NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
Civil No. 23-1593-BLS1

STEWARD MEDICAL GROUP, INC.
Plaintiff

vs.

JAMIE BARBER, & others[1]
Defendants

MEMORANDUM AND ORDER ON MOTIONS TO DISMISS

This case was filed in the wake of contentious litigation in Compass Medical, P.C. v. Steward Medical Group, Inc., Case No. 1784CV1407-BLS1 (the "Compass Case"). After a lengthy jury trial, in October 2022, Steward Medical Group, Inc. ("SMG") obtained a jury verdict for $16.4 million against Compass Medical, P.C. ("Compass") on SMG's counterclaims. Compass then filed for bankruptcy protection and filed a suggestion of bankruptcy in the Compass Case on June 5, 2023.

Six weeks later, on July 13, 2023, SMG filed this case against Compass's former Chief Executive Officer Jamie Barber ("Barber"), its former Chief Financial Officer Catherine Robinson ("Robinson"), and Bruce Weinstein ("Weinstein"), the former President of its Board of Directors. The case is before me on the defendants' individual motions to dismiss under Mass. R. Civ. P. 12(b)(6). Those motions are heavily laced with references to the factual record developed during the Compass Case, rather than focusing on the specific allegations of the Amended

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[1] Bruce Weinstein, M.D. and Catherine Robinson.

Complaint, which is the operative pleading. For the following reasons, Robinson and Barber's motions must be denied, but Weinstein's motion must be allowed.

BACKGROUND[2]

A. The Provider and Management Services Agreement

In November 2011, SMG and Compass executed a Provider and Management Services Agreement (the "PMSA"). Barber and Robinson actively participated in negotiating the PMSA with SMG. Under Schedule 7.1 of the PMSA, Compass was entitled to receive a Monthly Fee "for providing the items and services under" the PMSA, which was calculated using a Base Rate (for 2012) and an Adjusted Base Rate (for all other years). Schedule 7.1 required the Base Rate to be calculated according to the following formula:

> (a) the total collections of Compass for services rendered during the period from October 1, 2010 through September 30, 2011 (the "Base Year") minus rent expense incurred by Compass during the Base Year; and (b) divided by the total wRVUs generated by Compass providers during the Base Year. (Emphasis added).

Schedule 7.1 further provided, in a section titled "'Meaningful Use' Payments," that "[i]n addition to the Monthly Fee set forth above, Compass shall be entitled to receive and retain all federal 'meaningful use' payments that it receives from Steward or elsewhere that are attributable to services rendered at the Medical Offices during the term of this Agreement." Meaningful use payments were incentive payments provided under the Medicare Electronic Health Record ("EHR") Incentive Program to Medicare eligible professionals who used certified EHR technology.

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[2] This background is taken from the allegations in the Amended Complaint and Jury Demand ("Amended Complaint") (Docket #17), the reasonable inferences that may be drawn therefrom, the documents attached thereto or referenced therein, and the court records from the Compass Case. See Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 224 (2011); Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000).

SMG agreed to pay Compass to provide administrative services for SMG's patients at certain SMG medical offices. PMSA § 5. Among those services, Compass was responsible for "[t]he maintenance, custody and supervision of business records . . . and reports relating to the business operations of Steward at the Medical Offices." Id. § 5.1(a). Record maintenance duties continued after termination or expiration of the PMSA. Id. §§ 12.2(c), (g). The PMSA also required Compass to enter a Medical Records Custody Agreement ("MRCA") with SMG after the termination or expiration of the PMSA whereby Compass would become the custodian of SMG's medical records relating to the PMSA. Id. § 12.2(d).

B. Compass's Inclusion of Meaningful Use Payments in Base Rate

In June 2012, after execution of the PMSA, Evan Lynch-Throne ("Lynch-Throne"), Director of Business Development at Steward Health Care Systems LLC, emailed Robinson seeking a detailed breakdown of the revenue Compass included in calculating the Base Rate. After conferring with Barber, Robinson emailed Lynch-Throne a spreadsheet that included meaningful use funds in a line item labeled, "Quality, Pay for Performance," although in an email with Barber in October 2011, Robinson categorized meaningful use payments separately from other forms of revenue earned by Compass. Barber and Robinson knew that meaningful use payments were not deemed by the parties to be part of "the total collections of Compass for services rendered" referenced in Schedule 7.1 of the PMSA or "Quality, Pay for Performance" funds. SMG was unaware that Robinson included meaningful use payments in the Base Rate.

C. The Compass Case

In May 2017, Compass filed the Compass Case. SMG asserted counterclaims. During discovery, Robinson testified at her deposition in September 2021 that $800,000 of meaningful use funds were included as "collections" in Compass' Base Rate calculation.

