

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT  
IN AND FOR VOLUSIA COUNTY, FLORIDA**

IPATHOLOGY, LLC,

*Plaintiff/Counter-Defendant,*

v.

LAWRENCE BLASIK

*Defendant,*

&

DAMIAN ARFARAS; JASON L. WELCH;  
BLUE OCEAN DERMATOLOGY, LLC;  
BLUE OCEAN LABORATORY, LLC;  
DERMATOLOGY ON THE SPOT, LLC; &  
THE KALEIDOSCOPE OCEAN, LLC;

*Defendants/Counter-Plaintiffs,*

v.

WESLEY MOSCHETTO,

*Third Party Defendant.*

**CASE NO: 2015-30621 CICI**

**AMENDED ANSWER, AFFIRMATIVE DEFENSES,**

**COUNTERCLAIMS & THIRD PARTY CLAIMS**

Defendants<sup>1</sup>, Damian Arfaras (“Arfaras”); Jason L. Welch (“Welch”); Blue Ocean Dermatology, LLC (“Blue Ocean Dermatology”); Blue Ocean Laboratory, LLC (“Blue Ocean Laboratory”); Dermatology on the Spot, LLC (“Dermatology on the Spot”); and The

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<sup>1</sup> This pleading is filed on behalf of the Defendants listed above. The Counterclaims and Third Party Claims are filed only on behalf of the parties indicated in those respective counts. This pleading is not filed on behalf of Defendant Lawrence Blasik, who has filed a petition for bankruptcy in the Middle District of Florida – Petition #: 6:15-bk-04279-CCJ.

Kaleidoscope Ocean, LLC (“Kaleidoscope”) (collectively, the “Defendants”), by and through their undersigned counsel, file this Amended Answer, Affirmative Defenses, Counter-Claims and Third Party Claims and in support state as follows:

**I. ANSWER:**

**Parties, Jurisdiction, and Venue**

1. **ADMITTED**
2. **ADMITTED.**
3. **ADMITTED.**
4. **ADMITTED.**
5. **ADMITTED.**
6. **ADMITTED.**
7. **ADMITTED.**
8. **ADMITTED.**
9. **ADMITTED** for jurisdictional purposes only. **DENY** that Plaintiff has been damaged and that Plaintiff is entitled to any relief whatsoever.
10. **ADMITTED** for jurisdictional purposes only. **DENIED** as to all other allegations contained in paragraph 10 of Plaintiff’s Complaint.

**General Allegations**

11. Plaintiff is without knowledge as to the allegations contained in Paragraph 11 of Plaintiff’s Complaint and therefore **DENIES** the same.
12. **ADMITTED. AVER** that the Operating Agreement denotes that the respective percentage interests in iPathology would be 67/33. Due to unanticipated start-up costs which Moschetto

covered, the parties agreed that their respective interests would be 75% for Moschetto and 25% for Arfaras.

13. **DENY** that Agreements denote that Arfaras' respective roles were all one and the same.

**AVER** that Arfaras' duties are outlined in the Operating and Membership Agreements and that those Agreements speak for themselves.

14. **DENIED.**

15. **DENIED** as to Arfaras ever having executed the Agreement.

16. **DENIED** as to Arfaras ever having executed the Agreement.

17. **DENIED** as to Arfaras ever having executed the Agreement.

18. **ADMIT** that Arfaras had contact with customers while employed by iPathology. Defendants

**DENY** all other allegations contained in Paragraph 18 of Plaintiff's Complaint.

19. **DENIED.**

20. **DENIED.**

21. **DENIED.**

22. **ADMITTED.**

23. **ADMIT** that Arfaras began working with certain of Welch's and Blasik's businesses

subsequent to the termination of his employment with iPathology. **DENY** that any entities

with which Arfaras was affiliated competed with iPathology.

24. **DENIED.**

25. **ADMIT** that Welch is no longer a customer of iPathology. Defendants **DENY** all other

allegations contained in Paragraph 25 of Plaintiff's Complaint.

26. **DENIED.**

27. **DENIED.**

28. **DENIED.**

29. Defendants are without knowledge regarding the existence of any agreements between iPathology and Morgan & Morgan, P.A. and therefore **DENY** existence of the same. **DENY** that Plaintiff is entitled to recovery of any fees in this action, save for those that Plaintiff may become entitled to as expressly provided for in the Operating Agreement and the Membership and Employment Agreement.

**Count I**  
**Breach of Contract against Arfaras**

30. **ADMITTED** as to the nature of the suit. **DENY** that any breach occurred or could occur or that Plaintiff is entitled to any relief.

31. Defendants reallege and reincorporate their responses to Paragraphs 1 – 29 above as if fully incorporated herein.

32. **DENIED.**

33. **DENIED.**

34. **DENIED.**

35. **DENIED.**

36. **DENIED.**

37. **DENIED.**

38. **DENIED.**

39. **DENIED.**

40. **DENIED.**

41. **DENIED.**

42. **DENIED.**

43. **DENIED.**

**Count II**  
**Breach of Contract against Arfaras**

44. **ADMITTED** as to the nature of the suit. **DENY** that any breach occurred or that Plaintiff is entitled to any relief.
45. Defendants reallege and reincorporate their responses to Paragraphs 1 – 29 above as if fully incorporated herein.
46. **ADMITTED.**
47. **DENIED.**
48. **DENIED.**
49. **DENIED.**
50. **DENIED.**
51. **DENIED.**
52. **ADMIT** that §18.13 of the Operating Agreement provides for prevailing party attorney fees.

**Count III**  
**Breach of Fiduciary Duty against Arfaras**

53. **ADMITTED** as to the nature of the suit. **DENY** that any breach occurred or that Plaintiff is entitled to any relief.
54. Defendants reallege and reincorporate their responses to Paragraphs 1 – 29 above as if fully incorporated herein.
55. **ADMITTED.**
56. **DENIED.**
57. **DENIED.**
58. **DENIED.**

**Count IV**  
**Breach of Duty of Loyalty and Duty of Care**

59. **ADMITTED** as to the nature of the suit. **DENY** that any breach occurred or that Plaintiff is entitled to any relief.

