

STATE OF VERMONT
CALEDONIA COUNTY, SS

COMPANION ANIMAL CARE, P.C.,
ALISA HICKS, DR. ROBERT HICKS,
Plaintiffs

v.

SALLY SCHLUETER (f/k/a CALAMAIO),
CRAIG CALAMAIO
Defendants

and

COMPANION LEASING CORP. OF
LITTLETON
Intervenor

SUPERIOR COURT
Docket No. 299-11-07 Cacv

FILED
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CALEDONIA COURTS

Decision on:

Defendants' Motion to Dismiss Counts II, III, and V, November 30, 2007

Defendants' Motion for Summary Judgment, December 20, 2007

Companion Leasing Corp of Littleton's Motion to Intervene, December 21, 2007

Plaintiffs' Motion to Amend Complaint, December 28, 2007

Plaintiffs' Motion for Partial Summary Judgment, January 18, 2008

Plaintiffs' Motion for a Preliminary and Permanent Injunctions, January 18, 2008

This action arises from the sale of a veterinary practice. Plaintiffs, the buyers and borrowers, became unable to keep up their obligations to Defendants, the sellers and lenders. Defendants declared a default on certain loan agreements and sought to recover from Plaintiffs collateralized veterinary equipment. Defendants also sought to terminate a lease with Plaintiffs, not for non-payment, but for failure to give written notice of intent to renew. Plaintiffs responded with this superior court action asserting waiver of lease-renewal provision and accusing Defendants of causing the default by breaching a covenant not to compete in the practice of veterinary medicine. Defendants counterclaimed on the notes and for ejectment.

As a preliminary matter, Companion Leasing Corporation of Littleton, Inc. seeks, by motion filed December 21, 2007, to intervene in this matter. The movant holds one of two promissory notes central to this action, secured by an interest in certain veterinary equipment in Plaintiffs' control. There being common questions of law and fact, the motion to intervene is GRANTED. V.R.C.P. 24(b).

I. Background and Summary of Pertinent Documents

a. Transactional Documents

Defendants sold to Plaintiffs Hicks a veterinary practice, Companion Animal Care, P.C. (CAC), by means of a stock and asset sale and stock redemption agreement (“Stock Agreement”) executed September 22, 2004. Plaintiff Robert Hicks¹ financed the purchase by executing, as CAC, a \$583,000 promissory note to Defendants (“CAC Note”²), together with a \$17,000 promissory note to Intervenor Companion Leasing Corporation of Littleton (CLC) (“CLC Note”), all subject to a Security Agreement collateralizing the business assets and subject also to the personal guaranty of Plaintiffs Hicks.

The notes were bound together with provisions in each to the effect that “[a]ny default under any other note or obligation of Borrower to Lender, whether now existing or hereafter arising, shall constitute a default hereunder.” As part of the sale, Plaintiffs agreed to cause CLC to lease its premises at 54 Western Avenue in St. Johnsbury, from Defendants, and the parties formed a Lease Agreement consistent with that intent. The Lease Agreement provided that “[t]he Tenant shall have the right to renew this Lease for up to at least six (6) additional terms of one (1) year by providing written notice of election to renew to Landlord at least sixty (60) days prior to” the end of each lease term, each term ending on the last day of each year. Lease Agreement ¶ 2. Were the lease to extend beyond the end of 2011, the parties agreed that either would be entitled to terminate with sixty days written notice. *Id.*

Also as part of the sale, Defendants agreed to execute a covenant not to establish, participate in, or finance a veterinary clinic within fifteen miles of the CAC premises; not to rent or sell the CAC premises to a competing veterinary clinic; and not to “actively recruit[] current [CAC] clients to another veterinary clinic.” Stock Agreement ¶ 12. Consistent with that intent, the parties formed a Noncompetition Agreement, wherein they covenanted not to “engage or participate in the practice of veterinary medicine within a fifteen mile radius of the present location of [CAC].”

b. Commencement of the Action, Complaint, and Answer

Plaintiffs operated CAC as anticipated, but by October, 2007, declared themselves unable to keep up with all of their obligations to Defendants. Defendants sought to inspect Plaintiffs’ business records, and then by certified letters dated November 13,

¹ Shares in a professional corporation organized under 11 V.S.A. 801 *et seq.* may be transferred only to persons “duly licensed to render the same specific professional services as those for which the corporation was organized.” *Id.* § 805. Thus is Plaintiff Robert Hicks, a veterinarian, the formal shareholder and purchaser, although Plaintiffs Hicks jointly guaranteed obligations to Defendants.

² The parties’ papers often refer to this note as the “CAC Note” (Defendants) or the “business note” (Plaintiffs). For clarity, court will adhere as closely as possible to the parties’ descriptors. The court adopts the parties’ convention of referring to the relevant documents—viz., the Stock Agreement, the CAC Note, the CLC Note, the Security Agreement, the Lease Agreement, and the Noncompetition Agreement—collectively as the “Loan Documents.”

2007, issued notice of default and acceleration under the Loan Documents. Defendants also notified Plaintiffs that the Lease Agreement would terminate at the end of the term, as Plaintiffs had failed to provide 60-days written notice of election to renew.

On November 16, 2007, three days after Defendants declared a default, Plaintiffs filed a five-count Complaint. Its allegations included a description of the documents summarized *supra*, as well as accusations that, *inter alia*: (1) “The Plaintiffs Hicks entered into the agreement based on representations by Defendants that the veterinary practice grossed over \$600,000 per year, which turned out not to be true.” (*Id.*, Allegations ¶ 6); (2) “Defendants established a veterinary practice sixteen miles away from [CAC]” (*Id.* ¶ 8); (3) Defendants advertised in the Caledonian Record newspaper (*Id.* ¶ 9); (4) Defendants did so to “actively recruit current clients from Plaintiffs’ practice.” (*Id.* ¶ 10); (5) “twenty known clients,” and more unknown clients, were lost to Defendants (*Id.* ¶ 12). In short, Plaintiffs complained that they were forced into breach by Defendants’ misrepresentations about the practice’s revenue (*Id.* ¶ 6) and Defendants’ active recruitment of their clients, in violation of the Noncompetition Agreement (*Id.* ¶ 12).³

The Complaint charged⁴, in Count I, breach of contract; in Count II, failure of consideration; in Count III, fraud in the inducement; in Count IV, irreparable harm; and in Count V, intentional interference with business relations, “with the purpose of forcing [Plaintiffs] out of business so that [Defendants] can take over the veterinary practice in St. Johnsbury.”

