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SOUTHERN DISTRICT OF

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

INNOVATIVE THERAPEUTICS, PEOPLE AGAINST CANCER, INC., FRANK D. WIEWEL, and HAROLD L. SMITH, Plaintiffs, vs. DR. JACK O. TAYLOR, ROYCE KESSELRING, FRANCISCO TORIZ, INNOVATIVE THERAPEUTICS INTERNATIONAL, INC., INNOVATIVE THERAPEUTICS WORLDWIDE, INC., THERAPEUTIC NUTRITIONALS, Defendants.	))))))))))))))))))))	Civil No. 4-01-CV-10679 ORDER

Before the Court is plaintiffs' motion for temporary restraining order and preliminary injunction filed on November 27, 2001. Defendants filed a resistance on February 11, 2002. This Court held a hearing on February 13 and 14, 2002. The matter is fully submitted.

I. BACKGROUND

This litigation stems from the dissolution of a partnership. The Innovative Therapeutics partnership was formed in 1996, and it dissolved in 2001 when one of three partners chose to leave. The three partners were Frank Wiewel, Harold Smith, and Jack Taylor. Innovative Therapeutics was designed to serve individuals with cancer by recommending, formulating, manufacturing and distributing nutritional supplements. The partnership operated without a

written agreement.

To form the Innovative Therapeutics partnership, each partner contributed an aspect from the business he ran apart from the partnership. Wiewal provided potential customers to the partnership; Taylor then provided these potential customers with computer generated advice on what nutritional supplements they needed; and Smith provided the supplements for sale to these customers. All three members of the partnership profited when the customers purchased supplements from Smith.

Wiewel is the founder and president of a non-profit organization called "People Against Cancer" ("PAC"), a California corporation with offices in Otho, Iowa. PAC researches alternative medicine therapies. It shares these therapy options with cancer patients who contact the organization. PAC requests that people who contact the organization become members, at a cost of $450. Testimony at the hearing indicated this fee was maintained solely by PAC, and not contributed to the Innovative Therapeutics partnership. Thereafter, PAC members fill out a medical history questionnaire and provide PAC with photocopies of their medical records. In its web site, PAC states that it then faxes the information to an international network of physicians and researchers, and that it receives responses regarding whether the physicians and researchers believe they can provide assistance. PAC advertises that it provides a detailed written report, and a follow-up consultation to its members or others receiving its services. *See* Defendant's Exh. E (copy of page from organization's web page,

www.peopleagainstcancer.com).[1]

As a part of his work with PAC, Wiewal met Taylor in the early 1990s. After learning about Taylor's services, Wiewal began referring individuals that contacted PAC to Taylor. Taylor would then perform an assessment on that individual, and recommend nutritional supplements. In 1996, Taylor approached Wiewal with the idea of making their relationship a formal partnership. PAC would receive a "grant" every time one of the individuals it referred to Taylor purchased nutritional supplements.

Jack Taylor is a professional nutritional counselor and a chiropractor. He holds a Master of Science degree in biology and human nutrition. He is a licensed chiropractor in the states of Illinois and Texas. He is also a certified clinical nutritionist and is licensed by the states of Illinois and New York in that field. Taylor operated "Dr. Taylor's Wellness Center, Inc." in Arlington Heights, Illinois. As previously described, prior to the formation of the Innovative Therapeutics Partnership, Taylor received patient referrals from Wiewal. He would then operate a computer program entitled the Metabolic Assessment Program ("MAP") to determine what supplements the patients required. The MAP program performs nutritional assessments. A person fills out a questionnaire, has laboratory tests performed, and sends this data to Taylor who then inputs the data into the computer program. The program then recommends dietary choices, lifestyle changes, and the use of specific types of nutritional supplements for the person. The MAP program was designed for cancer patients to help them treat and fight their disease. The

