

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
BIG STONE GAP DIVISION**

<b>MICHAEL B. FORD,</b>	)	
Plaintiff,	)	Civil Action No. 2:09cv00055
	)	
v.	)	<b><u>REPORT AND</u></b>
	)	<b><u>RECOMMENDATION</u></b>
<b>WELLMONT HEALTH</b>	)	
<b>SYSTEM, et al.,</b>	)	By: PAMELA MEADE SARGENT
Defendants,	)	United States Magistrate Judge

This case is before the court on the defendants' Motion To Dismiss, (Docket Item No. 5), and Motion To Compel Arbitration, (Docket Item No. 6), which were filed on August 28, 2009, as well as the plaintiff's Motion To Remand, (Docket Item No. 9), which was filed on September 15, 2009. This action was removed from the Circuit Court of Wise County, Virginia, pursuant to 28 U.S.C. § 1332, § 1441 and § 1446. These motions are before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). As directed by the order of referral, the undersigned now submits the following Report and Recommendation.

*I. Facts*

At the outset, the court will discuss the jurisdictional facts relevant to the court's consideration of the plaintiff's Motion To Remand, which must be addressed first in order to determine whether the court has proper jurisdiction over the matter. The plaintiff, Dr. Michael B. Ford, M.D., a Virginia resident, brought this action against his employer, Wellmont Health System, a Tennessee corporation, Medical

Associates of Southwest Virginia, Inc., a Virginia corporation, and Brian Slocum, the Interim Chief Administrative Officer of Wellmont Physician Services, who is a Tennessee resident. In a declaration of Gary D. Miller, general counsel for Wellmont Health System, he indicated that Wellmont Physician Services, a subsidiary of Wellmont Health System and a Tennessee corporation with its principal place of business in Tennessee, had done business in Virginia under the name Medical Associates of Southwest Virginia. (Docket Item No. 3), (Declaration of Gary D. Miller, (“Declaration”), at 1.) Miller explained that “Medical Associates of Southwest Virginia” was a separate and distinct entity from “Medical Associates of Southwest Virginia, Inc.,” which was named by Dr. Ford as a defendant in this action. (Declaration at 1.) In fact, “Medical Associates of Southwest Virginia, Inc.” is located in Blacksburg, Virginia, and is a Virginia entity that has no relation to the allegations in this case or to Wellmont Health System or Dr. Ford. (Declaration at 1.)

The following facts are relevant to the merits of the case and, for the purposes of the court’s consideration of the Motion To Dismiss, the facts, as alleged in the Complaint, will be accepted as true. On February 7, 2007, Dr. Ford entered into a Physician Employment Agreement with Wellmont Health System, which was amended on October 16, 2008. (Docket Item No. 1, Attachment No. 2 at 3.) According to Dr. Ford, he conducted a medical services practice in Big Stone Gap, Virginia, where he was a tenant in a facility owned by Wellmont Health System. (Docket Item No. 1, Attachment No. 2 at 3.) Dr. Ford alleges that, on July 10, 2009, without any prior notice, he was confronted by Brian Slocum and was presented with a notice of termination of employment. (Docket Item No. 1, Attachment No. 2 at 3.) Dr. Ford further alleges that the notice prohibited him from providing any professional

services in a hospital or outpatient setting, and he claims that his malpractice insurance, compensation and benefits were all terminated. (Docket Item No. 1, Attachment No. 2 at 3.) In addition, Dr. Ford asserts that he was prohibited from gaining entry to his office, removing personal property, retrieving items such as copies of patient records and other materials, as well as personal property such as cabinets, office fixtures and furnishings. (Docket Item No. 1, Attachment No. 2 at 3-4.) Following his termination, the defendants sent letters to each of Dr. Ford's patients, informing them that Dr. Ford was no longer associated with Medical Associates of Big Stone Gap. (Docket Item No. 1, Attachment No. 2 at 4, 27.) The letter notified his patients that the remaining physicians and nurses were "accepting new patients and would welcome [them] as [] patient[s]" and also explained that Wise Medical Group also was accepting new patients. (Docket Item No. 1, Attachment No. 2 at 4, 27.) Dr. Ford alleges that the letter was a "deliberate effort to destroy [his] practice of medicine," claiming that the defendants "engaged in direct and intentional acts to interfere with [his] ability to practice medicine in the Commonwealth of Virginia." (Docket Item No. 1, Attachment No. 2 at 4.)

Dr. Ford also contends that he asked to be told of the reasons for his termination, and states that Wellmont Health System had a procedure in place that entitled him to various rights under the corrective disciplinary policy at the time of his termination. (Docket Item No. 1, Attachment No. 2 at 4-5.) However, according to Dr. Ford, these rights were denied, and he was not provided with a hearing as required by Wellmont Health System's grievance procedure. (Docket Item No. 1, Attachment No. 2 at 5.) Thus, as a result of these alleged actions, Dr. Ford claims that the defendants intended to deprive him of the ability to practice medicine and also

intended to tortiously interfere with his medical practice in Big Stone Gap and surrounding areas. (Docket Item No. 1, Attachment No. 2 at 4-5.) Furthermore, Dr. Ford alleges that the letter sent to his patients showed that the defendants “deliberately and intentionally wrongfully interfered with [his] ability to practice his profession in any hospital or outpatient setting” with “malice aforethought,” and with the intent to deprive him the means to earn a living, all of which has caused him to sustain substantial financial losses. (Docket Item No. 1, Attachment No. 2 at 5.)

## *II. Analysis*

### *A. Motion To Remand*

The court will first address the plaintiff’s Motion To Remand. Following removal from state court, a motion to remand may be made pursuant to 28 U.S.C. § 1447, which states “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded . . . . The State court may thereupon proceed with such case.” 28 U.S.C.A. § 1447(c) (West 2006). It is well-settled that, on a motion to remand, the removing party bears the burden of establishing jurisdiction. *See Mulcahey v. Columbia Organic Chems. Co., Inc.*, 29 F.3d 148, 151 (4th Cir. 1994) (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921)). Furthermore, the court must strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court. *See Mulcahey*, 29 F.3d at 151; *see also Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 (3rd Cir. 1992).

