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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2022-000352

Medical University of South Carolina and University Medical Associates of the Medical University of South Carolina,..... Appellants,

v.

HCA Healthcare, Inc.; Trident Medical Center, LLC; Terry A. Day; Betsy Kay Davis; Joshua D. Hornig; Eric J. Lentsch; David M. Neskey; and Anand K. Sharma,..... Defendants,

Of Which HCA Healthcare, Inc. and Trident Medical Center, LLC, are the ..... Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

PART I (previously submitted with Appendix to Petition for Writ of Supersedeas)

Orders, Judgments, Decrees, or Decisions

Pleadings

Transcripts

Other Materials or Documents

PART II (new documents being submitted with Appendix to Petition for Certiorari)

Orders, Judgments, Decrees, or Decisions

Other Materials or Documents

The South Carolina Court of Appeals

Medical University of South Carolina and University Medical Associates of the Medical University of South Carolina, Appellants,

v.

HCA Healthcare, Inc., Trident Medical Center, LLC, Terry A. Day, Betsy Kay Davis, Joshua D. Hornig, Eric J. Lentsch, David M. Neskey, and Arand K. Sharma, Defendants,

Of Which HCA Healthcare, Inc. and Trident Medical Center, LLC are the Respondents.

Appellate Case No. 2022-000352

ORDER

After careful consideration, Appellants' petition for supersedeas is denied. Appellants' request for a hearing on their petition is denied.

AJ

FOR THE COURT

Columbia, South Carolina

cc:
Robert L. Widener, Esquire
Celeste Tiller Jones, Esquire
James Keith Gilliam, Esquire
James Lynn Werner, Esquire
David Beam Summer, Jr., Esquire

FILED
Aug 11 2022

Katon Edwards Dawson, Jr., Esquire
Ashley Wheeling Johnson, Esquire

The South Carolina Court of Appeals

Medical University of South Carolina and University Medical Associates of the Medical University of South Carolina, Appellants,

v.

HCA Healthcare, Inc., Trident Medical Center, LLC, Terry A. Day, Betsy Kay Davis, Joshua D. Hornig, Eric J. Lentsch, David M. Neskey, and Arand K. Sharma, Defendants,

Of Which HCA Healthcare, Inc. and Trident Medical Center, LLC are the Respondents.

Appellate Case No. 2022-000352

ORDER

Appellants seek rehearing of this court's August 11, 2022 order denying their petition for supersedeas. After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

J.

J.

J.

Columbia, South Carolina

FILED
Sep 13 2022

cc:
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Jul 22 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2022-000352
Case No. 2021-CP-10-05289

Medical University of South Carolina and University Medical Associates of the Medical University of South Carolina,..... Appellants,

v.

HCA Healthcare, Inc.; Trident Medical Center, LLC; Terry A. Day; Betsy Kay Davis; Joshua D. Hornig; Eric J. Lentsch; David M. Neskey; and Anand K. Sharma,..... Defendants,

Of Which HCA Healthcare, Inc. and Trident Medical Center, LLC, are the ..... Respondents.

PETITION FOR WRIT OF SUPERSEDEAS

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Pursuant to Rules 240(a) and 241(c) of the South Carolina Appellate Court Rules, the Medical University of South Carolina ("MUSC") and the University Medical Associates of the Medical University of South Carolina ("UMA") (collectively "Moving Parties") petition this Court for a writ: (1) superseding the circuit court orders denying injunctive relief to the Moving Parties and (2) imposing a temporary injunction while the Moving Parties' appeal is pending.

Introduction

Trident Medical Center, LLC ("Trident") and HCA Healthcare, Inc. ("HCA") (collectively "Hospital Defendants") came into possession of MUSC's Property through employee misappropriation by the Individual Defendants (defined *infra*), and they refuse to return it. **(R. 144-47, R. 160-63)**. In this petition, MUSC asks this Court to require the Hospital Defendants to return the Property and to refrain from using it while this appeal is pending.