60. Defendants reallege and reincorporate their responses to Paragraphs 1 – 29 above as if fully incorporated herein.

61. **ADMITTED.**

62. **DENIED.**

63. **DENIED.**

64. **DENIED.**

#### **Count V**

#### **Tortious Interference with Advantageous Business Relationships against Arfaras**

65. **ADMITTED** as to the nature of the suit. **DENY** that any breach occurred or that Plaintiff is entitled to any relief.

66. Defendants reallege and reincorporate their responses to Paragraphs 1 – 29 above as if fully incorporated herein.

67. Defendants **ADMIT** that Arfaras knew of certain of iPathology's customer relationships but **DENY** all other allegations in paragraph 67 of Plaintiff's Complaint.

68. **DENIED.**

69. **DENIED.**

70. **DENIED.**

71. **DENIED.**

72. **DENIED.**

73. **DENIED.**

74. **DENIED.**

75. **DENIED.**

**Count VI**

**Tortious Interference with Advantageous Business Relationships against Welch**

76. **ADMITTED** as to the nature of the suit. **DENY** that any interference occurred or that Plaintiff is entitled to any relief.

77. Defendants reallege and reincorporate their responses to Paragraphs 1 – 29 above as if fully incorporated herein.

78. **DENIED.**

79. **DENIED.**

80. **DENIED.**

81. **DENIED.**

82. **DENIED.**

83. **DENIED.**

84. **DENIED.**

85. **DENIED.**

86. **DENIED.**

**Count VII**

**Tortious Interference with Advantageous Business Relationships against Blasik**

87. **ADMITTED** as to the nature of the suit. **DENY** that any interference occurred or that Plaintiff is entitled to any relief.

88. Defendants reallege and reincorporate their responses to Paragraphs 1 – 29 above as if fully incorporated herein.

89. **DENIED.**

90. **DENIED.**

91. **DENIED.**

92. **DENIED.**

93. **DENIED.**

94. **DENIED.**

95. **DENIED.**

96. **DENIED.**

97. **DENIED.**

**Count VIII**

**Tortious Interference with Advantageous Business Relationships against Blue Ocean Dermatology**

98. **ADMITTED** as to the nature of the suit. **DENY** that any interference occurred or that Plaintiff is entitled to any relief.

99. Defendants reallege and reincorporate their responses to Paragraphs 1 – 29 above as if fully incorporated herein.

100. **DENIED.**

101. **DENIED.**

102. **DENIED.**

103. **DENIED.**

104. **DENIED.**

105. **DENIED.**

106. **DENIED.**

107. **DENIED.**

108. **DENIED.**

**Count IX**



**Tortious Interference with Advantageous Business Relationships against Blue Ocean Laboratory**

109. **ADMITTED** as to the nature of the suit. **DENY** that any interference occurred or that Plaintiff is entitled to any relief.
110. Defendants reallege and reincorporate their responses to Paragraphs 1 – 29 above as if fully incorporated herein.
111. **DENIED.**
112. **DENIED.**
113. **DENIED.**
114. **DENIED.**
115. **DENIED.**
116. **DENIED.**
117. **DENIED.**
118. **DENIED.**
119. **DENIED.**

**Count X**

**Tortious Interference with Advantageous Business Relationships against Dermatology on the Spot**

120. **ADMITTED** as to the nature of the suit. **DENY** that any interference occurred or that Plaintiff is entitled to any relief.
121. Defendants reallege and reincorporate their responses to Paragraphs 1 – 29 above as if fully incorporated herein.
122. **DENIED.**
123. **DENIED.**
124. **DENIED.**

- 125. **DENIED.**
- 126. **DENIED.**
- 127. **DENIED.**
- 128. **DENIED.**
- 129. **DENIED.**
- 130. **DENIED.**

**Count XI**

**Tortious Interference with Advantageous Business Relationships against Kaleidoscope**

- 131. **ADMITTED** as to the nature of the suit. **DENY** that any interference occurred or that Plaintiff is entitled to any relief.
- 132. Defendants reallege and reincorporate their responses to Paragraphs 1 – 29 above as if fully incorporated herein.
- 133. **DENIED.**
- 134. **DENIED.**
- 135. **DENIED.**
- 136. **DENIED.**
- 137. **DENIED.**
- 138. **DENIED.**
- 139. **DENIED.**
- 140. **DENIED.**
- 141. **DENIED.**

Defendants **DENY** all allegations contained in each of the WHEREFORE clauses contained in Plaintiff's Complaint. Defendants specifically **DENY** that Plaintiff is entitled to the

relief requested, including injunctive relief, damages, costs, fees, or any other relief which may otherwise accrue to Plaintiff.

## **II. AFFIRMATIVE DEFENSES**

Defendants, by and through their undersigned counsel, hereby submit the following affirmative defenses:

### **FIRST AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by illegality. The restrictive covenants at issue exceed a reasonable geographic scope and are not necessary to protect a legitimate business interest. No legitimate business interest is at issue because (1) Defendant Arfaras never had access to valuable confidential information that belonged to Plaintiff and was not otherwise available to other competitors in the industry; (2) any customer relationships at issue are not substantial customer relationships within the meaning of Florida Statute 542.335; (3) Plaintiff's goodwill is intrinsically tied to its relationships with customers – of which none are substantial – thus Plaintiff has no goodwill to protect; (4) Plaintiff did not provide Defendant training or education or otherwise make an extraordinary investment in developing Defendant as an employee and (5) there is no other legitimate business interest that justifies enforcement of any restrictive covenants. The restrictive covenants, therefore, constitute unlawful restraints of trade and are therefore illegal and unenforceable.

