

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF CONNECTICUT**

KIM P. ROBBINS, M.D., ROBBINS	:
EYE CENTER, P.C., AND FAIRFIELD	:
REFRACTIVE CENTER, LLC,	:
Plaintiffs,	:
	:
-vs-	: Civ. No. 3:00cv57 (PCD)
	:
COMPREHENSIVE MEDICAL	:
MANAGEMENT, INC.,	:
Defendant.	:

**RULING ON MOTION FOR DEFAULT JUDGMENT**

Plaintiffs move for default judgment pursuant to FED. R. CIV. P. 55(b). The motion is granted.

**I. BACKGROUND**

Kim Robbins is a licensed ophthalmologist. Dr. Robbins is the President and Medical Director of Robbins Eye Center, where she provides ophthalmologic diagnosis, care and treatment, including cataract surgery. Defendant specializes in business management and development of professional ophthalmologic practices.

In March, 1999, plaintiffs executed the Operating Agreement of Fairfield Refractive Center, LLC (“Operating Agreement”) with defendant establishing the Fairfield Refractive Center, LLC and the Medical Offices Services Agreement requiring defendant to provide management services. Plaintiffs allege defendant breached the Operating Agreement and Services Agreement by failing to (1) pay vendors and contractors; (2) deduct proper withholdings from employee wages; (3) provide financial statements; and (4) provide financial documentation for invoices generated and presented to plaintiffs for reimbursement. Plaintiffs also allege fraud, including (1) misrepresentations inducing plaintiffs to

execute the contracts; (2) material omissions regarding pending litigation involving CMMI officers and directors; (3) fraudulent invoices for services not rendered and equipment not purchased; and (4) demands for salary reimbursements for employee hours not worked.

Plaintiffs filed this action seeking rescission of several agreements, damages, and attorneys' fees. They claim breach of contract, fraudulent misrepresentation, negligent misrepresentation, violation of Connecticut Unfair Trade Practices Act ("CUTPA"), CONN. GEN. STAT. § 42-110a *et seq.*, tortious interference, breach of an implied covenant of good faith and fair dealing and breach of a fiduciary duty. On November 30, 2001, plaintiffs sought and obtained an entry of default against defendant for failure to appear. Plaintiffs filed the present motion, to which defendant has filed no opposition and has offered no contrary evidence on the issue of damages.

## II. DISCUSSION

Plaintiffs move for default judgment. They seek rescission of two contracts in addition to damages.

### A. Standard

Upon entry of a default judgment for "failure to plead or otherwise defend" against a complaint, a defendant admits every well-pleaded allegation of the complaint. *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 108 (2d Cir. 1997). Defendant, having failed to submit a memorandum in opposition to plaintiffs' motion for default judgment, is also subject to D. CONN. L. CIV. R. 9(a)(1), which provides that "[f]ailure to submit a memorandum . . . may be deemed sufficient cause to grant the motion, except where the pleadings provide sufficient grounds to deny the motion." Having reviewed the allegations and found the claims legally sufficient, defendant concedes

liability on all counts.

## **B. Rescission of Contracts**

Plaintiffs seek rescission of the Operating Agreement, the dissolution of Fairfield Refractive Center, LLC organized thereby and rescission of the Medical Offices Services Agreement.

“[A] party to a contract . . . may rescind that contract and avoid liability thereunder if that party’s consent to the contract was procured either by the other party’s fraudulent misrepresentations, or by the other party’s nonfraudulent material misrepresentations.” *Monroe v. Great Am. Ins. Co.*, 234 Conn. 182, 188 n.4, 661 A.2d 581 (1995).<sup>1</sup> Plaintiffs allege that they were fraudulently induced to sign the contracts. Fraud in the inducement renders a contract voidable<sup>2</sup> at the option of the defrauded party. *A. Sangiovanni & Sons v. F.M. Floryan & Co.*, 158 Conn. 467, 472, 262 A.2d 159 (1969).<sup>3</sup> Plaintiffs have elected to rescind the Operating Agreement and the Medical Offices Services Agreement, thus those contracts are hereby rescinded. In the absence of an Operating

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<sup>1</sup> Plaintiffs’ claims for damages are limited to counts of common law torts and statutory violations, thus there is no concern of an impermissible award of damages on a rescinded contract. *See Metcalfe v. Talariski*, 213 Conn. 145, 159, 567 A.2d 1148 (1989); *Davidson v. O’Connell*, 114 Conn. 116, 122, 158 A. 207 (1932).