A defendant may remove a case based on diversity jurisdiction pursuant to 28

U.S.C. §§ 1332, 1441. A district court has original jurisdiction over matters between citizens of different states when the amount in controversy exceeds \$75,000. *See* 28 U.S.C.A. § 1332(a)(1) (West 2006). When a defendant removes a case from state court based upon diversity jurisdiction, the defendant must prove complete diversity. Moreover, for removal to be deemed valid, diversity of citizenship must exist at the time the notice of removal is filed. *See Porsche Cars N. Am., Inc., v. Porsche.net*, 302 F.3d 248, 255-56 (4th Cir. 2002); *see also Sayers v. Sears, Roebuck & Co.*, 732 F. Supp. 654, 656 (W.D. Va. 1990). Diversity of citizenship is determined at the time an action is commenced. *See Freeport-McMoRan, Inc. v. KN Energy, Inc.*, 498 U.S. 426, 428 (1991). Thus, because the amount in controversy is not at issue here, in order to determine whether this court has jurisdiction, we must determine whether or not there was complete diversity between the parties at the time this action was commenced.

In this case, Dr. Ford argues that diversity jurisdiction is absent and that the case should be remanded back to state court. (Docket Item No. 10), (Brief In Support Of Plaintiff's Motion To Remand, ("Remand Brief"), at 3-5.) In particular, Dr. Ford contends that the defendants failed to comply with Virginia Code Annotated §§ 59.1-69-70. In relevant part, Virginia Code Annotated § 59.1-69 states, "[n]o . . . corporation shall conduct or transact business in this Commonwealth under any assumed or fictitious name unless such . . . corporation shall sign and acknowledge a certificate setting forth the name under which such business is to be conducted or transacted[.]" Moreover, the certificate must contain the names of each person, partnership, limited liability company or corporation owning the same, as well as the post-office and residence address, and, if the corporation is a foreign corporation, it

must include the date the certificate of authority to transact business in Virginia was issued to it by the State Corporation Commission. *See* VA. CODE ANN. § 59.1-69 (2009). The corporation must file all of the information in the office of the clerk of the court in which deeds are recorded in the county, or in the city wherein the business will be conducted. *See* VA. CODE ANN. § 59.1-69(A) (2006 Repl. Vol.). Virginia Code Annotated § 59.1-70 requires that a corporation doing business under an assumed or fictitious name file the certificate required by § 59.1-69 with the State Corporation Commission.

Dr. Ford points out that neither Wellmont Health System nor Wellmont Physician Services complied with the applicable Virginia law because they failed to file proper documentation to conduct business under the name Medical Associates of Southwest Virginia. (Remand Brief at 4.) Both parties recognize that Wellmont Health System and Wellmont Physician Services failed to file the proper certificate with the clerk of courts in Wise County or the State Corporation Commission.<sup>1</sup> Dr. Ford claims that the failure to do so rendered Medical Associates of Southwest Virginia a “disregarded entity,” resulting in personal liability to those doctors and nurses listed on the company letterhead. (Remand Brief at 4.) This argument is without merit. There is no authority within this circuit that would impose liability on employees of such an entity, as none of those listed on the letterhead can be proven to be officers of the corporation in question. Furthermore, the allegations within Dr.

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<sup>1</sup>The defendants indicated that certificates registering “Medical Associates of Southwest Virginia” and “Medical Associates of Big Stone Gap” as assumed or fictitious names of Wellmont Physician Services were in the process of being filed in Wise County, Virginia, and with the State Corporation Commission. (Docket Item No. 15), (Memorandum In Opposition To Motion To Remand, (“Remand Opposition Brief”), at 2.)

Ford's Complaint specifically reference Wellmont Health System, Wellmont Physician Services and Brian Slocum. The Complaint does not mention or name any of the persons listed on the company letterhead.

The undersigned is of the opinion that the failure to file the appropriate documentation to operate as a foreign corporation in Virginia is practically immaterial to this court's handling of the Motion To Remand. In essence, the primary consequence of a failure to file a certificate to do business as a foreign corporation under an assumed or fictitious name is that the particular entity is prohibited from maintaining a suit in Virginia. *See* VA. CODE ANN. § 13.1-758(A) (2006).

The critical issue in this case revolves around the particulars as to the defendants named by Dr. Ford. In this case, the party "Medical Associates of Southwest Virginia, Inc.," as conceded by the other parties to this action, had absolutely nothing to do with Dr. Ford, Wellmont Health System or any of its subsidiaries. Moreover, as stated earlier, the named entity had nothing to do with the allegations set forth in Dr. Ford's Complaint. Because Dr. Ford wrongly named an entity as a defendant that had no relation to the activities alleged in the Complaint, it is obvious that he can establish no claim against that entity. Thus, as argued by the defendants, and for the reasons stated below, the undersigned finds that the doctrine of fraudulent joinder is applicable in this particular case.

The fraudulent joinder doctrine permits removal when a nondiverse party is a

defendant in the case.<sup>2</sup> See *Mayer v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999). To establish fraudulent joinder, the removing party must demonstrate that the plaintiff cannot establish a cause of action against the in-state defendants.<sup>3</sup> See *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232-33 (4th Cir. 1993); see also *Lucker v. Cole Vision Corp.*, 2005 U.S. Dist. LEXIS 44810 (W.D. Va. June 17, 2005). As stated in *Mayer*, under this doctrine, a district court is allowed to assume jurisdiction over an action even if there are nondiverse named defendants at the time the case is removed from state court. See 198 F.3d at 461. Furthermore, the doctrine of fraudulent joinder “effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants ... and thereby retain jurisdiction.” *Mayer*, 198 F.3d at 461 (citing *Cobb*, 186 F.3d at 677-78.)

After reviewing the filings of record, as well as the arguments set forth by the parties, I am of the opinion that, because “Medical Associates of Southwest Virginia,

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<sup>2</sup>As explained in a footnote in *Mayer v. Rapoport*, 198 F.3d 457, 461 n.8 (4th Cir. 1999), the term fraudulent joinder can be misleading, as it neither always requires a showing of fraud, nor does it require joinder. “[I]t is irrelevant whether the defendants were ‘joined’ to the case or originally included as defendants; rather, the doctrine is potentially applicable to each defendant named by the plaintiff either in the original complaint or anytime prior to removal.” *Mayer*, 198 F.3d at 461 n.8 (citing *Cobb v. Delta Exports, Inc.*, 186 F.3d 675, 678 (5th Cir. 1999)).

