

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

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DEBRA P. HACKETT, CLK
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA

D&J OPTICAL, INC.,)
)
Plaintiff,)
)
v.)
)
DR. TAMMY WALLACE, DEBBIE)
HUGHES, and ENTERPRISE)
OPTICAL, LLC,)
)
Defendants.)

CIVIL ACTION NUMBER:

1:14-cv-658-WHA-TFM

DEMAND FOR JURY TRIAL

COMPLAINT

Plaintiff D. & J Optical, Inc. ("D & J Optical"), through its undersigned counsel, brings the following complaint for both injunctive and monetary relief against defendants Dr. Tammy Wallace, Debbie Hughes, and Enterprise Optical, LLC ("Enterprise Optical"). In support of its complaint, D & J Optical alleges as follows:

I. INTRODUCTION

1. This action involves the present and future misappropriation and use of D & J Optical's confidential, proprietary, and trade secret information, which was maintained on its secured computer system and otherwise, by its former

employees Dr. Tammy Wallace and Ms. Debbie Hughes, now employees of its competitor Enterprise Optical, d/b/a Eyes of Ozark Optical (“Eyes of Ozark”).

II. PARTIES

2. Plaintiff D & J Optical is an Alabama corporation with its principal place of business in Ozark, Alabama. Frank V. Jones is its President, and Kyle Jones is its Controller.

3. Defendant Wallace is a former independent contractor of D & J Optical and a current employee of Enterprise Optical. Wallace is a resident of Alabama.

4. Defendant Hughes is a former employee of D & J Optical and current employee of Enterprise Optical. Hughes is a resident of Alabama.

III. JURISDICTION AND VENUE

5. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, 18 U.S.C. § 1030(g), and 17 U.S.C. § 1201, as D & J Optical asserts claims arising under the laws of the United States, more particularly claims under the Computer Fraud and Abuse Act (“CFAA”) and the Digital Millennium Copyright Act (“DMCA”).

6. The Court has supplemental matter jurisdiction over all other claims asserted herein pursuant to 28 U.S.C. § 1367(a).

7. This court has personal jurisdiction over all parties as residents of Alabama.

8. Venue is proper in this District and this Division pursuant to 28 U.S.C. § 1391 in that all defendants reside in this judicial district and that a substantial portion of the events giving rise to D & J Optical's claims occurred in this judicial district, more particularly in Dale County, Alabama.

IV. FACTUAL ALLEGATIONS

9. D & J Optical operates optical centers in Ozark and Opp, Alabama.

10. In 2009, Wallace was engaged as a part-time optometrist at the Ozark office. Wallace worked two days per week at D & J Optical, and Frank Jones, the president of D & J Optical, assisted Wallace in finding work with Dr. Velvet Maddox for the remaining three days per week. Wallace's work at D & J Optical was reduced to only one day per week later in 2009 but returned to two days per week in 2010. In 2011, Wallace worked three days per week from January 1 to September 11. Due to the retirement of D & J Optical's other optometrist, Wallace's work was increased to four days per week in October of 2011.

11. In 2012, Wallace's work became full time, five days per week. Her scheduled hours were Monday through Thursday, 8 a.m. to 5 p.m., and Friday 8 a.m. to 1 p.m.

12. Wallace entered into an Independent Contractor Agreement with D & J Optical effective as of January 1, 2012 (attached hereto as Exhibit A) (the "Agreement"). According to section 2 of the Agreement, Wallace agreed to "devote her entire time, ability and attention to the business" of D & J Optical. Wallace further agreed that she would not disclose, directly or indirectly, during the term of the Agreement or at any later time, D & J Optical's "client names, addresses, personal information, files and records, as well as various other processes, procedures, compilations of information, records, and specifications that are owned by the CORPORATION and that are regularly used in the operation of the CORPORATION'S business." Wallace agreed that "all files, records, documents, drawings, specifications, equipment, and similar items relating to the business of the CORPORATION, whether prepared by the CONTRACTOR or otherwise coming in the CONTRACTOR'S possession shall remain the exclusive property of the CORPORATION and shall not be removed from the premises of the CORPORATION under any circumstances whatsoever without prior consent of the CORPORATION."

