IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MICHAEL LALONDE,

Plaintiff,

v.

TAYLOR ENGLISH DUMA, LLP, MICHAEL TROTTER, and AARON KOWAN,

Defendants.

CIVIL ACTION FILE NO. 2015CV259810

JUDGE SCHWALL

ORDER

This matter came before the Court on various pretrial motions, which the Court heard on January 31, 2018. By Order entered on February 14, 2018, the Court ruled upon several motions to exclude expert testimony, but reserved ruling on dispositive motions until the parties mediated this matter on March 1, 2018. Though the parties mediated in good faith, the matter did not resolve in mediation. Accordingly, the Court must now determine the parties' respective summary judgment motions.[1]

Having considered the motions, the entire record, applicable law, and oral argument, the Court hereby DENIES Plaintiff's Motion for Partial Summary Judgment, GRANTS Defendants' Motion for Summary Judgment, and makes the following findings of fact and determinations of law:[2]

[1] Defendant Aaron Kowan was dismissed with prejudice by consent on January 30, 2018, and an order quashing a subpoena upon O'Connell Regulatory Consultant, Inc. was entered on March 15, 2018.

[2] Additionally, in light of the Court's instant ruling, Plaintiff's Motion for Order Compelling GE Healthcare to Produce Documents in Response to Subpoena and Defendants' Motion for Permission to File Out of Time Motion for Summary Judgment regarding Plaintiff's Claim for Damages for Fair Market Value are both denied as moot.

FACTUAL BACKGROUND

A. Formation of Company / Negotiation of Operating Agreement

In 2008, plaintiff Michael Lalonde (hereinafter "Lalonde" or "Plaintiff") decided to invent a continuous positive airway pressure ("CPAP") machine to treat sleep apnea. (Amended Compl., ¶ 8.) Two years later, he determined that his CPAP prototype was sufficiently developed to seek financial backing (Amended Compl., ¶ 9) and retained his friend and attorney, Michael Trotter, to represent him in negotiating and drafting documents necessary to consummate a business relationship with an investor. (Amended Compl., ¶ 11; Trotter Depo., p. 87:5-9.)

Plaintiff's former business partner, Blake Whitney, introduced Plaintiff to PBM Capital Investments, LLC ("PBM") as a potential investor after Plaintiff had failed to gain any traction with other potential investors. (Lalonde Depo., p. 163:20 – p. 164:3; Trotter Depo. (May 12, 2017), p. 81:15-16 ("There were no other investors on the horizon after years of effort.").) PBM was the only entity able and willing to fund Plaintiff's CPAP venture. (Lalonde Depo., p. 179:6-20, p. 199:1-9; Trotter Depo. (May 12, 2017), p. 81:15-16.)

In September 2010, Plaintiff pitched his idea to PBM as an integrated CPAP mask, which he called the "ZGo." (Lalonde Depo., p. 124:1-23.) Plaintiff claimed that this was much smaller and more portable than anything available on the market. (Amended Compl., ¶ 8.) PBM was under the impression that it was the world's smallest, fully functional, and operational CPAP device (*PBM Capital Investments, LLC, Plaintiff v. Michael G. Lalonde, Defendant*, Case No. 3:13-cv-00008-GEC-BWC, in the United States District Court for the Western District of Virginia (Charlottesville Division) (hereinafter, the "Federal Lawsuit") (MGL_032282-032303), ¶¶ 12, 16, attached as Exhibit 25 to Lalonde's Deposition).) PBM also understood that one of

the key reasons Plaintiff's system was revolutionary was because it had been designed around, and incorporated, a fully integrated, small, quiet, unique motor/compressor/controller that Plaintiff had invented and developed ("Integrated Blower"), which was small enough and quiet enough to be attached, along with batteries, directly onto a mask that he also claimed to have designed and that the entire system could be worn by the patient as part of the mask. (*Id.* at ¶ 14.) PBM thought that Plaintiff had eliminated technical development risks before asking for financing and that only final refinements were required. (*Id.* at 20; Deposition of PBM's corporate representative, per Rule 30(b)(6) ("PBM Depo."), p. 167:24 – p. 168:6.)

Based on the foregoing, PBM expressed interest in providing financing for "the final stages of development and launch of the product." (March 20, 2013, Deshum Board Meeting Minutes, attached to Defendants' Notice of Filing as Exhibit C, (MGL_033618-22); PBM Depo., p. 167:25 – p. 168:3 ("[T]he initial investment thesis was that it was already 90 to 95 percent complete.").) To do this, PBM and Plaintiff were going to form a new company, Zephyr Labs, LLC.[3]

In November 2010, PBM's attorneys created the first draft of the Zephyr Labs, LLC Limited Liability Company Agreement (the "Operating Agreement" or the "Agreement")[4] that would govern how the Company was to operate. (Trotter Depo. (April 14, 2017), Exs. 25 and 25A thereto.) From there, Plaintiff, PBM, and Defendants Michael Trotter, Aaron Kowan and the firm of Taylor English Duma LLP (collectively, "Defendants") spent the next five months negotiating and drafting the terms of the Agreement. (*See generally* Trotter Depo. (April 14, 2017), Exs. 25-25C; Ex. A to Defendants' Notice of Filing, collection of emails.)

