IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

Norman Bamber, M.D. Plaintiff, v. Prime Healthcare Kansas City - Physician's Services, LLC, Defendant.	)))))))))	Case No. 17-CV-00229-W-HFS

ORDER

This is a contract dispute between a physician and a physician practice group or "clinic," affiliated with, bearing the "St. Joseph" dba name, and physically adjoining St. Joseph Medical Center, a hospital located in Kansas City, Missouri.[1] Dr. Norman Bamber has sued the hospital affiliate, his former employer, Prime Healthcare Kansas City - Physician's Services, LLC ("Prime"), for breach of contract, breach of contract – special damages, and tortious interference and unfair competition. (Doc. 1). Pending before the Court are cross-motions for summary judgment, but not fully matching. Dr. Bamber contends he is entitled to summary judgment on his breach of contract claim for wrongful termination (Count I) (Doc. 82) while Prime seeks summary judgment in its favor on: (1) Dr. Bamber's claim in Count I for damages representing payment for emergency department on-call coverage; (2) breach of contract – special damages

[1] At oral argument and in the most recent filing (Doc. 108), counsel for Dr. Bamber contended he was not the hospital's employee, but rather the employee of a medical clinic. Both the hospital organization and the clinic are, however, subsidiaries of a hospital conglomerate, also carrying the Prime name, and the medical center is designated as a third-party beneficiary of the employment contract with the medical clinic. Services performed at the hospital were a major segment of Dr. Bamber's work. His full-time employment was devoted, directly or indirectly, to the conglomerate, and it would be fallacious to treat him as practicing independently, or simply as a part of the doctors' organization. I do not understand that he claims breach of contract because the wrong persons terminated him.

(Count II); and (3) tortious inference and unfair competition (Count III). (Doc. 80). Prime does not seek summary judgment as to all Count I claims, thus treating as an open question the loss of Dr. Bamber's Base Salary for further litigation.[2]

Summary Judgment Standard.

Summary judgment is appropriate if the moving party demonstrates there are no genuine issues of material fact and that the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of informing the court of the basis for its motion. Solis v. Contingent Care, LLC, 2013 WL 12205693, at *1 (W.D. Mo. Mar. 15, 2013) (citing Celotex Corp. v. Catrett, 467 U.S. 317, 323 (1986)). To avoid summary judgment, the nonmoving party must set forth specific facts showing a genuine issue for trial. Id. (citing Lower Brule Sioux Tribe v. South Dakota, 104 F.3d 1017, 1021 (8th Cir.1997)). In deciding whether to grant summary judgment, the Court must view all facts in a light most favorable to the nonmoving party, and give that party the benefit of all reasonable inferences drawn from the facts. Robinson v. Monaghan, 864 F.2d 622, 624 (8th Cir. 1989).

Background.

For the purpose of summary judgment, the Court finds the facts to be as follows. Facts controverted or that are immaterial to the Court's ruling have been omitted.

On February 12, 2015, Dr. Bamber, a board-certified neurosurgeon, signed a full-time Physician Employment Agreement ("Agreement") with Carondelet Physician Services. (Doc. 83, Ex. 2). Carondelet was the entity used to hire and manage groups of doctors practicing at St. Joseph Medical Center, a hospital located in Kansas City, Missouri. A few days later, Prime

[2] I decline Prime's late filed suggestion that I offer full sua sponte relief to it if that seems meritorious or that I deal with a summary judgment motion mentioned in briefing.

(the parent corporation) purchased St. Joseph Medical Center and Carondelet assigned the Employment Agreement to Prime (the clinic). (Doc. 83, ¶ 17).

The Agreement detailed two components of Dr. Bamber's compensation: base salary and emergency room call coverage. Article V of the Employment Agreement stated that Dr. Bamber would be paid: (1) a base salary of $780,000 annually and (2) additional compensation for "emergency department call coverage." (Doc. 83 Ex. 2, p.6). Regarding the latter, the Agreement provided: "compensation for emergency room call coverage shall be above and in addition to the 'Base Salary' and Physician shall be paid Five Hundred Dollars ($500) per 24 hour call coverage." (Doc. 83 Ex. 2, p. 6). The original Agreement limited Dr. Bamber's call responsibilities to one-hundred twenty-two (122) days in any employment year, with weekend and consecutive day limitations unless otherwise agreed. (Doc. 83 Ex. 2, p. 7).