<sup>3</sup>The United States Court of Appeals for the Fourth Circuit has recognized that, in order to properly establish that a nondiverse defendant has been fraudulently joined, the removing party must establish either: (1) that there is no possibility that the plaintiff could establish a cause of action against the in-state defendant in state court; or (2) that there has been outright fraud in the plaintiff’s pleading of jurisdictional facts. See *Marshall*, 6 F.3d at 232 (quoting *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981)). In this case, no “outright fraud” occurred or was alleged. Thus, in determining whether fraudulent joinder is applicable, the sole issue before the court is whether Dr. Ford could possibly be able to establish a cause of action against “Medical Associates of Southwest Virginia, Inc.”

Inc.” is an entity that had no connection to the other parties involved and had no relation to the allegations set forth by Dr. Ford, it is evident that there is no possibility that Dr. Ford could establish a cause of action against this particular named defendant. Accordingly, the undersigned finds the doctrine of fraudulent joinder to be applicable under these factual circumstances, and will, therefore, recommend that the court assume jurisdiction over the case, dismiss the action as it pertains to “Medical Associates of Southwest Virginia, Inc.” and retain jurisdiction over the matter, as there is complete diversity among the remaining defendants.

After determining that fraudulent joinder is applicable in this case, the undersigned will not consider whether the court should permit Dr. Ford to amend the Complaint to include the appropriate defendant, which would be Wellmont Physician Services, a Tennessee corporation that was doing business in Virginia under the names “Medical Associates of Southwest Virginia” and “Medical Associates of Big Stone Gap.” In fact, it could be argued that Wellmont Physician Services is a necessary party in this case since it was the actual medical practice where Dr. Ford worked. However, a closer look at the Physician Employment Agreement reveals that this particular contract was between Dr. Ford and Wellmont Health System, not Wellmont Physician Services in particular. Thus, since Wellmont Physician Services is not a necessary party, the court will proceed with the claim only as it relates to the remaining defendants, Wellmont Health System and Brian Slocum.<sup>4</sup>

For the reasons stated above, the undersigned recommends that Dr. Ford’s

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<sup>4</sup>The undersigned notes that, even if Dr. Ford were permitted to amend his Complaint to include the proper party, complete diversity would be present, as Wellmont Physician Services is a Tennessee corporation, and this court would continue to possess proper jurisdiction.

Motion To Remand be denied, and that Medical Associates of Southwest Virginia, Inc., be dismissed as a party to this action.

*B. Motion To Dismiss*

A motion to dismiss made under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. In considering such a motion, the court should accept as true all well-pleaded allegations and view the complaint in the light most favorable to the plaintiff. *See e.g., De Sole v. United States*, 947 F.2d 1169, 1171 (4th Cir. 1991) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969)). “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

For quite some time, this court has cited *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), for the proposition that in order to grant a motion to dismiss, it must appear certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief. *See also Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4th Cir. 1999). However, the Supreme Court recently revisited the proper standard of review for a motion to dismiss and stated that the “no set of facts” language from *Conley* has “earned its retirement” and “is best forgotten” because it is an “incomplete, negative gloss on an accepted pleading standard.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

In *Twombly*, the Supreme Court stated that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions,

and a formulaic recitation of the elements of a cause of action will not do.” 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555 (citations omitted). Additionally, the Court established a “plausibility standard,” in which the pleadings must allege enough to make it clear that relief is not merely conceivable but plausible. *See Twombly*, 550 U.S. at 555-63.

The Court further explained the *Twombly* standard in *Ashcroft v. Iqbal*, No. 07-1015, 556 U.S. \_\_\_\_, slip op. at 14-15, (May 18, 2009):

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. ... Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. ...

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief.

(Internal citations omitted.)

It appears that Dr. Ford is of the belief that the court should apply the substantive law of the state of Tennessee in this matter. As noted by the defendants, only issues relating to the employment agreement shall be governed by Tennessee

law. The employment agreement specifically states “[t]his Agreement shall be interpreted, construed and governed according to the laws of the state of Tennessee.” The defendants concede that Dr. Ford has set forth sufficient facts to state a claim for breach of contract. Thus, because any breach of contract claim would relate to the interpretation of the contract and whether the defendants breached that contract, the court notes that Tennessee law would be applicable to this cause of action.

However, the fact that the parties agreed that any issues arising regarding the interpretation of the contract itself would be governed by Tennessee law does not necessarily mean that Tennessee law will govern any tort claims that arise between the parties. When a court’s jurisdiction is based upon diversity, as it is in this case, the court must apply the substantive law of the forum state, including the forum state’s choice of law rules. *See Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496-97 (1941); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *see also Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990); *Nguyen v. CNA Corp.*, 44 F.3d 234, 237 (4th Cir. 1995); *Merlo v. United Way of Am.*, 43 F.3d 96, 102 (4th Cir. 1994). In tort actions, such as the ones asserted by the plaintiff in this case, Virginia applies *lex loci delicti*, or the substantive law of the place of the wrong. *See Jones v. R.S. Jones & Assocs., Inc.*, 431 S.E.2d 33, 34 (Va. 1993); *see generally Milton v. IIT Research Inst.*, 138 F.3d 519, 522 (4th Cir. 1998); *Buchanan v. Doe*, 431 S.E.2d 289, 291 (Va. 1993). Accordingly, Dr. Ford’s tort claims of conversion and tortious interference with a prospective business or economic advantage shall be analyzed according to the applicable Virginia law.<sup>5</sup>

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<sup>5</sup>In the plaintiff’s Brief In Opposition To Defendants’ Motion To Dismiss, (Docket Item No. 11), he erroneously relies upon Tennessee law. As explained previously, although the parties agreed that the contract itself was to be interpreted under Tennessee law, the tort claims