[3] After its inception, Zephyr's name was changed to Deshum Medical, LLC. (Plaintiff's Statement of Material Facts filed July 31, 2017 ("PSMF"), ¶ 10.) For the sake of simplicity, unless otherwise noted, Zephyr and Deshum are referred to interchangeably as "the Company."

[4] Capitalized terms that are not defined herein have the meanings ascribed to them in the Operating Agreement.

As part of the negotiated Agreement, PBM was to contribute $5 million to the Company and Plaintiff was contributing his conceptual CPAP device and the associated patent application; PBM and Plaintiff imputed a value of $2,486,136 on Plaintiff's contributions.[5] As a result (and not surprisingly), PBM retained more control over the Company.[6] Still, during the lengthy negotiation of the Agreement, the parties agreed to certain minority "rights" for Plaintiff. These rights were captured in the "Super Majority" requirements and allowed Plaintiff to retain some control or veto power of certain events and decisions. (*See generally* Operating Agreement, Section 6.03.)[7]

Plaintiff was involved in the process that created these "rights." Approximately four months into the negotiation process, Plaintiff had an in-person meeting with PBM representatives in Charlottesville, Virginia to address what Plaintiff considered key business principles; the terms of this meeting were memorialized in a memorandum, which was sent to Plaintiff and then to Trotter and Kowan. (Lalonde Depo., p. 154:19-21; p. 158:25 – p. 159:3 and Ex. 15 thereto (MGL_022302-03) (the "Charlottesville Memo").) At this meeting, Plaintiff explicitly agreed that his consent was *not* required for selling the business: "Super Majority will only relate to changes of the operating agreement, articles, etc. and *not* be a part of operating or selling the business. Super Majority will be need [sic] for anything that changes the rights of

[5] PBM and Lalonde arrived at the value of Lalonde's interest through a simple mathematical equation – PBM was contributing $5 million and would get 66.79% of the issued and outstanding Units of the Company, thus the total value of the Company for accounting purposes was $7,486,136. Lalonde's capital contribution was therefore calculated at $2,486,136 (which is the remaining 33.21% of $7,486,136). (Lalonde Depo., p. 216:23-24 ("[I]t represented a third of the, the $5 million [PBM] investment.").) He received $350,000 of this in cash upon execution of the Agreement, leaving a balance of $2,136,136. (Ex. 1B to PSMF, Operating Agreement, Ex. A thereto; Lalonde Depo., p. 216:9-16).

[6] Because the ratio between PBM's contribution and Lalonde's contribution was 2:1, PBM appointed two Managers to the Board (Paul Manning and Sean Stalfort) and Lalonde appointed one (himself). (Section 6.02; PSMF, ¶ 9.)

[7] "Super Majority" decisions require a majority vote of the Class A (Manning, Stalfort) *and* Class B (Lalonde) Managers; in other words, Lalonde's consent was required for all decisions that called for "Super Majority" consent. (Ex. B to PSMF, Execution Copy of Operating Agreement, Section 1.01.)

Mike." (Ex. 15 to Lalonde Depo., Charlottesville Memo ¶ 4 (MGL_022303) (emphasis added); Jones Depo., p. 36:17-19.)

In addition to participating in meetings with PBM's representative, Plaintiff reviewed or had the opportunity to review each draft of the Operating Agreement, had conferences (either in-person or by telephone) with the Defendants before and after every draft of the Operating Agreement went out, and executed the final version. (Kowan Depo., p. 11:4-7; p. 125:5-10; and Ex. P1 thereto, DEF000012-23, (billing entries reflecting these conferences); collection of emails showing drafts of the Operating Agreement sent to and from Plaintiff, attached to Defendants' Notice of Filing as Exhibit A; Ex. 1B to PSMF, Execution Copy of Operating Agreement). Plaintiff even made substantive changes to drafts of the Operating Agreement. (Email from Plaintiff to Defendants on March 25, 2011 at 3:27 PM and attachment thereto showing Plaintiff's substantive contributions to the Operating Agreement, attached to Defendants' Notice of Filing as Exhibit D (MGL_025396; MGL_025410; MGL_025431-32; MGL_025442; MGL_025449); Email from Plaintiff to Trotter on November 28, 2010 at 8:18 PM and attachment thereto showing Plaintiff's substantive contributions to the Operating Agreement, attached to Defendants' Notice of Filing as Exhibit E (MGL_004355; MGL_004371; MGL_004376; MGL_004387).)

B. **Failure of the Company**

Shortly after the Company formed, PBM had concerns with the ZGo concept that Plaintiff had pitched and decided not to pursue it. (Lalonde Depo., p. 226:23 – p. 227:8.) Specifically, PBM was concerned with intellectual property issues regarding a competing patent that protected an integrated CPAP mask (something Plaintiff claimed was his unique idea) and FDA approval challenges. (Lalonde Depo., p. 227:1-25.) Furthermore, PBM "came in thinking

that [its] capital was to commercialize a product that was basically ready to launch." (PBM Depo., p. 131:22-24; PBM Depo., p. 131:19-20 ("Lalonde had represented the device to be [approximately] 90 or 95 percent done.").) As time went on, it became clear this was not the case. (PBM Depo., p. 131:24 – p. 132:3; Ex. 25 to Lalonde's Depo., *Federal Lawsuit*, ¶ 31.)