The parties agree that Dr. Bamber took frequent emergency department calls and he met the 122-day limit before the end of his first Employment Year. (Doc. 83, ¶ 42). On November 20, 2015, the parties entered into an Amendment of the Employment Agreement which provided Dr. Bamber with additional compensation of $1,000 for each scheduled day of emergency call coverage at St Joseph in excess of 122 days per Employment Year. (Doc. 83, Ex. E). The Agreement was for a five-year term, but could be terminated at the end of three years by either party; before that, the Agreement could only be terminated for enumerated reasons. (Doc. 83, Ex. 2, p. 10). Thus, the claim apparently relates to the period where cause for termination must be shown, ending last February.

After the parent company purchased St Joseph Medical Center, it considered cost-cutting measures. Among other measures, various executives discussed Dr. Bamber's Agreement and emergency neurological services in general. It was decided to discontinue the stroke program at the hospital. Effective November 1, 2016, the hospital stopped providing

neurological emergency call coverage and arranged for the care of patients presenting with emergency neurological concerns at other hospitals. (Doc. 83, ¶ 60).

After the decision to discontinue emergency room call coverage, a dispute arose as to Dr. Bamber's obligation to provide inpatient consultations. Specifically, the parties disagreed as to whether Dr. Bamber continued to be obligated under the Agreement to see patients admitted to the hospital when other physicians requested a consultation. Dr. Bamber understood the Agreement to mean that he was only required to provide inpatient consultations as part of his obligation under emergency department call coverage, and so, once that coverage was terminated, he had no obligation to perform inpatient consultations when asked. Prime, on the other hand, interpreted the Agreement to require Dr. Bamber to provide requested inpatient consultations to patients at the hospital. Whether the Base Salary of the Agreement required Dr. Bamber to perform inpatient consultations at St. Joseph Hospital is now the central dispute.

On October 26, 2016, Dr. Bamber met with Jodi Fincher, Administrator for St Joseph Hospital, to discuss the decision to discontinue neurosurgical emergency department call. (Doc. 83, ¶ 58). Fincher told him that the hospital was planning to discontinue neurosurgery as part of its emergency room services and to transfer patients needing such care to another hospital. (Doc. 83, Ex. A, Dr. Bamber Dep. at 214). At that time, Dr. Bamber informed Fincher that he considered emergency department call to be the only method to obtain inpatient consults and that other than his established patients, he would not be available to consult on any new inpatients at St. Joseph Medical Center, although he would see them in his clinic. (Doc. 83, ¶ 58, Ex. A Dr. Bamber Dep. at 224).

On November 11, 2016, counsel for Prime sent Dr. Bamber a letter regarding: "Notice of Breach of Physician Employment Agreement." (Doc. 83, Ex. 3). The letter stated: "you are in material breach of your Physician Employment Agreement," and that "[y]our refusal to perform

any inpatient consults at St. Joseph Medical Center is a material breach of the St. Joseph Medical Center Medical Staff Bylaws and the services required pursuant to Article II of the Agreement." (Doc. 83, Ex. 3). The letter warned that pursuant to the Agreement, Dr. Bamber had 30 days to cure the Breach, and if he failed to do so, Prime would terminate the Agreement effective immediately. (Doc. 83, Ex. 3).

Dr. Bamber's attorney responded by letter dated November 18, 2016, stating that he had not breached the Agreement, had performed inpatient consults throughout the term of his Agreement, and that he had performed an inpatient consult as recently as Sunday, November 13. (Doc. 83, Ex. 11). Prime's counsel responded with a termination letter dated December 12, 2016, stating that "one alleged consult within the past thirty days is misplaced as [Dr. Bamber] has failed to provide such consultations on a multitude of occasions for the entire month of December." (Doc. 83, Ex. 6). Dr. Bamber was terminated, effective December 13, 2016. (Id).

Dr. Bamber then filed this action, to which cross-motions for summary judgment are now pending. (Docs. 80, 82).