13. In September of 2012, Wallace approached D & J Optical's President, Frank Jones, about buying the optometry practice. Mr. Jones declined Wallace's proposal of a seller-financed purchase arrangement. During the discussions surrounding the purchase offer, Jones first became aware that Wallace had information regarding the practice that she would not have access to in the regular course of her duties. At this time, Jones made inquiries of the D & J Optical staff, and he became aware that Wallace had been removing patient files from the office. Jones told Wallace that she was not allowed to remove records from the office or access any of the corporate records maintained on the company's computer system. Wallace agreed she would not remove any files in the future.

14. On August 29, 2013, Wallace gave notice that she was leaving the D & J Optical practice effective November 27, 2013.

15. Upon information and belief, during 2013, Wallace began working part time for Enterprise Optical on Friday afternoons. D & J Optical did not receive a request for, nor grant its consent, to this secondary employment at a competitor.

16. On December 3, 2013, Wallace began working at Eyes of Ozark Optical. On December 3, 2013, D & J Optical began receiving faxed requests for patient records. The fax number printed on these requests indicated that they originated at Enterprise Optical. During the first two weeks that Eyes of Ozark

Optical was open, D & J Optical received more than 50 requests for patient records, including from patients who were not due for a return visit at that time.

17. Ms. Debbie Hughes was an employee at D & J Optical's Ozark office from March 3, 2007 until October 25, 2013. Her duties included the entry and filing of insurance claims.

18. Upon information and belief, at some point in 2013, Hughes formed a plan with Wallace to leave D & J Optical and begin working at Enterprise Optical.

19. On September 14, 2013, Hughes requested vacation days from D & J Optical. Upon information and belief, on those days Hughes was attending training at Enterprise Optical. During her official vacation days, and while training at Enterprise Optical, Hughes entered D & J Optical's office and downloaded patient contact information at her secured workstation, saving it first to the desktop of her work station, then transferring the file to another drive. She then attempted to erase the evidence of her actions from her computer.

20. On October 1, 2013, Hughes gave notice of her intent to leave D & J Optical. On October 28, 2013, she began working at Enterprise Optical. On December 3, 2013 she began working at Eyes of Ozark with Wallace.

21. D & J Optical maintains a secure server for storage of its confidential and trade secret information related to the optometry practice. D & J Optical manages digital patient records related to insurance billing through Panacea

software. All data is stored on the secure server located in D & J Optical's office. The server contains data on the patients and practice from both Ozark and Opp offices. Access to the server from the Opp office is by way of a secured network connection.

22. The Panacea software stores basic demographic and contact information for each patient, as well as brief descriptions of the diagnosis, treatment history, follow-up schedule, and billing information for each patient seen at the optical centers.

23. Access to the D & J Optical server for the purpose of making any configuration modifications thereto is limited to only Mr. Kyle Jones, Controller of D & J Optical, and Tom Rivers, an IT consultant and co-designer of the Panacea software. Kyle Jones is the only employee of D & J Optical who is allowed remote access to the computer system.

24. Employees requiring access to D & J Optical's computerized patient data or practice information for billing or other purposes are assigned confidential log-in credentials and passwords which allow them access to data through assigned workstations. No D & J Optical employees have been given credentials and passwords which grant them access to the server or allow them to make any modifications to D & J Optical's computer system.

25. Kyle Jones is the only D & J Optical employee who can assign log-in credentials and passwords.

26. Credentials and passwords are inactivated when an employee leaves D & J Optical.

27. The patient records utilized by optometrists providing services at D & J Optical are paper files, and the optometrists are given no user name, password, or workstation access because it is not necessary for the performance of their duties.

28. Wallace had no user name, password, or workstation access at D & J Optical.

29. Hughes was assigned a user name and password that allowed her access to the patient records through her assigned workstation in order to fulfill her duties in filing insurance claims with private insurers as well as the Centers for Medicare and Medicaid Services ("CMS"). Hughes had no administrator privileges to access the D & J Optical server or computer system.

30. In 2014, Kyle Jones discovered that data had been transferred without authorization from the D & J Optical server to "Starfield Technologies File Backup." IT Consultant Tom Rivers researched this service and confirmed it is not a service used or authorized by D & J Optical.

