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**IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY**

PROVIDENCE HEALTH SYSTEM-  
OREGON, an Oregon nonprofit corporation,

Plaintiff,

vs.

ASANTE, an Oregon nonprofit corporation;  
OREGON ADVANCED IMAGING, LLC, an  
Oregon limited liability company; and THE  
MEDFORD RADIOLOGICAL GROUP LLP,  
an Oregon limited liability partnership,

Defendants.

**CASE NUMBER: 07-2742-L7**

**OPINION AND ORDERS ON MOTIONS  
FOR SUMMARY JUDGMENT**

These matters came before the Court upon defendant Asante’s (“Asante”) Motion for Summary Judgment, Plaintiff’s Cross Motion for Partial Summary Judgment, Plaintiff’s Second Motion for Partial Summary Judgment, and Asante’s Cross Motion for Partial Summary Judgment. The Court having reviewed said motions, and all Responses and Replies pertaining to the motions, as well as Responses filed by defendant Medford Radiological Group (“MRG”), and the Court further having conducted oral argument on said motions on October 26, 2009, and having considered the argument of counsel, Arden J. Olson on behalf of plaintiff, David B. Markowitz on behalf of Asante, Robert N. Meals on behalf of MRG, and Michael D. Crew on behalf of defendant Oregon Advanced Imaging (“OAI”), and being otherwise fully advised in the premises, the Court sets forth the following Opinion and Order.

OPINION

1  
2 The Court will set forth its determinations regarding all the pending motions in one  
3 opinion. All references to claims of relief and counterclaims refer to the First Amended  
4 Complaint and the Amended Answer.

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6 Plaintiff's Second Motion for Summary Judgment seeks partial summary judgment on its  
7 First Claim for Relief, asking the Court to find that the notation that the existence of OAI is  
8 "perpetual," contained in the OAI Articles of Organization filed with the Secretary of State,  
9 controls over any other provision to the contrary in the OAI Operating Agreement. Further, in  
10 conformance with such a ruling, plaintiff seeks the Court's ruling that Asante's July 31, 2008  
11 Notice of Termination of OAI is void. It is undisputed that the Articles of Organization declare  
12 that OAI's existence is "perpetual". It is also undisputed that Article 2.6 of the Operating  
13 Agreement sets forth that OAI's term of existence commences on the date of the filing of the  
14 Articles of Organization, (on or about March 1, 2002), and continues until the 5<sup>th</sup> anniversary of  
15 the effective date of the Operating Agreement (which is defined as the date the Operating  
16 Agreement was entered into, which was July 29, 2002). ORS 63.047 requires that the articles  
17 shall set forth "the latest date on which the limited liability company is to dissolve or a statement  
18 that its existence is perpetual". ORS 63.047(1)(f). Thus, the statutory scheme sets forth that  
19 perpetual existence is the sole option when the latest date of dissolution is unknown at the time  
20 the articles of organization are filed with the Secretary of State. It is evident from the record  
21 before this Court that the "latest date on which the limited liability company is to dissolve" was  
22 unknown when the Articles of Organization were filed. The record reflects that the Operating  
23 Agreement (containing the 5 year term of existence) was not signed by the parties until several  
24 months after the Articles of Organization were filed with the Secretary of State. Plaintiff argues  
25 that the Articles of Organization control any conflict with the terms of the Operating Agreement.

1 However, in light of ORS 63.621, there is no conflict present. That statute sets forth that a  
2 limited liability company is dissolved upon the first of several enumerated events to occur, which  
3 includes events specified in the Operating Agreement. ORS 63.621(2). In short, despite the  
4 reference in the Articles of Organization to the “perpetual” existence of OAI, the parties had the  
5 right to set forth a dissolution date in their Operating Agreement. It is apparent that the parties  
6 exercised that right by including Article 2.6 in their Operating Agreement. The Court must  
7 therefore deny the portion of plaintiff’s Second Motion for Partial Summary Judgment which  
8 seeks a ruling to the contrary, and grant Asante’s Cross Motion against plaintiff’s first claim for  
9 relief and MRG’s cross-claim.  
10

11  
12 Plaintiff’s Second Motion for Partial Summary Judgment also included a motion to  
13 dismiss Asante’s Third Counterclaim against plaintiff. It is apparent that this counterclaim  
14 became Asante’s Second Counterclaim upon the filing of the Amended Answer. While  
15 argument on this motion centered on the provision regarding non-competition within the  
16 Medford city limits (Article 5.8 of the Operating Agreement), the counterclaim also includes  
17 allegations regarding other matters (equity position offers, referrals, preparation of false meeting  
18 minutes). The Court cannot find that there are no genuine issues of material fact in regard to  
19 Asante’s Second Counterclaim against plaintiff, and therefore cannot make any ruling favoring  
20 plaintiff on that counterclaim by way of summary judgment.  
21