Dr. Bamber argues that summary judgment should be entered in his favor on his claim for breach of contract because: 1) Prime relied on a false premise in terminating him because the Agreement no longer required Dr. Bamber to perform inpatient consultations for St. Joseph patients; 2) Prime failed to provide specific notice of the alleged breach as required by the Agreement; 3) Prime failed to follow the specific remedy contractually required under Section 5.5 of the Agreement; and 4) there was no evidence presented of Dr. Bamber failing to perform inpatient consultations. (Doc. 82). Prime filed a cross motion for summary judgment, arguing that it is entitled to partial summary judgment on: 1) Count I for damages representing payment for emergency department on-call coverage; 2) Count II for breach of contract special damages; and 3) Count III for tortious interference with business relationships. (Doc. 80).

Breach of Contract (Count I).

To prevail on a motion for summary judgment for a breach of contract claim, Dr. Bamber must show that there is no genuine dispute as to the material facts that establish: (1) the existence of a valid contract; (2) defendant's obligation under the contract; (3) a breach by defendant of that obligation; and (4) resulting damages. Keveney v. Mo. Military Acad., 304 S.W.3d 98, 104 (Mo. 2010) (en banc). When interpreting a contract, a court must ascertain the intent of the parties by looking at the words of the contract and giving those words their plain, ordinary, and usual meaning. Ethridge v. Tier One Bank, 226 S.W.3d 127, 131 (Mo. 2007) (en banc). The Court will rely on the language of the contract alone unless its terms are ambiguous. Id. On occasion, however, where unusual wording appears, the background relationship of the parties may be helpful to understand what is meant.

Inpatient Consultations.

Dr. Bamber first argues that summary judgment should be granted on his breach of contract claim because the undisputed facts show that Prime relied on a false premise in terminating him because his Agreement did not require inpatient consultations for new St. Joseph patients with whom Dr. Bamber did not have a physician-patient relationship. He further argues that neither the Agreement nor the Hospital By-laws (incorporated into the Agreement) obligated him to be available to see inpatients who were not his pre-existing patients. He points to evidence that the parent company wanted to terminate his Agreement as a cost-cutting measure and that it used his refusal to perform inpatient consultations as a ruse to justify terminating the Agreement.

For support, Dr. Bamber relies on "Base and Performance Compensation" and "Work Standards" provisions of Article V of the Agreement. (Doc. 83, Ex. 2, p. 6-7). He asserts that these provisions expressly define his contractually negotiated obligation and require only that he be available to see patients in his office and at outpatient facilities during business hours for five days per week. He notes that the Agreement does not contain the word "inpatient" or the

phrase "inpatient consultations." (Doc. 83, Ex. 2.). Dr. Bamber also refers to the Medical Staff By-laws which he says do not require inpatient consults or inpatient consultations. (Doc. 83, Ex. 13).

Article V of the Agreement (Doc. 83, Ex. 2) outlines certain terms and conditions of Dr. Bamber's employment contract. The "COMPENSATION" provision states:

> 5.2. **Base and Performance Compensation.** Physician shall receive and annual salary of Seven Hundred and Eighty Thousand Dollars ($780,000.00) during the term of this Agreement (the "Base Salary") . . . Physician . . . acknowledges and agrees that in addition Physician will be entitled to additional compensation for providing emergency department call coverage. This compensation for emergency room call coverage shall be above and in addition to the "Base Salary" and Physician shall be paid Five hundred Dollars ($500.00) per 24 hour call coverage.

Article V further defines the responsibilities of the physician:

> 5.4 **Work Standards.** In addition to such other terms and conditions set forth in this Agreement, as may be required to earn his/her Base Salary, Physician must meet the following work standards ("Minimum Work Standards"):
>
> 5.4.1 Minimum Accessibility Level. Physician agrees to comply with CPS' standard work hour and coverage policies and shall work fifty-two (52) week per year excepting PTO or excused absences taken in accordance with CPS' policy. Physician shall be accessible for patient care at the Practice Site or on an outpatient basis within the Carondelet Health system five (5) days per week, except in those instances where Physician has requested and been granted PTO, or has otherwise been granted an excused absence.
>
> Physician shall assume call responsibility pursuant to the call coverage calendars, which will be agreed upon by the physician(s) of the Practice and/or contracted physicians to cover call obligations and delivered and distributed by Practice Administrator at the Practice Site. Physician's call responsibilities shall not exceed one hundred twenty-two (122) days in any employment year, including no more than seventeen weekend and no more than four (4) consecutive days unless otherwise mutually agreed upon by the parties. . . .