The Compass Case was tried in the Fall of 2022. On September 29, 2022, Robinson testified that the $800,000 in meaningful use funds was included in the category "Other Professional Revenue" under the subcategory entitled "Quality, Pay for Performance" in the spreadsheet provided to Lynch-Throne. In response to Robinson's testimony, SMG moved to add intentional and negligent misrepresentation claims based on the concealment of the meaningful use payments. The Court (Kazanjian, J.) allowed the addition of those claims. At the conclusion of the trial, a jury awarded SMG damages, some of which related to the concealment of the meaningful use payments.

D. Failure to Provide Medical Records

In September 2021, Compass notified SMG that it would not renew the PMSA. The PMSA terminated on April 1, 2022. At that time, Compass and SMG executed an MRCA with an effective date of April 1, 2022. The MRCA defined Compass' obligations to maintain and produce certain medical records.

After the MCRA was executed, SMG asked Compass to provide certain medical records and patient data. SMG needed the information to submit a quality report to third-party payors to comply with its obligations under risk management contracts with those payors. Compass did not provide the requested information.

In April 2022, SMG complained to Barber and Barber agreed to provide the information; however, the information SMG received was incomplete and unusable. SMG tried repeatedly to work with Compass to fix the issues with little success. SMG spoke with Compass' Chief Medical Officer to no avail; he screamed and refused to provide the information. Entreaties to Barber were likewise unhelpful. SMG alleges "[u]pon information and belief" that Barber and Weinstein "jointly decided not to provide SMG with access to the requested data" and that they

did so "based on their hostility and ill will toward SMG" and "in retaliation for SMG's legal claims against Compass." Amended Complaint ¶¶ 61, 62, 64.

As a result of SMG's failure to obtain the information requested, SMG did not receive payments from certain third-party payors that it was otherwise entitled to receive.

E. The Present Lawsuit

After trial in the Compass Case and after Compass sought bankruptcy protection, SMG filed this case against Barber, Robinson, and Weinstein. In its Amended Complaint, SMG asserts claims for fraudulent misrepresentation (Count I) and violation of G.L. c. 93A (Count III) against Barber and Robinson based on their purported concealment of meaningful use funds in the 2012 email to Lynch-Throne outlining the revenue used for the Base Rate. It also asserts claims for tortious interference with contractual relations (Count II) and violation of G.L. c. 93A (Count IV) based on Barber and Weinstein's purported failure to provide the medical records and patient data to SMG requested in 2022. The relevant contracts for purposes of the tortious interference claim are the PMSA and the MRCA.

DISCUSSION

I. Standard of Review

Under Mass. R. Civ. P. 12(b)(6), I must accept as true the factual allegations in the complaint and draw "all reasonable inferences" from those allegations in plaintiff's favor. Dunn v. Genzyme Corp., 486 Mass. 713, 717 (2021). The factual allegations in the complaint must set forth the basis for plaintiff's entitlement to relief with "more than labels and conclusions," Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); and "'raise a right to relief above the speculative level[,] . . . plausibly

suggesting (not merely consistent with)' an entitlement to relief." Iannacchino, 451 Mass. at 636, quoting Bell Atl., 550 U.S. at 555.

II. Fraudulent Misrepresentation v. Robinson & Barber (Count I)

SMG asserts a fraudulent misrepresentation claim against Barber and Robinson based on their purported concealment of meaningful use funds in the 2012 email to Lynch-Throne outlining the revenue used to calculate the Base Rate. Robinson and Barber contend that the claim fails because (i) it is time barred; and (ii) because Schedule 7.1 of the PMSA required meaningful use funds to be included in the Base Rate calculations. Neither argument is persuasive at this pleading stage.

A. Statute of Limitations

Tort claims, including claims for fraud, have a three-year statute of limitations, G.L. c. 260, § 2A, and generally accrue "when the plaintiff is injured." Koe v. Mercer, 450 Mass. 97, 101 (2007). "Under th[e] discovery rule," however, "the statute of limitations starts when the plaintiff discovers, or reasonably should have discovered, 'that [he] has been harmed or may have been harmed by the defendant's conduct.'" Id., quoting Bowen v. Eli Lilly Co., 408 Mass. 204, 205-206 (1990). "The knowledge required to trigger commencement of the statute of limitations is not notice of every fact which must eventually be proved in support of the claim, but rather knowledge that an injury has occurred." AA & D Masonry, LLC v. South St. Bus. Park, 93 Mass. App. Ct. 693, 699 (2018) (internal quotations omitted). "A plaintiff may be put on 'inquiry notice' where it is informed of facts that would suggest to a reasonably prudent person in the same position that an injury has been suffered as a result of the defendant's conduct." Commonwealth v. Tradition (N. Am.) Inc., 91 Mass. App. Ct. 63, 71 (2017).