### **SECOND AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by the doctrine of equitable estoppel. Upon executing the restrictive covenants at issue, Plaintiff, by and through Wesley Moschetto, represented to Defendant Arfaras that Moschetto would adhere to the duty of loyalty imposed

on managing members of an LLC by Fla. Stat. §605.04091. Defendant Arfaras relied on that representation to his detriment when he agreed to execute the restrictive covenants at issue. Plaintiff, by and through the actions of Moschetto, has since changed its position with respect to Moschetto's duty of loyalty by, amongst other things, (1) using company money for personal expenses; (2) failing to properly maintain the accounts and records of the company; (3) funneling money from the company to other ventures owned by Moschetto; (4) leasing property owned by Moschetto to the company at exorbitant rates that did not reflect the market value of the leased property; (5) and not paying the company's independent contractors at the agreed rates. Plaintiff, having lured Arfaras into the restrictive covenants and later changing its position to Arfaras' detriment, is estopped from asserting any rights that may have otherwise inured to its benefit under the restrictive covenants at issue.

### **THIRD AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by the doctrine of equitable estoppel. Upon executing the restrictive covenants at issue, Plaintiff, by and through Wesley Moschetto, represented to Defendant Arfaras that Moschetto would adhere to the duty of care imposed on managing members of an LLC by Fla. Stat. §605.04091. Defendant Arfaras relied on that representation to his detriment when he agreed to execute the restrictive covenants at issue. Plaintiff, by and through the actions of Moschetto, has since changed its position with respect to Moschetto's duty of care by, amongst other things, (1) illegally failing to operate with a laboratory supervisor; (2) illegally failing to reimburse pathologists for work they have performed; (3) materially misrepresenting distribution amounts for members of the company to the IRS; (4) illegally retaining equipment that was wrongfully delivered to the company and selling it for personal gain; and (5) illegally billing customers – through private and

government insurance policies – for diagnosing slides when company had only created the slides. Plaintiff, having lured Arfaras in to the restrictive covenants and later changing its position to Arfaras’ detriment, is estopped from asserting any rights that may have otherwise inured to its benefit under the restrictive covenants at issue.

#### **FOURTH AFFIRMATIVE DEFENSE**

Plaintiff’s claims are barred, in whole or in part, by the doctrine of unclean hands. During the relationship between Arfaras and iPathology, Plaintiff (1) illegally failed to operate with a laboratory supervisor; (2) illegally failed to reimburse pathologists for work they performed; (3) materially misrepresented distribution amounts for members of the company to the IRS; (4) illegally retained equipment that was wrongfully delivered to the company and – by and through the managing member – sold such equipment for personal gain; and (5) illegally billed customers – through private and government insurance policies – for creating slides when company had only diagnosed the slides. Further, Plaintiff – by and through its managing member Wesley Moschetto – committed other wrongful acts including, but not limited to: (1) using company money for Moschetto’s personal expenses; (2) failing to properly maintain the accounts and records of the company; (3) funneling money from the company to other ventures owned by Moschetto; (4) renting property owned by Moschetto at exorbitant rates that did not reflect the market value of the leased property; (5) and failing to pay the company’s independent contractors at the agreed rates. Plaintiff’s conduct in this regard operates to prevent Plaintiff from seeking to invoke the Court’s equitable jurisdiction.

#### **FIFTH AFFIRMATIVE DEFENSE**

Plaintiff’s claims are barred, in whole or in part, by the doctrine of set-off. Defendant Arfaras is entitled to a set-off against sums of money that Plaintiff owes to Arfaras for (1) 3

payroll periods for which Arfaras has not been paid; (2) reimbursements for marketing materials paid for by Arfaras; and (3) reimbursements for mileage for calendar year 2014. Plaintiff agreed to make these payments or reimbursements to Arfaras, but has failed to do so. Accordingly, to the extent Arfaras owes Plaintiff any money, that amount should be set-off against Plaintiff's existing debt to Arfaras.

### **SIXTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands. Plaintiff has fraudulently and materially misrepresented that the Defendant Arfaras executed the Confidentiality, Noncompetition, Nonsolicitation, and Nonacceptance Agreement. Arfaras never executed any such agreement. Plaintiff's conduct in this regard – which amounts to perpetrating a fraud on the Court – operates to prevent Plaintiff from seeking to invoke the Court's equitable jurisdiction.

WHEREFORE Defendants respectfully request judgment in their favor, an award of attorney's fees and costs and such other further relief as the Court deems just and proper.

### **JURY TRIAL DEMAND**

Defendants demand a jury trial on all issues so triable.

### **COUNTERCLAIMS & THIRD PARTY CLAIMS**

Defendants Damian Arfaras ("Arfaras"); Jason L. Welch ("Welch"); Blue Ocean Dermatology, LLC ("Blue Ocean Dermatology"); Blue Ocean Laboratory, LLC ("Blue Ocean Laboratory"); Dermatology on the Spot, LLC ("Dermatology on the Spot"); and The

Kaleidoscope Ocean, LLC (“Kaleidoscope”) (collectively, the “Counterclaimants”), by and through their undersigned counsel and pursuant to Florida Rule of Civil Procedure 1.170 and 1.180, file these Counterclaims against iPathology, LLC (“iPathology”) and Third Party Claims against Wesley Moschetto (“Moschetto”), and in support state as follows:

### **NATURE OF THE CASE**

1. Counterclaimants seek a declaratory judgment that will declare the restrictive covenants contained in (1) the Operating Agreement of iPathology, LLC; and (2) the Membership and Employment Agreement void and unenforceable due to prior breaches by IPathology Member Wesley Moschetto of the Operating Agreement.
2. Counterclaimants seek a declaratory judgment that will declare the restrictive covenants contained in (1) the Operating Agreement; and (2) the Membership and Employment Agreement void and unenforceable as a matter of public policy due to IPathology’s numerous violations of regulation and laws.
3. Counterclaimants seek a declaratory judgment that will declare the Confidentiality, Noncompetition, Nonsolicitation and Nonacceptance Agreement allegedly executed by Arfaras void.
4. Additionally, Arfaras states claims against Moschetto for breach of contract and breach of fiduciary duty and against iPathology for an Accounting.