Because the Agreement defined "Practice Site" as the "medical office operated by the Practice" (Doc. 83, Ex. 2, p.2), Dr. Bamber argues that his Base Salary was limited to services he provided at the clinic, and there is no obligation included in the Agreement requiring Dr. Bamber to provide inpatient consultations at St. Joseph Medical Center except as part of

emergency department call obligations. Because the Agreement does not include the term "inpatient consultations," he argues that Prime is attempting to create an obligation that does not exist in the Agreement.

Dr. Bamber further explains that before Prime terminated emergency call compensation, he performed inpatient consultations as part of his emergency call responsibilities. Under the St. Joseph Medical Staff "On-Call Physician Policy," St. Joseph maintained a schedule of physicians that provided emergency department call coverage. "Physicians on call for the [emergency department] will also be responsible for consultations on inpatients in the hospital when requested." (Doc. 83, Ex G). Dr. Bamber relies on this policy statement to support his argument that his obligation to provide inpatient consultations depended entirely on his emergency department call and once that call was terminated so was his obligation to provide inpatient consultations. Dr. Bamber emphasizes that no part of his Agreement, including the hospital by-laws, required him to perform inpatient consultations.

Prime has, however, directed this Court to other provisions of the Agreement which plausibly create Dr. Bamber's obligation to perform inpatient consultations as requested by Prime. Article 2.1 requires Dr. Bamber to provide "Professional Services . . . in accordance with the terms of this Agreement and policies of [Prime] . . . ". Section 2.4 defines "Professional Services" and includes the requirement: "At the direction of [Prime], Physician shall provide the following professional services at the Practice Site and Medical Centers." (Doc. 83, Ex.2, Par. 2.4) (emphasis added). Professional services include:

2.4.1 Medical services to Patients, such services to be performed in a professional manner consistent with applicable medical standards;

* * *

2.4.4. On-site physician coverage and on-call coverage as agreed by the physicians of the Practice including coordination of vacation and call coverage;

* * *

2.4.6. Other physician services as may reasonably be requested by [Prime].

These provisions, requiring "medical center" service, particularly the reasonable request provision, may create ambiguity as to Dr. Bamber's obligation to provide inpatient consultations under the Agreement. Lafarge N.A., Inc. v. Discovery Grp., L.L.C., 574 F.3d. 973, 979 (8th Cir. 2009) ("A contract is ambiguous when it is reasonably susceptible to different constructions."). If so, Dr. Siegel's expert opinion favoring Prime would be pertinent. (Doc. 88, Ex. I). In any event, I may take judicial notice that "[t]ypically (on-call) compensation is paid only for coverage of the (Emergency Department) and not for general neurology ward and consultation services." (Doc. 101, Ex. G. p. 6). Assuming that consultation responsibilities are generally treated differently from the more onerous and demanding "on-call" duties required for the Emergency Room, such a practice, even if widely understood, would of course be subject to change by agreement.

The issues regarding contract obligations, and thus Prime's contention that Dr. Bamber was subject to being terminated, were somewhat clarified at recent oral argument. Although the purpose of recent filings and the scheduling of argument was principally to clarify the underlying hospital and doctor practices, which present some novelty to the uninitiated, counsel argued some of their basic legal contentions. Counsel for Dr. Bamber devoted much emphasis on the contention that his clinical practice was the subject of the employment contract, that he was not a hospital employee, and thus he had hospital duties only as narrowly specified for on-call activity in the agreement. Hospital patients, other than his pre-existing patients, were, in general, not his responsibility, so it was argued. This concept is inconsistent with the provisions of the Agreement.

The purpose of the Agreement was "to provide neurosurgical services within the service area" of St. Joseph Medical Center and to offer "benefit to the communities" served by the hospital. (Doc. 83. Ex. 2, p.1). "Medical Centers shall be third–party beneficiaries of this

Agreement."(Id. at Par. 2.1) "Patients" are defined to include persons receiving "care, facilities or services . . . by or through (Prime) or a related organization of (Prime)" (Id. at Par. 1.4.), thus including patients at St. Joseph Medical Center. Services were to be performed "at the Practice Site and Medical Centers."(Id. Par. 2.4). In addition to "on-site physician coverage"[3] and "on-call coverage as agreed" there was a general duty to provide "other physician services as may reasonably be requested" by Prime. (Id. Pars. 2.4.4 and 2.4.6). This general language can be used to deal with a third class of patients, hospital patients not requiring emergency assistance on-call (or to be transported to another facility) yet not mobile enough to appear at the clinic for an appointment.