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[1] PAC states two other noteworthy matters on its currently active web page. First, "We are not financially affiliated with any specific physician or clinic. We do not receive referral fees from anyone treating cancer. We are completely independent and act as the advocate of people with cancer." *See* www.peopleagainstcancer.com (viewed on March 18, 2002). Second, "We do not diagnose, prescribe or make treatment recommendations – we provide options. We educate with unbiased information toward informed choice." *Id.*

initial charge by Taylor for his services in operating the program is $750, and it is recommended that individuals pay approximately $400 at regular intervals to have the program updated to adjust the recommendations. Testimony at the hearing indicated these fees were maintained by Taylor, and not contributed to the Innovative Therapeutics partnership.[2]

Prior to the formation of the Innovative Therapeutics partnership, Taylor would operate the program for individuals referred to him by Wiewal. He would then recommend to these individuals that they buy nutritional supplements from certain suppliers who would then pay Taylor a commission. Despite the referral, Wiewal and PAC would not receive a commission.

While considering entry into their partnership, Taylor and Wiewal approached Harold Smith, who owned a company entitled Ultra Life which was located in Carlyle, Illinois. Smith's company manufactured and distributed nutritional supplements. Taylor had known Smith since the early 1960s, and they were friends. Taylor and Wiewal invited Smith to become a part of the Innovative Therapeutics partnership in 1996. The partnership was then formed by these three individuals and operated as a division of Smith's company.

Once the partnership was formed, Wiewal supplied the Innovative Therapeutics partnership with customer referrals. Taylor operated the MAP program for individuals referred to him by Wiewal. Taylor, Wiewal and Innovative Therapeutics marketed the use of the MAP computer program to its customers. Taylor also provided advice regarding the formulations for nutritional supplements that were marketed by Innovative Therapeutics, and recommended the Innovative Therapeutics' products to his patients. Smith was the operations manager for

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[2] Another program, the Metabolic Assessment Regimen ("MAR"), services a broader population and is designed for individuals who are interested in avoiding illness. It appears that this program may have been marketed to some individuals who sought the services of Innovative Therapetics.

Innovative Therapeutics, and oversaw the manufacture and distribution of the supplements the partnership sold. Smith also was responsible for the bookkeeping and financial affairs of the Innovative Therapeutics partnership.

The partnership profited when individuals purchased nutritional supplements from the Innovative Therapeutics' line of supplements. It appears that the individuals who primarily purchased these supplements were individuals who initially contacted Wiewal, were then referred to Taylor, and were in turn referred to Smith at a toll-free number for the purchase of the recommended supplements. The profits were distributed amongst the three partners based on a verbal agreement.

It was undisputed at the hearing that Taylor's expertise and the MAP and MAR programs operated by Taylor were of central importance to the Innovative Therapeutics partnership.[3] Taylor developed the programs with his office manager, Francisco Toriz, also a named defendant in this action. Taylor testified he provided Toriz with the substance of the programs, and then Toriz translated the information Taylor gave him into the computer program. A "License and Nondisclosure Agreement" was signed by Taylor and Toriz on December 30, 1994. *See* Defendant's Exh. G. The agreement listed the parties as Toriz & Associates, doing business at an address in Mexico and represented by Francisco Toriz, and Dr. Taylor's Wellness Center, represented by Jack Taylor. *Id.* The agreement addressed both the MAP and Metabolic Assessment Regimen, "MAR," programs. The agreement stated that Toriz & Associates was the owner of both programs, and that Taylor was a licensed user. *Id.* Taylor explained at the

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[3] For example, the Innovative Therapeutics web site that was active prior to the partnership's dissolution in June 2001 prominently showed a picture of Taylor, and discussed the MAR program. *See* Plaitniff's Exh. 1.

hearing that in lieu of paying Toriz for his efforts in developing the programs, Taylor allowed Toriz to assume ownership rights of the programs.