### **PARTIES**

5. iPathology is a Florida limited liability company with its principal place of business in Polk County, Florida.
6. Arfaras is a citizen and resident of Volusia County, Florida.
7. Welch is a citizen and resident of Volusia County, Florida.

8. Blue Ocean Dermatology is a Florida limited liability company with its principal place of business in Volusia County, Florida.
9. Blue Ocean Laboratory is a Florida limited liability company with its principal place of business in Volusia County, Florida.
10. Dermatology on the Spot is a Florida limited liability company with its principal place of business in Volusia County, Florida.
11. Kaleidoscope is a Florida limited liability company with its principal place of business in Seminole County, Florida.
12. Wesley L. Moschetto is the 75% owner and Managing Member of iPathology.
13. On information and belief, Wesley L. Moschetto is a citizen and resident of Hillsborough County, Florida.

#### **JURISDICTION AND VENUE**

14. This is an action for Declaratory Relief under §86.011 Florida Statutes.
15. This is an action for breach of contract and breach of fiduciary duty.
16. iPathology and Moschetto consented to jurisdiction in the State of Florida and, specifically, in this Court by bringing a claim against Counterclaimants in this Court.
17. The amount in controversy exceeds fifteen thousand dollars (\$15,000), exclusive of interest, costs, and attorney fees.

#### **FACTS**

18. On or about October 18, 2004, Wesley Moschetto (“Moschetto”) founded iPathology.
19. iPathology was the company through which Moschetto provided consulting services for laboratories as an independent contractor.



20. In 2008, Moschetto and Arfaras entered the Operating Agreement of iPathology, LLC (the “Operating Agreement”)(exhibit A to Complaint<sup>2</sup>).

21. The Operating Agreement reserves sole and exclusive control of the management, business, and affairs of the Company to the Managing Member. (Operating Agreement §6.01).

22. The Operating Agreement additionally reserves specific duties to the Managing Member that include, without limitation:

- a. Maintaining the assets of the Company in good order;
- b. Collecting sums due the Company; and
- c. Acquiring, utilizing for Company purposes, and disposing of any asset of the Company.

(Operating Agreement §6.01).

23. The Operating Agreement specifically restricted the Managing Member from, among other things:

- a. Doing any act in violation of the Operating Agreement; and
- b. Possessing Company property or assigning rights in Company property other than for a Company purpose.

(Operating Agreement §6.02).

24. The Operating Agreement contains a confidentiality covenant which reads in relevant part:

**7.01 Confidential Information.** The Members acknowledge that, from time to time, they may receive information from or regarding the Company in the nature of trade secrets or that otherwise is confidential, the release of which may be damaging to the Company or persons with which it does business. Each Member shall hold in strict confidence any information it receives regarding the Company that is identified as being confidential (and if that

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<sup>2</sup> The Operating Agreement denotes that the respective percentage interests in iPathology would be 67/33. Due to unanticipated start-up costs which Moschetto covered, the parties agreed that their respective interests would be 75% for Moschetto and 25% for Arfaras.

information is provided in writing, that is so marked) and may not disclose it to any person...

(Operating Agreement §7.01).

25. The Operating Agreement grants each Member a right to indemnification from the Company subject to the following terms:

**10.01 Right to Indemnification.** Subject to the limitation and conditions as provided in this Article, each person who was or is made a party or is threatened to be made a party to or is involved in any Proceeding, or any appeal in such a Proceeding, or in any inquiry or investigation that could lead to such a Proceeding, by reason of the fact that he or she, or a person of whom he or she is the legal representative, is or was a Member of the Company... shall be indemnified by the Company to the fullest extent permitted by the FLLCA... against judgments, penalties..., fines, settlements and reasonable expenses (including, without limitation, attorney's fees) actually incurred by such person in connection with such Proceeding, and indemnification under this Article shall continue as to a person who has ceased to serve in the capacity which initially entitled such person to indemnity hereunder. . . The rights granted pursuant to this Article shall be deemed contract rights, and no amendments, modification or repeal of this Article shall have the effect of limiting or denying any such rights with respect to actions taken or Proceeding arising prior to any such amendment, modification or repeal. It is expressly acknowledged that the indemnification provided in this Article could involve indemnification for negligence or under theories of strict liability.

**10.02 Advance Payment.** The right to indemnification conferred in this Article shall include the right to be paid or reimbursed by the Company the reasonable expenses incurred by a person of the type entitled to be indemnified under paragraph 10.01 of this Agreement who was, is or is threatened to be made a named defendant or respondent in a Proceeding in advance of the final disposition of the Proceeding and without any determination as to the person's ultimate entitlement to indemnification; provided, however, that the payment of such expenses incurred by any such person in advance of the final disposition of a Proceeding, shall be made only upon delivery to the Company of a written affirmation by such person of his or her good faith belief that he has met the standard of conduct necessary for indemnification under this Article and a written undertaking, by or on behalf of such person, to repay all amounts so advanced if it shall ultimately be determined that such indemnified person is not entitled to be indemnified under this Article or otherwise.

(Operating Agreement §§10.01-10.02).

26. Contemporaneously with the execution of the Operating Agreement, the parties also entered into the Membership and Employment Agreement (the “Membership Agreement”)(exhibit B to Complaint<sup>3</sup>).
27. The Membership Agreement requires the Members to continuously vote their shares in a manner that would cause Moschetto to be voted the Managing Member. (Membership Agreement §1).
28. The Membership Agreement provides for Arfaras to receive a monthly salary. (Membership Agreement §4.1).
29. Despite the language of the Membership Agreement, the course of dealings between the parties establishes that Arfaras’ salary was paid in bi-weekly installments.
30. The Membership Agreement authorizes the Members to incur expenses for the promotion and conduct of iPathology and provides that such expenses will be reimbursed. (Membership Agreement §5).
31. The Membership Agreement lays out duties for Wesley Moschetto including, but not limited to:
- a. Supervising, directing, and controlling all operations of the Company;
  - b. Ensuring compliance with local, state, and federal laws and regulations;
  - c. Overseeing the approval and processing of revenue, expenditures, position control documents, and budgeting;
  - d. Developing and implementing finance, accounting, billing and auditing procedures; and

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<sup>3</sup> The Membership Agreement carries through the incorrect percentage interests in iPathology. Despite this, Arfaras held a 25% share in the company.

e. Establishing and maintaining appropriate internal control safeguards.