Although Dr. Bamber's recitations suggest he believed he had no obligation to hospital patients except through on-call duties that were being terminated, in other contexts he acknowledged an obligation to consult, at the request of primary-care physicians, but declined to visit "new patients" in the hospital. He asked that they be brought to his clinic, and then apparently returned to their hospital rooms.

The ultimate question under the employment contract is thus not whether consultations could be required but rather whether the location of consultations could be required at the hospital. The record is clear that good medical practice requires that bed-ridden patients should be visited at the hospital rather than transported to and from the clinic, to save Dr. Bamber the

[3] This cryptic term may not be readily understood by the general reader, but apparently does not refer to service at the clinic ("Practice Site"). Prime's expert, Dr. Siegel, says it refers to "inpatient coverage" (Doc. 88, Ex. I), which Dr. Bamber contends is absent from the agreement, and which pre-litigation hospital staff were unable to locate in so many words. I need not look for outside help, however, or treat the term as ambiguous, as the term appears to be widely used jargon in the medical profession, referring to the institutional location of service to patients and prospective patients. *See e.g.* Shannon v. Trivett, 2016 WL 4679796, at * 2 (S.D. Ind.); Sunderland v. Bethesda Health, Inc., 2016 WL 2736087, at *1-2 (S.D. Fla.) (aff'd and rev'd on different grounds); Lewis-Gale Medical Center, LLC v. Romero, 2014 WL 1707055, at *6 (Va. Ct. App.) ("'access to some level of **on-site** specialty care . . . appears to be becoming the standard of care for hospitals providing . . . newborn care'"); Preston v. Meriter Hosp., Inc., 747 N.W.2d 173, 181 (Wis. Ct. App. 2008) ("the hospital considers whether it will undertake longer-term full treatment on-site or instead transfer the patient . . . "). It thus does refer to inpatient service, which would be offered separately from "on-call coverage."

inconvenience of a visit to the nearby hospital. Only if a jury could determine his refusal to go to the hospital room was "reasonable" would he be exonerated from violating the agreement. I conclude he is clearly not entitled to summary judgment on this issue, and it is rather more likely that Prime would be entitled to summary judgment on the issue of breach of contract.[4]

In my conclusions stated above I have implicitly rejected Dr. Bamber's contentions that he should prevail because of Article V of the Agreement or the Medical Staff On-Call Physician Policy. The On-Call policy does expressly refer to an on-call physician's responsibility to "also" offer "consultations on inpatients in the hospital when requested." (Doc. 83, Ex. G). This does not offer any direction to physicians not serving "on-call" duty, and does not give them direction regarding hospital visits. The Policy deals essentially with Emergency Room practice. The wording may thus have been added to avoid having "on-call" doctors refusing inpatient consultation on a theory that "on call" emergency room duties were their excusive responsibilities.

Article V contains a provision that "Physician shall be accessible for patient care at the Practice Site or on an outpatient basis" for five days a week, less excused absences. (Doc. 83, Ex. 2, Art. 5.4.1). That deals with doctor accessibility, not where patients should ultimately be served. In other words, since Dr. Bamber had a designated Practice Site he was expected to be accessible there, rather than at a hospital site, like a hospitalist – or unreachable on a golf course. The subject matter has nothing to do with requiring patients to go to the doctor, or exempting the doctor from making visits, when "reasonably" requested, under Article II.

Notice Requirements.

Dr. Bamber next argues that he is entitled to summary judgment on his breach of contract claim because Prime failed to follow the notice requirements of the Agreement. Specifically, he argues that Prime's November 11, 2016, letter was deficient and constitutes a

[4] If Prime now seeks summary judgment it should do so by motion. Rather than overload filings, counsel may adopt by reference material and argument previously filed, with any supplements they wish to add.

breach of the Agreement because: 1) it did not provide for the remedies that Section 5.5 sets out for violations of the "Minimum Works Standards" of Section 5.4, and (2) did not identify the specific sections of the Employment Agreement and Medical Staff Bylaws allegedly breached as required by Section 5.5 of the Agreement. Section 5.5 provides:

> failure to comply with the Minimum Work Standards will result in formal notice of same being sent to Physician. Continuing failure to comply with the Minimum Work standards may also result in peer review and the requirement that Physician improve his/her performance pursuant to the provisions of an action plan specifically developed for correction of the deficiency. Failure to improve performance and correct all deficiencies set for the in the action plan may result in a ten percent (10%) reduction in Physician's Base Salary until such time as all deficiencies have been corrected and the standards are met.