It is disputed amongst the parties whether the MAP and MAR programs operated by Taylor were assets of the partnership. Wiewal and Smith both testified that Taylor represented to them at the formation of the Innovative Therapeutics partnership that he was the developer and owner of both programs. Smith and Wiewal testified they were not capable of running either the MAP and MAR programs, however, and that they did not operate the programs during the existence of the partnership. Only Taylor operated the programs. During the partnership, Taylor also operated the programs as a part of his own health care practice for individuals who were not affiliated with the Innovative Therapeutics partnership.

In late 1999, an individual named Royce Kesselring became an employee of the Innovative Therapeutics partnership. Kesselring was brought in to help market Innovative Therapeutics, and expand it to Europe. Kesselring was a friend, or acquaintance, of both Taylor and Smith.

Once Kesselring became involved with the partnership, it appears that problems began to surface. Taylor began to question Smith on the quality of the supplements, the distribution process, and the environment in which they were produced. *See, e.g.,* Plaintiff's Exh. 12 (January 14, 2000 email from Taylor to Smith discussing problems in the relationships involved with the Innovative Therapeutics partnership, and problems with customer service in providing supplements). Some financial differences also developed. *See, e.g., id.* and Plaintiff's Exh. 14 (June 11, 2001 email from Taylor to Smith and Wiewal discussing problems with receiving commission checks and travel reimbursement). Testimony at the hearing indicated that the

partners became less satisfied over time as the partnership did not profit and grow as they had anticipated.

In June 2001 Taylor notified his two partners, Smith and Wiewal, that he had decided to leave the Innovative Therapeutics partnership. He informed them that he would support a new business venture with Kesselring to market a different line of nutritional supplements, and that he would recommend these new supplements to his patients in the future. Taylor states that he gave Smith and Wiewal the chance to join the new business venture as major shareholders. Smith and Wiewal declined.

The new business venture started by Taylor and Kesselring was initially entitled "International Therapeutics Worldwide, Inc," a named defendant in this action. It was incorporated in the state of Illinois. Later, the name was officially changed to "Therapeutic Nutritionals," also a named defendant in this action. Testimony at the hearing indicated that Taylor is not a partner in the new business venture, but receives commissions on the sale of supplements.

Testimony and evidence were presented at the hearing regarding the marketing efforts of the new company. On October 25, 2001, Kesselring wrote a letter to Taylor's patients.[4] *See* Plaintiff's Exh. 17. It was written on letterhead from the new company, Therapeutic Nutritionals, and Kesselring listed himself as president of the company. The letter urged Taylor's patients to purchase Therapeutic Nutritionals' supplement products. *Id.* Then, in a letter dated December 10, 2001, another letter was sent on Therapeutic Nutritionals' letterhead.

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[4] Testimony at the hearing indicated the letter went to individuals whose names and addresses were maintained in Taylor's database of patients, and were not separately maintained by Smith or the Innovative Therapeutics partnership.

It was addressed to Taylors' patients, but was unsigned. *See* Plaintiff's Exhibit 18. This letter offered a discount on the company's supplement products.

In a letter dated December 11, 2001, Taylor wrote to his patients on his own letterhead. *See* Plaintiff's Exh. 19. Taylor reminded his patients that they should call a different phone number than they had in the past to place their nutritional supplement orders, as he stated this is "the best place to order updated products for nutritional recommendations that I made for you." *Id.* This letter did not mention the Therapeutic Nutritional company name, but the number given was the company's phone number. In the letter, Taylor also stated, "I have requested the new distributor of products to give you an introductory discount of 20% on all products good through January [2002]. My continued research has identified this company to be efficient and has very fair pricing structures." *Id.* This letter does not disclose Taylor's involvement or affiliation with the new company.

At the time of the hearing, Smith and Wiewal continued to operate the Innovative Therapeutics partnership as a division of Smith's Ultra Life corporation. However, the partnership's sales had significantly dropped as Taylor's patients had begun to purchase supplements from Nutritional Therapeutics or somewhere else. Further, Innovative Therapeutics no longer benefitted from offering Taylor's MAP and MAR programs.