<sup>2</sup> The breach of an implied covenant of good faith and fair dealing claim and the breach of a fiduciary duty claim both remain notwithstanding plaintiffs’ option to rescind the contracts. A voidable contract is one where a party may elect to avoid obligations created by the contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 (1979). That a contract is voidable presumes the existence of a valid contract until the defrauded party elects to disavow its obligations under the contract that would create/establish the requisite fiduciary duty or covenant of good faith and fair dealing. An award of damages for breach of an implied covenant will not issue as such a claim, with ties to the underlying contracts, *see Hoskins v. Titan Value Equities Group*, 252 Conn. 789, 793, 749 A.2d 1144 (2000), would, in effect, award both damages and rescission for a breach of contract claim. *Davidson v. O’Connell*, 114 Conn. 116, 122, 158 A. 207 (1932).

<sup>3</sup> Plaintiffs’ claims for damages are limited to counts of common law torts and statutory violations, thus there is no concern of an impermissible award of damages on a rescinded contract. *See Metcalfe*, 213 Conn. at 159.

Agreement, and in consideration of the unlikelihood that Fairfield Refractive Center, LLC would be capable of continued operations without its membership, it is hereby ordered dissolved pursuant to CONN. GEN. STAT. § 34-207.

### **C. Damages**

Plaintiffs also seek compensatory damages, punitive damages and attorneys' fees on the remaining counts. A concession of liability does not suffice to establish the appropriate measure of damages. An award of damages must be adequately supported by evidence and may not simply be adopted from a proposed figure taken at face value. *Transatlantic Marine Claims Agency, Inc.*, 109 F.3d at 111.<sup>4</sup> In support of their damages claims, plaintiffs have provided the affidavits of David Kaufman, Chief Executive Officer of Robbins Eye Center, P.C., Michael Brown, a damages expert on lost profits analysis, and of Matt Hausman as to attorneys' fees.

#### 1. compensatory damages

Plaintiffs claim compensatory damages of \$2,346,577.62. Kaufman's affidavit adequately delineates individual entries that constitute the total amount sought. The amount sought must, however, be "proved with reasonable certainty," *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 69, 717 A.2d 724 (1998), and based on "sufficient evidence and reasonable assumptions." *Westport Taxi Serv., Inc. v. Westport Transit Dist.*, 235 Conn. 1, 32, 664 A.2d 719

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<sup>4</sup> "Damages, which are neither susceptible of mathematical computation nor liquidated as of the default, usually must be established by the plaintiff in an evidentiary proceeding in which the defendant has the opportunity to contest the amount." *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992). Defendant was afforded the opportunity for a hearing to determine the damages to be awarded and declined to attend the hearing and further declined the opportunity to submit evidence.

(1995). A number of claims for damages cannot satisfy this standard.

Kaufman “believe[s] Robbins Eye Center’s Refractive Center will have to be closed for up to six weeks to repair prior renovations and assure code compliance” because of defendant’s misrepresentation that it had obtained the necessary permits before renovating. Plaintiffs claim \$231,000 in lost patient revenues during that potential six-week closure, calculated by multiplying patient sheets totaling \$77,000 from a selected two-week period by a factor of three. Kaufman also “believes from [his] discussions with contractors that the cost of the work to be performed will be at least \$20,000.” These claimed damages can be considered neither reasonably certain nor based on calculations founded upon reasonable assumptions. There is no evidence as to how far the actual construction deviated from code compliance to substantiate a claim of a six-week repair effort. Assuming, arguendo, this could be overlooked, there is further no indication to substantiate that the two-week period offered as a basis for the calculation represents a typical two-week period thus is a proper basis on which to calculate lost revenues.

