical medical needs of its patients.

62. Defendants' unlawful and unauthorized withdrawal of corporate funds from Dysfunctional has caused and will cause Dysfunctional and its current and future medical patients to suffer considerable injury that cannot adequately be remedied with money damages alone.

63. For these reasons, this Court must: (i) order the immediate return of corporate funds to the Dysfunctional corporate bank accounts so that Dysfunctional can continue its business operations without the threat or actualization of threatened patient care; (ii) preliminarily and permanently restrain and adjoin Defendants from accessing Dysfunctional's corporate funds absent a majority consensus of the shareholders of Dysfunctional; and/or the authorization of a Receiver appointed to administer the affairs of Dysfunctional; and /or a Court Order authorizing Defendants to access said funds; and (iii) preliminarily and permanently restrain and adjoin from _____.

64. Granting the requested injunctive relief will cause no injury or burden to Defendants, who will be, as they have been, compensated for their services provided on behalf of Dysfunctional, but denying such relief will cause serious, immediate and irreparable injury to Dysfunctional and its patient base.

COUNT II
Breach of Contract

65. Plaintiffs restate and incorporate by reference the allegations contained in Paragraphs 1 through 64 above

66. From the inception of Dysfunctional in June, 2001, Plaintiffs and Defendants expressly agreed to allocate salary draws, profits, expenses and losses on an equal 25%/physician basis consistent with the parties' ownership interest in Dysfunctional.

67. Plaintiffs have fully performed all of their obligations pursuant to the parties' 25%/physician allocation agreement.

68. Defendants have utterly refused to perform; and have materially breached the parties' 25%/physician allocation agreement as evidenced, *inter alia*, by their unilateral and unauthorized increase in salary draw since August, 2004 and their unilateral and unauthorized withdrawal of Dysfunctional corporate funds in the approximate $400,000.

69. Defendants' aforementioned conduct constitutes a material breach of the parties' 25%/physician allocation Agreement.

70. Although repeated demands have been made upon Defendants to perform as mandated by the 25%/physician allocation Agreement, Defendants have refused and failed to do so.

71. As a direct and proximate result of Defendants' material breach and default under the 25%/physician allocation Agreement, Plaintiffs have suffered substantial pecuniary loss, in excess of $25,000.00.

COUNT III
Fraudulent Inducement, Misrepresentation and Concealment

72. Plaintiffs restate and incorporate by reference the allegations contained in Paragraphs 1 through 71 above.

73. Prior to and during the inception of Dysfunctional, Defendants represented and induced the Plaintiffs to incorporate Dysfunctional and become physician-shareholders in the entity by promising, representing and guaranteeing to the parties that each physician-shareholder of Dysfunctional would allocate the salary draws, corporate profits and losses -- absent of an express agreement to the contrary -- on a 25%/physician allocation basis.

74. Before, during and after the inception of Dysfunctional, Defendants knowingly, intentionally and fraudulently misrepresented and concealed their true intention to refuse to allocate salaries, corporate profits and losses pursuant to the parties' expressed 25%/physician allocation Agreement.

75. Defendants representations and inducements to Plaintiffs were material.

76. At the time Defendants made the foregoing representations and inducements to Plaintiffs, Defendants had no present intention of honoring said representations, as evidenced by *inter alia* Defendants' later refusal to abide by and adhere to the terms as outlined in the 25%/physician allocation Agreement; and as further evidenced by Defendants' unilateral, unauthorized and unlawful conversion of Dysfunctional corporate funds for their own personal use.

77. Such misconduct by Defendants was malicious and undertaken in conscious disregard for the rights of Plaintiffs; and was material and made with intent to harm and mislead Plaintiffs.

78. Plaintiffs justifiably relied upon Defendants' representations and conduct, continued in their provision of services, expertise, work, labor and skill toward the furtherance of Dysfunctional, and were directly harmed and injured by the aforementioned fraudulent inducements, misrepresentations and concealments.