22 Asante’s original Motion for Summary Judgment, and plaintiff’s Cross Motion for Partial  
23 Summary Judgment are really flipsides of the same coin. Asante’s motion asks the Court for a  
24 ruling in Asante’s favor on all of plaintiff’s complaint, on the grounds that all issues are now  
25 moot. Further, it seeks the dissolution of the Preliminary Injunction. Plaintiff’s Cross Motion  
26 for Partial Summary Judgment seeks the Court’s declaratory ruling that the OAI Operating  
27 Agreement was extended by the January 2007 Agreement (plaintiff’s seventh claim for relief)  
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1 and further that plaintiff is entitled to a permanent injunction requiring Asante's specific  
2 performance of that agreement, in relation to plaintiff's second, third, fourth, fifth and eighth  
3 claims for relief. At the conclusion of the July 2007 preliminary injunction hearing, the Court  
4 determined that the five year period of existence of OAI, as set forth in Article 2.6 of the  
5 Operating Agreement, had been extended by unanimous consent of each of the partners of OAI  
6 in a series of January 2007 correspondence. The Court ruled that Asante's proposal that OAI,  
7 and its Operating Agreement, be continued for a five year period beyond the previously  
8 scheduled termination date of July 29, 2007, with a new provision that any of the partners could  
9 exercise an option to terminate with 24 months notice, had been unanimously adopted. That is  
10 the law of the case, and none of the evidence in the record in support of and in opposition to the  
11 pending motions persuades the Court to the contrary. Plaintiff's seventh claim for relief seeks a  
12 declaration regarding the existence and governance of a company of which it is a partner. As  
13 such, plaintiff's claim is not solely derivative of any action OAI itself might pursue, at least as to  
14 this claim, as argued by Asante. Asante also argues that it is entitled to a dismissal of plaintiff's  
15 Seventh Claim for Relief (among others) because Asante's behavior subsequent to the entry of  
16 the preliminary injunction is in conformance with the Court's order and that therefore no  
17 justiciable controversy exists. However, regardless of Asante's past or current behavior, Asante  
18 still goes to great lengths to argue that the Court erred in its prior ruling, and takes the position  
19 that the original Operating Agreement and the existence of OAI was not extended by the January  
20 2007 agreements. The evidence in the record supports a finding of the Court at this time that,  
21 based on the undisputed facts, plaintiff is entitled to a declaration that the January 2007  
22 agreement is binding on Asante, that Asante is estopped to deny that the OAI Operating  
23 Agreement will remain in force until the earlier of July 29, 2012 or 2 years following written  
24 notice of termination by any OAI member; that OAI's post July 29, 2007 business plan was

1 validly adopted and controls OAI operation; and that OAI may continue the employment of its  
2 staff pending final disposition of all of the claims herein.

3         The second portion of plaintiff's Cross Motion for Partial Summary Judgment seeks the  
4 Court's order that Asante's specific performance of the January 2007 agreement be in the form  
5 of a permanent injunction. Asante has provided the 2 year termination notice set forth in the  
6 January 2007 Agreement. The effect of that notice is that OAI will dissolve as of July 31, 2010.  
7 Consequently, a permanent injunction would be inappropriate. However, despite the assertion  
8 that Asante's future conduct will be consistent with its behavior between the entry of the  
9 preliminary injunction and the date of argument of these motions, it would nonetheless be  
10 inappropriate to dissolve the preliminary injunction pending further resolution of the issues still  
11 pending in this dispute.<sup>1</sup> The Court finds that Asante has waived any argument that the  
12 preliminary injunction is void because of a lack of bond, based on its failure to previously  
13 present any issue to that effect, and on its subsequent ratification of the substance of the  
14 preliminary injunction. ORCP 82A(6).

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17         The Court believes it preferable to allow the parties to create their own path toward  
18 dissolution of OAI, if they can, in light of these rulings. To that end, the Court will allow the  
19 parties to engage in such discussions until February 1, 2010 (or beyond, upon the unanimous  
20 request of the parties). Thereafter, barring notification that the partners have agreed upon a plan  
21 of dissolution, the Court will appoint a receiver to oversee the wind down and dissolution of  
22 OAI, pursuant to ORS 63.664(3). The Preliminary Injunction, as modified, shall remain in  
23 effect. It now sets forth that none of the parties are to solicit any of OAI's employees. The  
24 Court anticipates that if and when that provision is further modified, it will allow all of the  
25 parties' an equal opportunity to solicit OAI employees.