I first will address Dr. Ford’s claim of conversion. Dr. Ford alleges that following his receipt of the notice of termination, he was “prohibited from gaining entry to his office at Cloverleaf, from removing his personal property located at the aforementioned office, has further been prohibited from retrieving copies of all of his patient files and records and other material, letters, pamphlets, books, and any and all personal property, including cabinets, office fixtures and furnishings[.]” (Docket Item No. 1, Attachment No. 2 at 3-4.) In Virginia, it is well-settled that “[c]onversion is any wrongful exercise or assumption of authority . . . over another’s goods, depriving him of their possession [and any] act of dominion wrongfully exerted over property in denial of the owner’s right, or inconsistent with it . . . .” *Universal C.I.T. Credit Corp. v. Kaplan*, 92 S.E.2d 359, 365 (Va. 1956); *see also Airlines Reporting Corp. v. Pishvaian*, 155 F. Supp. 2d 659, 663-64 (E.D. Va. 2001); *Economopoulos v. Kolaitis*, 528 S.E.2d 714, 719 (Va. 2000). As such, in order to properly assert a claim for conversion, a plaintiff must allege (1) the ownership or right to possession of the property at the time of the conversion; and (2) the wrongful exercise of dominion or control by the defendants over the plaintiff’s property, thereby depriving the plaintiff of possession of the property. *See Airlines Reporting Corp.*, 155 F. Supp. 2d at 664 (citing *Universal*, 92 S.E.2d at 365). Furthermore, “[a]n action for conversion can be maintained only by the person having a property interest in and entitled to the immediate possession of the item alleged to have been wrongfully converted.” *Economopoulos*, 528 S.E.2d at 719 (citing *United Leasing Corp. v. Thrift Ins. Corp.*, 440 S.E.2d 902, 906 (Va. 1994)).

In this case, in addition to claiming that the defendants prohibited him from

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will be evaluated pursuant to the applicable Virginia law.

retrieving certain personal property, Dr. Ford also contends that he was prohibited entry into his former place of employment and was not allowed to retrieve patient files and records. (Docket Item No. 1, Attachment No. 2 at 3-4.) The fact that Wellmont Health System allegedly prohibited Dr. Ford from entering his former office does not establish grounds for a claim of conversion. Likewise, Wellmont Health System's decision to deny Dr. Ford's request for patient files and records was justified. As plainly stated in the employment agreement, "[u]pon termination of this Agreement by either party, all patient records, books of account, case histories, x-rays and other corporate documents of the Clinic shall remain the property of WHS and Clinic." (Docket Item No. 1, Attachment No. 2 at 18.) Dr. Ford explicitly agreed to this contractual term when entering into the employment agreement with Wellmont Health System. Wellmont Health System was under no duty to provide its property to a former employee. According to the employment agreement entered into voluntarily by each party, the patient files and records were rightfully the property of Wellmont Health System; thus, Dr. Ford had no property interest in those items, rendering him unable to maintain a proper claim for conversion. *See Economopoulos*, 528 S.E.2d at 719. As such, Dr. Ford has failed to state a proper claim of conversion against Wellmont Health System and Slocum as to these particular items.

As for Dr. Ford's claim that Wellmont Health System and Slocum wrongfully converted certain personal items such as his letters, pamphlets, books, cabinets, office fixtures and furnishings, it appears that he has plead sufficient facts to state a claim. In his Complaint, he specifically alleged that the previously mentioned personal items were withheld from him, and that he was prevented from gaining access to such items. (Docket Item No. 1, Attachment No. 2 at 4.) Dr. Ford alleges that, following his

termination, he was prohibited from retrieving personal items - items which he allegedly owned and had the right to possess. The facts set forth in the Complaint also indicate that Wellmont Health System essentially had dominion and control over the personal items, as they would not permit Dr. Ford to retrieve the items, thereby depriving him the possession of his alleged property. (Docket Item No. 1, Attachment No. 2 at 3-4.) The defendants claim that Dr. Ford's personal items were "packed" and delivered to him. (Docket Item No. 16), (Memorandum In Support Of Motion To Dismiss, ("Defendants' MTD Brief"), at 3.) However, this case is before the court on a motion to dismiss; thus, the court is required to accept as true all well-pleaded allegations and view the complaint in the light most favorable to the plaintiff. *See De Sole*, 947 F.2d at 1171. With this principle in mind, and based upon the facts set forth in the Complaint, the undersigned is of the opinion that Dr. Ford sufficiently stated a claim for conversion against Wellmont Health System.

Dr. Ford also attempts to assert a claim of conversion against Slocum, claiming that sufficient facts were alleged. However, the Complaint is devoid of any allegations that Slocum personally withheld any property rightfully belonging to Dr. Ford. Dr. Ford points out that the July 2009 termination letter was signed by Slocum, at which time Dr. Ford was informed that he could not perform any professional services pursuant to the employment agreement in a hospital or outpatient setting. (Docket Item No. 11), (Brief In Opposition To Defendants' Motion To Dismiss, ("Plaintiff's MTD Opposition"), at 4-5) Based upon this letter, Dr. Ford argues that "[i]t is a fair assumption that Slocum would have directed the conversion of [his] personal property." (Plaintiff's MTD Opposition at 5.) This argument is without merit and is totally speculative. As stated above, the Complaint contains no allegations that

Slocum wrongfully converted Dr. Ford's personal property. Thus, for the reasons stated, the undersigned finds that Dr. Ford failed to properly state a claim of conversion against Slocum.

Next, Dr. Ford appears to attempt to state a claim of tortious interference with a prospective business or economic advantage. In his Complaint, Dr. Ford fails to precisely name or reference any specific cause of action. Nonetheless, he does assert allegations that the defendants intentionally interfered with his ability to practice medicine in the Commonwealth of Virginia. (Docket Item No. 1, Attachment No. 2 at 5.) In particular, Dr. Ford alleges that following his termination, a letter was sent to each of his patients informing them that he was no longer associated with Medical Associates of Big Stone Gap. (Docket Item No. 1, Attachment No. 2 at 4.) He further alleges that this letter was an attempt to solicit his patients, as the letter stated that the remaining physicians and nurses at Medical Associates of Big Stone Gap were "accepting new patients and would welcome [them] as [] patient[s]." (Docket Item No. 1, Attachment No. 2 at 4, 27.) The letter also informed Dr. Ford's patients that Wise Medical Group, another Wellmont Health System facility, also was accepting new patients and would be "willing to be [their] future healthcare provider." (Docket Item No. 1, Attachment No. 2 at 27.) Based upon the contents of this letter, Dr. Ford claims that the defendants deliberately attempted to destroy his practice of medicine in the Big Stone Gap and Wise County area, as they "engaged in direct and intentional acts to interfere with [his] ability to practice medicine in the Commonwealth of Virginia." (Docket Item No. 1, Attachment No. 2 at 4.)

