

VIRGINIA:

IN THE ALEXANDRIA CIRCUIT COURT

Alex McMillan, IV, DDS, P.C.,)
)
 and)
)
 Alex McMillan, IV, DDS, Old Town, P.C.)
)
 Plaintiffs, Counterdefendants)
)
 v.)
)
 Thomas J. Winkler, DDS.)
)
 Defendant, Counterclaimant)

Case No.CL09001800

Judgment Order

This Matter Came Before the Court upon the Complaint filed by Alex McMillan, IV, DDS, P.C., and Alex McMillan, IV, DDS, Old Town, P.C., by counsel, and by the Counterclaim filed by Thomas J. Winkler, DDS, by counsel; and

This Matter was tried by the Court without a jury on March 2 through March 5, 2010, at which trial each party was represented by counsel and presented evidence and argued to the Court; and

The Court finds that the Defendant, Thomas J. Winkler, was an at-will employee of the Plaintiffs; and

The Court finds that the Defendant Thomas J. Winkler never had any ownership interest of any kind in either of the Plaintiffs; and

The Court finds that there was no partnership agreement to carry on as co-owners of a business for profit between Thomas J. Winkler and Alex McMillan, IV; and

The Court finds that the mark “No Matter How Many Years and How Many Fears, It’s

Time for You to Smile Easy” is, and always has been, an asset of Alex McMillan, IV, DDS, P.C.; and

The Court finds that the mark “Smileeasy.com” and the domain “Smileeasy.com” are and always has been, assets of Alex McMillan, IV, DDS, P.C.; and

The Court finds that the mark “Burkedentists.com” and the domain “Burkedentists.com” are and always has been, assets of Alex McMillan, IV, DDS, P.C.; and

The Court finds that the Plaintiffs’ list of patients is, and always has been, an asset of the Plaintiffs; and

The Court finds that the Defendant deliberately and intentionally misappropriated a trade secret of the Plaintiffs, to wit, the patient list in March of 2009; it is hereby

ORDERED, as to **Count 1** of the Complaint, Trade Secret Violations pursuant to Virginia Code section 59.1-33 et seq., judgment is GRANTED to the PLAINTIFFS; and it is further

ORDERED that the Defendant shall, within thirty (30) days of the entry of this Order, return the misappropriated patient list to the Plaintiffs; and it is further

ORDERED that the Defendant shall, within thirty (30) days of entry of this Order, provide a list to the Plaintiffs of all patients that the Defendant brought to Alex McMillan, IV, DDS, P.C. when he became an employee in 2002; and it is further

ORDERED that the Defendant shall, within thirty (30) days of entry of this Order, provide a list to the Plaintiffs of all patients seen by the Defendant at the offices of the Plaintiffs, who the Defendant claims were first seen by the Defendant; and it is further

ORDERED that the Defendant shall, within thirty (30) days entry of this Order, provide a list to the Plaintiffs of all patients who were formerly seen at the offices of the Plaintiffs but who

the Defendant has treated since he left his employment in March 2009; and it is further

ORDERED that Defendant shall have no contact with any patient of the Plaintiffs other than 1) the patients identified above as having been brought to the practice of Alex McMillan, IV, DDS, P.C., by the Defendant when the Defendant became an employee in 2002; 2) patients identified above as having been first seen by the Defendant while employed at the Plaintiffs; and 3) patients identified above as having been seen by the Defendant since he left his employment with the Plaintiffs in March 2009; and it is further

ORDERED that the Defendant shall, within thirty (30) days of the entry of this Order, destroy all copies of the patient list as are in his care, custody or control; and it is further

ORDERED, as to **Counts 2, 3, 4 and 5** of the Complaint, Unfair Competition and Trademark Infringement, both state and Federal, judgment is GRANTED to the PLAINTIFFS with the exception of the claim under Virginia Statutory Trademark Infringement for which judgment is GRANTED to the DEFENDANT; and it is further

ORDERED that the Defendant shall cooperate in the prompt correction of the registration with the US Patent and Trademark Office to provide that the applicant and owner of the mark “No Matter How Many Years and How Many Fears, It’s Time for You to Smile Easy,” Registration No. 3585864, is, and always has been, Alex McMillan, IV, DDS, P.C., and the Defendant shall, within seven (7) days from the entry of this Order, execute the assignment, attached hereto as Exhibit A, *nunc pro tunc* to the date of the initial filing; and it is further

ORDERED that the Defendant shall forthwith transfer and relinquish all rights and control of the mark “Smileeasy.com” and the domain “Smileeasy.com” to Alex McMillan, IV, DDS, P.C.; and it is further

ORDERED that the Defendant shall forthwith transfer and relinquish all rights and

control of the mark "Burkedentists.com" and the domain "Burkedentists.com" to Alex McMillan, IV, DDS, P.C.; and it is further