79. As a direct and proximate result of the aforementioned inducements, misrepresentations, concealments and conduct, Plaintiffs have been damaged in an amount in excess of Twenty-Five Thousand Dollars ($25,000.00).

COUNT IV
Conversion

80. Plaintiffs restate and incorporate by reference the allegations contained in Paragraphs 1 through 79 above.

81. On March 5, 2005 and thereafter, Defendants unlawfully withdrew, converted and removed over One Hundred Forty Thousand Dollars ($140,000) in Dysfunctional corporate accounts for their own personal use and distribution, despite their agreement with Plaintiffs to the contrary.

82. Defendants have continued to exercise a wrongful dominion over Plaintiffs' property rights of Dysfunctional and the wrongfully converted funds; including but not limited to, Plaintiffs' rights and the specific corporate funds converted by Defendants, Plaintiffs' interests in Dysfunctional, and their right to participate in the direction, management and operation of Dysfunctional.

83. Defendants have wrongfully exercised dominion over Plaintiffs' property and exclusion of their right, or by withholding it from their possession under a claim inconsistent with their rights.

84. As a direct and proximate result of Defendants' wrongful conversion and possession of Plaintiffs' funds and property, Plaintiffs have been damaged in an amount in excess of Twenty Five Thousand Dollars ($25,000.00).

COUNT V
Breach of Fiduciary Duty

85. Plaintiffs restate and incorporate by reference the allegations contained in Paragraphs 1 through 84 above**.**

86. As 25%/physician, equal shareholders with Plaintiffs, Defendants owe Plaintiffs fiduciary obligations of the utmost loyalty, good faith and integrity in dealing with Plaintiffs and corporate affairs.

87. As noted above, Defendants failed to exercise loyalty, good faith and integrity in their dealings with Plaintiffs with respect to their corporate affairs, of acting for the common benefit of all equal shareholders and all transactions relating to Dysfunctional's business and of refraining from taking any advantage of Plaintiffs by inducement, misrepresentation, concealment or threat. As a direct and proximate result of Defendants' breach of their fiduciary obligations to Plaintiff, Plaintiff has suffered substantial pecuniary loss, in excess of Twenty Five Thousand Dollars ($25,000.00).

COUNT VI
Derivative Relief

88. Plaintiffs restate and incorporate by reference the allegations contained in Paragraphs 1 through 87 above.

89. Plaintiffs bring this action, in part, derivatively in the right and for the benefit of Dysfunctional to redress injuries suffered and to be suffered by Dysfunctional as a result of the breaches of fiduciary duty and other violations of law by the Defendants.

90. Plaintiffs were shareholders of Dysfunctional at the time of the unlawful conduct of Defendants.

91. Plaintiffs will adequately and fairly represent the interests of Dysfunctional in enforcing and prosecuting its rights.

92. As set forth in detail above, Plaintiffs have made several efforts to redress the wrongs of Defendants, but to no avail.

93. The Individual Defendants breached their fiduciary duties to Dysfunctional and to its shareholders by unilaterally and unlawfully converting corporate funds for their own benefit.

94. All of the Individual Defendants owe and owed a fiduciary duty to Dysfunctional to maintain corporate funds for the benefit of the corporation.

95. The Individual Defendants breached their fiduciary duty of good faith by unilaterally and unlawfully converting corporate funds for their own use. Furthermore, the Individual Defendants breached their fiduciary duty of good faith when they charged and collected expert consulting fees for their own benefit, when these fees were due to the corporation.

96. As a direct and proximate result of the Individual Defendants foregoing breaches of fiduciary duties, Dysfunctional has the same damages as alleged herein.