A motion to dismiss on statute of limitations grounds must show that there is no plausible basis under which the claims would be timely. See Id. at 72-73 (dismissal reversed where "not clear from the face of the [ ] complaint that [the] claims were untimely;" "where the date triggering the statutes of limitation is disputed . . . the wiser course is to present the matter to the fact finder"); O'Laughlin v. Pittsfield, 990 F. Supp. 2d 44, 47 (D. Mass. 2013) (Ponsor, J.) ("A court may only grant a motion to dismiss based on the statute of limitations if, after evaluating the record in the light most favorable to the plaintiff, there is 'no plausible basis' for finding the claim to be timely."), quoting Erlich v. Ouellette, Labonte, Roberge & Allen, P.A., 637 F.3d 32, 35 (1st Cir. 2011).

SMG asserts that, at the earliest, the statute of limitations began to run in September 2021, when during Robinson's deposition it learned of the purported concealment of meaningful use funds.[3] See Amended Complaint ¶ 27. Barber and Robinson argue this is not the case for three reasons, none of which have merit on a motion to dismiss.

First, Robinson and Barber contend that the 2012 email to Lynch-Throne put SMG on inquiry notice, thus triggering the statute of limitations. However, neither the email nor the attached spreadsheet makes any mention of meaningful use payments and thus, it is difficult to discern how the email, without more, informed SMG of facts that reasonably suggested that it had been injured.

Second, primarily relying on testimony from the Compass Case, Robinson and Barber argue that SMG had constructive knowledge of its injury in 2014 because George Clairmont, a co-founder of Compass who then joined SMG in 2014, was aware that meaningful use funds

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[3] SMG does not assert that fraudulent concealment tolled the statute of limitations.

were included in the Base Rate before he left for SMG and his knowledge can be imputed to SMG. See Demoulas v. Demoulas, 428 Mass. 555, 584 (1998), quoting Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co., 381 F.2d 245, 250 (4th Cir. 1967) ("knowledge of officers and directors having substantial control of all activities of a corporation is imputed to the corporation"). This argument fails because there are disputed questions of fact as to what exactly Clairmont's knowledge was, at what point he obtained such knowledge, and whether he had sufficient control of SMG to trigger imputation of his knowledge to the company. These questions cannot be resolved on a motion to dismiss.

Lastly, Robinson and Barber argue that SMG was put on notice that meaningful use payments had been included in the 2012 email to Lynch-Throne, at the latest, on December 24, 2019. On that date, as part of discovery in the Compass Case, Compass produced the October 2011 email between Robinson and Barber, which separately itemized meaningful use funds in the Base Rate calculation. I disagree that the content of the October 2011 email necessarily signals that Robinson and Barber included meaningful use payments in the 2012 breakdown sent to Lynch-Throne such that its production provided the requisite notice of injury.

Here, when SMG knew or should have known of its injury requires factual development and cannot be assessed on the Amended Complaint alone or any documents which are the proper subject of judicial notice. The claim cannot now be dismissed on statute of limitation grounds.

B. Schedule 7.1 of the PMSA

The PMSA requires the Base Rate to be calculated using "the total collections of Compass for services rendered during the period from October 1, 2010 through September 30, 2011." PMSA Sch. 7.1 (emphasis added). Robinson and Barber contend that meaningful use funds were appropriately included in the calculation of the Base Rate because this language does

not differentiate between revenues earned from physicians treating patients and other revenues. Therefore, they argue, the fraud claim must be dismissed.[4] I disagree.

Schedule 7.1 contains a separate section addressing meaningful use payments, which provides that "[i]n addition to the Monthly Fee set forth above, Compass shall be entitled to receive and retain all federal 'meaningful use' payments that it receives from Steward or elsewhere that are attributable to services rendered at the Medical Offices during the term of this Agreement." (Emphasis added). The inclusion of a separate provision addressing meaningful use payments and the language in that provision suggesting that such payments are "in addition to the Monthly Fee," which is calculated using the Base Rate, at the very least creates an ambiguity as to whether the Base Rate properly includes meaningful use payments. As such, the interpretation of the PMSA presents a factual question that cannot be addressed on a motion to dismiss. See Seaco Ins. Co. v. Barbosa, 435 Mass. 772, 779 (2002) ("Where . . . [a] contract . . . has terms that are ambiguous, uncertain, or equivocal in meaning, the intent of the parties is a question of fact to be determined at trial.").

III. Tortious Interference v. Barber & Weinstein (Count II)

SMG asserts a claim for tortious interference with contractual relations based on Barber and Weinstein's purported failure to provide SMG with copies of medical records and patient data when requested in 2022. To succeed on such a claim, a plaintiff must demonstrate that "(1) he had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions." Psy-Ed Corp. v.