PBM tasked Plaintiff with coming up with a new "vision." (Lalonde Depo., p. 227:14-19.) PBM felt that "the design Mike [Lalonde] came up with had some material flaws. So to take it from there to be a launchable product, they ultimately had to redevelop the motor. They had to figure out a solution for the sound .... They had to develop a whole new control system or algorithm to control the responsiveness to breathing, because his didn't really work. They had to develop a battery solution, because he hadn't developed one. They had to reconfigure the whole circuit board. And they had to redesign the housing, because his housing looked like he had basically copied an existing product on the market." (PBM Depo., p. 128:13 – p. 129:2.) Plaintiff admits that he had to generate "something new, unintended, which was no longer a ZGo." (Lalonde Depo., p. 239:6-11.)

By December 2011, Paul Manning—PBM owner and Deshum Board member—was disappointed and upset that the device could not be manufactured by January. (Ex. L to Defendants' Notice of Supplemental Filing, Lalonde's Timeline, MGL_032131, Row 4 ("Dec 2011").) Manning became "very aggressive" in demanding that he needed to sell units despite Plaintiff's objections to FDA design control compliance and legalities. (*Id.*) Manning even threatened to cut off Plaintiff's salary. (*Id.*)

By February 2012, PBM had hired an engineer, Toby Herrera, who told everyone that he was approached by Stalfort—PBM Principal and Deshum Board member—to "snitch on Lalonde and help them build a case to get rid of him for a ridiculous amount of money." (*Id.* at

Row 5 ("Feb 2011").) By Spring of 2012, Manning told Plaintiff that he was "disgusted with him." (*Id.* at Row 6 ("Spring 2012").) Around that time, a new engineer, Kevin Librett, came in "to take over the project to get to a workable device." (PBM Depo., p. 132:13-20; Lalonde Depo., p. 253:11-13.) Before his start date, Librett told Plaintiff that he was not sure he could come on board because PBM was asking him to "'conduct an inappropriate relationship with a peer"; the peer was Plaintiff. Librett warned Plaintiff to proceed with extreme caution in his relationship with PBM. (Ex. L to Defendants' Notice of Supplemental Filing, Lalonde's Timeline, MGL_032131, Row 6 ("Spring 2012"), ¶ 2.)

Manning directed Librett to prepare the FDA application to be filed with "sketchy testing (basically falsified) data" and wanted Plaintiff's signature on it. (*Id.*) Plaintiff firmly refused to sign; Manning was furious and threatened Plaintiff. (*Id.* at MGL_032132 (Row 1: continuation of "Spring 2012".) By Plaintiff's own account, Manning continued to threaten him and pressure him into signing false FDA documents. (*Id.* at Row 2 ("May 2, 2012").)

Plaintiff resisted doing any testing because he was skeptical of PBM's intentions; Manning was "furious" and threatened to fire Plaintiff and sue him, and added that he had enough money to ruin Plaintiff's entire family for generations to come. (*Id.* at Row 5 ("Fall 2012"), ¶ 2.) Plaintiff felt that Manning was directly working to defeat him in any way possible and possibly set him up for fraud by signing false documents. (*Id.* at ¶ 4.) Plaintiff felt the relationship with Deshum/PBM was "outright dangerous." (*Id.* at ¶ 6.)

Manning had become intensely focused on producing 25 units by Christmas of 2012. (Lalonde Depo., p. 261:22 – 262:10 ("[I]t was absolutely intense, screaming intense focus."). Plaintiff was unable to do this. (Lalonde Depo., p. 262:17-20.) As a result, the day after Christmas, PBM told Plaintiff to fire everyone in the Georgia office and stop working on the

device. (Lalonde Depo., p. 262:25 – p. 263:3 and Ex. 23 thereto.) By January 2013, PBM had fired Plaintiff "for cause" as an employee of Deshum. (Ex. N to Defendants' Supplemental Notice of Filing, MGL_032050 (email); MGL_032051-53 (signed termination letter attached to email).) He was terminated because, from the perception of PBM, (1) he had misled them as to the state of development of the device; and (2) he was not accomplishing a workable device. (PBM Depo., p. 169:25 – p. 170:4.)

C. **Subsequent Lawsuits**

Manning then made good on his threats to sue Plaintiff. The first lawsuit came in January after Deshum fired Plaintiff. Deshum filed a civil action against Plaintiff in Virginia state court. (*Deshum Medical, LLC f/k/a Zephyr Labs, LLC, Plaintiff, v. Michael G. Lalonde, Defendant*, Case No. 13-42, in the Circuit Court for the City of Charlottesville (hereinafter, the "Virginia lawsuit") (MGL_036377-036408), attached as Exhibit 26 to Lalonde's Deposition.)

In the Virginia lawsuit, Deshum alleged, among other things, that Plaintiff had made repeated misrepresentations concerning the functionality, operation, and development of the CPAP and that the prototype was too loud, contained rudimentary functional software that was of little to no use, was poorly designed, and was far from completion. (Lalonde Depo., Ex. 26 thereto, the Virginia Lawsuit, ¶ 14.) Deshum further alleged that Plaintiff made numerous false statements, concealed material information, and otherwise actively misled Deshum and others concerning product development. (*Id.* at ¶ 15.)