Upon the allegations of their Complaint, Plaintiffs obtained from this court, Zonay, J, an *ex parte* temporary restraining order, of even date with their filing, enjoining Defendants from removing veterinary equipment from CAC through November 26. By letter of November 21, 2007, Plaintiffs notified the court that they had reached an interim agreement with Defendants that the latter would not summarily repossess veterinary equipment. This agreement obviated Plaintiffs’ motion for a temporary restraining order and preliminary injunction, and the parties therefore agreed to cancel a hearing on the matter.

With their Answer, filed December 21, 2007, Defendants counterclaimed on three counts. In Counterclaim Count I, Defendants seek judgment on the now-accelerated note and guaranty debt. In Counterclaim Count II, Defendants seek to enforce their interest in the collateral. In Counterclaim Count III, Defendants seek ejectment on the basis of failure to renew. Defendants seek a writ of replevin with regard to the collateral and

³ The pleading is curious in a very particular respect: It alleges coincident facts which invite the reader to infer a causal relationship, but it conspicuously avoids direct causal claims. For example, the Complaint follows its allegations of active, personal recruitment and deliberate, competitive advertising with no-cause assertions that clients have left CAC for Defendants’ practice. Were they recruited away? Plaintiffs do not say. The same allegations are followed with an assertion that “As a result of declining business, for the first time, in October 2007, plaintiffs were unable to pay the monthly payment on the [CAC Note]. They paid the rental payment on the [Lease Agreement], and on the [CLC Note].” Did business decline because of competition from Defendants? Plaintiffs do not say.

⁴ The original Complaint is discussed in the past tense, as it has been amended.

assets, a writ of possession with regard to the premises, and appointment of a receiver to operate CAC.

II. Analysis of outstanding motions

a. Defendants' motion to dismiss, necessarily including Plaintiffs' motion to amend

By their filing of November 30, 2007, Defendants move to dismiss Complaint Counts II, III, and V on the basis that the challenged counts fail to state a claim upon which relief can be granted. V.R.C.P. 12(b)(6).

The purpose of a Rule 12(b)(6) motion is “to test the law of the claim, not the facts which support it.” *Powers v. Office of Child Support*, 173 Vt. 390, 395 (2002). “To sustain dismissal, the court must have no doubt that the alleged facts, if proven, would not entitle the plaintiff to relief under any legal theory.” *Brigham v. State*, 2005 Vt. 105 (citation omitted). In assessing the legal sufficiency of Plaintiffs’ pleadings, the Court will “assume[] that all well pleaded factual allegations in the complaint are true, as well as all reasonable inferences that may be derived therefrom.” *Bethel v. Mount Anthony Union High School Dist.*, 173 Vt. 663 (2002) (citing *Richards v. Town of Norwich*, 169 Vt. 44, 48 (1999)).

On December 28, 2007, Plaintiffs moved to amend their Complaint to bolster Count V. Defendants have opposed the motion on the grounds it would be futile. Under V.R.C.P. 15(a), a party is entitled to amend his complaint “before a response is served.” Plaintiffs do not explain the delay.

In substance, the amendment sought is a simple and concise effort to rescue a cause of action related to business interference. On one hand, its simplicity suggests that we risk little prejudice to Plaintiffs by allowing it. On the other hand, its simplicity—and the attendant absence of any newly-discovered information, newly-alleged substantive facts, or reason why it could not have been raised earlier or incorporated in the original Complaint—creates the appearance that Plaintiffs may have used Defendants’ filings, which by the time of the effort to amend, included the instant motion to dismiss, the Answer, and a motion for summary judgment, to educate Plaintiffs on the deficiencies of their claims. Preventing this is foremost among the reasons that V.R.C.P. 15(a) terminates the right to amend at service of a responsive pleading. At some point, unexcused delay in amendment becomes wasteful and exploitative of the efforts of the opposing party. The Vermont Supreme Court consistently has encouraged trial courts to grant leave to amend with extraordinary liberality. Although the court is concerned about prejudicial and possibly tactical exploitation of Defendants’ responsive pleadings, the merits are little changed by the simple amendment sought. Plaintiff’s motion to amend the Complaint therefore is GRANTED, and analysis will proceed under the Amended Complaint, which differs in substance only at Count V.

1. Count II

Count II is fatally defective on its face, because it pleads an antiquated term of art instead of a cause of action distinct from breach, which is pled in Count I. Count II alleges, “The non compete clause of the agreement specifically states that it is part of the consideration for the agreement,” ergo, “Violation of the non compete clause constitutes a failure of consideration.” Am Compl. ¶¶ 22, 23 (emphasis added).

Theories labeled “failure of consideration” sometimes are offered as an affirmative defense to claims of breach. See, for example, *Kingston Pipe Industries, Inc. v. Champlain Sprinkler, Inc.*, 177 Vt. 484, ¶ 4 (2004) (mem.). But employed as Plaintiffs employ it, the term is wholly synonymous with breach. To claim failure of consideration in the more common (though still rare) sense is to attack a contract at formation, on the basis that it lacked mutuality. Nothing like that is alleged by the Complaint, which, taken as true, makes clear that Plaintiffs and Defendants exchanged mutual promises by their agreements, whereafter Plaintiffs in fact took control of the veterinary clinic they purchased from Defendants and used the equipment and premises for more than three years. Avoidance, one remedial goal possibly served by pleading failure of consideration by breach of a contract term as though it were distinct from breach, is inappropriate where there has been substantial performance. *Cushman v. Outwater*, 121 Vt. 426, 433 (1960)⁵.