COUNT VII
Contribution and Indemnification

97. Plaintiffs restate and incorporate by reference the allegations contained in Paragraphs 1 through 96 above.

98. Dysfunctional's alleged liability on account of the wrongful acts and practices and related misconduct described above, arises in whole or in part, from the knowing, reckless, disloyal and/or bad faith acts or omissions of Defendants as alleged above, and Dysfunctional is entitled to contribution and indemnification from each of the Defendants in connection with all such claims that have been, are or may in the future be asserted against Dysfunctional by virtue of the Individual Defendants' misconduct.

99. Plaintiffs have no adequate remedy at law.

COUNT VIII
Appointment of Receiver

88. Plaintiffs restate and incorporate by reference the allegations contained in Paragraphs 1 through 87 above.

89. Plaintiffs are 25% equal shareholders of Dysfunctional and have given good and valuable consideration therefore.

90. As Dysfunctional shareholders, Plaintiffs have an equal 25% interest in the revenues and other funds of Dysfunctional.

91. Due to Defendants' unilateral, unlawful and unauthorized depletion of Dysfunctional corporate funds, Dysfunctional's operations are in jeopardy, patient care is at risk and Plaintiffs' interest in Dysfunctional is continually eroding and at risk of being lost.

92. Plaintiffs are entitled to the appointment of a receiver for Dysfunctional to prevent the loss, patient danger and further injury to Plaintiffs' equity interest in Dysfunctional.

93. Based upon the threatened and actual actions of Defendants, Dysfunctional is in imminent danger of insolvency, thereby warranting the appointment of a receiver.

94. Plaintiffs are entitled to the appointment of a receiver for Dysfunctional in the interests of equity.

COUNT IX
Request for Judicial Dissolution

95. Plaintiffs restate and incorporate by reference the allegations contained in Paragraphs 1 through 94 above

96. Pursuant to Ohio Revised Code § 1701.91(2)(c), this Court should Order the dissolution of Dysfunctional since it is established, *inter alia*, that the objects of the corporation have wholly failed or are entirely abandoned or that their accomplishment is impracticable.

97. Pursuant to Ohio Revised Code § 1701.91(A)(4), this Court should Order the dissolution of Dysfunctional since it is established *inter alia*, that the objects of the corporation have wholly failed or are entirely abandoned or that their accomplishment is impracticable since Plaintiffs equal one-half of the shareholders and Directors of Dysfunctional; are entitled to exercise one-half of the voting power; it has established that the corporation is an even number of Directors who are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock.

98. Pursuant to Ohio Revised Code §1701.91(D), annexed to this Verified Complaint as Exhibit __, is a schedule which sets forth the name of each shareholder, his address, the number of shares owned by him, and any balance unpaid on his shares.

WHEREFORE, Plaintiff respectfully requests this Court to enter the following relief:

(1) On Count I of their Complaint, Plaintiffs request that this Court enter a preliminary and permanent injunction restraining and enjoining Defendants from: _____;
[**FILL IN FROM MOTION FOR TRO PRELIMINARY AND PERMANENT INJUNCTON**.]

(2) On Count II of their Complaint, Plaintiffs request this Court enter judgment in their favor against Defendants for compensatory and punitive damages, reasonable attorney's fees and costs;

(3) On Count III of their Complaint, Plaintiffs request this Court enter judgment in their favor against Defendants for compensatory and punitive damages, reasonable attorney's fees and costs;

(4) On Count VI of their Complaint, Plaintiffs request this Court enter judgment in her favor against Defendants for compensatory and punitive damages, reasonable attorney's fees and costs;

(5) On Count V of their Complaint, Plaintiffs request this Court enter judgment in her favor against Defendants for compensatory and punitive damages, reasonable attorney's fees and costs;

(6) On Count VI of their Complaint, Plaintiffs request that this Court issue a Temporary Restraining Order and Injunction to seize the assets of Dysfunctional and prevent defendants from a further unauthorized conversion

of corporate funds; and to appoint a receiver with such authority and duties as the Court may direct and is necessary to protect the property or the rights of Plaintiffs, of the patients of Dysfunctional and to carry on the business of Dysfunctional until a full hearing can be had pursuant to Ohio Revised Code §41701.91(C); and

(7) On all Counts of Plaintiffs' Complaint, such other and further relief as this Court may deem just, equitable and proper.