Specifically, Dr. Bamber argues that Prime breached the Agreement by failing to provide him with an action plan, peer review, or salary reduction alternative as required by the Agreement. A shortcoming of Dr. Bamber's argument, however, is that Prime's position is that he was terminated for breaching Article II of the Agreement, allegedly one of his basic obligations, rather than the minimum work standards provisions of Article V. Accordingly, Dr. Bamber's argument that he is entitled to summary judgment based on defective notice is DENIED.

Evidence of Refusing to Perform Inpatient Consultations.

Dr. Bamber next argues that he is entitled to summary judgment on his breach of contract claim because Prime has not offered any specific evidence that he refused to perform inpatient consultations after November 1, 2016. Dr. Bamber states: "During the 10 days following November 1, 2016, Prime never came to Dr. Bamber with a specific request to perform an inpatient consultation in association with any identified patient."

Although Dr. Bamber argues that there is no evidence of his refusal to provide inpatient consultations, Dr. Bamber does not refute the substantial testimony that he told hospital administrators, St. Joseph physicians, other professionals at the hospital, and his own staff that

he was no longer available for inpatient consultations. (Doc. 88, Ex. M, Dr. Bamber Dep. at 61, 62-63) At his deposition, Dr. Bamber testified: "{s}imilar with the conversation I had with Mr. Nyp and Jodi Fincher, that outside of my contractual period of being on call, that I would be not willing to see new unaffiliated inpatient consults, and I would see them in my office instead." (Dr. Bamber Dep. at 59). Dr. Bamber agreed that after November 1, he was not aware of performing any inpatient consults after November 1 except for one patient who was a preexisting patient in his practice. (Dr. Bamber Dep. at 78, 86). Thus, Dr. Bamber committed at least an anticipatory breach (if he had several inpatient duties) and has not met his burden of demonstrating that he is entitled to summary judgment in his favor.

Damages for Emergency Department Call Coverage.

Prime asserts that it should be granted partial summary judgment on Dr. Bamber's claim for damages representing emergency department call coverage. As damages for the alleged breach, Dr. Bamber seeks to recover the difference between his Prime salary and the salary he now earns, as well as payment of the additional amounts Prime was obligated by the contract to pay for emergency department on-call coverage. Prime asserts that the contract, by its terms, did not mandate on–call compensation and that the additional pay was only triggered if Prime asked Dr. Bamber to provide such coverage.

The Agreement provides that, in addition to an annual base salary, Prime was obligated to pay Dr. Bamber "additional compensation for providing emergency department call coverage." (Doc. 83, Ex. 2, Par. 5.2). Prime characterizes its obligation as contingent, and thus, emergency department call should not be included as part of Dr. Bamber's alleged damage. He responds that call compensation is a proper component of damages because emergency department call was a required component of his Agreement, relying on the 122-day limit for call coverage in the Agreement.

The Agreement as to call compensation is not mandatory, and the 122-day provision only concerns the maximum amount of call days. The Agreement states: "Physician will be

entitled to additional compensation for providing emergency department call coverage." (Doc. 83, Ex. 2, Par. 5.2). The Agreement is specific in that emergency department call coverage is "above and in addition to the 'Base Salary,'" and there are no terms in the Agreement creating a minimum obligation on the part of Prime to compensate Dr. Bamber for emergency department call. It is undisputed that the Agreement mandated Prime to pay for taking emergency department call; however, that obligation was only triggered upon Prime's request. Thus, the unambiguous terms of the contract establish that emergency department call compensation was a discretionary component of Dr. Bamber's compensation package. Emergency department call compensation should not be included in Dr. Bamber's alleged damage calculations. See Eagle Fuels, LLC v Perrin, 10 F.Supp.3d 1028, 1043 (W.D. Mo. 2014) (refusing to include lease revenue in damage calculation because speculative). Accordingly, Prime is entitled to summary judgment on its claim that emergency department call coverage is not a component of Dr. Bamber's alleged damage.