Plaintiffs’ opposition to dismissal endeavors to distinguish Defendants’ cited authority, but does not address the broader point: a bargained-for promise inherently is part of the consideration given in respect of *any and every* extra-monetary bilateral contract, but this does not make breach tantamount to a failure in formation. A contracts hornbook helps to explain that the confusion here is more linguistic than legal:

The term ‘failure of consideration’ ... does not relate to the formation of a contract but rather to the performance of a contract ... If C promises to build a structure for O and O promises to make payment when the work is completed, it is clear that there is consideration on both sides of this contract and that therefore a contract was formed upon the exchange of promises ... The use of the term ‘failure of consideration’ in this sense appears to be an unnecessary

⁵ There is some disagreement among the parties concerning the import of the *Cushman* case. The holding relevant to the principle cited is, “Where the innocent party has received partial performance and substantial benefit it would be unjust to allow him to avoid his contractual duties altogether because the performance of the other party is interrupted short of completion by a breach. This is a doctrine recognized at law, also. *Tichnor Brothers v. Evans*, 92 Vt. 278, 279-280 [1918].” *Cushman* 121 Vt. at 433.

The *Cushman* Court distinguished its case from *Burke v. N. P. Clough, Inc.*, 116 Vt. 448 (1951), where breach discharged a contract, specifically on the basis that substantial benefit was had in *Cushman*, making *Tichnor Bros. v. Evans* 92 Vt. 278 (1918) the operative precedent. Notwithstanding its age, *Tichnor Bros.* remains good law and gives a very clear and concise holding on this point: “Where, as here, the stipulation [allegedly breached] goes only to a part of the consideration, and may be compensated for in damages, its breach does not relieve the other party from performance.” *Id.* There is no question on the pleadings but that Plaintiffs in fact enjoyed the benefit of controlling the veterinary clinic, its premises, and its equipment, between September 2004 and the difficulties of October 2007, up to and including the ongoing operation of the veterinary clinic. That being the case, total avoidance or discharge is not a legally-possible outcome under any contract theory.

invitation to confusion because the word consideration is being used in two different senses. Fortunately, the use of this phrase has gradually fallen into disuse.

Calamari and Perillo, *The Law of Contracts*, 3rd ed. (1987), § 11-21, pp. 474-75. Accord Restatement (Second) of Contracts § 237 (“What is sometimes referred to as ‘failure of consideration’ by courts and statutes is referred to in this Restatement as ‘failure of performance’ to avoid confusion with the absence of consideration.”).

Our Supreme Court has noted similar confusion by parties, noting in one case, “we do not see how defendant’s position is advanced by labeling his theory as failure of consideration rather than breach of contract,” because mutuality comes from an exchange of promises, not complete performance of them. *Northern Aircraft v. Reed*, 154 Vt. 36, 45-6 (1990). “Thus,” the Court explained, “what defendant has labeled failure of consideration is really an alleged failure to render performance as obligated.” *Id.* Such is the case here as well.

Count II identifies no legal theory or cause of action in any way distinct from the claim of breach in Count I. For that reason, Count II must be dismissed.

2. Count III

“Plaintiffs agree that the complaint, as it presently stands, fails to state a claim of fraud with particularity, and hereby agree[] to dismiss that claim without prejudice.” Plaintiff’s Opposition, p.3. The court agrees, for reasons articulated in Defendants’ motion, and will not dilate on an assented-to point. However, the caveat that dismissal is offered without prejudice suggests that Plaintiffs might feel free to raise the claim again at will. This is not the case, as doing so would amount to amending the Amended Complaint without leave of the court. Count III is dismissed.

3. Count V

Plaintiffs’ original Count V alleged intentional interference with business relations, and Defendants argued it failed to state a claim. Defendants’ argument, among other things, asserted that the tort’s difficult requirement that there be criminal or fraudulent conduct “accords with the view that tortious interference with business relations provides less protection to a plaintiff than tortious interference with a contract.” Defendants’ Motion to Dismiss, p. 5. In a footnote on the same page, Defendants noted “Plaintiffs have not alleged tortious interference with contract, which requires an actual executory contract between plaintiff and a third party.” *Id.* fn 1 (citing as an example, *Mitchell v. Aldrich*, 122 Vt. 19, 22 (1960))⁶.

⁶ The court declines to follow this characterization inasmuch as it suggests a contract must be actual and executory for a claim to lie; in fact, *Aldrich* endorses the protection of expectancy short of an enforceable contract. See *infra* note ____.

Here the questionable fairness of late amendment, discussed in concept *supra.*, rears its head in practice: With the responsive pleading in hand, Plaintiffs responded by amending the Complaint to write their way around the deficiencies identified by their opponents, modifying the claim to “intentional interference with contractual relations and prospective contractual relations,” all without adding or amending any substantive factual allegation. In their Motion to Amend, Plaintiffs told the court, “Plaintiffs seek leave to amend their Complaint by clarifying Plaintiffs’ claims for intentional interference with contractual relations.” Plaintiffs’ Motion to Amend, p.1. That misstates what was done. Plaintiffs did not “clarify” any existing claim for intentional interference with contractual relations, because there was none; rather, they pasted that brand new claim, directly suggested to them by a responsive pleading, over top of their claim for intentional interference with business relations, which the responsive pleading had advised them was a nonstarter.

Defendants have objected to Plaintiffs’ motion to amend Count V, which the court has allowed nonetheless. Because the objection is one of futility, it amounts to an assertion that the stated basis for dismissal stands. We therefore proceed to analyze the amended count under the Rule 12(b)(6) standard.