[4] Robinson and Barber also argue that the Amended Complaint distorts and mischaracterizes Robinson's trial testimony. At this stage, that argument is of no moment.

Klein, 459 Mass. 697, 715-716 (2011), quoting G.S. Enters., Inc. v. Falmouth Marine, Inc., 410 Mass. 262, 272 (1991). With regard to the third element, "[w]here the defendant is a corporate official acting in the scope of his corporate responsibilities, a plaintiff has a heightened burden of showing the improper motive or means constituted 'actual malice,' that is, 'a spiteful, malignant purpose, unrelated to the legitimate corporate interest.'" Psy-Ed Corp., 459 Mass. at 716, quoting Blackstone v. Cashman, 448 Mass. 255, 260-261 (2007). "The malice must be the 'controlling factor' in the defendant's conduct." Kelleher v. Lowell Gen. Hosp., 98 Mass. App. Ct. 49, 55 (2020), quoting Blackstone, 448 Mass. at 270.

Barber and Weinstein argue that Count II fails because the Amended Complaint does not plausibly allege that they engaged in any conduct amounting to intentional interference or that they possessed actual malice. With regard to Weinstein, I agree that the Amended Complaint fails to state a claim for tortious interference. In contrast to Barber, the Amended Complaint contains a dearth of allegations regarding Weinstein's conduct. It only alleges in conclusory fashion that Weinstein, along with Barber, decided not to provide SMG with the requested information and directed another employee to stonewall SMG. See Amended Complaint, ¶¶ 59, 61. Thus, regardless of whether actual malice is adequately pled, the claim must be dismissed as to Weinstein because it fails to put forward any substantive allegations plausibly suggesting that he participated in the intentional interference.

The same is not true for Barber. Unlike with Weinstein, the Amended Complaint adequately alleges his involvement in the purported scheme to deny SMG the requested information, including communications between him and SMG regarding delivery of the information and his alleged failure to fulfill promises he made in those communications. These allegations are sufficient to plausibly allege intentional interference with the PMSA and/or the

MRCA. Moreover, the Amended Complaint adequately alleges actual malice. See Kelleher, 98 Mass. App. Ct. at 56 (although "direct evidence of malice is not required," a "plaintiff must allege specific facts from which a plausible inference of malice can be drawn[;] a bare allegation that the defendant's interference was 'improper in motive or means' is not sufficient.); Fraelick v. PerkettPR, Inc., 83 Mass. App. Ct. 698, 708 (2013) (reversing dismissal of tortious interference claim because plaintiff's allegations of actual malice "require[d] an assessment of statement of mind," and thus the claim had to be "evaluated on the basis of a factual record"). SMG alleges that Barber withheld the information in retaliation for SMG's lawsuit against Compass, which was then ongoing. See Amended Complaint at 3 & ¶¶ 62-64. Such motivation is plausibly unrelated to a legitimate corporate interest. Accordingly, the claim survives as to Barber.

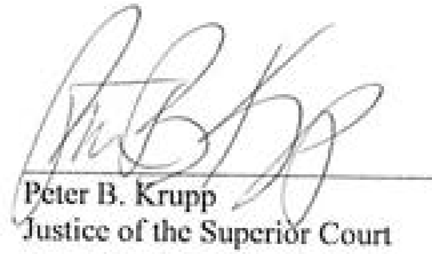
IV. G.L. c. 93A (Counts III and IV)

Plaintiff's claims under G.L. c. 93A are derivative of Counts I and II. Because the underlying claims against Barber and Robinson survive, so does the Chapter 93A claims against them. Conversely, because the underlying tortious interference claim against Weinstein fails, so too does the Chapter 93A claim against him. See Cold Spring Green, LLC v. East Bos. Sav. Bank, 99 Mass. App. Ct. 1130, 2021 WL 2589144 at *3 (June 21, 2021) (Rule 23.0 decision) ("A c. 93A claim has no merit if it is wholly derivative of a meritless common-law claim, such as a claim for breach of contract, fraud, or misrepresentation.").

ORDER

The Motion by Defendant Catherine Robinson to Dismiss Plaintiff's Amended Complaint (Docket #27) and Defendant Jamie Barber's Motion to Dismiss the Amended Complaint (Docket #31) are **DENIED**. Defendant Bruce Weinstein, M.D.'s Motion to Dismiss Counts II and IV of

the Amended Complaint Against Him Pursuant to Mass. R. Civ. P. 12(b)(6) for Failure to State a Claim (Docket #34) is **ALLOWED**.



Dated: May 1, 2024

Peter B. Krupp
Justice of the Superior Court