The next month, PBM filed the Federal lawsuit. (Exhibit 25 to Lalonde's Deposition, the Federal Lawsuit.) In the Federal lawsuit, PBM alleged, among other things, that the representations made by Plaintiff in 2010 were false and intended to fraudulently induce PBM to form Deshum, enter into the Operating Agreement, and invest millions of dollars. (*See id.*)

PBM sought over $3 million and punitive damages from Plaintiff for his alleged "fraudulent conduct." (*Id.* at p. 20 ("Prayer for Relief").)

D. Dissolution and Liquidation of the Company

The following month, the Deshum Board held a special meeting. (Exhibit C to Defendants' Notice of Filing, March 20, 2013 Board Meeting Minutes, MGL_033618-22.) At that time, the $5 million PBM investment, which was supposed to be for the final stages of development and launch of the product, had been virtually exhausted to attempt to develop what PBM had thought was already in existence when Deshum was formed. (*Id.* at MGL_033618.)[8] The development process was still not complete and was ongoing, and a number of features that had been promised by Plaintiff as being completed or near completion in early 2011 were never developed. (*Id.* at MGL_033618-19.) There was still "substantial development to be completed on the software, circuit board and acoustics, as well as the final form design." (*Id.*) It was not possible to launch a product without significantly more investment. (*Id.*)[9]

By the next month PBM concluded:

> the Company will soon have exhausted its capital reserves and that, under present circumstances, **it is not possible for the Company to raise additional capital.** Accordingly, the undersigned does hereby elect to cause the Company to be terminated and dissolved in accordance with Section 11.01 of the LLC Agreement.

(Ex. 1C to PSMF (DEF000089) (April 23, 2013 letter) (emphasis added).) Two weeks later, the Board held a meeting. (Ex. 1D to PSMF (PBM000643) (May 7, 2013 Board Meeting Minutes).) At this meeting, by a vote of two to one, with Plaintiff dissenting, the Deshum Board voted to

[8] The last of PBM's $5 million went in on March 22, 2013. (PBM Depo., p. 47:9-10.)
[9] Although the FDA had approved the device by this time, it was not market ready. (PBM Depo., p. 184:22 – p. 185:13.)

dispose of Company Property upon dissolution via in-kind distributions. (Ex. 1D to PSMF (PBM000644-45).)

Two weeks later, Plaintiff sought "an order dissolving Deshum Medical, LLC" in Delaware Chancery Court. (*Verified Petition of Member for Judicial Dissolution of Deshum Medical, LLC, and for the Appointment of a Receiver* (*Lalonde v. PBM Capital Investments et al.*, Civil Action No. 8580-VCN, Court of Chancery of the State of Delaware, hereinafter "*Lalonde's Verified Petition for Dissolution*") (MGL_034500-034607), ¶ 1, attached to Defendants' Notice of Filing as Exhibit H.) He alleged under oath that there was "growing animosity" between himself and the other Managers. (*Id.* ¶ 46.) He further swore that "the Company is no longer able to carry on its business in a reasonably practicable manner." (*Id.* at ¶ 51.)

By August 2013, all Members of the Company, including Plaintiff, had acted affirmatively to dissolve the Company. (Ex. 1F to PSMF (PBM 000648 ¶ 1(c)); PBM Depo., p. 157:11-17; Exhibit H to Defendants' Notice of Filing, *Lalonde's Verified Petition for Dissolution* (MGL_034500-034607).) The Company retained an appraiser, McGladrey, to determine the value of the Company. On or about August 23, 2013, the Board voted to (1) accept the McGladrey valuation to determine that the fair market value of the Company was $430,000; and (2) dispose of Company Property via in-kind distributions. (Ex. 1D to PSMF (PBM000644-45); Ex. 1F to PSMF (PBM 000648-52); PBM Depo., p. 166:21 – p. 167:2).) All assets of Deshum were then distributed to Human Design Medical, LLC ("HDM"). (Ex. 1G to PSMF, Bill of Transfer (PBM 000656).)

E. Settlement and Dismissal of Lalonde's Verified Petition for Dissolution

Approximately three months later, PBM paid Plaintiff a $310,000 settlement in exchange for dismissal of the Virginia Lawsuit, the Federal Lawsuit, and *Lalonde's Verified Petition for Dissolution.* (Ex. I to Def's Notice of Filing, Settlement Agreement (MGL_034996-97).) As part of this settlement, Plaintiff released, acquitted, and covenanted not to sue Deshum; PBM; HDM; Sean Stalfort; Paul Manning; and others for any claims relating to, asserted in, or arising out of their relationship and the above litigation. (Ex. I to Def's Notice of Filing, Settlement Agreement, (MGL_035001) p. 6, ¶ 5.) Notably, $140,000 of this settlement amount was paid directly to Plaintiff as "consideration for the sale of his membership interest in Deshum." (Ex. I to Def's Notice of Filing, Settlement Agreement, (MGL_034996) p. 1, ¶ 1.) Plaintiff then dismissed with prejudice his *Verified Petition for Dissolution*, forever waiving his opportunity to have a Delaware court resolve his dispute. (Ex. K to Defendants' Notice of Filing, Pl's Response to Taylor English Duma's First Request for Admissions No. 2 (Admitted).)