Kaufman also claims that the \$240,000 would have been directed to marketing had it not been for defendant’s actions which caused it to be allocated to legal and other expenses. He “believes this translates to a loss of \$1,120,000 in terms of general marketing.” This figure is derived from the assumption that \$30,000 spent on marketing will yield 800 eye procedures, with each procedure representing a \$1,400 profit to plaintiffs.<sup>5</sup> Other than Mr. Kaufman’s representation that he is

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<sup>5</sup> The result does not follow from the equation as given. If \$30,000 marketing results in 800 eye procedures with a per procedure profit of \$1400, \$240,000 marketing should represent a factor of eight times that of \$30,000 marketing, or \$8,960,000, less the \$240,000 spent on marketing, or \$8,720,000.

responsible for marketing at his place of business, there is no evidence that Mr. Kaufman is competent to make such a prediction. There is further no foundation for the legitimacy of the formula utilized, the level of the expenditure claimed nor the return on such an expenditure if made.

Plaintiffs also claim a \$100,000 liability incurred for a barter agreement/note with Barter Network, Inc. The note was co-executed by plaintiffs and CMMI, and the latter promised to cover the note for the benefit of plaintiffs. Plaintiffs offer evidence of what appear to be two monthly statements on a line of credit of \$100,000. The mere fact of such an agreement/note does not obligate defendant to compensate plaintiffs for the full amount thereof. Nor would defendant appear to be obligated to compensate plaintiffs for goods purchased on the line of credit by or for the benefit of plaintiffs absent evidence of the precise undertaking. Absent evidence of the nature of the purchases, the terms of the “note,” the actual liability for which plaintiffs are obligated or have paid and any benefit enjoyed by plaintiffs for good or services purchased, an award of damages could not be considered reasonably certain.

Deducting claims found not reasonably sustained, plaintiffs are entitled to actual damages in the amount of \$875,577.62.

Plaintiffs claim lost profits of \$979,125, which must be based “on sufficient evidence and reasonable assumptions.” *Westport Taxi Serv.*, 235 Conn. at 32. Plaintiffs offer the affidavit of Michael Brown, a damages expert retained to conduct an analysis of profits lost in consequence of defendant’s tortious acts. There is no dispute as to his expertise or his methods. The assumptions underlying his calculations are, however, subject to questions.

Plaintiffs offer evidence of defendants’ interference with a survey by the Accreditation

Association for Ambulatory Health Care, Inc. (“AAAHC”) needed for credentialing and payment by insurers. Defendant allegedly ordered the nurses under its charge not to report to work on the day of the survey. There is, however, no evidence that defendants’ actions caused a four-month delay and the lost profits resulting therefrom. The only evidence is of a single act on the day of the AAAHC survey. There is no evidence connecting this act to a four-month delay. Loss predicated on this assumption cannot be considered reasonably certain. Similarly, losses allegedly caused by the three-month delay in obtaining licensing, presumably for the same act, are not established. It is further not clear that the four-month period and three-month period overlap and that the procedures claimed as opportunities lost during such periods are separate or the same, thus constituting double recovery.

Deducting these amounts from the lost profits claimed, including two reasonably supported lost contract claims involving Dr. Abreu and Dr. Block, plaintiff is entitled to lost profits of \$732,000. Compensatory damages are thus found to be \$1,609,577.62.

## 2. Punitive Damages

Plaintiffs claim punitive damages under two different theories: common law and CUTPA. CUTPA permits a discretionary award of punitive damages, *see* CONN. GEN. STAT. § 42-110g(a) and (d), whereas common law punitive damages are limited to attorney’s fees less taxable costs. *See Barry v. Loiseau*, 223 Conn. 786, 825, 614 A.2d 414 (1992). Under either theory, a claim for punitive damages must be supported by evidence of “a reckless indifference to the rights of others or an intentional and wanton violation of those rights.” *Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033, 1040 (2d Cir.1992); *Gargano v. Heyman*, 203 Conn. 616, 622, 525 A.2d 1343 (1987). There is sufficient evidence of defendant’s reckless indifference to plaintiffs’ rights and intent to injure

plaintiffs' business to justify an award of punitive damages.