Vermont has recognized tortious interference with contractual relations at least since the 1960 case of *Mitchell v. Aldrich*, 122 Vt. 19, 22. *Williams v. Chittenden Trust Company*, 145 Vt. 76, 80 (1984). The elements of the tort in this state have been adopted from the Restatement (Second) of Torts § 776. *Id.* (In the case of tortious interference with prospective contractual relations, see *Id.* § 766B.⁷) “[T]o be liable for interference with a contractual relationship, the defendant must have intentionally and *improperly* induced or caused [a third party] not to perform under [his] contract with the plaintiff.” *Kollar v. Martin*, 167 Vt. 592, 593 (1997) (quoting *Williams*, 145 Vt. at 80; emphasis and brackets verbatim from *Kollar*). “Not every act that disturbs a contract is actionable, however ... The act of interference must be wrongful or improper ... by some measure beyond the fact of interference itself. *Kollar*, 167 Vt. at 593 (citations omitted).

In *Mitchell v. Aldrich*, Mitchell agreed to purchase from Comette a herd of cattle, for a sum certain, and Comette received security on the agreement and memorialized the agreement in writing. Comette’s bank held a mortgage on the herd and sent an appraiser, Aldrich to evaluate it. The appraiser, who lacked authority to approve or disapprove loans, learned of the contract, and then represented to Comette that Mitchell would not be approved by the bank to purchase the herd, but that an alternative purchaser, Drew, would be, and at a higher price. Comette therefore backed out of his contract with Mitchell. The Vermont Supreme Court held that Mitchell had a viable action against Aldrich in tort.

⁷ The court does not adopt Defendants’ assertion that a contract must in all cases be executory, because *Mitchell* endorsed a tort based in interference with prospective expectancies: “The remedy afforded [for tortious interference with contractual relations] is not restricted to definite and enforceable contracts. Protection is appropriate against unjustified interference with reasonable expectancies of profit though the contract is terminable at will or unenforceable against the promisor in an adversary proceeding. The added element of a definite contract may be the basis for greater protection but it is not an essential requirement.” *Mitchell*, 122 Vt. at 23.

In *Mitchell*, there was an identifiable contract to which the defendants were not a party, but with which they were alleged to have interfered. Plaintiff's pleading gives us something quite different. The Amended Count V alleges that: "The defendants have ... interfered with plaintiffs['] contractual relations by solicitation of current clients of the Plaintiffs' business in contravention of the agreement between the parties." Amended Complaint, Count V. ¶1 (emphasis added). Defendants are accused of interference with prospective contractual relations, "by interfering with plaintiffs' valid business expectancy that they would be free from Defendants' competition within the 15 mile radius of the non-competition clauses of the parties' agreements." Amended Complaint, Count V. ¶2 (emphasis added). It is further alleged that Defendants "solicited clients within the area covered by the non-compete clauses in their agreement with plaintiffs." Amended Complaint, Count V (emphasis added). ¶4.

Amended Count V, like Count II, fails ultimately because it does not state a claim distinct from breach of contract, which is alleged in Count I. Ordinary competition for customers or clients between businesses or professional service providers is, of course, not a tort. Plaintiffs are alleging that conduct by Defendants, which would not be a tort absent the parties' Noncompetition Agreement, becomes a tort by virtue of the contract only. See underlined quotations, *supra*. Each and every of the duties Plaintiffs allege or imply in Amended Complaint, Count V, ¶¶ 1-5 is a duty arising directly from the parties' contract and no other source.

[Vermont courts] have been careful to maintain a dividing line between contract and tort theories of recovery. See, e.g., Winey v. William E. Dailey, Inc., 161 Vt. 129, 136, 636 A.2d 744, 749 (1993) (in construing consumer fraud law, Court holds that mere breach of contract does not raise presumption of fraud); Favreau v. Miller, 156 Vt. 222, 229, 591 A.2d 68, 73 (1991) (where personal injury is alleged, "concepts of tort and negligence law," rather than contract law, "provide the more straightforward way to describe the respective duties and liabilities of the parties"); Bevins v. King, 147 Vt. 203, 204, 514 A.2d 1044, 1045 (1986) (fraudulent nonperformance of contract is not a tort); Lyon v. Bennington College Corp., 137 Vt. 135, 137, 400 A.2d 1010, 1012 (1979) (conversion action against college for taking of tenure of professor not maintainable because "contractual rights, which are personal and without marketability" are not goods that can be converted); Lapoint v. Dumont Constr. Co., 128 Vt. 8, 10, 258 A.2d 570, 571 (1969) (law of negligence inapplicable to breach of contract action).

Breslauer v. Fayston School Dist., 163 Vt. 416, 421-22 (1995). That the tort alleged here is an intentional one is of no moment, because intentional business competition is not a tort. If we remove reference to the contract from Count V, we are left with an allegation only that Plaintiffs intentionally solicited Defendants' clients (¶1). But for the contract, nothing would prevent that. That is why the noncompetition contract exists.

Plaintiffs' Amended Complaint makes no allegation from which could be derived any tort. The only duties Plaintiffs allege have been violated are duties not to compete, which do not exist at tort law, but which are imposed by the contract between the parties.

The intentional acts alleged against Defendants amount to intentional breach of the contract between the parties, not between Plaintiffs and someone else. For this reason, Plaintiffs fail to state a claim for tortious interference with contractual relations, and amended Count V must be dismissed.

Defendant's Motion to dismiss counts II, III, and IV must be GRANTED.

b. Cross-motions for summary judgment

Defendants and Intervenor (hereinafter, Defendants) moved for summary judgment on December 20, 2007, as to all claims and counterclaims. Plaintiffs opposed the motion and, on January 28, 2008, filed a motion for partial summary judgment as to breach.

On a motion for summary judgment, "Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material facts exists. *Price v. Leland*, 149 Vt. 518 (1988). However, summary judgment is mandated where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251 (1989).

The court derives the undisputed facts from the parties' statements of fact under V.R.C.P. 56(c)(2). Facts in the moving party's statement are deemed undisputed when supported by the record and not controverted by facts in the nonmoving party's statement which are also supported by evidence in the record. *Boulton v. CLD Consulting Engineers, Inc.*, 175 Vt. 413, 427 (2003) (citing *Richart v. Jackson*, 171 Vt. 94, 97 (2000)).