(Membership Agreement §6.2).

32. The Membership Agreement contains a non-compete/non-solicitation agreement which reads:

For a period of two years following the separation of a Member from the Company, for whatever reason, the Member shall not directly or indirectly, as a proprietor, partner, Member, lender, employee, or in any other capacity compete with the Company's business or other lines of business not engaged in by the Company or engaged in by the Company during the term of the Member's employment by contacting or soliciting anyone working at the Company or any of the Company's clients or referring physicians. For a period of two (2) years from the separation of the Company, the Member shall not directly or indirectly, as a proprietor, partner, Member, lender, employee, or in any other capacity assist in the building of or working for a competing laboratory within thirty five (35) miles of the Company.

(Membership Agreement §13.1)

33. The Membership Agreement incorporates by reference any non-conflicting provisions of the Operating Agreement including, without limitation, the Indemnity provision. (Membership Agreement §29.8).

34. The signature block of the Membership Agreement denotes that each of the Members is executing the Agreement – including the restrictive covenants contained therein – in their capacity as Members. (Membership Agreement pg. 8).

35. During the course of Arfaras' involvement with the Company, Managing Member Wesley Moschetto engaged in numerous acts of misconduct.

### **Moschetto's Wrongful Conduct**

36. Moschetto locked Arfaras out of the Company and utterly prevented him from gaining access to any of the Company's books, records, accounts or other corporate materials.

37. In October 2014, Arfaras served Moschetto and the Company with written demand that Moschetto allow him to inspect the Company's books and records during normal business hours at a time and location specified by the Company. (Exhibit A – Demand Letter). Moschetto refused this demand.
38. As such, Arfaras has been left in a state of limbo: In spite of being locked out of the Company, Arfaras has never been compensated for his ownership interest in the Company.
39. Moschetto prevented the Company from paying Arfaras since at least June 2014 and the Company presently owes Arfaras at least \$15,000 as a result.
40. Moschetto prevented the Company from reimbursing Arfaras for necessary and appropriate marketing expenses to which he was entitled under the Operating Agreement in the amount of at least \$1,500.
41. Moschetto prevented the Company from reimbursing Arfaras for necessary and appropriate mileage expenses to which he was entitled under the Operating Agreement in the amount of at least \$7,000.
42. Moschetto caused more than \$50,000 of his own personal charges on corporate credit cards to be classified as purchases by Arfaras and therefore distributions. This resulted in Arfaras having to pay taxes on an additional \$50,000 that he did not earn.
43. Moschetto caused in excess of \$10,000 to be assigned to Arfaras as a distribution when that sum should have been classified as reimbursement for corporate expenses, again causing Arfaras an increased tax burden.
44. Moschetto took nearly \$100,000 in personal distributions from the Company unbeknownst to Arfaras.

45. Moschetto repeatedly misclassified his own personal expenses as corporate expenses and misrepresented the same to Arfaras.
46. Moschetto caused the Company to operate without a laboratory supervisor in violation of Florida Administrative Code Rule 59A – 7.035.
47. Moschetto solicited outside investors to invest in the Company or merge with the Company and misrepresented the financial status of the laboratory to those investors.
48. Moschetto sexually harassed an employee, was sued for sexual harassment, and caused the Company to pay the costs of settlement of the matter which resulted in diminishing the value of the Company to Arfaras' detriment.
49. Moschetto sold Company chemicals and supplies to another lab and personally pocketed the proceeds.
50. Moschetto knowingly and willfully caused the Company to repeatedly bill health insurance providers – including the State and Federal Government – for both creating and diagnosing slides when the Company had only created the slides.
51. Not only did the false billing amount to Medicare and insurance fraud, but it also resulted in diminishment of the Company's clientele and goodwill.

#### **The Forged Agreement**

52. iPathology appended to its Complaint in this action a certain Confidentiality, Noncompetition, Nonsolicitation, and Nonacceptance Agreement (the "Agreement"). (Exhibit C to Complaint).
53. Plaintiff represented to this Court that the Agreement had been executed by Arfaras. (Complaint ¶14).
54. Defendant Arfaras has never been given such an Agreement for him to execute.

55. Defendant Arfaras never signed such an Agreement.
56. Defendant Arfaras never engaged in any conversations or communications with any Member or employee of iPathology regarding his execution of such an Agreement.
57. Prior to the institution of this action, Defendant Arfaras had never seen the Agreement.
58. Defendant Arfaras' signature on the Agreement is forged.
59. As the Managing Member, Moschetto caused the forged document to be produced.

**COUNT I DECLARATORY JUDGMENT**

**Declaratory Judgment that the Confidentiality, Noncompetition, Nonsolicitation, and Nonacceptance Agreement is Void and Unenforceable**

60. Defendants repeat and reallege the allegations in Paragraphs 1-17 and 53-60 as if fully incorporated herein.
61. This is an action for declaratory relief pursuant to §86.011 Florida Statutes.
62. Plaintiff alleged that Arfaras was prohibited from disclosing Confidential Information by Paragraph 1 of the Agreement. Complaint ¶15.
63. Plaintiff further alleged that Defendant Welch had knowledge of the Agreement. Complaint ¶24.
64. Finally, Plaintiffs alleged that Arfaras, Welch, and the other Defendants used the confidential information which was covered under the Agreement. Complaint ¶27.
65. Based on these allegations, Plaintiff brought a breach of contract action against Arfaras and tortious interference with advantageous business relationship claims against all Defendants.
66. The Agreement is unenforceable because Defendant Arfaras never executed it.
67. The Agreement is unenforceable because Defendant Arfaras' signature affixed thereto was forged.