On November 27, 2001, Wiewel, PAC, Smith and the Innovative Therapeutics partnership brought suit in this Court against Taylor, Kesselring, Toriz, and the new business venture under its various names.[5] Plaintiffs allege eight separate causes of action. Plaintiffs

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[5] The Court will refer to the new business, of which Kesselring is the president, by the name under which it is currently registered in the state of Illinios, "Therapeutic Nutritionals." *See* Defendant's Exhibits L - O.

allege unfair competition in violation of 15 U.S.C. section 1125(a) (Count I); common law trademark infringement and unfair competition (Count II); trade secret misappropriation (Count III); breach of fiduciary duty (Count IV); intentional interference with prospective business advantage (Count V); breach of contract (Count VI); fraudulent misrepresentation (Count VII); and conversion (Count VIII). In the pending motion for a temporary restraining order and preliminary injunction, plaintiffs request the Court issue an order precluding defendants from misappropriating plaintiffs' trade secrets (Count III) and breaching fiduciary duties owed by defendants to plaintiffs (Count IV).

II. APPLICABLE LAW & DISCUSSION

In determining whether to grant a temporary restraining order and a preliminary injunction, this Court must consider the following factors: 1) plaintiff's probability of success on the merits, 2) the threat of irreparable harm to plaintiff, 3) the balance between this harm and potential harm to others if relief is granted, and 4) whether an injunction serves the public interest. *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld / Scott Fetzer Co.*, 997 F.2d 484, 485 (8th Cir. 1993) (citing *Dataphase Sys., Inc. v. C L Sys., Inc*, 640 F.2d 109, 114 (8th Cir. 1981)). These are commonly referred to as the *Dataphase* factors. No single factor is dispositive, and the Eighth Circuit favors a flexible approach. *Calvin Klein Cosmetics Corp. v. Lenox Lab.*, 815 F.2d 500, 503 (8th Cir. 1987).

This Court's subject matter jurisdiction is properly invoked, as a federal question is properly alleged in plaintiff's complaint. Plaintiffs claim they are entitled to injunctive relief because defendants have misappropriated trade secrets and continue to breach fiduciary duties.

See Complaint, Cts. III-IV. This Court has supplemental jurisdiction over these claims which are grounded in state law.

"A preliminary injunction is appropriate if any one of a plaintiff's claims supports such relief." *See Minn. Mining & Mfg., Co. v. Taylor*, 21 F. Supp. 2d 1003, 1004 (D. Minn. 1998) (citing *Metric & Multistandard Components Corp. v. Metric's Inc.*, 635 F.2d 710, 715 (8th Cir. 1980)). With respect to the present injunctive relief claims, the Court will review plaintiffs' claims of misappropriation of trade secrets and breach of fiduciary duties. If the Court determines that plaintiffs are likely to succeed on the merits of either one of these claims, then it will consider the remaining *Dataphase* factors.

A. Choice of Law

As a preliminary matter, the Court must determine whether Illinois or Iowa law will govern plaintiffs' misappropriation of trade secrets and breach of fiduciary duty claims. Iowa law provides the choice of law rules, as it is the forum state. *See America Online, Inc. v. Nat'l Health Care Discount, Inc.*, 121 F.Supp. 2d 1255, 1268 (N.D. Iowa 2000) (citing numerous cases which stand for the proposition that a federal court exercising jurisdiction over state law claims in a case grounded in federal question jurisdiction will follow the choice of law rules of the forum state). Iowa follows the "most significant relationship test," as stated in Restatement (Second) Conflict of Laws sections 6 and 145 ("Restatement"). *See id.* at 168-69. Relevant to this determination are the following factors: where the alleged injury occurred; where the conduct causing the injury occurred; the domicile, residence and place of incorporation of the parties; and the place where the relationship of the parties is centered. *See Veasley v. CRST Int'l, Inc.*, 553 N.W.2d 896, 897 (Iowa 1996) (reviewing choice of law under Restatement section

145). Restatement section 6(2) lists certain other factors that may be considered:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(a) the protection of justified expectations,
(b) the basic policies underlying the particular field of law,
(c) certainty, predictability and uniformity of result, and
(d) ease in the determination and application of the law to be applied.