Respectfully submitted,

_____

Attorney for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by Jury of all issues in this action.

_____

Attorney for Plaintiffs

VERIFICATION

I, Thomas Proctor, M.D., do hereby verify that I have read the foregoing Verified Complaint for Injunction Relief and Damages; and that the factual allegations contained within are true and correct to the best of my personal knowledge, information and belief.

_____
Thomas Proctor, M.D.

Sworn to and subscribed before me this ___ day of March, 2005.

_____
NOTARY PUBLIC

VERIFICATION

I, David Gamble, M.D., do hereby verify that I have read the foregoing Verified Complaint for Injunction Relief and Damages; and that the factual allegations contained within are true and correct to the best of my personal knowledge, information and belief.

_____
David Gamble, M.D.

Sworn to and subscribed before me this ___ day of March, 2005.

_____
NOTARY PUBLIC

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Thomas Proctor, M.D. 1234 Euclid Avenue Cleveland, Ohio 44114 and David Gamble, M.D. 5678 Superior Avenue Cleveland, Ohio 44114 Plaintiffs v. Jonathan Smith, M.D. 4567 Main Street Cleveland, Ohio 44114 and Timothy Wesson, M.D. 8910 Center Street Cleveland, Ohio 44114 and Dysfunctional Family Practice c/o Statutory Agent Plimy the Elder 5150 Broadway Columbus, Ohio 43215 Defendants.	)	**CASE NO.:** **JUDGE:** **MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTION AND FOR IMMEDIATE <u>APPOINTMENT OF RECEIVER</u>**

Plaintiffs, Thomas Proctor, M.D. ("Dr. Proctor") and David Gamble, M.D. ("Dr. Gamble") (collectively "Plaintiffs"), pursuant to Ohio Civil Rules 65(A) and (B); and Ohio Revised Code §1701.91(C) and Ohio Revised Code §2735.01(A), (E) and (F), respectfully move this Honorable Court to:

1. Enter a Temporary Restraining Order and Preliminary and Permanent Injunction to prevent Defendants Jonathan Smith, M.D. and Timothy Wesson, M.D. ("Defendants") from engaging in any acts and/or undertaking any activity with respect to the corporate bank accounts, stock or other assets of Dysfunctional Family Practice, Inc. ("Dysfunctional") absent the authorization of a Receiver and/or a Court Order authorizing Defendants to undertake such activity with respect to Dysfunctional's accounts and assets;

2. Enter a Temporary Restraining Order and Preliminary and Permanent Injunction ordering Defendants to immediately return the approximate $400,000 of Dysfunctional's corporate funds to Dysfunctional's corporate accounts; said funds being unilaterally and unlawfully withdrawn by Defendants on March 5, 2005, without the knowledge, consent or authorization of Plaintiffs who are equal shareholders in Dysfunctional with Defendants; and

3. Enter an Order appointing a Receiver to oversee, administer and approve all Dysfunctional payables and receivables until further Order of the Court in light of Defendants unilateral, unlawful and unauthorized withdrawal of Dysfunctional corporate funds which have been seized and converted by Defendants for their own personal use.

As outlined in Plaintiffs' Verified Complaint and the attached Brief in Support (which is expressly incorporated herein), this Court is well within its discretion to grant the requested Temporary Restraining Order and Preliminary and Permanent Injunctive Relief since: (1) Defendants' unilateral and unauthorized withdrawal of Dysfunctional's corporate funds have depleted the Dysfunctional accounts to a level which prohibits Dysfunctional from meeting its payroll and expense obligations; thus jeopardizing Dysfunctional's ability to render safe and effective patient care to its' over 5,000 Northeast Ohio patients; and (2) undersigned counsel certifies to this Court that upon the immediate filing of this Motion and the attending Verified

Complaint, he contacted Defendants' legal counsel, faxed said legal counsel a true and accurate copy of the Verified Complaint, this Motion and the Brief in Support, and advised Defendants' counsel that he was seeking an immediate Temporary Restraining Order requesting the relief noted above.