Dr. Ford also contends that the defendants' failure to follow Wellmont Health

System's grievance procedure was another attempt to deprive him of the ability to practice medicine and to tortiously interfere with his existing medical practice. (Docket Item No. 1, Attachment No. 2 at 5.) Lastly, Dr. Ford claims that the defendants "deliberately and intentionally wrongfully interfered" with his ability to practice medicine in any hospital or outpatient setting and have prohibited him from opening an office or obtaining privileges in any local hospital, all of which, according to Dr. Ford, are attempts to deprive him of the means to earn a living, resulting in substantial financial losses. (Docket Item No. 1, Attachment No. 2 at 5.)

The Supreme Court of Virginia has recognized the tort of wrongful interference with a prospective business or economic advantage. *See Glass v. Glass*, 321 S.E.2d 69, 76-77 (Va. 1984); *see also Commercial Bus. Sys., Inc. v. Halifax Corp.*, 484 S.E.2d 892, 896 (Va. 1997). In order to prove this cause of action, a plaintiff must demonstrate: "(1) the existence of a business relationship or expectancy, with a probability of future economic benefit to plaintiff; (2) defendant's knowledge of the relationship or expectancy; (3) a reasonable certainty that absent defendant's intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy; and (4) damage to plaintiff." *Commercial Bus. Sys., Inc.*, 484 S.E.2d at 896 (quoting *Glass*, 321 S.E.2d at 77).

With regard to the first element, the court notes that although Dr. Ford had a professional relationship with his patients, the fact that he worked as an employee of Wellmont Health System, under an agreement in which he could be terminated for cause, provided no guarantee that the professional relationship would continue. Nonetheless, it is obvious that Dr. Ford had established a business relationship and

expectancy of future economic benefit based upon the relationship, thus satisfying the first element. Next, it is equally as obvious that the defendants had knowledge of this business relationship. However, an examination of the Complaint and the allegations set forth by Dr. Ford shows that he did not properly allege facts to satisfy the third element. As stated above, Dr. Ford must allege facts to show to a reasonable certainty “that absent defendant’s intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy[.]” *Commercial Bus. Sys., Inc.*, 484 S.E.2d at 896. At no point in the Complaint did Dr. Ford allege that, had the letter not been mailed to his patients, he would have been able to continue the professional relationship. Dr. Ford had no specific agreement with his patients that they would continue to seek medical treatment from him. It is certainly reasonable that he would have expected such loyalty from his patients; however, he failed to allege any facts against Wellmont Health System or Slocum stating that, absent the termination and subsequent mailing of the letter, his patients would have continued to seek his medical services. In fact, as noted by the defendants, the letter referenced by Dr. Ford was not sent by Wellmont Health System or Slocum; instead, it was sent by Medical Associates of Southwest Virginia, Inc., a party that was never properly named by Dr. Ford.

In light of the Supreme Court’s decisions in *Twombly* and *Iqbal*, this court is not permitted to step in and fill in the blanks for a partially well-pleaded cause of action. As stated in *Twombly*, a plaintiff must state more than “labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). In this case, Dr. Ford even failed to specifically identify the causes of action under which he

sought relief, and also failed to recite the elements of those claims. That said, had Dr. Ford set forth factual allegations that could have established a plausible claim, he would have met the standard. But, as stated above, he failed to precisely allege facts to show that, absent the defendants' intentional misconduct, he would have continued his professional relationship with his patients and received the expected benefit of their continued business. Thus, Dr. Ford's Complaint fails to state factual allegations to raise this particular right to relief above the speculative level and also fails to make it clear that relief is plausible. *See Twombly*, 550 U.S. at 555-63. Accordingly, the undersigned finds that Dr. Ford failed to state a claim against both Wellmont Health System and Slocum, and I recommend that the claim of tortious interference with a prospective business or economic advantage be dismissed against each defendant.

### *C. Motion To Compel Arbitration*

The defendants also filed a Motion To Compel Arbitration, asking that the court stay the current proceedings and compel arbitration between the parties. The employment agreement entered into by the parties on February 7, 2007, and amended on October 16, 2008, contained an arbitration clause that states,

**ARBITRATION.** Any controversy arising out of or relating to this Agreement, or relating to the breach hereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect. The award rendered by the Arbitrator or Arbitrators shall be final and judgment upon the award rendered by the Arbitrator or Arbitrators may be entered upon it in any court having jurisdiction thereof. The Arbitrator or Arbitrators shall possess the powers to issue mandatory orders and restraining orders in connection with such arbitration. The expense of the arbitration shall be

borne by the losing party unless otherwise allocated by the Arbitrator or Arbitrators. This agreement to arbitrate shall be specifically enforceable under the prevailing Arbitration Law. During the continuance of any arbitration proceedings, the parties shall continue to perform their respective obligations under this Agreement.

(Docket Item No. 1, Attachment No. 2 at 18-19.) As agreed to in the employment agreement, Tennessee law will govern issues regarding the interpretation of this agreement, including the arbitration clause.

The defendants contend that the parties should proceed to arbitration regarding the claims asserted by Dr. Ford, claiming that the issues raised by Dr. Ford “ar[ose] out of or relating to the Agreement.” (Docket Item No. 6), (Motion To Compel Arbitration, at 1-2.) In response, Dr. Ford argues that the Motion To Compel Arbitration should be denied, stating that the arbitration clause is not enforceable because the agreement did not provide that arbitration is the parties’ exclusive remedy and that the employment agreement and arbitration clause were ambiguous and unconscionable. (Docket Item No. 12), (Plaintiff’s Brief In Opposition To Defendants’ Motion To Compel Arbitration, (“Plaintiff’s Arbitration Opposition Brief”), at 2-7.) After reviewing the parties’ arguments, and for the reasons set forth below, the undersigned is of the opinion that the defendants’ Motion to Compel Arbitration should be granted.