F. Failure of HDM

After HDM received all of Deshum's assets, HDM continued working on the device in an attempt to salvage PBM's investment. Despite receiving an additional $12 million in funding from PBM Pharmaceuticals (PBM Depo., p. 54:1-8), HDM's efforts were not successful; although HDM generated sales, HDM was never profitable. (PBM Depo., p. 41:9-10; p. 84:10-15; 86:22 – p. 87:11; p. 88:4-12; p. 89:4-8; p. 89:25 – p. 90:3; p. 139:5-7.) Eventually HDM was sold as a fraction of a larger transaction ("the Fosun sale"). (PBM Depo., p. 93:4-5; p. 21:20 – p. 22:6.)

G. **The Fosun Sale**

Sometime after HDM acquired the assets of Deshum, PBM formed several foreign entities to acquire a Swedish company called Breas Medical Ltd. and a British company called B&D Electromedical Limited.

> So you had, really, two silos underneath PBM Capital Investments. You had [HDM], which was the legacy Deshum business, and then you had all the Breas and B&D, you know, the more ventilator business, and those were held separately. And then immediately prior to the acquisition, just for simplicity's sake dealing with Fosun, [PBM] put all of the HDM interests and the Breas and B&D interest up into a single holding company, PBM RESP Holdings, LLC. And then ultimately, that was the business that entered into transactions with Fosun.

(PBM Depo., p. 20:4 – p. 22:6 and Ex. 25 thereto.) These ventures required tens of millions of dollars of funding from PBM, PBM-related entities, and Paul Manning, individually. (Harms Depo., Ex. 3 thereto, p. 27; PBM Depo., Ex. 14 thereto, PBM_0016749-81.)

DISCUSSION

In the instant legal malpractice action, Plaintiff claims that the Defendants had a duty to ensure that the Operating Agreement allowed him the ability, as a Unit holder, to prevent dissolution of the Company, and that the failure to include such a provision caused all his damages.

Georgia law provides that, "[i]n a legal malpractice action, the plaintiff must establish three elements: (1) employment of the defendant attorney, (2) failure of the attorney to exercise ordinary care, skill and diligence, and (3) that such negligence was the proximate cause of damage to the plaintiff." *Leibel v. Johnson*, 291 Ga. 180, 181, 728 S.E.2d 554, 555 (2012) (*citing Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 265 Ga. 374, 375(2)(a), 453 S.E.2d 719 (1995)*) (emphasis added).

With this legal standard in mind, the Court turns to the facts of this case. The first element of a legal malpractice action is undisputed. Both sides agree that Plaintiff employed Defendants as counsel. And while both sides have focused their briefings and argumentation on the second element of a legal malpractice action -- a breach of duty of care by counsel -- this second element does not form the crux of the issue. Breach of the standard of care and causation are inarguably separate inquiries. The presence of one cannot substitute for a deficiency of evidence as to the other. "[A]n act of negligence alone does not create a cause of action in tort without damages." *Rogers v. Norvell*, 174 Ga. App. 453, 457, 330 S.E.2d 392, 396 (1985) (holding that attorney's alleged act of negligence was not proximate cause of client's loss).

Simply put, even if this Court were to agree with Plaintiff's assertions and determine that Defendants violated their standard of care as his counsel,[10] Plaintiff has not shown and cannot uphold his burden to show that Defendants were the proximate cause of his damages and, therefore, his legal malpractice claim fails as a matter of law.

A. Causation

1. Defendants Did Not Cause the Loss of "Corporate Opportunities"

The only alleged act of malpractice is that the Operating Agreement allowed dissolution without Plaintiff's consent. Plaintiff contends that, as a result, Deshum lost the "opportunity" to finalize and sell the device and pursue the acquisition of Breas and B&D. (Pl's Response, p. 37.) In 2013, however, Plaintiff admitted under oath that the Company could not have continued and dissolution was inevitable. (*Lalonde's Verified Petition for Dissolution*, ¶¶ 1, 51.) Because it is undisputed that "it [was] not reasonably practicable for Deshum to continue to carry on business." the outcome would not have been different, and so the Defendants cannot be liable.

[10] And this Court does not hold that Defendants violated their standard of care.

(*See id.* at ¶¶ 1, 51; *see also* Ex. 1C to PSMF, April 23, 2013 letter (PBM000089); Ex. 1D to PSMF, May 7, 2013 Deshum Board Meeting Minutes (PBM000643).)

Likewise, Deshum's dissolution did not "free" PBM "from the restraints of the Delaware corporate opportunity doctrine." (Pl's Brief, p. 36.) *Guth v. Loft, Inc.*, 5 A.2d 503, 511, 514 (Del. 1939),[11] explicitly says that the corporation must have the "ability to pursue" and be "financially able to undertake" the alleged opportunity before it becomes a "corporate opportunity." Deshum lacked the ability to financially undertake any opportunities once the $5 million commitment was gone. Thus, by definition, Deshum simply had no corporate opportunities.