31. Kyle Jones also discovered that Cisco Mobility Client software had been installed without authorization on a D & J Optical workstation and that a wireless transmitter had been plugged into a USB port of a workstation. These items allowed remote access to the server through a wireless access point or virtual private network (“VPN”). At least seven user names were established without authorization, none of whom were employees of D & J Optical. This configuration could allow access to the server remotely. None of this was created or authorized by D & J Optical.

32. Kyle Jones also discovered a wire from the company’s internet access point extending into the attic of the building. This wire connected a booster located in the attic which could allow access to a workstation from the internet.

33. Consultant Tom Rivers was able to determine that the D & J Optical server was remotely accessed from an IP address assigned to the Ozark D & J Optical network by a computer named “WALLACEFAMILY.” Access from this computer began at least by October 31, 2013 and continued at least until December 2, 2013, which was after Wallace terminated her contract with D & J optical.

34. D & J Optical workstations also have been accessed remotely from computer addresses that can be traced to Enterprise Optical on dates both before and after Wallace and Hughes terminated employment with D & J Optical.

35. Installation of the Cisco Mobility Client software, wireless transmitter, antenna, and range booster required physical access to the D & J Optical computer system, which was kept locked in the D & J Optical's office. Such access was not authorized by D & J Optical.

36. Upon information and belief, a high level of technical expertise was required to install and set up the Cisco Mobility Client and establish the user names, including repeated efforts to establish a user with administrative privileges. Upon information and belief, Hughes has family members with the technological skills to accomplish these tasks.

37. In 2014, there was a break-in at the D & J Optical offices. The only item stolen was a hard drive from a computer workstation.

38. Upon information and belief, at some point during 2013, before giving notice of their intent to leave D & J Optical, Wallace and Hughes formed a relationship with Enterprise Optical. During this time, Wallace formulated her plan to leave D & J Optical for employment with Eyes of Ozark.

39. As part of this plan, Hughes underwent training with Enterprise Optical during the time when she claimed to be on vacation. During this time, Wallace and Hughes took steps to extract patient and practice information for the benefit of Enterprise Optical, doing business as the newly opened Eyes of Ozark.

40. As a result of the unauthorized remote access to D & J Optical's computer system, D & J Optical was forced to employ experts to undertake a forensic analysis of the computers, and to report the unauthorized access as a breach of protected health information ("PHI") by sending letters to patients in the Panacea database, posting notice in local newspapers, and submitting a breach notification report to the U.S. Dept. of Health and Human Services.

V. CAUSES OF ACTION

COUNT I – VIOLATION OF THE COMPUTER FRAUD AND ABUSE ACT, 18 U.S.C. § 1030

41. D & J Optical incorporates the allegations of the preceding paragraphs of this complaint as if restated fully herein.

42. Wallace intentionally accessed the D & J Optical computer system without authorization using credentials and a password that were not assigned to her by D & J Optical and thereby wrongfully obtained information regarding D & J Optical's patients and operations.

43. Wallace with the knowledge of Hughes and Enterprise Optical knowingly and with the intent to defraud, accessed the D & J Optical computer system without authorization using credentials and a password that were not assigned to her by D & J Optical and thereby wrongfully obtained confidential,

proprietary, and trade secret information regarding D & J Optical's patients and operations for the purpose of securing an unfair competitive advantage for her new employer, Enterprise Optical.

44. Wallace intentionally accessed the D & J Optical computer system without authorization using credentials and a password that were not assigned to her by D & J Optical and knowingly transmitted commands to download the previously secure patient data to an unsecured cloud back-up drive, home computer, or other storage device, thereby impairing the integrity of the data by rendering it less secure.

45. Wallace, with the knowledge of Hughes and Enterprise Optical, knowingly and with the intent to defraud D & J Optical by accessing confidential, proprietary, and trade secret information stored on the D & J Optical computer system, created new user credentials and passwords that allowed unauthorized remote access by individuals without the authority to access the computer system, thereby trafficking in passwords through which the computer system could be accessed without authorization.