1. Undisputed Facts

The following are the facts derived from Defendants' Statement of Undisputed Facts, filed December 20, 2007 (Def. UDF) and Plaintiff's Statement of Disputed Facts filed January 18, 2008 (Pl. DF), together with Plaintiff's Statement of Undisputed Facts (Pl. UDF) filed the same date and Defendants' Verified Response to Plaintiffs' Statement of Undisputed Facts, filed February 13, 2008 (Def. DF).

The parties entered into the sale and loan agreements described *supra*, whereby the CLC Note and the CAC Note were cross-collateralized and subject to the personal guaranty of Dr. Robert Hicks and Alisa Hicks. Def. UDF ¶¶ 10, 11. In October and November 2007, Plaintiffs did not meet their payment obligations under the CAC Note and Defendants were unable to obtain complete financial information from Defendants.

Def. UDF ¶ 12. Defendants sent Plaintiffs notice of acceleration and demanded that they collect collateral described in the parties' Security Agreement Def. UDF ¶ 14.

Defendants operate a veterinary practice in East Haven, Vermont, 17 miles from the Plaintiffs' premises in St. Johnsbury. Def. UDF ¶ 18. The East Haven practice is listed in the local telephone directory, but the listing does not name Dr. Schlueter or Dr. Calamaio. Def. UDF ¶ 19. Dr. Schlueter also began a mobile veterinary clinic, a unique service which caught the attention of the Caledonian Record, a newspaper which circulates across all of the geographic territory relevant to the instant action, including St. Johnsbury and East Haven. Dr. Schlueter requested that the newspaper reporter include that she sold her St. Johnsbury practice and does not practice in St. Johnsbury; the reporter did this. Def. UDF ¶ 21. Defendants have participated in rabies clinics outside the fifteen-mile radius of the CAC premises, and in March 2007, they allowed the Caledonian Record to make announcements for clinics in Newark and Island Pond. Def. UDF. ¶ 22; Accord Pl. DF ¶ 2 (adding that one announced clinic was the same day as a clinic of Plaintiffs). The court takes judicial notice that Island Pond, Vermont is approximately twenty-eight aerial miles from the CLC premises. The court takes judicial notice that Newark, Vermont is approximately nineteen aerial miles from the CLC premises. Defendants' yellow pages listing, identifying their clinic but not their names, and notices of rabies clinics in which they participated, doubtless have reached persons within a fifteen-mile radius of the CAC premises who receive the Caledonian Record and the telephone book, but Defendants have never advertised that they practice veterinary medicine within that physical territory. Def. UDF. ¶ 21.

Defendants have not solicited CAC clients. Def. UDF. ¶23. However, Defendants have treated CAC clients' animals at the animal owners' request when approached. Def. UDF ¶ 23. Defendant Schlueter has euthanized an animal and has provided a rabies shot within 15 miles of the CAC premises. Pl. DF ¶ 3.

Plaintiffs have offered that Defendants "personally solicited [CAC] clients by talking directly with them about their veterinary services." However, the only record evidence Plaintiffs cite to preserve this question is their own hearsay in an Affidavit of January 22, 2008, wherein they say unnamed clients told them Defendants had spoken of their veterinary practice: "We have heard from approximately half a dozen people who told us that the Calamaios talked to them directly about their veterinary services." Pl. Affidavit (cited by Pl. DF ¶ 1). Affidavits "shall set forth such facts as would be admissible in evidence." V.R.C.P. 56(e). Hearsay not otherwise supported in the record is incompetent independently to keep an issue in controversy.

Defendants own the CAC premises, which they lease to Plaintiffs and CAC. Def. UDF ¶ 26. The Lease Agreement provides for written, annual renewal, which renewal was due by November 1, 2007. Def. UDF ¶ 23. Plaintiffs and CAC did not provide written notice of renewal by November 1, 2007, and on November 12, Defendants advised them that their lease was terminated for non-renewal. Def. UDF ¶ 27.

Plaintiffs' four-paragraph Statement of Disputed Facts, produced after months of discovery, references only one document in the record: a Joint Affidavit of Plaintiffs, filed four days after the Statement of Disputed Facts itself.

All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party. The statements of material facts required to be served under this paragraph shall consist of numbered paragraphs and shall contain specific citations to the record.

V.R.C.P. 56(c)(2).

Under Rule 56(c)(2), Defendants' citations only to their own after-filed hearsay affidavit have the practical effect of an admitting those of Defendants' facts not genuinely put in dispute thereby. This is a particularly harsh procedural result, and so the court has searched the record from top to bottom to be sure no injustice results. None does. The court, however, adds and accepts as undisputed a material fact that is plain from the record but not set forth by Plaintiffs' statement: Defendants had not previously insisted upon written lease renewal, and received none in November 2005 and none in November 2006, but did not protest. See Affidavit of Alisa Hicks, November 16, 2007, ¶ 20 ("We have faithfully paid the lease over the years, and have never formally notified [Defendants] of the renewal each year. They never before required formal notification, and I did not believe we need[ed] to provide such notification.").

Finally, the court notes that Plaintiffs, on March 5, 2008, made a filing captioned Plaintiff's Amended Opposition to Motion for Summary Judgment. This amended opposition claimed to respond to Defendants' assertion that there had been no response to their undisputed material facts, by incorporating Plaintiffs' answer to Defendants' counterclaim. As above, on summary judgment, "[t]he statements of material facts required to be served ... shall consist of numbered paragraphs and shall contain specific citations to the record." V.R.C.P. 56(c)(2). Of the twenty-two paragraphs incorporated from the counterclaim answer, not one contains a citation of any kind to any evidence in the record. The twenty-two paragraphs, reasserted after months of discovery, merely restate bald assertions.