See America Online, 121 F.Supp. 2d at 1269 (citing Restatement section 6(2) factors).

In this case, two of the three partners are domiciled in Illinois and operate their separate business entities in Illinois. Taylor operated his clinic in Arlington Heights, Illinois. Smith operates his Ultra Life business in Carlyle, Illinois. The Innovative Therapeutics partnership itself functions as a division of Ultra Life. *See* Complaint at ¶ 1. The new company formed by Kesselring, and supported by Taylor, Therapeutic Nutritionals, is an Illinois corporation.

The only Iowa connection to this case is the physical location of Wiewal and his non-profit organization, PAC, within the boundaries of the state. PAC is a self-described international organization, with offices in Germany and the United Kingdom and incorporated in the state of California. Individuals from all over this country, and from different parts of the world, contact Wiewal and he then provides his service to them. There does not appear to be anything about the work he does which is significantly related to the state of Iowa and its laws. The Innovative Therapeutics partnership continues to operate at Smith's facility in Illinois. Considering the factors enumerated above, this litigation is most significantly related to the state of Illinois, and its laws shall be applied.

B. Probability of Success on the Merits

In their brief, plaintiffs indicated they seek injunctive relief with regard to four matters. Plaintiffs assert that defendants are misappropriating trade secrets and breaching fiduciary duties by: (1) using the MAP and MAR computer programs, (2) using customer lists to solicit business, (3) using pricing information obtained from the Innovative Therapeutics partnership, and (4) by using supplier information obtained during their involvement with Innovative Therapeutics. At the conclusion of the presentation of evidence at the hearing, however, plaintiffs' counsel withdrew their third and fourth requests regarding pricing lists and supplier information. Remaining for consideration by this Court is whether defendants are misappropriating trade secrets or breaching fiduciary duties by using the computer programs or customer lists.

1. Claim of Trade Secret Misappropriation

Under Illinois law, in order for plaintiffs to succeed in showing defendants violated the Illinois Trade Secrets Act, plaintiffs must show the matter at issue was a : (1) a trade secret; (2) misappropriated; and (3) used in the defendant's business. *See Strata Marketing, Inc. v. Murphy*, 740 N.E. 2d 1166, 1068 (Ill. Ct. App. 2000) (citing *Magellan Int'l Corp. v. Salzgitter Handel GmbH*, 76 F.Supp. 2d 919, 927 (N.D. Ill. 1999)). The Illinois Trade Secrets Act defines a trade secret as:

> information, including but not limited to, technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers that:
> (1) is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use; and
> (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality.

765 ILL. COMP. STAT. 1065/2 (d) (cited in *Strata Marketing*, 740 N.E.2d at 1168). Additionally, there are six factors used to evaluate whether a trade secret exists:

> (1) [t]he extent to which the information is known outside of [the plaintiff's] business; (2) the extent to which it is known by the employees and others involved in [the plaintiff's] business; (3) the extent of measures taken by [the plaintiff] to guard the secrecy of the information; (4) the value of the information [to the plaintiff] and to [the plaintiff's] competitors; (5) the amount of effort or money expended by [the plaintiff] in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Strata Marketing, 740 N.E. 2d at 1168 (citing *ILG Ind., Inc. v. Scott*, 273 N.E.2d 393 (Ill. 1971)). Ultimately, "a trade secret is defined as 'a secret plan or process, tool, mechanism or compound known only to its *owner* and those . . . to whom it is necessary to confide it.'" *American Antenna Corp. v. Amperex Elec. Corp.*, 546 N.E.2d 41, 43 (Ill. Ct. App. 1989) (emphasis added) (quoting *Schulenburg v. Signatrol, Inc.*, 212 N.E.2d 865 (Ill. 1965)).