In general, arbitration agreements in contracts are favored in Tennessee both by statute and existing case law. *See Benton v. Vanderbilt Univ.*, 137 S.W.3d 614, 617 (Tenn. 2004). The Tennessee Uniform Arbitration Act, states that

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract . . . .

TENN. CODE ANN. § 29-5-302(a) (2000 Repl. Vol.). The Supreme Court of Tennessee has stated “the [Uniform Arbitration Act] embodies a legislative policy favoring enforcement of agreements to arbitrate.” *Buraczynski v. Eyring*, 919 S.W.2d 314, 317 (Tenn. 1996); *see also Benton*, 137 S.W.3d at 617-18. Furthermore, when the court is faced with determining whether the parties agreed to arbitrate a matter, courts generally should “apply ordinary state-law principles that govern the formation of contracts.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also T.R. Mills Contractors, Inc. v. WRH Enter., LLC*, 93 S.W.3d 861, 866-70 (Tenn. Ct. App. 2002). Thus, Tennessee contract law will govern the issues raised by the defendants, i.e., whether the arbitration clause is enforceable and whether it is ambiguous and/or unconscionable.

Dr. Ford specifically claims that the employment agreement contains two provisions that are irreconcilable, the arbitration clause and Paragraph 7(a) of the agreement, which grants Wellmont Health System the right to terminate the contract “[i]f Physician breaches any material obligation of Physician under this Agreement.” (Plaintiff’s Arbitration Opposition Brief at 4) (citing Docket Item No. 1, Attachment No. 2 at 16). Thus, according to Dr. Ford, “if in [Wellmont Health System’s] sole discretion, [Dr. Ford] breaches a term of the Agreement, [Wellmont Health System] is not required to submit that breach to arbitration and may unilaterally terminate [Dr. Ford] without notice.” (Plaintiff’s Arbitration Opposition Brief at 4.) Dr. Ford argues

that the termination provision directly contradicts the arbitration clause, which states that “[a]ny controversy rising out of or relating to this Agreement, or relating to the breach hereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect.” (Plaintiff’s Arbitration Opposition Brief at 4), (Docket Item No. 1, Attachment No. 2 at 18.)

The court is of the opinion that Dr. Ford’s argument as to this issue is without merit. Wellmont Health System did not possess a unilateral right to terminate the contract upon a breach by Dr. Ford. The employment agreement permitted Wellmont Health System to terminate the contract for “just cause . . . without any minimum prior notice[,]” provided that one of the delineated grounds for just cause as defined in the agreement was met. (Docket Item No. 1, Attachment No. 2 at 16-17.) While this provision certainly permitted Wellmont Health System to terminate Dr. Ford’s employment due to a breach, the employment agreement also provided that same remedy to Dr. Ford. Specifically, the employment agreement states, “Physician may terminate his employment under this Agreement if [Wellmont Health System] breaches any material obligation of [Wellmont Health System] under this Agreement and fails to correct said breach within thirty (30) days of receipt of notice of said breach from Physician.” (Docket Item No. 1, Attachment No. 2 at 17.) Thus, the plain language of the agreement indicates that *both* parties possessed the right to terminate for cause, thereby defeating Dr. Ford’s claim that Wellmont Health System retained a unilateral right to terminate the employment agreement. In addition, the employment agreement allowed either party to terminate the agreement upon no less than six months’ prior written notice. (Docket Item No. 1, Attachment No. 2 at 17.)

Furthermore, the defendants cite a decision by the Court of Appeals of Texas, which the undersigned recognizes is not binding authority upon this court, but in which an employee asserted a similar argument, contending that the arbitration agreement was illusory because the employer “avoided its mutual obligation to arbitrate by exercising its ‘sole discretion’ to terminate the contract.” *In re Mission Hosp., Inc.*, No. 13-07-543CV, 2007 Tex. App. LEXIS 8267, at \*11 (Tex. App. Oct. 18, 2007). The court further stated that the “obligation to arbitrate is not extinguished upon termination of the employment [a]greement between the parties.” *In re Mission Hosp., Inc.*, No. 13-07-543CV, 2007 Tex. App. LEXIS 8267, at \*11 (Tex. App. October 18, 2007). The arbitration clause in the Texas case included similar language, requiring arbitration for “[a]ny controversy, dispute or disagreement arising out of or relating to [the] Agreement, or the breach thereof.” *In re Mission Hosp., Inc.*, No. 13-07-543CV, 2007 Tex. App. LEXIS 8267, at \*11 (quoting the arbitration clause). The court determined that the employee had failed to provide the court any basis for construing the agreement as contingent upon his continued employment with the employer. *See In re Mission Hosp., Inc.*, No. 13-07-543CV, 2007 Tex. App. LEXIS 8267, at \*11. In support of its decision, the Court of Appeals of Texas cited a Supreme Court of Texas case that stands for the general proposition that an arbitration agreement is only illusory if a party retains the unilateral, unrestricted right to terminate. *See In re Mission Hosp., Inc.*, No. 13-07-543CV, 2007 Tex. App. LEXIS 8267, at \*11 (citing *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 230 n.2 (Tex. 2003)). As explained above, in this case, Wellmont Health System did not retain a unilateral, unrestricted right to terminate; instead, both parties possessed the right to terminate for cause.

Dr. Ford additionally asserts that the employment agreement and the arbitration

clause are ambiguous and unconscionable because of the alleged irreconcilable nature of the previously mentioned provisions in the contract, as well as the following: the employment agreement called for the application of the Commercial Arbitration Rules instead of rules applicable to employment situations; the employment agreement failed to state whether the matter was to be conducted pursuant to the rules of the American Arbitration Association or whether it was to be conducted by the American Arbitration Association; the applicable arbitration rules were not attached to the agreement; and the arbitration clause included language providing that “[d]uring the continuance of any arbitration proceedings, the parties shall continue to perform their respective obligations under this Agreement.” (Plaintiff’s Arbitration Opposition Brief at 2-7.)