68. As such, a dispute exists between Plaintiff and all Defendants regarding the enforceability of the Agreement.

69. Resolution of Plaintiff's claims against Defendants will not necessarily resolve questions regarding the enforceability of the Agreement and could leave the door open for possible future litigation.

70. There exists a bona fide controversy that flows out of iPathology's assertion that Arfaras is bound by the terms of the Agreement.

71. The controversy involves the legal relation of the parties – and those whose interests are aligned therewith – having adverse interests with respect to which the declaration is sought.

72. Accordingly, there exists an actual, practical and present need for a declaration pursuant to Fla. Stat. § 86.011 et. seq.

WHEREFORE, Defendants request entry of a declaratory judgment as described in this Count; request attorney's fees and costs pursuant to Fla. Stat. § 542.23; and request such other and further relief as this Court may deem just and proper.

### **COUNT II DECLARATORY JUDGMENT**

#### **Declaratory Judgment that the Restrictive Covenants are Unenforceable Due to Public Policy Considerations**

73. Defendants repeat and reallege the allegations in Paragraphs 1-60 as if fully incorporated herein.

74. This is an action for declaratory relief pursuant to §86.011 Florida Statutes.

75. Plaintiff brought a breach of contract action against Arfaras alleging that he (1) provided products or services in competition with iPathology and assisted Welch and the other Defendants in providing competing products and services; (2) failed to properly disclose his



business affiliation with Welch or the other Defendants; and (3) Disclosed iPathology's confidential information to Welch and the other Defendants. Complaint ¶¶48-50.

76. Based on Arfaras' alleged conduct in violation of the restrictive covenants, Plaintiff sued each of the other Defendants for tortious interference alleging that each of them "interfered with iPathology's advantageous business relationships, business, and assets, without privilege." Complaint ¶¶69, 80, 91, 102, 113, 124, and 135).

77. iPathology, engaged in and continues to engage in numerous acts in violation of (1) the Operating Agreement; and (2) the law, as articulated *supra*.

78. Allowing the agreements to continue to bind Arfaras to iPathology – by restricting his competition therewith – would be to lend this Court's aid to illegal conduct.

79. iPathology's unlawful conduct has brought the contracts into conflict with Florida's established public policy.

80. Under Florida law, a Court may refuse enforcement of a restrictive covenant on the ground that the contract violates public policy.

81. As such, a dispute exists between Plaintiff and all Defendants regarding the enforceability of the agreements.

82. Resolution of Plaintiff's claims against Defendants will not necessarily resolve questions regarding the enforceability of the agreements and could leave the door open for possible future litigation.

83. There exists a bona fide controversy that flows out of iPathology's assertion that Arfaras is bound by the terms of the agreements.

84. The controversy involves the legal relation of the parties – and those whose interests are aligned therewith – having adverse interests with respect to which the declaration is sought.

85. Accordingly, there exists an actual, practical and present need for a declaration pursuant to Fla. Stat. § 86.011 et. seq.

WHEREFORE, Defendants request entry of a declaratory judgment as described in this Count; request attorney's fees and costs pursuant to Fla. Stat. § 542.23; and request such other and further relief as this Court may deem just and proper.

**COUNT III DECLARATORY JUDGMENT**  
**Declaratory Judgment that the Restrictive Covenants are Unenforceable Due to Moschetto's Prior Breach.**

86. Defendants repeat and reallege the allegations in Paragraphs 1-52 as if fully incorporated herein.

87. This is an action for declaratory relief pursuant to §86.011 Florida Statutes.

88. Plaintiff brought a breach of contract action against Arfaras alleging that he (1) provided products or services in competition with iPathology and assisted Welch and the other Defendants in providing competing products and services; (2) failing to properly disclose his business affiliation with Welch or the other Defendants; and (3) Disclosing iPathology's confidential information to Welch and the other Defendants. Complaint ¶¶48-50.

89. Based on Arfaras' alleged conduct in violation of the restrictive covenants, Plaintiff sued each of the Defendants for tortious interference alleging that each of them "interfered with iPathology's advantageous business relationships, business, and assets, without privilege." Complaint ¶¶69, 80, 91, 102, 113, 124, and 135).

90. Moschetto engaged in and continues to engage in numerous acts in violation of (1) the Operating Agreement; and (2) the law as articulated herein.

91. Specifically, Moschetto has Moschetto prevented the Company from making payments and reimbursements to Arfaras in the amount of at least \$23,500.

92. The continued delinquency of this sum represents a material breach of Sections 4 and 5 of the Membership Agreement.
93. Moschetto's knowing and willful violations of the law represent material breaches of Sections 6.2 and 7 of the Membership Agreement and Sections 2.06, 5.01, 6.01, and 6.02 of the Operating Agreement.
94. Moschetto's other wrongful conduct as articulated *supra* constitutes material breaches of the Membership and Operating Agreements.
95. Neither of the agreements contains independent covenants.
96. Moschetto's prior material breaches act to discharge Arfaras' duties under the agreements.
97. Plaintiff has brought claims against the Defendants based upon Arfaras' alleged duties under the agreements
98. As such, a dispute exists between Plaintiff and all Defendants regarding the enforceability of the agreements.
99. Resolution of Plaintiff's claims against Defendants will not necessarily resolve questions regarding the enforceability of the agreements and could leave the door open for possible future litigation.
100. There exists a bona fide controversy that flows out of iPathology's assertion that Arfaras is bound by the terms of the agreements.
101. The controversy involves the legal relation of the parties – and those whose interests are aligned therewith – having adverse interests with respect to which the declaration is sought.
102. Accordingly, there exists an actual, practical and present need for a declaration pursuant to Fla. Stat. § 86.011 et. seq.

WHEREFORE, Defendants request entry of a declaratory judgment as described in this Count; request attorney's fees and costs pursuant to Fla. Stat. § 542.23; and request such other and further relief as this Court may deem just and proper.