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<sup>1</sup> The Court has modified the preliminary injunction to conform with its rulings herein.

1           The Court finds there are no trade secrets that will be compromised if the record in this  
2 case is no longer placed under seal, and that the strong policy in Oregon of conducting the  
3 people's business openly, including the court system, requires that the records be unsealed. The  
4 Court is aware that it acts on its own initiative in this regard and will postpone the unsealing of  
5 the records to allow any party to provide the Court, within 10 days of the entry of this Order,  
6 with its detailed reasons, complete with citation to authority, for retaining any portion of the  
7 court file under seal. Any such submissions may be made under seal pending further order of the  
8 Court.  
9

10           One final thought. Courts generally do not comment on the rulings we make—they stand  
11 for themselves. Having made the rulings I felt required to make, in order to dispose of the  
12 motions before me, I would normally refrain from setting forth anything more, and the lawyers  
13 will recognize the following comments as mere dicta. But my sense of disappointment compels  
14 me to make these observations. Both the plaintiff, Providence Health Systems, and defendant  
15 Asante are extremely well-regarded, high quality medical institutions, and this county is blessed  
16 by their presence. The formation of Oregon Advanced Imaging was a noble enterprise, from all I  
17 can detect from the record, and one thing (perhaps the only thing) that all the parties agree on is  
18 that OAI has been a highly successful endeavor, both in terms of the services it has provided to  
19 the community, and in the revenue it has generated for its partners. The spirit of collaboration  
20 that led Providence and Asante (along with Medford Radiological Group) to create OAI was  
21 impressive and, in light of the nature and caliber of the ongoing national dialogue regarding  
22 health care issues, rather inspiring. It thus pains me to see this otherwise productive venture  
23 come crumbling down. And it is a shame that this occurs, in part, because of the sometimes  
24 sophomoric behavior and attitudes of certain administrators at both institutions, which led to the  
25 substitution of the sense of cooperation between them with an atmosphere of mistrust.  
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1 I recognize that the Court's awareness of the web of relationships between Providence and  
2 Asante is limited to the record before it, but that record leads me to conclude, at least in regards  
3 to OAI, that both sides played their own forms of "gotcha" in their apparent effort to gain a  
4 competitive edge. I fear the outcome of this case and the events that led to it will have a chilling  
5 effect on any future collaboration between Asante and Providence, and perhaps other medical  
6 care providers in southern Oregon as well. If that is the case, it is our community, that counts on  
7 state-of-the-art medical services, that will suffer the most as a result. For the sake of all residents  
8 of Jackson County and the surrounding areas, I can only hope these anxieties will prove to be  
9 unfounded, and that the apparently-inevitable dissolution of OAI will be accomplished in such a  
10 way that the services OAI currently provides will continue with minimal interruption and  
11 without diminution in either their scope or quality.  
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14 **ORDER**

15 Based on the above and foregoing, and good cause appearing therefore, it is hereby

16 ORDERED that plaintiff's Second Motion for Partial Summary Judgment, regarding its  
17 first claim of relief, be and hereby is DENIED, and it is further;  
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19 ORDERED that Asante's Cross Motion for Partial Summary Judgment against plaintiff's  
20 first claim of relief and Medford Radiological Group's cross-claim be and hereby is GRANTED,  
21 and it is further;

22 ORDERED that plaintiff's Second Motion for Partial Summary Judgment, regarding  
23 Asante's Second Counterclaim, be and hereby is, DENIED, and it is further;

24 ORDERED that Asante's original Motion for Summary Judgment that plaintiff's  
25 Complaint is moot, be and hereby is DENIED, and it is further;  
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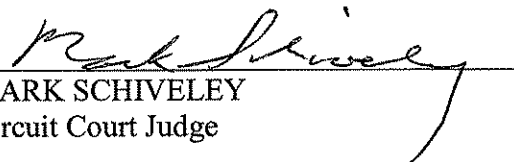
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1 ORDERED that plaintiff's Cross Motion for Partial Summary Judgment regarding its  
2 seventh claim for relief, by and hereby is GRANTED, and it is further;

3 ORDERED that plaintiff's Cross Motion for Partial Summary Judgment regarding the  
4 request for a permanent injunction supporting its eighth and second through fifth claims for relief  
5 be and hereby is DENIED.  
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8 DATED this 3 day of November, 2009.  
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12 MARK SCHIVELEY  
13 Circuit Court Judge  
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16 cc: Mr. Arden J. Olson  
17 Mr. David B. Markowitz  
18 Mr. Robert N. Meals  
19 Mr. Michael D. Crew  
20 Mr. Timothy Gerking  
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