A cardinal rule of contractual interpretation is to ascertain and give effect to the intent of the parties. *See Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006) (citing *Christenberry v. Tipton*, 160 S.W.3d 487, 494 (Tenn. 2005)). It is necessary that the courts look at the plain meaning of words in a contract to determine the parties’ intent. *See Allstate Ins. Co.*, 195 S.W.3d at 611. In doing so, if the contractual language is clear and unambiguous, the literal meaning will control. *See Allstate Ins. Co.*, 195 S.W.3d at 611. However, if the words of the contract are ambiguous, meaning that they are susceptible to more than one reasonable interpretation, the parties’ intent cannot be determined by a literal interpretation; therefore, “the court must apply established rules of construction to determine the intent of the parties.” *Allstate Ins. Co.*, 195 S.W.3d at 611-12 (citing *Planters Gin Co. v. Fed. Compress & Warehouse Co. Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002)).

Dr. Ford’s argument that the arbitration clause and the termination provisions

of the employment agreement contain ambiguous language and are irreconcilable is misplaced. As discussed earlier, the employment contract does not give Wellmont Health System a unilateral right to terminate the contract, as both parties had the right to terminate with cause. Furthermore, the language contained in each provision is not ambiguous, as the provisions simply set forth the grounds for termination by each party and explain that any controversy arising out of the agreement, or any breach thereof, shall be subject to arbitration. Likewise, the fact that the employment agreement indicated that the arbitration would be conducted “in accordance with the Commercial Arbitration Rules of the American Arbitration Association,” instead of rules applicable to employment situations, is of no consequence. (Docket Item No. 1, Attachment No. 2 at 18.) The court acknowledges that the parties should have probably agreed to the employment-related arbitration rules of the American Arbitration Association; however, the parties are bound by the arbitration rules agreed to within the employment agreement. The fact that the parties agreed to utilize a different set of arbitration rules does not render the arbitration clause ambiguous, as it is evident that the parties agreed to employ the Commercial Arbitration Rules. Similarly, the fact that the employment agreement failed to specifically state if the American Arbitration Association would conduct the arbitration does not create an ambiguity. Moreover, the court notes that neither of the alleged ambiguities would impact whether or not the parties agreed to arbitrate; they instead simply reference what rules apply and who will conduct the arbitration. After a review of the arbitration clause and termination provisions, the undersigned is of the opinion that the plain language of the employment agreement is perfectly clear, and the provisions are not susceptible to more than one reasonable interpretation and, thus, are not ambiguous. *See Allstate Ins. Co.*, 195 S.W.3d at 611.

Dr. Ford also argues that the arbitration clause and employment agreement are unconscionable because the arbitration clause included language that states, “[d]uring the continuance of any arbitration proceedings, the parties shall continue to perform their respective obligations under this Agreement[]” and because the employment agreement failed to attach the applicable arbitration rules. (Plaintiff’s Arbitration Opposition Brief at 5-7), (Docket Item No. 1, Attachment No. 2 at 19.) Under Tennessee law, a contract may be unconscionable if the provisions are so one-sided that the contracting party is denied an opportunity for a meaningful choice. *See Taylor v. Butler*, 142 S.W.3d 277, 285 (Tenn. 2004) (citing *Aquascene Inc. v. Noritsu Am. Corp.*, 831 F. Supp. 602, (M.D. Tenn. 1993)); *see also Owens v. Nat’l Health Corp.*, 263 S.W.3d 876, 889 (Tenn. 2007). “Enforcement of a contract is generally refused on grounds of unconscionability where the ‘inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.’” *Taylor*, 142 S.W.3d at 285 (quoting *Haun v. King*, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984)).

Dr. Ford claims that this particular language from the arbitration clause, when read in conjunction with the entire employment agreement, is unconscionable because it allowed Wellmont Health System “to terminate Dr. Ford’s employment and all benefits, upon an alleged breach, without notice and without obligation to maintain the status quo.” (Plaintiff’s Arbitration Opposition Brief at 6.) In other words, he contends that the language is unconscionable because it allowed Wellmont Health System to terminate Dr. Ford immediately upon an alleged breach, but does not provide Dr. Ford with the same remedy upon any breach by Wellmont Health System.

The language “[d]uring the continuance of any arbitration proceedings, the parties shall continue to perform their respective obligations under this Agreement[.]” appears to apply more to situations where termination is not an issue. Because, in essence, if an employee was terminated justly, then there would be no further obligations under the agreement, leaving only the issue of whether the termination was indeed just for possible arbitration. Upon review of this contractual language, the undersigned cannot say that this language, when considered with the remaining provisions of the employment agreement, rises to the level to be considered “so one-sided ... that the contracting party is denied an opportunity for a meaningful choice.” *Taylor*, 142 S.W.3d at 285. Similarly, the undersigned does not view this language as overly oppressive or that the inequality of the bargain shocks the judgment of one with common sense. *See Taylor*, 142 S.W.3d at 285.

In fact, as pointed out by the defendants, this was a contractual agreement negotiated by sophisticated parties, evidenced by the fact that the plaintiff is a medical doctor, who managed to negotiate and bargain for certain terms that he wished to include in the employment agreement. Thus, this is not a factual situation in which the parties were on unequal grounds and one party possessed an unfair advantage. The court also finds Dr. Ford’s argument as to the failure to attach the arbitration rules to be unpersuasive. The arbitration clause specifically stated which rules would apply, placing Dr. Ford on notice as to which rules would govern any future arbitration proceedings between the two parties. Moreover, as just stated, Dr. Ford was a sophisticated, educated party who would certainly, through his own diligence, or through the assistance of counsel, be able to locate the applicable rules of the American Arbitration Association. Accordingly, the undersigned is of the opinion that neither

the language of the arbitration clause nor the failure to attach the applicable rules were unconscionable.

Since the contractual language is clear and unambiguous, the undersigned is of the opinion that the literal meaning of the employment agreement and its provisions shall control. *See Allstate Ins. Co.*, 195 S.W.3d at 611. Therefore, it is my recommendation that the defendants' Motion To Compel Arbitration be granted.