Breach of Contract - Special Damages (Count II).

Prime next argues that it is entitled to summary judgment on the ground that special damages alleged in Count II are not recoverable. Prime argues that Dr. Bamber's damages are limited to the amount of salary, benefits, or other compensation to which he would have been entitled under the Agreement had it not been terminated, minus any income he actually earned or should have earned over that time. Gwartz v. Jefferson Memorial Hops Ass'n, 1994 WL 741012, at *1 (E.D. Mo. 1994). Prime argues that an award of special damages would be duplicative of actual damages already claimed for breach of contract. *See* Cason v. King, 327 S.W.3d 543 (under Missouri law, special or other consequential damages are not recoverable if they would duplicate "actual" or "benefit of the bargain damages").

"Special" damages are those which may be allowed for the breach of certain types of contracts, and include amounts which are not considered to arise "naturally" or "usually" from the breach of contract. Special damages are damages that "actually result from a wrongful act but are the product of the special circumstances of the case or are peculiar to the non-breaching party." Raineri Const. LLC v. Taylor, 63 F.Supp.3d 1017, 1033 (E.D. Mo. 2014) (*quoting* Porter v. Crawford & Co., 611 S.W.2d 265, 271 (Mo.Ct.App. W.D.)). Included in Dr. Bamber's request for "special damages" are the costs he incurred "to reopen his practice and resume his treatment of patients" after the termination of his employment. He includes such items as malpractice insurance, clinic space, wages for his staff, billing services, storage of his items from his office while employed by Prime and a computer to keep his records moving forward. (Doc. 87, ¶ 13).

Prime argues that special damages are not warranted here because Missouri law requires that such special damages be contemplated by the parties as the probable result of a breach of the contract at the time they contracted. Hernandez v. Westoak Realty & Inv. Co., 771 S.W.2d 876, 881 (Mo. App. S.D. 1989). Prime argues that there is no evidence that either of the parties considered Dr. Bamber's claim of special damages to be recoverable as a probable result of a breach of the Agreement, and in fact, specifically contemplated that such damages would not be recoverable.

Prime agrees that Dr. Bamber's alleged damages are "the amount of salary, benefits or other compensation to which he would have been entitled under the Agreement had it not been terminated, minus any income he actually earned (or should have earned)" for the three year period before the Agreement could have been terminated by either party. (Doc. 81, p.11-12). Thus, some of the items of damage Dr. Bamber claims as "special damages" are potentially included in calculating benefit of the bargain damages. For example, malpractice insurance (during the term of the breach) could be considered an employee benefit, and thus, appropriate to include in ordinary damage calculations.[5] *See also* Cason, 327 S.W.3d at 548 ("A plaintiff claiming a breach of contract has available and need not choose between three types of damages – actual, consequential, and

[5] As compared to the total cost of purchasing depreciable assets.

benefit of the bargain – as such damages are not necessarily inconsistent with one another; a plaintiff may not, however, be made whole more than once") (internal citations omitted). However, Dr. Bamber has not provided any evidence that staff wages, billing services, storage or other such expenses might have been contemplated by the parties. Indeed, Section 10.2.7 of the Agreement states that " . . . upon termination of this Agreement, neither party shall have any further obligation hereunder, including [Prime's] obligation of providing salary, employee benefits and medical malpractice insurance, except obligations accruing prior to the date of termination." (Doc. 83, Ex. 2 at p. 10). Further, the record currently before this Court contains no evidence as to Dr. Bamber's current compensation package or practice structure, and thus, the items to be included as damages are best left to be determined at any trial. There is no evidence or cogent argument presented that actual or ordinary benefit of the bargain damages cannot fully compensate Dr. Bamber. He is entitled to be fully compensated for his alleged loss, but not recover a windfall. Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc. 155 S.W.3d 50, 54 (Mo. Banc. 2005). Prime's motion for partial summary judgement seeking dismissal of Count II is therefore GRANTED.

Count III – Tortious Interference with Business Relationships.

Prime argues that it is entitled to summary judgment on Dr. Bamber's claim for tortious interference with business relationships.