Plaintiff's argument -- that PBM would have blocked itself from pursuing these opportunities by funding Deshum (or approving funding from a third party), thereby giving Deshum the "financial ability" to pursue the opportunities that it otherwise lacked the ability to pursue -- is not supported by the record. In fact, the record supports the opposite conclusion. (*See* Ex. C to Defendant's Notice of Filing, March 20, 2013 Board Meeting Minutes (MGL_033621); Ex. 1C to PSMF (DEF00089), April 23, 2013 PBM letter ("[T]he Company will soon have exhausted its capital reserves and [] under the present circumstances, it is not possible for the Company to raise additional capital."); Ex. 1D to PSMF (PBM000643-44) May 7, 2013 Board Meeting Minutes) ("[I]t is not presently feasible to obtain additional investments into Deshum Medical. ... PBM Capital is simply unwilling to contribute any additional funds. Neither selling the company nor raising capital from outside investors is a viable path forward

[11] Section 14.03 of the Operating Agreement provides: "This Agreement and the rights of the parties hereunder shall be interpreted in accordance with the laws of the State of Delaware." "A limited liability company agreement that provides for the application of Delaware law shall be governed by and construed under the laws of the State of Delaware in accordance with its terms." 6 *Del. C.* § 18-1101(i). Accordingly, the Court takes judicial notice of the opinions from Delaware courts cited herein. O.C.G.A. §§ 24-2-220; 9-11-43(c).

either.")).[12] Once the $5 million was gone, PBM was under no obligation to loan more money, contribute more money, or approve loans or further funding to Deshum.[13]

Moreover, even if Deshum did have the financial ability to undertake the alleged corporate opportunities, there is no evidence in the record that PBM would not have flouted the corporate opportunity doctrine and pursued "Deshum's opportunities" anyway. In fact, the undisputed evidence supports the conclusion that this would have happened: PBM pursued these opportunities to the exclusion of the Deshum successor, HDM. (Pl's Response, p. 79 (admitting that the "specific and identifiable opportunities were pursued by PBM" to the exclusion of HDM).) There is an absence of evidence in the record to support Plaintiff's assumption that PBM would not have "usurped" the opportunities from Deshum in the same way it "usurped" the opportunities from HDM. *See Shadburn*, 243 Ga. App. at 557, 533 S.E.2d at 767 (to survive summary judgment, "an inference cannot be based upon evidence which is too uncertain or speculative or which raises merely a conjecture or possibility").

Furthermore, Plaintiff "must show that, but for the error, the outcome would have been different; any lesser requirement would invite speculation and conjecture." *See Houston v. Surrett*, 222 Ga. App. 207, 209, 474 S.E.2d 39, 41 (1996) (holding that plaintiff's case "fails because he cannot show a causal link between his attorney's failure to raise the venue defense and any injury suffered" by plaintiff) (emphasis in original).

In this matter, there is no evidence in the record that an ongoing (*i.e.*, non-dissolved) Deshum "would have" purchased Breas and B&D. On the contrary, HDM—the company that

[12] Even if PBM did consent to this, the record does not support Lalonde's speculation that an outside investor would fund a company in which the majority owner was suing the minority owner for fraud. The Court cannot consider speculation on summary judgment. *See Shadburn v. Whitlow*, 243 Ga. App. 555, 557, 533 S.E.2d 765, 767 (2000).

[13] The Board would have to approve such funding and could not do so without PBM, as PBM's principals (Manning and Stalfort) controlled the Board. (See Operating Agreement, Sections 2.10, 6.01, 6.02.)

Plaintiff holds out as the equivalent of a non-dissolved Deshum— did not pursue those opportunities.

Moreover, Plaintiff has not shown that Paul Manning or PBM "would have" agreed to use Deshum to acquire Breas and B&D had Deshum not dissolved. Indeed, given the poor working relationship between Manning and Plaintiff, all evidence points to the contrary. (PBM Depo., p. 161:23 – p. 162:22; *Lalonde's Verified Petition for Dissolution* (MGL_034500-034607), at ¶¶ 1, 51.)

2. **No Evidence That Lalonde Would be in a Better Position**

As a separate basis showing lack of causation, there is no evidence that Plaintiff could have obtained a better deal from PBM than the one he signed or that no deal with PBM would have made him better off. "In cases involving an alleged unfavorable transaction, a plaintiff must show that he would have obtained a more favorable result in the underlying transaction but for the professional's negligence. The plaintiff may prove that he would have obtained a more favorable result in one of two ways: (1) by proving that he would have been able to obtain a better deal in the underlying transaction—the 'better deal' scenario; or (2) that he would have been better off by walking away from the deal—the 'no deal' scenario." *Gibbons v. Ludlow*, 2013 CO 49, ¶ 15, 304 P.3d 239, 3.[14] Plaintiff cannot satisfy either test.

a. **No evidence that Lalonde would have obtained a better deal**

Plaintiff has the burden of providing evidence that PBM would have agreed to terms more favorable to him than those in the final Operating Agreement. Plaintiff cannot meet this burden to show a *genuine* issue of fact exists as to whether PBM would have agreed that the Agreement contain the requirement that Plaintiff's consent as a Unit holder was needed for

[14] The Court finds this description of causation as consistent with the same standard in legal malpractice cases in Georgia. *See Szurovy v. Olderman*, 243 Ga. App. 449, 452-53, 530 S.E.2d 783, 786 (2000).