If we reach into the facts pled with Plaintiffs' Motion for Partial Summary Judgment, filed January 18, 2008, which is not, under V.R.C.P. 56(c)(2), a proper response to Defendants' Motion for Summary Judgment and Statement of Undisputed Facts, we still find no facts to controvert those offered by Defendants in their motion. Plaintiffs have asserted that Defendants registered with the Secretary of State, in relation to their filings as East Haven Veterinary Service, P.C., an address at 951 Rt. 2, East St. Johnsbury, and at some point parked their van there. UDF ¶ 4, 5. The court notes that there is no evidence the Defendants established a clinic at the East St. Johnsbury location or ever practiced veterinary medicine at that location, in any way. To these facts, Defendants have responded that the address is a formality of business registration. It is not disputed that Defendants never established a clinic or practiced veterinary medicine at the St. Johnsbury address listed with the Secretary of State. The same "Corporation

Information” available from the website of the Vermont Secretary of State clearly shows the East Haven address where it is undisputed that Defendants to practice veterinary medicine. A mailbox and a parking lot do not a veterinary clinic make.

2. Discussion.

At the heart of this case is a purely legal question: Whether the parties’ Noncompetition Agreement, properly construed, (1) prohibits Defendants from practicing veterinary medicine within the physical territory radiating fifteen miles from the CAC premises; or whether it (2) prohibits Defendants from accepting any veterinary client who resides within the physical territory radiating fifteen miles from the CAC premises. On this record, the distinction between these two views is tremendously important. It is the difference between restricting (a) where one may physically practice and (b) restricting from where one’s clients may emanate.

“If a contract is unambiguous, its construction is a question of law.” *Morrisseau v. Fayette*, 164 Vt. 358, 366 (1995); *Sisters & Brothers Inv. Group. v. Vermont Nat. Bank* 172 Vt. 539, 543 (2001). “Moreover, whether a contract is ambiguous or not is a question of law.” *Id.* “Ambiguity will be found where a writing in and of itself supports a different interpretation from that which appears when it is read in light of the surrounding circumstances, and both interpretations are reasonable.” *Isbrandtsen v. North Branch Corp.*, 150 Vt. 575, 579 (1988). However, if the terms of the contract are plain and unambiguous, “they will be given effect and enforced in accordance with their language.” *KPC Corp. v. Book Press, Inc.*, 161 Vt. 145, 150 (1993).

The relevant and only noncompetition provisions in the Loan Documents are found in the parties’ Noncompetition Agreement and at § 12 of the Stock Agreement contemplating that Agreement. The court agrees with Plaintiffs that the documents should be read together, because they were executed simultaneously and pertain to the same subject matter. In doing so, the court distinguishes this case and declines to apply the general rule that a merger clause, as exists at Noncompetition Agreement § 4(f), necessarily excludes all other memorializations of the subject matter. *Hoeker v. Department of Social and Rehabilitation Services*, 171 Vt. 620, 622 (2000). In this case, the merger clause provides that there may be no modification “except by a writing signed by the parties hereto,” which the Stock Agreement, executed the same day as part of the same transaction, is.

Under the Noncompetition Agreement, ¶1, Defendants agreed that, for a period of five years from closing, they would not, in any capacity, “engage or participate in the practice of veterinary medicine within a fifteen mile radius of the present location of the Company, which radius mileage shall be measured as air miles, not driving miles.” Defendants further agreed not to lease the CLC premises to another veterinary clinic in that period. However, the parties agreed, “Notwithstanding the foregoing, Sally Calamaio may practice with the Company, and may provide emergency veterinary services for any person or entity.” Finally, the parties agreed that any breach would cause “irreparable injury to Company for which an adequate monetary remedy does not

exist,” and “[a]ccordingly, in the event of any such breach or threatened breach, the Company shall be entitled, in addition to the exercise of other remedies, to seek injunctive or other equitable relief restraining the potentially breaching party ...”

Under the Stock Agreement, § 12, Defendants agreed that they would be prohibited from “Starting a new veterinary clinic within fifteen (15) miles of the [CAC premises],” or “[f]inancing or becom[ing] partners in a veterinary clinic established within fifteen (15) miles of the [CAC premises],” or “[r]ent[ing] or sell[ing] the [CLC premises] to a competing veterinary clinic,” or “[a]ctively recruiting current Company clients to another veterinary clinic.”

Here, there is no ambiguity as to what the contract prohibits. The contract prohibits Defendants from practicing veterinary medicine within the geographic space described by the area of a perfect aerial circle radiating fifteen miles from the CAC premises at 54 Western Avenue in St. Johnsbury; it prohibits Defendants from actively recruiting CAC clients who were clients in September 2004; and it grants that Sally Schlueter (f/k/a Calamaio) nonetheless may provide emergency veterinary services in that circle.

There also is no ambiguity as to what the contract *does not* prohibit. The contract does not prohibit Defendants from practicing veterinary medicine outside the fifteen-mile-radius circle radiating from 54 Western Avenue in St. Johnsbury. Nor does the contract prohibit Defendants from participating in town vaccination clinics outside the fifteen-mile radius. Nor does the contract prohibit Defendants from advertising their East Haven location to the public at large. Nor does the contract prohibit Defendants from receiving and servicing those former CAC clients who elect, without “active recruitment” by Defendants, to travel from homes within the fifteen-mile-radius circle to any clinic of Defendants’ outside that circle.

In short, the contract restricts where Defendants physically may practice veterinary medicine; it does not restrict from whence their clients may originate, so long as Defendants do not actively and specifically pursue clients who were CAC clients in September 2004. There is no active recruitment where Defendants merely advertise to the public at large, without a special effort to reach 2004 CAC clients, a veterinary clinic located outside the fifteen-mile-radius circle, particularly where Defendants avoid advertising their own names. The contract governs where the Defendants may practice, not where their clients may reside.

As a matter of law, the plain and unambiguous language of parties’ agreements simply does not restrict the actions of which they are accused. *Even if* we had the noncompetition contract Plaintiffs’ wish they had—one arguably purporting to restrict the residence of clients, not just the location of practice—such a contract would be subject to careful scrutiny and could, at such extremes, be unenforceable as against public policy promoting free consumer choice. See *Vermont Electric Supply Co. v. Andrus*, 132 Vt. 195, 198 (1974) (“Restrictions on doing business or on the exercise of an individual’s trade or talent are subject to scrutiny for reasonableness and justification,” because such

restrictions “run counter to that public policy favoring the right of individuals to freely engage in desirable commercial activity.”); accord, *Roy's Orthopedic, Inc. v. Lavigne*, 142 Vt. 347, 350 (1982); *Systems Software Inc. v. Barnes*, 178 Vt. 389, 391 (2005). That is, Plaintiffs’ expansive reading of the Noncompetition Agreement is not only contrary to the unambiguous language of the Agreement itself, but also contrary to the rules of construction applicable where noncompetition agreements *are* ambiguous.⁸

The unambiguous language of the contract is at irreconcilable variance with Plaintiffs’ filings, which at points defy any conceivable construction of the contract text. For example, Defendants offer that “The Calamaios state in paragraph 21 of their affidavit that they were asked by Dr. Stacy Henderson to take over rabies clinics in the Towns of East Haven, Newark, and Island Pond. Dr. Henderson’s practice is located in Lyndonville, within the 15 mile radius ...” Affidavit of Alisa Hicks, January 4, 2008 ¶ 5. Thus is responding to the request of someone in Lyndonville conflated with practicing veterinary medicine there in violation of the Noncompetition Agreement.

At points, Plaintiffs misconstrue documentation already in the record. For example, Plaintiffs offer that, “In paragraph 17 of their statement of undisputed facts, the Calamaios admit that both of them have provided emergency services within the 15 mile radius.” What the cited paragraph actually says is, “Drs. Schlueter and Calmaio have not practiced veterinary medicine within the 15-mile radius of the CAC office in St. Johnsbury, except for emergency services.” This paragraph, in turn, cites the Joint Affidavit of Defendants, December 10, 2007, ¶¶ 10-19. The Affidavit paragraphs do not even remotely suggest that both Defendants practiced emergency veterinary medicine within the 15-mile radius. Instead, they affirm that Defendants’ office is in East Haven, outside the circle; and that Defendants began operating their mobile veterinary van in late 2006, using it exclusively to provide services in East Haven, Vermont, Lancaster, New Hampshire, and Jefferson, New Hampshire, none of which are within the 15-mile radius. The Joint Affidavit, at ¶ 15, provides that:

Sally has been within the 15-mile radius only for emergency veterinary purposes. For example, when needed, other veterinarians asked Sally to attend to the emergencies because they were unable to do so. On one occasion, while at our attorney’s home to euthanize a pet, Sally also administered rabies shots to other pets to save the attorney, Kim Butler, a trip to East Haven. Also, after rendering emergency care to a dog giving birth, Sally subsequently dropped off medication

⁸ See also, *Johnston v. Wilkins*, 175 Vt. 567, ¶12 (2003) (mem.) (recognizing the issue without reaching it). The *Wilkins* trial court subsequently determined that restriction on client residence is unenforceable. *Johnson v. Wilkins*, No. 66-3-01 Lecv (Van Benthuyssen, J., Dec. 28, 2004). Following that, Johnson sued his attorney for malpractice on the basis that the attorney breached the standard of care expected of Vermont attorneys by (1) advising that a covenant could prevent a party from accepting customers from a particular geographic area, and by (2) advising that the defendant’s acceptance of such clients violated the parties’ noncompetition agreement. *Johnson, et al. v. Stevens et al.* 189-9-06 Lecv (Grearson, J., Nov. 7, 2007); 11 Vt. Tr. Ct. Rep. 33 (entry order on summary judgment; case not disposed). Surprisingly, Plaintiffs cite the Supreme Court opinion in *Johnson*, apparently unaware of its subsequent trial court history.

for the pups, but only because their owners could not get to East Haven to pick it up. We do not understand such activity to violate our agreement with the Hicks.

Not incidentally, this is the only evidence of breach in the entire record, and far from controverting it, Defendants offered it. How this could be parlayed into an admission that Craig Calamaio admitted to practicing veterinary medicine in the fifteen-mile radius is very difficult to understand.

Plaintiffs' case is predicated entirely on a construction of the Noncompetition Agreement that vastly exceeds the restrictive scope of its text. For this reason, it unravels dramatically upon construction of the contract, as a matter of law. Notably, Plaintiffs have not, by their Rule 56(c)(2) statement, contested Defendant's assertion that Defendants have not solicited CAC clients. Def. UDF. ¶23. The court's independent search of the record, undertaken out of concern this was an omission, finds no evidence of active recruitment to preserve a genuine issue of material fact sufficient to carry the question to the finder of fact.

While interesting debates could be had on whether and at what point aggressive advertisement into St. Johnsbury media might become "active recruitment" of 2004 CAC clients, those debates cannot be had on this record, because the uncontroverted evidence is that Defendants do not advertise other than by an ordinary yellow-pages listing for their East Haven practice. They are listed in the yellow pages as East Haven Veterinary Service and not by their personal names. They appear in newspaper notices of rabies clinics in Newark and Island Pond, both locations outside the fifteen-mile radius, both newspaper notices instigated by the town clerks of those municipalities. The advertisements, such as they are, are just like the yellow pages listing, in that they do not name Drs. Schlueter and Calmaio and display only the practice name, "East Haven Veterinary Clinic," which itself identifies a location, East Haven, outside the fifteen-mile radius. There is no evidence from which a jury could find that this constitutes breach of the Noncompetition Agreement or active recruiting of 2004 CAC clients. Although it is undisputed that Defendants have provided veterinary services at their East Haven clinic to clients who maintain physical residences inside the fifteen-mile radius, the Noncompetition Agreement does not prohibit this as a matter of law.

It is undisputed that Plaintiffs made no complaint of breach by competition, in any form, until they filed the instant Complaint days after receiving notice of default and acceleration. Even when Plaintiffs wrote Defendants to say they would be unable to keep up on the CAC Note, they made no complaint of breach by competition.