46. Wallace and Hughes, with the knowledge of Enterprise Optical, transmitted a program, information, code, or command that damaged the D & J Optical server by installing software to create a portal for remote access to the

previously secure system, thereby rendering the data less secure by exposing it to third-party hackers.

47. Wallace and Hughes, with the knowledge of Enterprise Optical, and without the authorization or knowledge of D & J Optical, attempted to damage permanently the data on the D & J Optical server by transmitting a program, information, code, or command which would have caused disabling of the computer system's security protections or permanent deletion of data had it not been detected.

48. Wallace and Hughes intentionally, and with the knowledge of Enterprise Optical, attempted remotely to access the information on the D & J Optical computer system from the Enterprise Optical office while undergoing a training session at Enterprise Optical. Hughes had no authorization remotely to access the computer system, and thus acted without authorization when making this attempt, or alternatively exceeded her authorization by attempting to access the data other than for business purposes related to her duties at D & J optical.

49. Hughes intentionally, and with the knowledge of Enterprise Optical and Wallace, accessed the D & J Optical computer system from her workstation at D & J Optical and downloaded patient contact information, first saving the file to her desktop, then transferring the file to another drive, and finally deleting file information from her desktop to conceal her actions. These actions were

undertaken during a time when Hughes claimed to be on vacation, but was, in fact, training at Enterprise Optical. Through these actions, Hughes exceeded her authorization to access the data for business purposes related to her duties at D & J optical by downloading the data with the knowledge of, and for the benefit of, D & J Optical's competitors Enterprise Optical and Wallace.

50. Wallace, Hughes, and Enterprise Optical conspired together to commit each of these wrongful acts of improper access to the D & J computer system for the purpose of obtaining D & J Optical's patient contacts and other confidential, proprietary, and trade secret information for the financial benefit of Enterprise Optical and Eyes of Ozark, and to cause material harm to D & J Optical's business.

51. D & J Optical's computer system is used in interstate commerce when billing insurance companies and CMS for the optical services rendered.

52. Defendants' unlawful actions have caused D & J Optical to suffer loss and damages, including, without limitation, costs of responding to the wrongful conduct, conducting a forensic investigation and damage assessment, replacement of computer hardware, notifying patients of the PHI breach, and other costs totaling more than \$5,000. In addition, the defendants' actions have caused, and are threatening to cause, irreparable harm to D & J Optical in that the monetary value of the information accessed, and the loss of revenue that has resulted from

the appropriation of the data and reputational harm caused by the PHI breach public notification requirements, cannot be readily ascertained.

WHEREFORE, D & J Optical demands injunctive relief against Wallace, Hughes, and Enterprise Optical as warranted by the facts adduced herein, and D & J Optical further demands compensatory damages, according to proof at trial, its costs, and all such other relief to which D & J Optical may show itself entitled.

**Count II – Violation of the Digital Millennium
Copyright Act, 17 U.S.C. § 1201**

53. D & J Optical incorporates the allegations of the preceding paragraphs of this complaint as if restated fully herein.

54. Access to D & J Optical's Panacea database software and the compilation of data contained therein is effectively controlled by a technological measure, namely the use of duly authorized and issued user credentials and passwords.

55. Wallace, Hughes, and Enterprise Optical wrongfully circumvented this technological measure by intentionally and without permission from, or knowledge of, D & J Optical, installing hardware and software on the D & J computer system and creating new user credentials, including users with administrative privileges, to allow remote access to the Panacea database and

software. Defendants knew that they lacked authorization to install hardware or software to create the remote access point, or to create new user credentials for individuals to access the D & J Optical computer system and the database and software contained therein.

56. Defendants wrongfully circumvented D & J Optical's technological measures by intentionally using credentials and a password wrongfully created to access the Panacea database and software. Defendants knew that the credentials and passwords did not belong to them and that they were not allowed to use the credentials to access the Panacea database and software located on D & J Optical's computer system.

57. D & J Optical has been damaged and is continuing to incur damages, at an amount to be proven at trial.

WHEREFORE, D & J Optical demands injunctive relief against defendants as set forth above and as warranted by the facts adduced herein, and D & J Optical further demands compensatory damages, according to proof at trial, attorneys' fees and costs, and all such other relief to which D & J Optical may show itself entitled.