**COUNT IV BREACH OF CONTRACT**

**BY ARFARAS AGAINST MOSCHETTO**

103. Arfaras repeats and realleges the allegations in Paragraphs 1-60 above as if fully incorporated herein.
104. This is an action for damages for Breach of Contract brought by Arfaras against Moschetto.
105. The Membership Agreement is a valid contract.
106. Arfaras fully performed under the Membership Agreement.
107. Based upon the language of the Operating Agreement, the Managing Member is able to operate iPathology as an alter ego of his own personality.
108. Moschetto did operate iPathology as an alter ego of his own personality.
109. Moschetto's actions and iPathology's actions are one and the same.
110. Moschetto and iPathology failed to make payments and reimbursements to Arfaras in the amount of at least \$23,500.
111. The continued delinquency of this sum represents material breach by Moschetto and iPathology of Sections 4 and 5 of the Membership Agreement.
112. Moschetto caused to be represented, and iPathology represented, that more than \$50,000 of Moschetto's own personal charges on corporate credit cards constituted purchases by Arfaras and therefore distributions.

113. This material breach of Section 6.2 of the Membership Agreement resulted in Arfaras having to pay taxes on an additional \$50,000 that he did not earn.
114. Moschetto and iPathology caused in excess of \$10,000 to be assigned to Arfaras as a distribution when that sum should have been classified as reimbursement for corporate expenses.
115. This material breach of Section 6.2 of the Membership Agreement caused Arfaras an increased tax burden.
116. In breach of Section 6.2 of the Membership Agreement, Moschetto took nearly \$100,000 in personal distributions from the Company unbeknownst to Arfaras.
117. This breach resulted in a diminishment in the value of iPathology which caused financial damages to Arfaras as a Member thereof.
118. As a direct and proximate result of Moschetto's and iPathology's breaches, Arfaras has suffered damages in an amount to be determined at trial.
119. Section 29.3 of the Membership Agreement provides for prevailing party attorney fees, costs, and expenses in any action related to the Membership Agreement.

WHEREFORE, Defendant requests entry of a judgment in his favor; requests damages in an amount to be determined at trial; requests attorney's fees and costs pursuant to the Membership Agreement; and requests such other and further relief as this Court may deem just and proper.

**COUNT V BREACH OF CONTRACT**

**BY ARFARAS AGAINST MOSCHETTO**

120. Arfaras repeats and realleges the allegations in Paragraphs 1-60 above as if fully incorporated herein.

121. This is an action for damages for Breach of Contract brought by Arfaras against Moschetto
122. The Operating Agreement is a valid contract.
123. Arfaras fully performed under the Operating Agreement.
124. Based upon the language of the Operating Agreement, the Managing Member is able to operate iPathology as an alter ego of his own personality.
125. Moschetto did operate iPathology as an alter ego of his own personality.
126. Moschetto's actions and iPathology's actions are one and the same.
127. Moschetto and iPathology caused the Company to operate without a laboratory supervisor in violation of Florida Administrative Code Rule 59A – 7.035.
128. Moschetto and iPathology repeatedly knowingly and willfully billed health insurance providers – including the State and Federal Government – for both creating and diagnosing slides when the Company had only created the slides.
129. Not only did the false billing amount to Medicare and insurance fraud, but it also resulted in diminishment of the Company's clientele, goodwill, and value.
130. Moschetto and iPathology illegally caused to be produced a forged agreement (Complaint Exhibit C) and misrepresented to this Court that the agreement was in fact executed by Arfaras.
131. Moschetto's and iPathology's violations of the law and state regulations amount to material breaches of sections 2.06, 5.01, 6.01, and 6.02 of the Operating Agreement.
132. Moschetto and iPathology solicited outside investors to invest in the Company or merge with the Company and misrepresented the financial status of the laboratory to those investors in violation of Section 2.06 of the Operating Agreement.

133. This conduct resulted in diminishment of the Company's goodwill – and therefore its value – to Arfaras' financial detriment.

134. As a direct and proximate result of Moschetto's and iPathology's breaches, Arfaras has suffered damages in an amount to be determined at trial.

135. Section 18.13 of the Agreement provides for prevailing party attorney fees in any action related to the Agreement.

WHEREFORE, Defendant requests entry of a judgment in his favor; requests damages in an amount to be determined at trial; requests attorney's fees and costs pursuant to the Operating Agreement; and requests such other and further relief as this Court may deem just and proper.

#### **COUNT VI BREACH OF FIDUCIARY DUTY**

#### **BY ARFARAS AGAINST MOSCHETTO**

136. Arfaras repeats and realleges the allegations in Paragraphs 1-60 above as if fully incorporated herein.

137. This is an action for damages for Breach of Fiduciary Duty brought by Arfaras against Moschetto.

138. Moschetto holds a position as Managing Member of iPathology in which he owed fiduciary duty to iPathology and its Members.

139. Moschetto's fiduciary duty included the duty to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law with regard to the Company's funds.

140. Moschetto breached his fiduciary duty by engaging in the intentional misconduct of:

- a. causing more than \$50,000 of his own personal charges on corporate credit cards to be classified as purchases by Arfaras and therefore distributions;

- b. taking nearly \$100,000 in unexplained personal distributions from the Company;
- c. repeatedly misclassifying his own personal expenses as corporate expenses;
- d. sexually harassed an employee and causing the settlement of the resulting lawsuit to be paid by the Company; and
- e. selling Company chemicals and supplies to another lab and personally pocketing the proceeds.

141. As a direct and proximate result of Moschetto's breaches, Arfaras has suffered damages in an amount to be determined at trial.

WHEREFORE, Defendant requests entry of a judgment in his favor; requests damages in an amount to be determined at trial; requests attorney's fees and costs; and requests such other and further relief as this Court may deem just and proper.

#### **COUNT VII BREACH OF DUTY OF LOYALTY**

#### **BY ARFARAS AGAINST MOSCHETTO**

142. Arfaras repeats and realleges the allegations in Paragraphs 1-60 above as if fully incorporated herein.

143. This is an action for damages for Breach of Duty of Loyalty brought by Arfaras against Moschetto.

144. Moschetto holds a position as Managing Member of iPathology in which he owed a duty of loyalty to iPathology and its Members.