In this case, the Court finds that neither the computer programs used by Taylor, nor the list of patients maintained in Taylor's records that was used to send marketing letters on behalf of Nutritional Therapeutics, were trade secrets under Illinois law. The Court need not determine whether these matters were misappropriated or used in defendant's business do not need to be reached, as they are not trade secrets.

The MAP and MAR programs were not owned by Taylor. The programs were developed by Taylor with the aid of Fransisco Toriz, whose company is the owner of the programs. *See American Antenna Corp.*, 546 N.E.2d at 43 (stating that a trade secret is defined by the fact that it is known only to its owner). Per a written agreement that was drafted in 1994, two years before the formation of the Innovative Therapeutics partnership, Taylor is a licensed user of the programs. *See* Defendant's Exh. G. Taylor used these programs as a part of his own health care

practice before the formation of the partnership. During his tenure as a partner in Innovative Therapeutics, Taylor continued to use these programs apart from the partnership. Further, even when the programs were used and the individuals eventually bought supplements from Smith to the benefit of the Innovative Therapeutics partnership, Taylor charged a separate $700 fee that he retained. Even if this Court assumes that Taylor owned the MAP and MAR programs[6] – and could have contributed the programs as assets to be owned by the Innovative Therapeutics partnership – neither Smith, Weiwal nor the Innovative Therapeutics partnership itself made any efforts to maintain the program's secrecy or confidentiality. Smith, Wiewal and the Innovative Therapeutics partnership itself did not expend any money in developing the programs, nor did they expend any money in guarding the secrecy of the information. *See Strata Marketing*, 740 N.E.2d at 1168.

The patient lists maintained by Taylor in his office did contain names that were maintained in a separate list by the Innovative Therapeutics partnership. However, Taylor maintained his list separate from his dealings with Smith, Wiewal, and Innovative Therapeutics. Taylor had properly acquired the list of patients, and he was not subject to any kind of

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[6] The Court does *not* find that Taylor owned the MAP and MAR programs. No evidence was presented at the hearing to controvert the fact that in 1994 Taylor entered into a licensing agreement with the programs' owner, Fransisco Toriz. However, the Court notes that Toriz, a named defendant, was absent from the hearing. While defendants' counsel offered to provide an affidavit from Toriz, an offer which was declined by plaintiffs' counsel at the hearing, the validity of the licensing agreement would be better supported if Toriz had testified at the hearing. It is unusual for an employee to become the owner of a very important and valuable item developed within the boundaries of a business. The Court is also troubled by the fact that Taylor operated as a partner in this enterprise for approximately five years, when his primary contribution to the partnership was the computer programs, and he did not alert his partners during this entire time to the fact that he operated the programs per the terms of a licensing agreement. However, the evidence presently in the record indicates that the licensing agreement is valid and Toriz is the owner of the programs.

partnership agreement regarding the list. Smith and Wiewal had to have known that Taylor maintained a separate list, as they were aware of the substantial fees he charged as a part of operating the computer programs and the other health care services he offered individuals who contacted him. The efforts of Smith, Wiewal and Innovative Therapeutics to maintain the secrecy and confidentiality of the names of people who purchased supplements from Smith were not sufficient under the circumstances to find that the list was a trade secret.