**Count III – Violation of the Alabama Trade
Secrets Act, Ala. Code § 8-27-1**

58. D & J Optical incorporates the allegations of the preceding paragraphs of this complaint as if restated fully herein.

59. D & J Optical's computer system contains valuable trade secrets belonging to D & J Optical. In particular, the data contained in the files on the computer system embodies a host of information that represents data, including patient contact information and practice management data, compiled through more than 45 years of optometry practice in the Ozark and Opp offices. The information embodied in the data represents years of experience and involvement with patients and with the practice of optometry, and cannot be readily, quickly or inexpensively replicated, nor derived from public sources.

60. The information embodied in the files located on the D & J Optical computer system is not publicly known and is not generally known among other optometry providers.

61. The information embodied in the files located on the D & J Optical computer system has significant economic value.

62. The information embodied in files located on the D & J Optical computer system has been the subject of efforts by D & J Optical to protect its secrecy, such efforts being reasonable under the circumstances.

63. The information embodied in files located on the D & J Optical computer system data constitutes trade secrets under the Alabama Trade Secrets Act.

64. Wallace, Hughes, and Enterprise Optical have misappropriated D & J Optical's trade secrets through the unauthorized and unlawful computer access described herein.

65. Defendants' misappropriation of D & J Optical's trade secrets, through unauthorized computer access, including installation of hardware and software to circumvent the physical protections in place, was willful and malicious. Defendants misappropriated D & J Optical's trade secrets by inducing a breach of confidence by D & J Optical employees. Defendants misappropriated D & J Optical's trade secrets by trespassing upon D & J Optical's property in order to install the hardware and software that enabled remote access to the computer system where the trade secret data was stored.

66. Defendants' misappropriation of D & J Optical's trade secrets will, if permitted to continue, damage D & J Optical in amounts difficult to ascertain, including loss of patients and customers, loss of good will, loss of market share, and loss of the value of the intellectual property.

67. In equity and good conscience, defendants should not be allowed to make use of D & J Optical's trade secret data for their own financial gain, to the detriment of D & J Optical.

WHEREFORE, D & J Optical demands injunctive relief against Wallace, Hughes, and Enterprise Optical as set forth above and as warranted by the facts adduced herein, and D & J Optical further demands compensatory and punitive damages, according to proof at trial, attorneys' fees, and costs, and all such other relief to which D & J Optical may show itself entitled.

Count IV – Violation of the Alabama Digital Crime Act

68. D & J Optical incorporates the allegations of the preceding paragraphs of this complaint as if restated fully herein.

69. Defendants without authority knowingly accessed D & J Optical's computer software, and have disclosed, used, controlled, or taken information or data residing in D & J Optical's computer software.

70. Hughes, exceeding her authorization by acting for the benefit of D & J Optical's competitor, accessed D & J Optical's computer software, and has disclosed, used, controlled, or taken information or data residing in D & J Optical's computer software.

71. Wallace, Hughes, and Enterprise Optical accessed a computer system operated by a medical institution and obtained information that is required by law to be kept confidential and records that are not public records.

72. Defendants in so doing intended to commit an unlawful act, to obtain a benefit, and to harm and defraud D & J Optical. Defendants' conduct has injured D & J Optical.

73. The unlawful actions of defendants have caused D & J Optical to expend more than \$2,500 in responding to the wrongful conduct, including, but not limited to, conducting a forensic investigation and damage assessment, replacement of computer hardware, and complying with federal PHI breach notification requirements.

74. Defendants have, by their conduct describe herein, violated the Alabama Digital Crime Act, *Ala. Code* § 13A-8-112, and caused D & J Optical to expend more than \$2,500 in response, a class B felony.

75. Alabama Code § 6-5-370 provides that “[f]or any injury, either to person or property, amounting to a felony, a civil action may be commenced by the party injured without prosecution of the offender.”

WHEREFORE, D & J Optical demands compensatory and punitive damages against Wallace, Hughes, and Enterprise Optical according to proof at trial,

together with costs of court and all such other relief to which D & J Optical may show itself entitled.