ORDERED that the Defendant shall not infringe further on the rights of Plaintiffs as to the marks "No Matter How Many Years and How Many Fears, It's Time for You to Smile Easy," Smileeasy.com or Burkedentists.com; and it is further

ORDERED that the domain "McMillanwinkler.com" shall be deleted; and it is further

ORDERED that judgment is GRANTED in favor of PLAINTIFFS and against Defendant in the amount of Fifty Thousand Dollars (\$50,000) for attorney fees in this matter; and it is further

ORDERED, as to **Count 6** of the Complaint, Cybersquatting, that judgment is GRANTED to the PLAINTIFFS; and it is further

ORDERED that the Defendant shall forthwith transfer control of "Smileeasy.com" to the Plaintiffs; and it is further

ORDERED that the Defendant shall forthwith transfer control of "Burkedentists.com" to the Plaintiffs; and it is further


ORDERED that judgment is GRANTED in favor of PLAINTIFFS and against Defendant in the amount of Thirty Thousand Dollars (\$30,000) in statutory damages; and it is further

ORDERED that the Defendant's motion, after presentation of evidence at trial, to non-suit all counts of his counterclaim other than Count 7, breach of agreement, is GRANTED and the Counterclaim, other than Count 7 is hereby NON-SUITED; and it is further

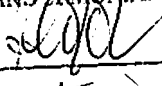
ORDERED that on **Count 7** of the Counterclaim, judgment is GRANTED to the DEFENDANT and against the Plaintiffs in the amount of Fifteen Thousand Four Hundred Dollars (\$15,400).

AND THIS CAUSE IS ENDED.

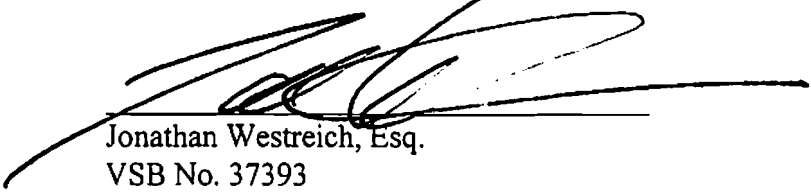
Entered this 17th day of March, 2010.



The Honorable Lisa B. Kemler
Alexandria Circuit Court Judge

A COPY TESTE:
EDWARD SRIGGIAN, CLERK
BY  DEPUTY CLERK
CERTIFIED THIS 17th DAY OF March 2010

SEEN AND AGREED IN PART AND OBJECTED TO IN PART:



Jonathan Westreich, Esq.
VSB No. 37393
604 Cameron Street
Alexandria, Virginia 22314
703-299-905

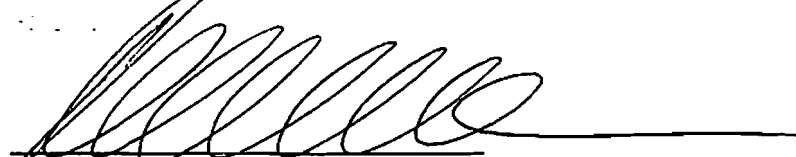
Steven Lieberman, Esq.
Greenberg Lieberman, LLC
2141 Wisconsin Avenue, Suite C2
Washington, DC 20007
202-625-7000

Specifically, the Plaintiff objects to this ruling to the extent that the Court failed to award financial damages for the loss incurred by the Defendant's misappropriation of the Plaintiff's patient list and by the Defendant's infringement on Plaintiff's Marks; further the Plaintiff objects to the award of damages for the cybersquatting claim as insufficient and inadequate; further the Plaintiff objects to the amount of the award of attorney fees as insufficient as the award does not properly account for the quantum of damage and fees caused as a result of the Defendant's conduct.

SEEN:

Rand L. Gelber, Esq.
VSB No.
8000 Towers Crescent Drive
Suite 1350
Vienna, Virginia 22182
703-356-0519
rgelbermd@aol.com

Seen and Objected to as to Judgment for the Plaintiff and Agreed as to judgment for the Defendant, with the exception of those matters on which judgment was not granted to Defendant/Counterclaimant, as set forth below:



Rand L. Gelber, Esq.
VSB No. 23991
8000 Towers Crescent Drive
Suite 1350
Vienna, Virginia 22182
703-356-0519
rgelbermd@aol.com

Defendant/Counterclaimant objects to the ruling to the extent that the Court failed to find a partnership or partnership agreement or otherwise enforce the agreement of the parties with respect to the equal sharing of income after expenses, or the court's finding that Winkler was an at-will employee, and never had any ownership interest of any kind in either of the Plaintiffs. In addition, Defendant objects to the finding that Winkler deliberately and intentionally misappropriated a trade secret and as to the finding of a trade secret in the patient list. Winkler also objects to the award of any attorneys fees in favor of Plaintiff or to the extent that they were excessive and unreasonable and the excessive statutory damages awarded, as well as all other findings and rulings against Defendant/Counterclaimant. Winkler also objects to the finding of infringement and unfair competition, both state and federal and of cybersquatting.