2. Claim of Breach of Fiduciary Duties

Illinois partnership law[7] states that implicit in partnership agreements is a fiduciary duty between partners to act in the best interest of the partnership. *See Laurence v. Flashner Med. Partnership*, 565 N.E.2d 146, 152 (Ill. Ct. App. 1990) (citing *Couri v. Couri*, 447 N.E.2d 334 (Ill. 1983)). A duty of loyalty applies between partners that is comparable to the same duty that applies to officers of a corporation or to joint adventurers under Illinois law. *See Dremco, Inc. v. South Chapel Hilll Gardens, Inc.*, 654 N.E. 2d 501, 504 (Ill. Ct. App. 1995). "The precise nature and intensity of the duty of loyalty depends, however, upon the degree of independent authority exercised by the fiduciary and the reasonable expectations of the parties at the beginning of the

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[7] In this case, there has not been an accounting or final settlement of partnership accounts among the three Innovative Therapeutics partners. "Generally, a partner cannot sue a copartner on a matter concerning the partnership until there has been a final settlement of the partnership accounts." *Battles v. LaSalle Nat'l Bank*, 608 N.E.2d 438, 444 (Ill. Ct. App. 1993) (citations omitted). There are a limited number of exceptions to this rule, and one applies to the present controversy, as this matter can be decided without a full review of the partnership accounts. *See Id.* at 445 (citing *Balcor Income Prop., Ltd. v. Arlen Realty, Inc.*, 420 N.E. 2d 612 (Ill. 1981)). However, the Court notes that the parties at the hearing and in their briefs presented a number of factual issues, which are not referenced in this Order, that would be resolved by an accounting or other settlement of accounts. *See also Beerman v. Graff*, 621 N.E.2d 173, 178 (Ill. Ct. App. 1993) (citation omitted) (stating that managing partner who is responsible for financial aspect of partnership has a duty to maintain accurate records and to account for partnership transactions).

relationship." *Id.* (citation omitted).

Unless an agreement states otherwise, "[o]nce a partner has left a partnership, the partnership is dissolved." *See Langer v. Becker*, 608 N.E.2d 468, 470 (Ill. Ct. App. 1992) (citing Ill. Rev. Stat. 1989, ch. 106 1/2, pars. 29, 31). Dissolution is "'the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.'" *See Dowell v. Bitner*, 652 N.E.2d 1372, 1379 (Ill. Ct. App. 1995). After dissolution, "[t]he fiduciary relationship ceases and the remaining partner[s are] free to do business on [their] own under a new name." *Id.* (citations omitted).

In *Dowell*, the Illinois court addressed a situation involving an employee who also served as officer and director of a partnership. 652 N.E.2d at 1372. It stated that an employee could plan, form and outfit a competing corporation while still working for the employer. However, the employee is not allowed to commence competition while still employed.[8] *Id.* at 1379. The court distinguished the responsibilities of an officer, as it stated that an officer owes a fiduciary duty of loyalty to the corporate employer (or partnership) not to exploit their position for their own personal benefit, nor to hinder the ability of the corporation (or partnership) to continue the business for which it was developed. *Id.* at 1379-80. Examples of things an officer is not allowed to do as a part of his duty of loyalty include using corporate or partnership assets for his own personal gain, or taking advantage of business opportunities which are considered to belong to the corporation or partnership. *See E.J. McKernan Co. v. Gregory*, 623 N.E. 2d 981, 993 (Ill.

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[8] Insofar as Kesselring was an employee of Innovative Therapeutics, the Court finds that based on the record before it that plaintiffs are unlikely to succeed on a breach of fiduciary duties claim against him. Nothing indicates the new business, Therapeutic Nutritionals, was in existence and competing with Innovative Therapeutics while Kesselring was still employed by Innovative Therapeutics. The other individual defendant, Toriz, was not an employee of Innovative Therapeutics.

Ct. App. 1993).

In this case, based on Illinois partnership law, plaintiffs have not shown that they are likely to succeed on the merits of their breach of fiduciary duties claim. The partnership was dissolved at the time Taylor exited the arrangement in June 2001. Evidence and testimony at the hearing indicated that Taylor's affiliation with a competing business, run by Kesselring, began after he left the Innovative Therapeutics partnership in June 2001. After the dissolution, Taylor's fiduciary relationship with Wiewal and Smith ceased and he no longer owed them a continuing duty of loyalty. *See Dowell*, 652 N.E.2d at 1379. The record does not show that Taylor used partnership assets for his own gain nor does it show that he usurped a business opportunity that should have belonged to the Innovative Therapeutics partnership.