Plaintiffs seek punitive damages equivalent to twice the award for compensatory damages in addition to common law punitive damages equivalent to its attorneys' fees. Considering the circumstances of the present case, plaintiffs are entitled to an award of punitive damages equivalent to their award for compensatory damages, or \$1,609,577.62. *See Tessman v. Tiger Lee Constr. Co.*, 228 Conn. 42, 53-54, 634 A.2d 870 (1993); *Stahle v. Michael's Garage*, 35 Conn. App. 455, 463, 646 A.2d 888 (1994). Common law punitive damages in addition to punitive damages under CUTPA would be duplicative and contrary to the purpose of common law punitive damages and will not be awarded. *See Barry*, 223 Conn. at 827. Plaintiffs' total punitive damages award is therefore \$1,609,577.62.

### 3. attorneys' fees

Plaintiffs also seek an award of attorneys' fees and costs of \$ 248,142.31. Plaintiffs have submitted detailed time records in support of an attorneys' fee award.

“[T]he court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney.” CONN. GEN. STAT. § 42-110g(d). Such an award is determined through consideration of the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 715 (5th Cir.1974). *See Jacques All Trades Corp. v. Brown*, 57 Conn. App. 189, 198, 752 A.2d 1098 (2000). Those factors include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee for similar work in the community; (6) whether the fee is

fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19. Fee applicants must “produce satisfactory evidence -- in addition to the attorney’s own affidavits -- that the requested rates are in line with those prevailing in the community for similar lawyer's of reasonably comparable skill, experience, and reputation.” *Blum v. Stenson*, 465 U.S. 886, 895-96 n.11 (1984). The award may be based in part on knowledge of hourly rates charged in a community and is not limited to the submitted evidence. *Miele v. N.Y. State Teamsters Conf. Pension & Ret. Fund*, 831 F.2d 407, 409 (2d Cir. 1987).

Plaintiffs are represented by two firms: Pullman & Comley and Kaufman & Cumberland Co. Plaintiffs request hourly rates as follows: \$295.00 for Attorney Steven S. Kaufman, \$285.00 for Attorney John F. Stafstrom, Jr., \$260.00 for Attorney James P. White, \$260.00 for Attorney Thomas A. Rouse, \$250.00 for Attorney Thomas F. Maxwell, \$250.00-\$275.00 for Attorney James T. Shearin, \$215.00 for Patricia Squires, \$200.00 for Attorney Gwen P. Weisberg, \$195.00 for Attorney Thomas Faher, \$165.00 per hour for Attorney Brian C. Roach, \$145.00 per hour for Attorney Matthew M. Hausman, \$145.00 per hour for Attorney Aimee J. Wood, \$135.00-\$155.00 per hour for Attorney Gerald Pia and \$95.00-\$110.00 for paralegal work.

There is no substantiation of the hourly rates requested. Rates will be assigned based on knowledge of rates charged by counsel in this District. *See Smart SMR of N.Y., Inc., v. Zoning Comm’n of Stratford*, 9 F. Supp. 2d 143, 150 (D. Conn.1998); *Evans v. Conn.*, 967 F. Supp. 673, 691-92 (D. Conn.1997). Thus, the court finds the following rates to be reasonable: Attorneys

Kaufman, Stafstrom, White, Rouse, Maxwell, Shearin and Squires - \$250.00/hour; Attorneys Weisberg, Faher, Roach, Hausman, Wood and Pia- \$150.00/hour; and paralegals - \$75.00/hour.

Having reviewed the submissions, and considering the attorneys' fees sought under the criteria set forth in *Johnson*, the following award is reasonable: \$166,610 in attorneys' fees plus \$8130.81 in costs for the attorneys of Pullman & Comley and \$45,645 in attorneys' fees plus \$1,699.99 in costs for the attorneys of Kaufman & Cumberland Co.

### III. CONCLUSION

Plaintiffs' Motion for Default Judgment (Doc. 130) is **granted**. The Operating Agreement and Medical Services Agreement are hereby rescinded in their entirety and Fairfield Refractive Center, LLC is ordered dissolved. Defendant is ordered to pay compensatory damages of \$1,609,577.62, punitive damages of \$1,609,577.62, \$212,255 in attorneys' fees and \$9,830.80 in costs. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, February \_\_\_\_, 2002..

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Peter C. Dorsey  
United States District Judge