In support of this Motion, Plaintiffs rely upon the Verified Complaint, filed simultaneously herewith, as well as the Brief in Support attached hereto and incorporated herein. Plaintiffs further request that no bond be required prior to the granting of any injunctive relief.

WHEREFORE, Plaintiffs respectfully request that this Court: (a) enter a Temporary Restraining Order and Preliminary and Permanent Injunction to prevent Defendants Daniel Smith, M.D. and Daniel Wesson, M.D. ("Defendants") from engaging in any acts and/or undertaking any activity with respect to the corporate bank accounts, stock or other assets of Dysfunctional Family Practice, Inc. ("Dysfunctional") absent the authorization of a Receiver and/or a Court Order authorizing Defendants to undertake such activity with respect to Dysfunctional's accounts and assets; (b) enter a Temporary Restraining Order and Preliminary and Permanent Injunction ordering Defendants to immediately return the approximate $400,000 of Dysfunctional's corporate funds to Dysfunctional's corporate accounts; said funds being unilaterally and unlawful withdrawn by Defendants on March 5, 2005, without the knowledge, consent or authorization of Plaintiffs who are equal shareholders in Dysfunctional with Defendants; and (c) enter an Order appointing a Receiver to oversee, administer and approve all Dysfunctional payables and receivables until further Order of the Court in light of Defendants unilateral ,unlawful and unauthorized withdrawal of Dysfunctional corporate funds which have been seized and converted by Defendants for their own personal use.

Respectfully submitted,

_____

Attorney for Plaintiffs

BRIEF IN SUPPORT

I. INTRODUCTION/FACTUAL BACKGROUND

Plaintiffs seek a temporary restraining order and other injunctive relief against Defendants to prevent the irreparable harm Plaintiffs (and Plaintiffs' patients) have suffered, are currently suffering and will continue to suffer from Defendants' March 5, 2005 unilateral, unlawful, fraudulent and deceptive withdrawal and conversion of Dysfunctional Family Practice Inc.'s funds in the amount of $400,000 for their own personal use and benefit. As is more detailed below, if this Court does not grant the requested temporary restraining order and attending injunctive relief, Dysfunctional will be prevented from meeting its payroll, overhead and malpractice insurance obligations; thus jeopardizing Dysfunctional's ability to operate as a medical practice group; which will concurrently jeopardize Dysfunctional's ability to treat and administer family medicine to its over 5,000 Northeast Ohio patients.

As set forth in greater detail in the Verified Complaint, Plaintiffs are equal shareholders in Dysfunctional Family Practice, Inc. ("Dysfunctional") -- a Cuyahoga County medical practice corporation incorporated in 2001 by Plaintiffs and Defendants (who are also 25% equal shareholders and Directors of Dysfunctional). Dysfunctional administers family (a/k/a "primary care") medicine including, but not limited to: the treatment of acute illnesses and injuries, diagnoses of potentially life-threatening diseases and conditions; as well as routine preventative medicine. Dysfunctional also provides several ancillary services, including phlebotomy, x-rays, lab work and physical therapy.

Dysfunctional employs approximately 20 non-physician employees in addition to the four physician-shareholders of the practice. In order to employ the aforementioned individuals, Dysfunctional must meet a payroll obligation of approximately $100,000.00/month. In addition

to payroll expenses, Dysfunctional has operating expenses totaling approximately $50,000.00/month. Additionally, Dysfunctional must pay quarterly medical malpractice insurance premiums totaling over $120,000.00/year.