Count V – Trespass

76. D & J Optical incorporates the allegations of the preceding paragraphs of this complaint as if restated fully herein.

77. Wallace, Hughes, and Enterprise Optical's actions in entering the D & J Optical premises without authorization to install hardware and software to create remote access to D & J Optical's computer system constitutes a trespass to real property and have damaged D & J Optical. Defendants' actions in accessing D & J Optical's computer system without authorization constitute a trespass upon and to D & J Optical's personal tangible and intangible property and have damaged D & J Optical.

78. Defendants' trespass was done willfully and with knowledge that it was in violation of D & J Optical's rights, entitling D & J Optical to punitive damages.

WHEREFORE, D & J Optical demands compensatory and punitive damages against Wallace, Hughes, and Enterprise Optical according to proof at trial, together with costs of court and all other such relief to which D & J Optical may show itself entitled.

Count VI – Conversion

79. D & J Optical incorporates the allegations of the preceding paragraphs of this complaint as if restated fully herein.

80. Wallace, Hughes, and Enterprise Optical's actions in accessing and making use of data stored on D & J Optical's computer system without authorization constitute an improper and unlawful deprivation of or interference with D & J Optical's intangible personal property, and a wrongful exercise of dominion over that property in defiance of D & J Optical's rights therein. Defendants have appropriated D & J Optical's intangible personal property for their own use and benefit. These acts thus constitute conversion and have damaged D & J Optical.

81. Defendants' conversion was done by means of trespass, willfully and with knowledge that it was in violation of D & J Optical's rights, entitling D & J Optical to punitive damages.

WHEREFORE, D & J Optical demands compensatory and punitive damages against defendants according to proof at trial, together with costs of court and all such other relief to which D & J Optical may show itself entitled.

Count VII – Breach of Contract

82. D & J Optical incorporates the allegations of the preceding paragraphs of this Complaint as if restated fully herein.

83. As set forth herein, the Agreement entered into by Wallace is a binding and enforceable contract between the parties and was supported by valuable consideration. In executing the Agreement, Wallace agreed to certain legally binding covenants and obligations to D & J Optical.

84. Wallace violated the express terms of Section 2 of the Agreement by removing D & J Optical patient and business records through unauthorized access to the D & J Optical computer system, and making use of, or disclosing directly or indirectly, the information contained in those records to Enterprise Optical.

85. Upon information and belief, Wallace is continuing to violate the Agreement by using, and disclosing the information from D & J Optical's records.

86. D & J Optical fully performed its obligations under the Agreement.

87. As a direct and proximate result of Wallace's material and ongoing breach of the Agreement, D & J Optical has and will continue to be irreparably injured and suffer financial damages.

88. D & J Optical has no adequate remedy at law for certain of Wallace's actions since the damages D & J Optical will suffer as a result of the material

breaches of the Agreement will undermine D & J Optical's current and prospective relationships with patients and customers, and the divulgence of D & J Optical's confidential proprietary information, as well as the loss of its competitive position and goodwill, are incapable of exact proof.

WHEREFORE, D & J Optical demands injunctive relief against Wallace, as set forth above and as warranted by the facts adduced herein, and D & J Optical further demands compensatory damages, according to proof at trial, and all such other relief to which D & J Optical may show itself entitled.

Count VIII – Breach of the Duty of Loyalty

89. D & J Optical incorporates the allegations of the preceding paragraphs of this complaint as if restated fully herein.

90. Hughes, as an employee of D & J Optical, and Wallace, as an independent contractor under contractual agreement with D & J Optical, were agents of D & J Optical and owed a duty of loyalty to discharge their responsibilities and to act at all times in the best interest of D & J Optical. Hughes and Wallace also had a duty to avoid placing themselves, during the agency, in a position adverse to that of D & J Optical. The confidential relationship that existed between Hughes, Wallace, and D & J Optical afforded Hughes and Wallace the power and means to take undue advantage of D & J Optical.

91. Hughes and Wallace breached their duty of loyalty to D & J Optical by failing to pursue opportunities for the benefit of D & J Optical and positioning themselves to act on opportunities for the benefit of themselves.