145. Moschetto's duty of loyalty included the duty to account to the company and hold as trustee for the company any property, profit, or benefit derived by Moschetto in the conduct of the company business.

146. Moschetto breached the duty of loyalty by engaging in the intentional misconduct of:



- a. causing more than \$50,000 of his own personal charges on corporate credit cards to be classified as purchases by Arfaras and therefore distributions;
- b. taking nearly \$100,000 in unexplained personal distributions from the Company;
- c. repeatedly misclassifying his own personal expenses as corporate expenses;
- d. sexually harassing an employee and causing the settlement of the resulting lawsuit to be paid by the Company; and
- e. selling Company chemicals and supplies to another lab and personally pocketing the proceeds.

147. As a direct and proximate result of Moschetto's breaches, Arfaras has suffered damages in an amount to be determined at trial.

WHEREFORE, Defendant requests entry of a judgment in his favor; requests damages in an amount to be determined at trial; requests attorney's fees and costs; and requests such other and further relief as this Court may deem just and proper.

**COUNT VIII BREACH OF DUTY OF CARE**

**BY ARFARAS AGAINST MOSCHETTO**

148. Arfaras repeats and realleges the allegations in Paragraphs 1-60 above as if fully incorporated herein.

149. This is an action for damages for Breach of Duty of Care brought by Arfaras against Moschetto.

150. Moschetto holds a position as Managing Member of iPathology in which he owed a duty of care to iPathology and its Members.

151. Moschetto's duty of care included the duty to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

152. Moschetto breached the duty of care by engaging in the intentional misconduct of:
- f. causing more than \$50,000 of his own personal charges on corporate credit cards to be classified as purchases by Arfaras and therefore distributions;
  - g. taking nearly \$100,000 in unexplained personal distributions from the Company;
  - h. repeatedly misclassifying his own personal expenses as corporate expenses;
  - i. sexually harassed an employee and causing the settlement of the resulting lawsuit to be paid by the Company; and
  - j. selling Company chemicals and supplies to another lab and personally pocketing the proceeds.
153. Moschetto further breached the duty of care by engaging in the following knowing violations of law:
- a. Causing the Company to operate without a laboratory supervisor in violation of Florida Administrative Code Rule 59A – 7.035;
  - b. Knowingly and willfully causing the Company to repeatedly bill health insurance providers – including the State and Federal Government – for both creating and diagnosing slides when the Company had only created the slides; and
  - c. Causing to be produced a forged agreement (Complaint Exhibit C) and misrepresenting to this Court that the agreement was in fact executed by Arfaras.
154. As a direct and proximate result of Moschetto's breaches, Arfaras has suffered damages in an amount to be determined at trial.

WHEREFORE, Defendant requests entry of a judgment in his favor; requests damages in an amount to be determined at trial; requests attorney's fees and costs; and requests such other and further relief as this Court may deem just and proper.

**COUNT IX – CONTRACTUAL INDEMNIFICATION**

**BY ARFARAS AGAINST IPATHOLOGY**

155. Arfaras repeats and realleges the allegations in Paragraphs 1-35 above as if fully incorporated herein.
156. This is an action for damages and injunctive relief for Contractual Indemnification brought by Arfaras against iPathology.
157. Plaintiff iPathology has brought claims against Arfaras that could not have been brought but for his status as a Member of iPathology.
158. Arfaras executed the Operating Agreement and thereby became a Member of iPathology.
159. iPathology's claim for breach of the Operating Agreement necessarily revolves around Arfaras' status as a Member.
160. Arfaras executed the Membership Agreement in his capacity as a Member of iPathology.
161. To the extent that iPathology's claims implicate the Membership Agreement, iPathology's claims could not have been brought but for Arfaras' status as a Member.
162. Arfaras' status as a Member is a necessary predicate to iPathology's breach of fiduciary duty claim.
163. Arfaras' status as a Member is a necessary predicate to iPathology's breach of duty of loyalty and duty of care claim.
164. Article X of the Operating Agreement requires iPathology to indemnify Members in the case of any proceeding brought against them by reason of the fact that he is a Member.
165. Article X further requires iPathology to provide such indemnification as expenses associated therewith are incurred and in advance of any determination of the Member's ultimate entitlement to indemnification.

166. Arfaras has begun accruing and will continue to accrue expenses associated with this proceeding, which expenses fall under the indemnification provision.

WHEREFORE Arfaras demands (1) judgment against iPathology for all expenses associated with this Action as they come due; and (2) in the event that iPathology refuses to pay such expenses as they come due, for positive injunctive relief requiring iPathology to tender such payments.

**COUNT X – ACCOUNTING**

**BY ARFARAS AGAINST IPATHOLOGY**

167. Arfaras repeats and realleges the allegations in Paragraphs 1-39 above as if fully incorporated herein.

168. This is an action by a member of a limited liability company for injunctive relief in the form of an Accounting.

169. Arfaras has a right to inspect the books and records of iPathology.

170. Arfaras has made a demand upon iPathology for an inspection of all business and accounting records and has been denied a full and complete inspection and production.

171. iPathology's finances constitute a series of complex transactions that Arfaras cannot decipher without the Court's assistance.

172. Arfaras has no adequate remedy at law as iPathology's accounts are in the exclusive possession of iPathology and Moschetto and are of such a complicated nature that only a court of equity can satisfactorily unravel them.

173. A Court-ordered accounting is necessary.

WHEREFORE Arfaras requests (1) injunctive relief in the form of an Accounting of iPathology's books and records; (2) attorney's fees and costs; and (3) such other and further relief as this Court may deem just and proper.

**JURY TRIAL DEMAND**

Counterclaimants demand a jury trial on all issues so triable.

Dated July 13, 2015

Respectfully submitted,

By: s/ Jonathan Pollard

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Counterclaimants*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on July 13, 2015, a copy of the foregoing was served on the below service list via electronic mail:

By: s/ Jonathan Pollard

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