On March 8, 2005, Plaintiff Dr. Proctor -- in her capacity as appointed physician-shareholder of Dysfunctional to pay accounts payable -- attempted to pay operating expenses from the Dysfunctional account. On that date she learned that on **Saturday, March 5, 2005,** Defendants unilaterally (and without authorization, consent or agreement amongst the Dysfunctional physician-shareholders) removed $400,000 from the Dysfunctional corporate bank accounts, and converted the same for their own personal use and distribution. (See Verified Complaint and Exhibits attached thereto). As a result of Defendants' unlawful and deceptive withdrawal and conversion of Dysfunctional's corporate funds, Dysfunctional is now prohibited from meeting its payroll, overhead and malpractice insurance premium obligations.[1]

Additionally, on March 10, 2005, Plaintiffs learned that Defendant Dr. Smith unilaterally (and without authorization, consent or agreement amongst the Dysfunctional shareholders) charged and collected expert consulting fees due and owing to Dysfunctional for his own personal benefit and use. (See Verified Complaint and Exhibits attached thereto).

Despite Plaintiffs' repeated demands to Defendants to return the unlawfully converted funds to the Dysfunctional corporate accounts (in order to permit Dysfunctional to continue its operations and provide patient care to its thousands of patients) Defendants have expressly and utterly refused to do so. Defendants' refusal to replace the illegally withdrawn funds to Dysfunctional's corporate accounts has rendered Dysfunctional unable to address the immediate

[1] For instance, Dysfunctional's first quarter malpractice premium in the amount of $34,334 is due on or before March 17, 2005; and as of the date of the filing of this Motion and the Verified Complaint (March 11, 2005), there is approximately $20,000 in Dysfunctional's checking account and $14,000 in Dysfunctional's savings account.

payroll, expenses and medical malpractice costs of its practice; thus rendering Dysfunctional unable to meet the critical medical needs of its patients. Defendants' unlawful and unauthorized withdrawal of corporate funds from Dysfunctional has caused and will cause Dysfunctional and its current and future medical patients to suffer considerable injury that cannot adequately be remedied with money damage alone.

II. LAW AND ARGUMENT

In *Valco Cincinnati, Inc. v. N & D Machining Service, Inc.* (1986) 24 Ohio St.3d 41, 492 N.E.2d 814, the Ohio Supreme Court set forth the required showing for the granting of a temporary restraining order. In deciding whether to grant such injunctive relief, the Supreme Court noted that it must examine the following four factors:

1. Whether there is a substantial likelihood that the plaintiff will prevail on the merits;

2. Whether the plaintiff will suffer irreparable injury if the injunction is not granted;

3. Whether third parties will be unjustifiably harmed if the injunction is granted; and

4. Whether the public interest will be served by the injunction.

In this case, these factors support the granting of the requested temporary restraining order.

A. There is a Substantial Likelihood that Plaintiffs Will Succeed on the Merits of Their Claims.

When one examines the facts of this case, it is evident that there is a substantial likelihood that Plaintiffs will succeed on the merits of their claims, thereby justifying the granting of a temporary restraining order. As Plaintiffs will establish, Plaintiffs and Defendants are equal 25%/physician-shareholders of Dysfunctional. Consistent with the parties' equal 25% ownership interests in Dysfunctional, each physician-shareholder agreed to receive equal salary

draws from Dysfunctional; and allocate and distribute expenses and losses of the corporation on an equal 25% basis. Plaintiffs' and Defendants' 25%/physician salary, revenue, expense agreement is reflected in the physicians' Schedule K-1's attached to their income tax returns for 2001, 2002 and 2003.