92. Hughes and Wallace also breached their duty of loyalty to D & J Optical by using company time, money, and other resources while still employed by D & J Optical to, at a minimum, misappropriate and otherwise use D & J Optical's confidential and proprietary information.

93. Hughes and Wallace also breached their duty of loyalty to D & J Optical by knowingly performing or aiding the installation of hardware and software on the D & J Optical workstations that would allow remote access to the secure computer system, constituting a reportable breach of PHI, and rendering the confidential data and patient records stored therein less secure.

94. The above-described actions were taken in bad faith, lacked the care that an ordinarily prudent person in a like position would exercise, and were contrary to the best interest of D & J Optical. These actions were undertaken while Hughes was still employed, and Wallace still contractually obligated, to D & J Optical and were done in anticipation of future competition against D & J Optical.

95. As a direct and proximate cause of Hughes's and Wallace's actions, D & J Optical has suffered damages including those from lost income, diminished competitive advantage, and reputational harm resulting from the required public

PHI breach notifications. D & J Optical also was injured by continuing to place trust and authority in Hughes, allowing her continued access to D & J Optical's confidential, proprietary, and trade secret information.

96. D & J Optical has no adequate remedy at law for certain of Hughes's and Wallace's actions since the damages D & J Optical will suffer as a result of the breach of duty will undermine D & J Optical's current and prospective customer and patient relationships, and the divulgence of its confidential, proprietary, and trade secret information, as well as the loss of its competitive position and customer good will, are incapable of exact proof.

WHEREFORE, D & J Optical demands injunctive relief against Hughes and Wallace as set forth above and as warranted by the facts adduced herein.

Count IX – Tortious Interference with Contract

97. D & J Optical incorporates the allegations of the preceding paragraphs of this complaint as if restated fully herein.

98. Enterprise Optical intentionally interfered with the contractual relationship existing between Wallace and D & J Optical.

99. Wallace and D & J Optical entered into an Agreement for provision of optometry services. Enterprise Optical was not a party to that contract, or agents to parties of the contract, and had no financial stake in the contract.

100. Enterprise Optical was aware of the existing contractual relationship between Wallace and D & J Optical. Enterprise Optical intentionally disrupted or interfered with the performance of this contract through its actions, including inducing Wallace to improperly access information on D & J Optical's computer system for the benefit of Enterprise Optical.

101. Enterprise Optical's actions have been a direct and proximate cause of damages suffered by D & J Optical, including those from lost income, diminished competitive advantage, and reputational harm caused by the required PHI breach notifications.

WHEREFORE, D & J Optical demands compensatory and punitive damages against Enterprise Optical according to proof at trial, together with all such other relief to which D & J Optical may show itself entitled.

Count X – Intentional Interference with Business Relations

102. D & J Optical incorporates the allegations of the preceding paragraphs of this complaint as if restated fully herein.

103. Under Alabama law, D & J Optical had a right, among others, to do business in a fair setting, free from unlawful interference.

104. By engaging in the unlawful and wrongful acts described herein, Wallace, Hughes, and Enterprise Optical intentionally interfered with business

relations between D & J Optical and its established customer and patient base which D & J Optical had developed through years of practice and good will.

105. Wallace and Hughes obtained knowledge of the existence of these relationships as a result of their employment. Enterprise Optical obtained actual knowledge of these existing relationships through the wrongful and unauthorized access to the data contained on the D & J Optical computer system.

106. Wallace, Hughes, and Enterprise Optical have unlawfully and intentionally interfered with the business relationships between D & J Optical and its patients and customers by, among other things, using the improperly accessed information on D & J Optical's computer system to solicit D & J Optical's established patient and customer base to become patients and customers of Enterprise Optical and Eyes of Ozark.

107. Wallace, Hughes, and Enterprise Optical were and are aware of the existence of D & J Optical's protectable business relationship, to which they are strangers, but nonetheless, Wallace, Hughes, and Enterprise Optical intentionally interfered with D & J Optical's business relationships.

108. Defendants' actions have been a direct and proximate cause of damages suffered by D & J Optical, including those from lost income, diminished competitive advantage, and reputational harm caused by the required public PHI breach notifications.