dissolution. Indeed, PBM's representative testified that the Operating Agreement reflected the terms that Plaintiff and PBM agreed to, including the terms regarding dissolution. (PBM Depo., p. 152:2-11; p. 153:10-17.) Plaintiff failed to meet his burden to show that PBM would have agreed to more favorable dissolution terms. (PBM Depo., p. 152:12 – p. 153:6 (this issue is, at most, a matter of pure speculation).) The claim therefore fails as a matter of law.[15] *See Mosera*, 306 Ga. App. at 232, 701 S.E.2d at 869 (attorneys were not the but for cause of plaintiff's damages because "this was the best deal [the attorneys] could obtain for him ... there is no evidence that defendants [in the underlying case] would have agreed to terms more favorable for [the plaintiff]"); *Szurovy*, 243 Ga. App. at 452-53, 530 S.E.2d at 786 ("Because [plaintiff] failed to show that [1] she could have negotiated a better agreement or [2] that she would have obtained better results in a trial, she has failed to establish damages and proximate cause. As a matter of law, her claims of damage are speculative."); *see also Pierre v. Steinbach*, 378 S.W.3d 529, 535 (Tex. App. 2012) (causation was not shown, as it was only speculative that buyer in underlying transaction would have accepted terms more favorable to plaintiff).

b. No evidence that "No Deal" with PBM would have put Lalonde in a better position

Because Plaintiff cannot show that he could have obtained a better deal from PBM, he must show that no deal with PBM would have put him in a better position than he is in today. *See generally Szurovy*, 243 Ga. App. at 452-53, 530 S.E.2d at 786. His current position is that he received nearly $1,000,000 in direct payments over the course of 2.5 years as a result of the deal

[15] Lalonde's reliance on hearsay and inferences that contradict undisputed testimony do not create a *genuine* issue of fact. *See Shaifuddin v. Drug Emporium*, 230 Ga. App. 679, 683, 498 S.E.2d 748, 752 (1998) (a party opposing a motion for summary judgment is entitled only to the benefit of reasonable inferences; unreasonable inferences have no probative value).

he entered into with PBM.[16] Plaintiff failed to meet his burden to show that not entering into the PBM deal would have made him better off than that. Absent non-speculative evidence that he would have been better off travelling down a non-PBM path, his claim fails as a matter of law. *See Mosera*, 306 Ga. App. at 232, 701 S.E.2d at 869 ("[T]his was the best deal appellees could obtain for him."); *Szurovy v. Olderman*, 243 Ga. App. 449, 452-53, 530 S.E.2d 783, 786 (2000); *Anderson v. Jones*, 323 Ga. App. 311, 317, 745 S.E.2d 787, 793 (2013) ("A legal malpractice claim cannot be based upon speculation and conjecture.").[17]

3. **Lalonde's Settlement Severs Causation**

Plaintiff's choice to settle and dismiss his *Verified Petition for Dissolution* also precludes causation. *See Jim Tidwell Ford, Inc. v. Bashuk*, 335 Ga. App. 668, 670-71, 782 S.E.2d 721, 724 (2016) (holding that "[i]n a case where a plaintiff's pending claims remain viable despite the attorney's alleged negligence, the plaintiff severs proximate causation by settling the case.") (*citing Duncan v. Klein*, 313 Ga. App. 15, 20, 720 S.E.2d 341, 346 (2011). *See also Rogers*, 174 Ga. App. at 457-58, 330 S.E.2d at 396 (clients failed to establish any loss caused by attorney's alleged negligence because it was plaintiff's own conduct in settling the action that caused plaintiff's injury).

In order to sever causation, the Defendants need only show that "it appears at least possible" that "further litigation 'may lead to a favorable result.'" *Bashuk*, 335 Ga. App. at 670-

[16] (1) at least $300,000 in salary as a Deshum employee (Ex. O to Defendants' Supplemental Notice of Filing, Pl's Response to Ds' Second Request for Admissions Nos. 1 and 2 (admitted)); (2) $350.000 in cash immediately upon executing the Operating Agreement (*id.* at Request No. 3 (admitted); (3) $18,556.58 as reimbursement for certain expenses incurred prior to execution of the Operating Agreement (*id.* at Request No. 4 (admitted)); and (4) $230,000 (of the $310,000) settlement with PBM, et al. (*id.* at Request No. 6 (admitted).)

[17] To the extent that Lalonde claims that he is entitled to 33% of HDM and a share of the profits from the sale of the Z-1 device, "derivations of same, and associated products/parts," this claim fails as a matter of law because HDM was never profitable (PBM Depo., p. 41:9-10; p. 84:10-15; 86:22 – p. 87:11; p. 88:4-12; p. 89:4-8; p. 89:25 – p. 90:3; p. 139:5-7) and there is no admissible evidence that "derivations of [the Z1] and associated products/parts" generated profits.