Further, the Court finds that during the existence of the partnership, Taylor was allowed to exercise a great deal of independent authority and his actions were consistent with the reasonable expectations of the parties at the outset of the partnership in 1996. *See Dremco*, 654 N.E. 2d at 504. Taylor maintained his own health care practice separate and apart from Innovative Therapeutics' dealings. Wiewal and Smith reasonably should have anticipated that he would keep a list of the people for whom he ran MAP or MAR programs and from whom he received $700, or more, in fees. Additionally, Taylor's operation of the MAP and MAR computer programs was a distinct and easily severable part of the partnership. His use of the programs and the fee he charged was comparable to the advice and assistance Wiewal's non-profit organization provided and the membership fee he charged, but did not share with the partnership. The other partners did not have anything to do with the actual operation of the MAP and MAR programs, nor did they receive a portion of the fee associated with the performance of

those programs. Innovative Therapeutics, Smith and Wiewal, only profited when individuals, for whom Taylor performed the MAP or MAR program, then took Taylor's recommendations and purchased supplements from Smith. This manner of operations was how the relationship was designed at the outset of the partnership, and it was a reasonable expectation for Taylor to believe that he could exit the partnership in the manner that he did.[9]

III. CONCLUSION

For the above stated reasons, plaintiffs' motion for a temporary restraining order and a preliminary injunction is denied. While the Court would normally conclude this memorandum order at this juncture, it has two additional matters that it feels compelled to articulate.

First, inaccurate statements have been made by both sides of this litigation as a part of their marketing efforts. Wiewal states in his PAC web site that his organization is not financially affiliated with anyone treating cancer, nor does it receive referral fees from anyone treating cancer. *See supra* footnote 1. While PAC and Innovative Therapeutics may have labeled the profits from the partnership that were returned to PAC a "research grant," PACs involvement in this litigation and in this partnership belies any assertion that it does not have a financial stake in any of the groups to which it refers its members. Taylor stated in his December 11, 2001 letter to his patients that they should call Therapeutic Nutritionals because his "research" identified the company to be efficient and to have fair pricing. *See* Plaintiff's Exh. 19. In fact, Taylor did not

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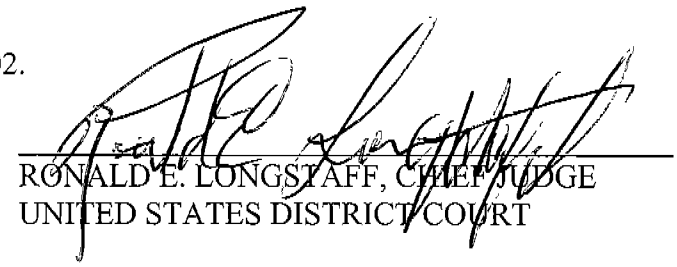
[9] By this finding, the Court does not intend to condone Taylor's business practices. Rather, the Court finds that under Illinois partnership law, and in the absence of a clear written partnership agreement with Smith and Wiewal, Taylor was not prevented from acting as he did because of a fiduciary duty.

do research and find a company to provide his patients with supplements. He was instrumental in the formation of Therapeutic Nutritionals, and receives a commission on every patient whom he refers that purchases supplements.

Secondly, after considering the evidence presented at the February hearing, the Court finds it difficult to identify any party entitled to prevail in this litigation if it is pursued. Rather, the parties' efforts should be directed toward obtaining a full and fair accounting of the assets and liabilities of the Innovative Therapeutics partnership. The parties could then participate in a settlement conference which could finalize their relationship termination and allow each to pursue more productive enterprises.

IT IS SO ORDERED.

Dated this 26th day of March, 2002.



RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT