

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY**

**ROBERT W. HERRING, JR., M.D.,** )  
 )  
 **Plaintiff,** )  
 )  
 **VS.** ) **NO. 17-732-BC**  
 )  
 **NASHVILLE GASTROINTESTINAL** )  
 **SPECIALISTS, LLC,** )  
 )  
 **Defendant.** )

**ORDER SETTING 6/18/18 RULE 16 CONFERENCE, AND NOTICE STATING  
MATTERS TO BE COVERED AND PROVIDING CASE SUMMARY**

After consulting Counsel on their availability, it is ORDERED that on Monday, June 18, 2018 at 9:00 a.m., a Rule 16 conference shall be conducted in court to set deadlines for the completion of the case. It is additionally ORDERED that by June 14, 2018, each side shall file a notice stating any discovery served and the status of the discovery.

In addition to matters Counsel shall present, the Court shall inquire about:

- any additional amendments to the pleadings to assure the pleadings are set to frame and proceed with discovery and dispositive motions;
- the extent of any accounting needed and whether its completion should be prioritized to eliminate and/or inform other claims;

- whether there are matters of contract construction or interpretation and if discovery is needed on these as a matter of mixed law and fact, or if these are just matters of law;

- setting discovery and summary judgment deadlines, and selecting a trial date.

### **Case Summary**

This lawsuit is a Complaint for Declaratory Judgment filed by a former stockholder and employee physician in the Defendant's corporate predecessor pertaining to a split-off of the Plaintiff's business from the Defendant's predecessor. The Plaintiff has filed this lawsuit for construction and declaration of an October 20, 2014 Share Exchange Agreement which provided for the transfer of all assets associated with Plaintiff's practice into a wholly owned subsidiary corporation (referred to in the Complaint as "NGH") to be formed by the Defendant. The Agreement provided that upon completion of certain obligations by Defendant related to the formation of NGH, the Plaintiff would exchange his shares in Defendant for all of the shares owned by Defendant in NGH as a tax-free reorganization under Sections 368(a)(1)(D) and 355 of the Internal Revenue Code.

A review of the Agreement shows that it contains conditions to each side's obligations. The Plaintiff seeks for the Court to declare that the construction of the Agreement establishes the Defendant breached in the following respects.

- The Defendant breached its obligation to pay the Plaintiff all sums collected by NGS that were properly payable to Plaintiff.
- The Defendant improperly withheld funds and deducted expenses that were not properly chargeable to Plaintiff from the funds owed to Plaintiff.
- The Defendant breached its obligation to provide supporting documentation for all sums collected by NGS that were properly payable to Plaintiff
- The Defendant breached its obligation to acquire all the necessary licenses, approvals and contracts necessary for NGH to operate the Plaintiff's business.
- The Defendant is not entitled to any payment under Paragraph 9 of the Agreement because the requirement for the \$10,000.00 payment in Paragraph 9 was modified and eliminated by the parties by agreement.
- The Defendant is not entitled to any payment under Paragraph 9 because Defendant materially breached Paragraph 9 of the Agreement by failing to remit to Plaintiff all the funds he is owed.
- The actions and conduct of the Defendant breached the duty of good faith and fair dealing under the Agreement.

The Plaintiff seeks recovery of damages and attorneys' fees and for the Defendant to provide an accounting of all funds that Defendant received after February 29, 2016 with the supporting documentation including remittance advices, explanation of benefits, deposits and disbursements related to any funds owed to the Plaintiff.

The Defendant denies the Plaintiff's claims and asserts eight affirmative defenses including that the Plaintiff was the first to breach, Plaintiff made Defendant's performance impossible or impracticable, the Plaintiff's damages were self-inflicted or were not mitigated, and payments from third-parties to Plaintiff should be offset.

The Defendant seeks dismissal of Plaintiff's claim, recovery of its attorneys' fees and has filed an Amended Counterclaim to recover damages and a declaration that the Plaintiff was the first to breach. In the Amended Counterclaim the Defendant explains that the Defendant owns and operates ambulatory surgery centers, one of which was used by the Plaintiff (the "Herring ASC"). The Agreement anticipated, among other things, a transaction pursuant to which the Herring ASC would be transferred to a new company and Plaintiff would trade his shares in NGS for the shares of the new company. Paragraph 7 of the Agreement required that the Plaintiff "take no action that will or is calculated to interfere with the operation of NGS or the Remaining NGS Business . . . ." The Defendant contends that in the following respects the Plaintiff breached paragraph 7 of the Agreement and interfered with the operation of NGS and the Remaining NGS Business:

- allowing physicians to perform procedures at the Herring ASC without prior NGS approval,
- issuing an unauthorized \$43,814.17 check to Quality Medical Researched owned by the Plaintiff,
- soliciting NGS employees to leave NGS to work for the Plaintiff,
- deleting and/or blocking NGS from accessing data which interfered with Defendant's ability to account for Plaintiff's collections, and
- providing unauthorized call coverage.

The Defendant has sued the Plaintiff for breach of the Agreement, breach of his employment agreement, and conversion with respect to NGS' data.

The Plaintiff denies the allegations of the Amended Counterclaim.

*s/ Ellen Hobbs Lyle*  
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ELLEN HOBBS LYLE  
CHANCELLOR  
BUSINESS COURT DOCKET  
PILOT PROJECT

cc by U.S. Mail, email, or efile as applicable to:  
Douglas Johnston, Jr.  
Timothy Harvey