72, 782 S.E.2d at 724-25. The Court finds, and Plaintiff's expert agrees, that it was at least possible that a court could have agreed that the Board violated Sections 11.02 and 6.03(f) by failing to return to Plaintiff his Unreturned Capital Contribution before disposing of Company Property via in-kind distributions to HDM. (*See generally* Jones Depo., p. 81:4-21.) A successful challenge of this process would have prevented that distribution from occurring without Plaintiff receiving his entire Unreturned Capital Contribution. Plaintiff voluntarily abandoned this challenge and decided to accept a substantial settlement and move on, thereby severing causation as to the loss of his capital account in Deshum of $2,136,126 and all consequences associated with the distributions to HDM. Thus, his claim fails as a matter of law. *See id; see also Mauldin v. Weinstock*, 201 Ga. App. 514, 518-19, 411 S.E.2d 370, 373-74 (1991) (plaintiff severed causation by electing not to pursue independent judicial action to resolve the issue of an allegedly untimely "appeal for investigation" caused by his former attorney; neither the timeliness of the "appeal for investigation" nor the merits of the client's claims were ever resolved; in effect, the client "basically adopted, without contest, the adversarial opinion ... that the notice filed in his behalf by [his attorney] was untimely"); *see also Abeln v. Eidelman*, 118 A.3d 452 (Pa. Super. Ct. 2015).[18]

Likewise, Plaintiff was paid for his interest in Deshum. If he believed he was not getting the value of Deshum's corporate opportunities, he had the litigation to pursue that claim. He could have, but did not utilize the process that was available, choosing instead to settle.

[18] Lalonde's reliance on the non-binding district court case of *Polsinelli PC v. Genesis Biosciences, Inc.*, No. 1:14-CV-00873-ELR, 2016 U.S. Dist. LEXIS 178441, at *17 (N.D. Ga. Jan. 26, 2016) does not change this result. Unlike the plaintiff in *Polsinelli*, "if [Lalonde] *had* prevailed at trial [in his Delaware *Verified Petition for Dissolution*], it would have been indisputable that the [alleged] malpractice did not cause" the loss of his capital account of $2,136,136. *See id.*

B. Waiver

In addition, Plaintiff waived any claim to challenge his rights under the Operating Agreement. His conduct of settling and dismissing his *Verified Petition for Dissolution*, regardless of his motive for doing so, prevented the Delaware court from judicially establishing that the Operating Agreement protected the value of his shares and operates to waive his ability to argue otherwise here. In *Mauldin*, 201 Ga. App. at 520, 411 S.E.2d at 374, for example, the Court of Appeals found that the client waived his right to sue his attorney because the client's conduct in refusing to authorize litigation, regardless of the motive for doing so, prevented the issues from being judicially established. *Id.* at 519-20, 411 S.E.2d at 374. The Court of Appeals did not resolve the validity of the underlying issue, but merely examined the facts to conclude that the issue was genuine. The court concluded that the client waived his ability to pursue a subsequent assertion of the right or any claim based thereon, including a claim for legal malpractice; once the right was waived, the waiver could not be withdrawn even if subsequent events proved the right waived to have been more valuable than anticipated. *Id.* at 520, 411 S.E.2d at 374.

Although *Mauldin* is factually distinguishable, the distinctions are immaterial and the same legal principles apply here. Plaintiff filed a *Verified Petition* in the Delaware Chancery court to dissolve Deshum and have the court appoint a receiver. He had a valid claim that, during this process, the Operating Agreement protected the value of his shares, which was what he said he wanted the Defendants to protect. (Lalonde Depo., p. 174:23-25.) It was certainly possible for the Delaware court to hold that Sections 11.02 and 6.03(f) of the Operating Agreement protected the value of Plaintiff's shares. At a minimum, the issue is genuine – this is

enough to render the claim viable for purposes of waiver. *Mauldin*, 201 Ga App. at 519, 411 S.E.2d at 374.

The Court "need not resolve the legitimacy" of the issue to determine as a matter of law that Plaintiff waived his right to pursue any claim (including a legal malpractice claim) based on the dissolution process by abandoning his pending, viable action in Delaware Chancery Court. *Id.* Plaintiff's own conduct in settling[19] and dismissing that action, regardless of his motive for doing so, prevented the Court from judicially establishing that the Operating Agreement protected the value of his shares and all associated rights. *See id.* Plaintiff's waiver of these claims bars his action against the Defendants.[20]

C. **Attorney's Fees**

Finally, Plaintiff abandoned his claim for attorney's fees under O.C.G.A. § 13-6-11 via a verified interrogatory response. (Ex. Q to Defendants' Notice of Filing, Pl's Response to Ds' Rog. No. 6.) To the extent that Plaintiff has tried to revive that claim, it fails with the malpractice claim. *See generally Connell v. Houser*, 189 Ga. App. 158, 159, 375 S.E.2d 136, 139 (1988).

[19] Lalonde accepted $140,000 as specific "consideration for the sale of his membership interest in Deshum," thereby waiving any opportunity to later pursue his membership interest in Deshum *and* any "opportunities" that might have come with it. (Ex. I to Def's Notice of Filing, Settlement Agreement, (MGL_34966) p. 1, ¶ 1.)

[20] Lalonde's argument that Defendants abandoned him is inconsistent with the undisputed evidence. As in *Mauldin*, Lalonde fired his attorneys. He explicitly ordered them to "please stop work on all matters." (John Gross Depo., Ex. 53 thereto, Email from Lalonde to Trotter (May 17, 2013) (MGL_033784).)

CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Defendant's Motion for Summary Judgment and DENIES the Plaintiff's Motion for Partial Summary Judgment.

SO ORDERED, this 18 day of APRIL, 2018.

Honorable Craig R. Schwall, Sr.
Judge, Superior Court Of Fulton County

DISTRIBUTION LIST

The above and foregoing ORDER was served this 18th day of April, 2018 on the following via eFileGA:

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