From 2001 (the inception of Dysfunctional) through August, 2004, each of the physician-shareholders -- pursuant to the aforementioned agreement -- allocated salaries, expenses and losses on an equal 25%/physician basis. Commencing in August, 2004, and continuing through the present, Defendants unilaterally (and without authorization, consent or agreement amongst the Dysfunctional physician-shareholders) received excess payments which brought their year-end salary draw totals to $195,000 (for Dr. Smith) and $171,000 (for Dr. Wesson), as opposed to $156,000 salaries drawn by Drs. Proctor and Gamble pursuant to the parties' agreement. Despite Plaintiffs' repeated demands to refrain from unilaterally receiving said excess salary payments, Defendants fraudulently, and in breach of their prior agreement, refuse to return the funds.

Although Defendants continually **proposed** an allocation model contrary to the 25%/physician agreement noted above, no agreement, other than the existing 25%/physician model, was agreed to by the Plaintiffs. Through a series of communications (by and between the physicians and their respective legal counsel), the parties have attempted to mediate and break the deadlock absent Court action. In the midst of these negotiations (as fully outlined in Plaintiffs' Verified Complaint), Defendants unilaterally, and without authorization, consent or agreement amongst the Dysfunctional shareholders, withdrew and converted for their own personal use and benefit, Dysfunctional's corporate funds totaling $400,000. Defendants have refused to return the corporate funds at issue; and have further converted expert consulting fees which comprise Dysfunctional corporate income into their own personal use and benefit.

In light of Defendants' conduct (which is fully described in Plaintiffs' Verified Complaint), there is a substantial likelihood that Plaintiffs will succeed on the merits of their claims alleged in their Verified Complaint; thereby justifying the granting of a temporary restraining order.

B. Plaintiffs Have Suffered and Will Continue to Suffer Immediate and Irreparable Injury in the Absence of a Temporary Restraining Order.

The irreparable harm to Plaintiffs is immediate and substantial. As of the filing of this Motion (and the corresponding Verified Complaint) there is only approximately $14,000 in Dysfunctional's savings account and approximately $20,000 in Dysfunctional's checking account. With payroll, medical malpractice premiums and other overhead expenses becoming due and owing within the next several days, there are present insufficient funds in the Dysfunctional corporate accounts to meet the medical practice's obligations. Indeed, had Defendants not unilaterally and unlawfully withdrawn and converted the Dysfunctional corporate funds at issue, there would be almost $200,000 in Dysfunctional's corporate accounts; thus eliminating any possibility that Dysfunctional might have to discontinue its operation and not be able to render care and treatment to its thousands of Northeast Ohio patients. If this Court does not grant the requested temporary restraining order and corresponding injunctive relief, Plaintiffs and Dysfunctional's current and future patients will suffer irreparable injury for which Plaintiffs have no adequate remedy at law.

C. The Granting of a Temporary Restraining Order Will Not Unjustifiably Harm Third Parties and Will Serve the Public Interest.

It is impossible to conceive how the granting of a temporary restraining order in this case could harm third parties. To the contrary, the grant of injunctive relief will merely result in preservation of the Corporation's business and assets for the benefit of third parties. The public

interest would clearly be served by the preservation of the Corporation's business, the maintenance of numerous jobs supported by such business, the uniform enforcement of the law, and the administration of health care to needy patients.

In addition to enjoining Defendants from engaging in any acts designed to dispose of the stock or assets of the Corporation or removing any such assets from the State, Plaintiffs seek the additional remedies of having the assets of the Corporation seized pursuant to Civil Rule 64 and delivered to a Court-appointed receiver pursuant to Civil Rule 66 to operate and manage. Plaintiffs assert that it is critical that a receiver be appointed immediately to begin operating the business in order to preserve the assets and goodwill of the operations pending disposition of Plaintiffs' substantive claims. Without such action, it is likely that the assets of the Corporation will be completely dissipated prior to adjudication of Plaintiffs' claims.

Respectfully submitted,

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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

Copies of the foregoing Motion for a Temporary Restraining Order, Preliminary and Permanent Injunction, and for Immediate Appointment of Receiver were sent this _____ day of _____ by facsimile and electronic mail to:

_____
One of the Attorneys for Plaintiffs