FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
APR 27 2004
GREGORY C. LANGHAM
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Case No. 02-Z-455 (BNB)

KIRK J. NIELSON, D.D.S,
S. KENT LAUSON, D.D.S., and
AURORA ORTHODONTICS, PROFESSIONAL L.L.P.,
a Colorado limited liability partnership, as successor to
AURORA ORTHODONTICS, P.C., a Colorado
professional corporation,

Plaintiffs,

v.

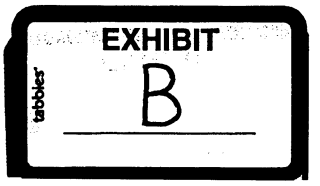
ORTHALLIANCE, INC., a Delaware
corporation,

Defendant.

ORDER AND FINAL JUDGMENT OF DISMISSAL

This matter was before the Court on March 24, 2004, for hearing on Plaintiffs' Motion For Partial Summary Judgment and Defendant's Motion For Partial Summary Judgment. The Court heard the arguments and statements of counsel, and made oral findings and conclusions of law which are incorporated herein by reference as if fully set forth.

In April of 1998, Plaintiffs Kirk J. Nielson, D.D.S.; S. Kent Lauson, D.D.S.; and Aurora Orthodontics, Professional LLP (AO), either directly or through entities wholly owned by one or more of them, entered into a series of contracts with Defendant OrthAlliance, Inc. Those contracts consisted of an Agreement And Plan Of Reorganization (Reorganization Agreement), a Consulting And Business Services Agreement (CBSA), guarantees by Nielson and Lauson of certain payment obligations



of AO under the CBSA (Guarantees), and employment agreements between AO, Nielson and Lauson (Employment Agreements).

In their First Claim for Relief, Plaintiffs assert that all of the aforementioned contracts must be considered as part of a single arrangement that, taken in its entirety, violates the Colorado Dental Practice Law, Colo. Rev. Stat. § 12-35-101 *et seq.* (CDPL). In their Second Claim for Relief, Plaintiffs assert that the covenants not to compete contained in the CBSA and the Employment Agreements are void under Colo. Rev. Stat. § 8-2-113. In their Fifth Claim for Relief, Plaintiffs assert that they were induced to enter into the contracts at issue by OrthAlliance's misrepresentations. Plaintiffs moved for partial summary judgment on their First and Second Claims for Relief, and Defendant moved for partial summary judgment on Plaintiffs' First, Second, and Fifth Claims for Relief, as well as on Plaintiffs' request for recovery of consulting fees.

As to Plaintiffs' First Claim for Relief, the legality of OrthAlliance's arrangements must be determined by looking at the substance of those arrangements taken in their entirety. The Court finds that the substance of OrthAlliance's arrangements taken in their entirety involves fee-sharing with a business corporation, the practice of dentistry by a business corporation, and the acquisition of an ownership interest in a dental practice by a business corporation, all in violation of the CDPL. Accordingly, the Court declares that OrthAlliance's arrangements are illegal under Colorado law and enjoins OrthAlliance from seeking to enforce its arrangements against Plaintiffs.

As to Plaintiffs' Second Claim for Relief, the covenants not to compete contained in the CBSA and the Employment Agreements are not covenants to protect trade secrets within the meaning of Colorado law. Covenants not to compete also do not fall

within any of the other exceptions provided by Colorado law. Therefore, the covenants not to compete contained in the CBSA and the Employment Agreements are void under Colo. Rev. Stat. § 8-2-113.

As to Plaintiffs' Fifth Claim for Relief, the undisputed facts now before the Court, and the reasonable inferences therefrom, are insufficient to support a claim of actionable fraud or negligent misrepresentation under Colorado law.

The Court finds that, under Colorado law, in the circumstances of this case, the illegality of OrthAlliance's arrangements requires that the parties be left where the Court finds them, and renders moot Plaintiffs' Third and Fourth Claims for Relief and Defendant's First, Second, Third, and Fourth Counterclaims. Accordingly, it is

ORDERED that Plaintiffs' Motion For Partial Summary Judgment is granted. It is

FURTHER ORDERED that Defendant's Motion For Partial Summary Judgment is granted as to Plaintiffs' Fifth Claim for Relief. It is

FURTHER ORDERED that Defendant's Motion For Partial Summary Judgment is otherwise denied. It is

FURTHER ORDERED that Plaintiffs' Third and Fourth Claims for Relief and Defendant's First, Second, Third, and Fourth Counterclaims are dismissed with prejudice as moot. It is

FURTHER ORDERED that judgment is entered in favor of Plaintiffs Kirk J. Nielson, D.D.S.; S. Kent Lauson, D.D.S.; and Aurora Orthodontics, Professional LLP, and against Defendant OrthAlliance, Inc., on Plaintiffs' First Claim for Relief, and the Agreement and Plan of Reorganization, the Consulting and Business Services Agreements, the Employment Agreements, the Guarantees, and any and all amendments to or modifications of any of the aforementioned agreements are declared

illegal, void, and unenforceable in their entirety, and Defendant is hereby enjoined from attempting to enforce the terms of any of the aforementioned agreements. It is

FURTHER ORDERED that judgment is entered in favor of Plaintiffs Kirk J. Nielson, D.D.S.; S. Kent Lauson, D.D.S.; and Aurora Orthodontics, Professional LLP, and against Defendant OrthAlliance, Inc., on Plaintiffs' Second Claim for Relief, and the covenants not to compete contained in the Consulting And Business Service Agreement and the Employment Agreements are declared illegal, void, and unenforceable in their entirety. It is

FURTHER ORDERED that judgment is entered in favor of Defendant OrthAlliance, Inc., and against Plaintiffs Kirk J. Nielson, D.D.S.; S. Kent Lauson, D.D.S.; and Aurora Orthodontics, Professional LLP, on Plaintiff's Fifth Claim for Relief. It is

FURTHER ORDERED that judgment of dismissal is entered as to Plaintiffs' Third and Fourth Claims for Relief and Defendant's First, Second, Third, and Fourth Counterclaims. It is

FURTHER ORDERED that all relief with respect to the above claims and counterclaims not granted herein is denied. It is

FURTHER ORDERED that the parties shall pay their own costs.

DATED at Denver, Colorado, this 26 day of April, 2004.

BY THE COURT:

ZITA L. WEINSHIENK, Senior Judge
United States District Court

CERTIFICATE OF SERVICE

Civil Action No. 02-Z-455 (BNB)

The undersigned certifies that a copy of the foregoing ORDER was served on April 27, 2004, by:

( ) delivery to:

MAGISTRATE JUDGE BOYD N BOLAND

DAVID S STEEFEL ESQ
JAMES C RUH ESQ
ERIC BONO ESQ
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OR

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GREGORY C. LANGHAM, Clerk

By _____
Deputy Clerk