Under Missouri law, a tortious interference claim requires that a plaintiff plead and prove: (1) a contract or a valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) intentional interference by the defendant inducing or causing a breach of contract or relationship; (4) absence of justification; and (5) damages resulting from defendant's conduct. Cole v. Homier Distrib. Co., 599 F.3d 856, 861 (8th Cir. 2010) (*citing* Horizon Mem'l Group, LLC v. Bailey, 280 S.W.3d 657, 662 (Mo.Ct.App. 2009)). Further, a claim for tortious interference cannot be predicated upon "speculation, conjecture or guesswork." Tamko Roofing Products v. Smith Eng'g Co., 450 F.3d 822, 830 (8th Cir. 2006).

Prime contends that Dr. Bamber cannot prove at least three of the basic elements of a tortious interference claim, specifically that there is no evidence that: 1) any of Dr. Bamber's business relationships were harmed; 2) Prime's alleged conduct was the cause of any such harm; and 3) Dr. Bamber suffered damages.

Dr. Bamber alleges that Prime interfered with his "existing and prospective patient relationships" by providing "either no information or false information about the current status of Dr. Bamber's practice" after the termination of his employment. As far as damages, Dr. Bamber points to evidence that: (1) "he saw a drastic decrease in patient referrals" following his termination. (Doc. 87, ¶ 40) and (2) a patient email discussing his inability to contact Dr. Bamber. (Doc. 87, ¶53) He also identifies seven patients that he says had "difficulties contacting him after Prime's termination" and argues that from this evidence it is reasonable to infer that certain unknown individuals could not contact him, resulting in damages for lost patient revenue. (Doc. 87, ¶ 19). Once again, Dr. Bamber states that Prime's reason for terminating the Agreement was based on cost-cutting measures, not his refusal to take inpatient call, and that this evidence supports his tortious interference claim. He cites evidence that Prime was looking for a way to terminate his contract, believing that his salary was "exorbitant" and that he had a "sweet deal." (Doc. 87, ¶ 47, 48).

Reviewing the record evidence, however, Dr. Bamber has failed to establish a genuine issue as to damages. Indeed, he testified in his deposition that he could not identify any patients that he actually lost, or identify any referring doctors who said they were not provided with his new contact information. (Doc. 81, Ex. B, at p. 110, 112 – 113). Although he testified that he had seen a "dramatic decrease in referrals," he could not identify any patients who were unable to get in contact with him and he admitted that he still saw patients that occasionally came from his "prior referral sources." (Doc. 96, Ex. H. at 118). The email from one patient that he could not get in contact with Dr. Bamber and that several patients had "difficulties contacting him" does not support an inference

that Dr. Bamber suffered lost patient revenues.[6] *See* Tamko Roofing Products, 450 F.3d at 830 (speculative damages may not support a claim for tortious interference). Although there is some flexibility in proving lost profits, damages must at least be supported by "reasonable certainty." Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc., 155 S.W.3d 50, 55 (Mo. 2005).

Carter v. St John's Reg'l Medical Center, 88 S.W.3d 1, 13-14 (Mo. Ct. App. S.D. 2002), is instructive. In that case, the plaintiff doctor prevailed at trial on his tortious interference claim based on the hospital's refusal to release patient medical records. The doctor argued that the failure to release medical records caused him to lose at least two patients and referrals from other doctors. Nevertheless, the Appeals Court reversed the jury verdict on the tortious interference claim because the doctor failed to establish causation and damages. *Id*. at 16-18. Here, like Carter, Dr. Bamber's allegation of damage lacks "reasonable certainty as to both existence and amount." *Id.* For these reasons, Prime is entitled to summary judgment on Dr. Bamber's claim for tortious interference with business relationships. Accordingly, it is herby

ORDERED that Dr. Bamber's motion for partial summary judgment on Count I is DENIED. (Doc. 82). It is further ORDERED that Prime's motion for partial summary judgment on Counts II and III and the claim in Count I for Emergency Department call coverage compensation is GRANTED. (Doc. 80).

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

December 12, 2018
Kansas City, Missouri

[6] Similarly, that some patients had a difficult time contacting Dr. Bamber is not sufficient evidence from which a reasonable juror could conclude causation – this evidence does not support an inference that Prime "actively and affirmatively took steps" to prevent patients from contacting Dr. Bamber. *See* Tamko Roofing Products Inc., 450 F.3d at 830.