WHEREFORE, D & J Optical demands compensatory and punitive damages against Wallace, Hughes, and Enterprise Optical according to proof at trial, together with costs of court and all such other relief to which D & J Optical may show itself entitled.

Count XI – Fraudulent Suppression

109. D & J Optical incorporates the allegations of the preceding paragraphs of this complaint as if restated fully herein.

110. Wallace and Hughes were aware of their intention to leave D & J Optical's employ in advance of the date on which they notified D & J Optical of their intention to do so.

111. During the time between when Wallace and Hughes made the decision to leave D & J Optical and the date on which they communicated their intent to D & J Optical, Wallace and Hughes concealed or failed to disclose their decisions to leave D & J Optical for employment at D & J Optical's competitor Enterprise Optical in a newly formed venture, Eyes of Ozark Optical.

112. During the time between when Wallace and Hughes made the decision to leave D & J Optical and the date on which they communicated their decisions to D & J Optical, Wallace and Hughes began improperly, and without

authority, accessing the confidential, proprietary, and trade secret information stored on D & J Optical's computer system.

113. Wallace's and Hughes's intentional and malicious failure to timely notify D & J Optical of their decisions to leave D & J Optical, particularly as Wallace and Hughes were accessing confidential, proprietary, and trade secret information, to benefit their future employer, Enterprise Optical, induced D & J Optical to continue employing and compensating Wallace and Hughes as normal.

114. D & J Optical was damaged by continuing to employ Wallace and Hughes even as they were actively, and unlawfully, accessing D & J Optical's confidential, proprietary, and trade secret information to aid their future employer.

WHEREFORE, D & J Optical demands compensatory damages against Wallace and Hughes, according to proof at trial, together with costs of court and all such other relief to which D & J Optical may show itself entitled.

COUNT XII – CIVIL CONSPIRACY

115. D & J Optical incorporates the allegations of the preceding paragraphs of this complaint as if restated fully herein.

116. Civil conspiracy is a separate substantive tort that arises when two or more people either act unlawfully or act lawfully by unlawful means. Any defendant who participates in a civil conspiracy is liable for the damages sustained

as a result of the conspiracy, regardless of whether the defendant profited from the conspiracy.

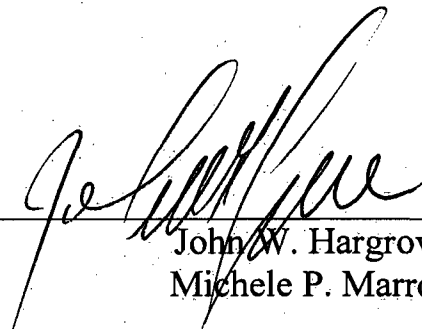
117. Wallace, Hughes, and Enterprise Optical have unlawfully and intentionally conspired to commit the unlawful acts recited herein with the purpose of obtaining unauthorized access to D & J Optical's computer system and the confidential, proprietary, and trade secret information contained therein.

118. In furtherance of this conspiracy, hardware and software were placed on the D & J Optical workstations to allow unauthorized remote access to the secure computer system. Placement of the hardware and software were accomplished through physical trespass to the real property of D & J Optical. The use of the fraudulent credentials established by the conspirators allowed remote access to the computer system, a trespass upon D & J Optical's tangible and intangible personal property. On numerous occasions the D & J Optical computer system was remotely accessed from IP addresses that can be traced to Wallace and the Enterprise Optical office. Through this conspiracy, the conspirators sought to, and did, achieve an unfair economic advantage by obtaining the confidential, proprietary, and trade secret information of D & J Optical.

119. As a direct and proximate result of the conspiracy between Wallace, Hughes, and Enterprise Optical, D & J Optical has suffered damages including those from the cost of investigating and responding to the unauthorized access, cost

of complying with required PHI breach notification rules, lost income, diminished competitive advantage, and reputational harm resulting from the required public PHI breach notifications.

WHEREFORE, D & J Optical demands compensatory and punitive damages against Wallace, Hughes, and Enterprise Optical according to proof at trial, together with costs of court and all such other relief to which D & J Optical may show itself entitled.



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PLAINTIFF SEEKS A TRIAL BY JURY ON ALL COUNTS

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