In the course of discovery, Defendants have admitted a *de minimis* breach—the non-emergency provision of a single rabies shot⁹ in Lyndonville¹⁰—and Plaintiffs have

⁹ The court construes and applies the Noncompetition Agreement to the undisputed facts as follows. Administration of a rabies shot is the practice of veterinary medicine, because a non-veterinarian would be prohibited from doing it. Delivery of veterinary medicines is not the practice of veterinary medicine, because a mail carrier can do it. Euthanizing an animal presumptively is an emergency procedure, as animals generally are euthanized when actively suffering, and Plaintiffs have shown no evidence that the animal in question was not suffering.

come forward with no other evidence raising a genuine issue of material fact as to further breach. There is no connection between this breach and any injury to Plaintiffs. Nonetheless, administration of the rabies shot was a breach, and the court disagrees with Defendants' assertion that it ceased to be so because the breach was incident to non-breaching emergency care. Courts faced with similar, inconsequential overstepping in noncompetition contexts have found that such technical breaches are not actionable. *Sheehey v. Sheehey*, 702 N.E.2d 200, 204-05 (Ill. App. 4th Dist., 1998). The court will issue injunctive relief clarifying Defendants' obligations to abstain from the practice of veterinary medicine in the fifteen-mile radius, even for friends and business relations in their own homes. There is, however, no remaining issue of material fact as to breach by the Defendants. The only evidence of breach is undisputed and *de minimis*.

Summary judgment for Defendants on all of Plaintiffs' claims is mandated, and the court will remedy the *de minimis* breach with injunctive relief "restraining the potentially breaching party from committing such breach or threatened breach," as contemplated by Noncompetition Agreement § 2.

c. Counterclaim and waiver arguments

Plaintiffs, by their Opposition to Defendants' Motion for Summary Judgment, filed January 18, 2008, have reasserted noncompetition arguments without raising any factual dispute as to their counterclaim liability on the Loan Documents, their default thereunder, or the ejectment action. Plaintiffs have contended, however, that Defendants' undisputed actions, in allowing Plaintiffs to renew the Lease Agreement in 2005 and 2006 without written notice, constitute waiver of the renewal provision of the Lease Agreement.

The Lease Agreement, at § 2, provides that: "The Tenant shall have the right to renew this Lease for up to at least six (6) additional terms of one (1) year by providing written notice of election to renew to Landlord at least sixty (60) days prior to December 31, 2005 or the end of the then-existing renewal term."

The Lease Agreement, by its own terms, is not susceptible to oral or conduct-based modification. It "represents the entire agreement of the parties as to the subject ... superseding all prior negotiations and agreements." Lease Agreement § 2(e). It "may be modified or amended only by written agreement signed by both Landlord and Tenant." Lease Agreement § 2(f).

The Lease Agreement, at § 23(b), also contains a nonwaiver provision: "Failure of the Landlord to insist upon the strict performance of any of the terms, conditions or covenant of this Lease shall not be deemed a waiver of any rights or remedies the Landlord may have and shall not be deemed a waiver of any subsequent breach or default in the terms, covenants and conditions of this lease."

¹⁰ Other filings place the location of the rabies shot in Kirby. In either event, the fact of the single rabies vaccination is not disputed, and the court takes judicial notice that Lyndonville and Kirby both fall within the fifteen-mile radius.

Instead of disputing the enforceability of the nonwaiver provision of § 23(b), Plaintiffs have simply ignored it. The court by its independent research is unable to find any basis upon which to invalidate the nonwaiver provision, and Plaintiffs have given none. "The courts must enforce contracts as they are written." *Roy's Orthopedic, Inc. v. Lavigne*, 145 Vt. 324, 327 (1985) (citing *Sullivan v. Lochearn, Inc.*, 143 Vt. 150, 153 (1983)); *Medlar v. Aetna Insurance Co.*, 127 Vt. 337, 347. It is the duty of all courts "to construe contracts; we will neither make or remake them for the parties, nor will we ignore their provisions." *Vermont State Colleges Faculty Federation, VFT, AFT, Local No. 3180, AFL-CIO v. Vermont State Colleges*, 141 Vt. 138, 144 (1982). Plaintiffs validly terminated the lease for nonrenewal under the Lease Agreement.

Order

For the foregoing reasons,

Companion Leasing Corp of Littleton's Motion to Intervene is GRANTED;

Plaintiffs' Motion to Amend Complaint is GRANTED;

Defendants' Motion to Dismiss Counts II, III, and V is GRANTED; and

Summary Judgment is GRANTED in favor of Defendants/Counterclaim Plaintiffs and against Plaintiffs/Counterclaim Defendants on all claims, counterclaims, and causes of action;

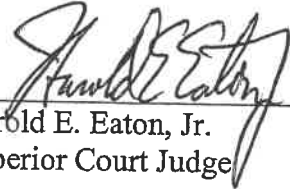
Provided however, that *de minimis* breach is uncontroverted as to the provision of a single rabies vaccination in Lyndonville;

In view of the *de minimis* breach, and the suggestion that non-emergency services within the restricted area may be provided ancillary to emergency services, the court clarifies the parties' rights and obligations as follows:

Defendants are ENJOINED from practicing veterinary medicine within a fifteen-mile radius of 54 Western Avenue in St. Johnsbury; such injunction to expire by its own terms September 22, 2009; provided however, that Sally Schlueter may provide emergency medical services in that area, such permitted emergency services defined as those undertaken in circumstances where withholding or delay of veterinary care would be substantially likely to cause imminent physical harm or undue suffering to an animal, and such permitted emergency services excluding any non-emergency veterinary care, whether or not ancillary to an emergency visit, whether or not made for compensation, and whether or not provided to a friend, relative, acquaintance, or business relation.

Attorney Palmer shall prepare forms of judgment updated to the time of filing,
upon approval of which the requested writs shall issue.

Dated at St. Johnsbury this 21st day of April, 2008.



Harold E. Eaton, Jr.
Superior Court Judge