In considering the defendants' Motion to Dismiss, the undersigned examined the validity of certain tort claims. In this case, the parties agreed to a rather broad arbitration clause, which indicates "[a]ny controversy arising out of or relating to this Agreement, or relating to the breach hereof" shall be arbitrated. (Docket Item No. 1, Attachment No. 2 at 18.) "Courts have consistently found that broad arbitration clauses like the one [in this case] encompass tort claims arising between the parties." *Bodor v. Green Tree Servicing, LLC*, No. M2007-00308-COA-R10-CV, 2007 Tenn. App. LEXIS 548, at \*8 (Tenn. Ct. App. Aug. 24, 2007) (citing *Dale Supply Co. v. York Int'l Corp.*, 2003 Tenn. App. LEXIS 720, at \*5 (Tenn. Ct. App. Oct. 9, 2003); *Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 869 (6th Cir. 1990)). As such, the undersigned recommends that the remaining tort claim of conversion as to Wellmont Health System be submitted to arbitration along with any wrongful termination or breach of contract claims asserted by Dr. Ford. The undersigned further recommends that, should the court adopt this Report and Recommendation, the court should stay all current and future proceedings in this case until the arbitration has been completed.

## **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. “Medical Associates of Southwest Virginia, Inc.” is located in Blacksburg, Virginia, incorporated in the Commonwealth of Virginia and was erroneously named as a defendant in this case by the plaintiff, as the entity had absolutely no relation to the allegations set forth by plaintiff in his Complaint;
2. The doctrine of fraudulent joinder permits removal when a nondiverse party is a defendant in the case. In order to establish fraudulent joinder, the defendants must demonstrate that Dr. Ford cannot establish a cause of action against the in-state defendant;
3. The doctrine further provides that a district court is permitted to assume jurisdiction over an action even if there are nondiverse named defendants at the time the case is removed from state court, thereby allowing the district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants and thereby retain jurisdiction;
4. Because “Medical Associates of Southwest Virginia, Inc.” is an entity that had no connection to the other parties involved and had no relation to the allegations set forth by Dr. Ford, there is no possibility that Dr. Ford could establish a cause of action against this particular defendant;
5. Thus, the court should assume jurisdiction over the matter even though the named defendant is a nondiverse party, dismiss the action as it pertains to Medical Associates of Southwest Virginia,

Inc., and retain jurisdiction over the matters, as there is complete diversity among the remaining defendants;

6. The party that Dr. Ford should have named, Wellmont Physician Services or Medical Associates of Southwest Virginia, is not a necessary party in this action because the contractual agreement at issue was between Dr. Ford and Wellmont Health System; thus, Dr. Ford will not be permitted to amend his Complaint to include this entity;
7. Since jurisdiction in this case is based upon diversity, this court must apply the substantive law of the forum state, including the forum state's choice of law rules. Thus, with regard to the defendants' Motion To Dismiss, the tort claims asserted shall be governed by the substantive law of the place of the wrong, i.e., Virginia;
8. In order to properly assert a claim for conversion under Virginia law, the plaintiff must allege (1) the ownership or right to possession of the property at the time of the conversion; and (2) the wrongful exercise of dominion or control by the defendants over the plaintiff's property, thereby depriving the plaintiff of possession of the property;
9. Furthermore, an action for conversion can be maintained only by a person having a property interest in the property and who was entitled to immediate possession of the item alleged to have been wrongfully converted;
10. Dr. Ford has failed to state a claim of conversion, as it pertains to patient files and records, because the employment agreement plainly stated that, upon termination, such items would remain the rightful property of Wellmont Health System;
11. Dr. Ford also failed to state a claim of conversion against Brian

Slocum as to certain personal property because Dr. Ford asserted no allegations that Slocum personally withheld any property rightfully belonging to Dr. Ford;

12. However, Dr. Ford did allege sufficient facts to state a claim of conversion against Wellmont Health System, as he specifically alleged that Wellmont Health System prohibited him from retrieving personal items such as letters, pamphlets, books, cabinets, office fixtures and furnishings;
13. In Virginia, in order to prove the tort of wrongful interference with a prospective business or economic advantage, the plaintiff must demonstrate: (1) the existence of a business relationship or expectancy, with a probability of future economic benefit to plaintiff; (2) defendant's knowledge of the relationship or expectancy; (3) a reasonable certainty that absent defendant's intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy; and (4) damage to plaintiff;
14. Dr. Ford failed to meet the third element because he failed to allege that, had the termination letter not been mailed to his patients, he would have been able to continue the professional relationship; thus, Dr. Ford failed to precisely allege facts to show that absent the defendants' intentional misconduct, he would have continued his professional relationship with his patients and received the expected benefit of their continued business;
15. As such, Dr. Ford failed to state a claim of wrongful interference with a prospective business or economic advantage against both Wellmont Health System and Brian Slocum;
16. Tennessee law governs the issues relating to the interpretation of the provisions in the employment agreement, particularly the arbitration clause;

17. The arbitration clause in the employment agreement was neither ambiguous nor unconscionable; thus, since the contractual language was clear and unambiguous, its literal meaning should be followed, and the parties should proceed to arbitrate their disputes;
18. Since this particular employment agreement included a broad arbitration clause, the tort claims arising between the parties also should be arbitrated; and
19. The surviving tort of conversion against Wellmont Health System, as well as the remaining contract-related disputes between the parties, shall be settled through arbitration; thus, the court should stay the proceedings in this case until arbitration has been completed.

### **RECOMMENDED DISPOSITION**

For the reasons detailed in this Report and Recommendation, I hereby recommend that the court deny the plaintiff's Motion To Remand and dismiss Medical Associates of Southwest Virginia, Inc., as a party in the case, grant the defendants' Motion To Dismiss as to all claims against Brian Slocum, grant the defendants' Motion To Dismiss as to the claim of tortious interference with a prospective business or economic advantage against Wellmont Health System, deny the defendants' Motion To Dismiss as to the claim of conversion against Wellmont Health System and grant the defendants' Motion To Compel Arbitration, thus, staying the proceedings until arbitration has been completed.

## NOTICE TO PARTIES

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C);

Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed finding or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence to recommit the matter to the magistrate judge with instructions.

Failure to file written objection to these proposed findings and recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in this matter to the Honorable Glen M. Williams, Senior United States District Judge.

The Clerk is directed to send a certified copy of this Report and Recommendation to all counsel and unrepresented parties of record.

ENTER: November 30, 2009.

*/s/ Pamela Meade Sargent*  
UNITED STATES MAGISTRATE JUDGE