Terry Day, Betsy Davis, Joshua Hornig, Eric Lentsch, David Neskey, and Anand Sharma (collectively "Individual Defendants") were long-term employees of MUSC, providing sophisticated medical care to patients as part of MUSC's head and neck cancer practice. **(R. 142, R. 158)**. While employed by MUSC and while members in UMA, the Individual Defendants misappropriated MUSC's Property and disseminated it to their future employer, the Hospital Defendants. **(R. 144-47, R. 160-63, R. 468-90)**. MUSC's misappropriated Property ("Property") consists of the following:

1. Physician preference cards,
2. Instrument lists,
3. Financial information showing the amount of revenue generated by four of the Individual Defendants during their employment with MUSC,
4. Financial information showing the salaries four of the Individual Defendants received while employed by MUSC, and

5. Case logs for Individual Defendant Terry Day, and salaries for MUSC's residents and signed contracts for incoming fellows in the head and neck cancer program.

(*Id.*).

Shortly after MUSC commenced this lawsuit, the Individual Defendants agreed to settle with the Moving Parties. As part of that settlement, the Individual Defendants agreed to pay $1.7 Million[1] to the Moving Parties, to ***destroy*** the Property in their possession, and to ***refrain from using the Property*** in the future. **(R. 280-81, R. 293-94, R. 305-06, R. 317-18, R. 339-30, R. 341-42)**. The Hospital Defendants entered into no such agreement. Instead, the Hospital Defendants defiantly insist on keeping the Property and using it to unlawfully compete with MUSC's long-running and nationally renowned head and neck cancer practice. **(R. 125, R. 272)**.

The choice before the Court is simple: will it allow the Hospital Defendants to retain and continue to use Property that came to it through the Individual Defendants' misappropriation, or will it require the Hospital Defendants to return it? The Court's decision has significant public policy implications, as the Court will either decide to reward the Individual Defendants' brazen conduct and those who receive purloined materials, or the Court will decide to protect those who spend the time, money, and energy to innovate and develop the materials in the first place.

MUSC submits the choice is obvious and asks this Court to grant its petition for writ of supersedeas, which will return the parties to the status quo (that point in time before the Individual Defendants' misappropriation) and preserve the competitive advantage MUSC enjoys over the Hospital Defendants as the first-in-time creator and innovator of the Property.

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[1] The Individual Defendants agreed to pay the following sums: Defendant Lentsch agreed to pay $317,817.00, Defendant Davis agreed to pay $201,150.00, Defendant Day agreed to pay $201,150.00, Defendant Sharma agreed to pay $201,150.00, Defendant Hornig agreed to pay $447,866.00, and Defendant Neskey agreed to pay $330,867.00. **(R. 280, R. 293, R. 305, R. 317, R. 329, R. 341)**.

Factual/Procedural Background

The Moving Parties are MUSC and UMA. MUSC is a State Agency created by the General Assembly of South Carolina for the public service missions of providing comprehensive health care to South Carolina's citizens while educating and training future healthcare professionals. S.C. Code § 59-123-10, *et seq.* **(R. 10-11, R. 143, R. 159)**. UMA is a South Carolina 501(c)(3) corporation that promotes and supports the missions of MUSC by *inter alia* providing patient care in MUSC's clinics through its physician members, who are employed by MUSC as medical school faculty. **(R. 10-12)**.

The Hospital Defendants are private, for-profit entities. **(R. 143, R. 159)**. Trident is a for-profit hospital, owned by wholly owned subsidiaries of HCA. **(R. 11, R. 122, R. 143, R. 159)**. HCA is a for-profit operator of healthcare facilities. ***(Id.)***. HCA is publicly traded on the New York Stock Exchange and is obligated to earn profits for its shareholders. **(R. 143, R. 159)**.

In the late 1990s, MUSC started its head and neck cancer practice, more formally known as the Head and Neck Oncology Division of the Otolaryngology Department. **(R. 141, R. 158)**. MUSC's head and neck cancer team consists of numerous clinicians from different healthcare disciplines. **(R. 142, R. 158)**. MUSC's head and neck cancer team performs multi-phased, complicated procedures, often lasting up to ten to fifteen hours. **(R. 143, R. 159, R. 171)**. Through the investment of significant amounts of time and resources, MUSC built one of the largest programs in the country devoted to the care of the head and neck cancer patient. **(R. 141, R. 158)**. Of particular note, MUSC established a head and neck fellowship program, which attained accreditation from the prestigious American Head and Neck Society.[2] **(R. 150, R. 164)**.

[2] There are fewer than fifty such accredited fellowship programs in the country. **(R. 150, R. 164)**.

Historically, the Hospital Defendants have not maintained a similar head and neck cancer practice at Trident Medical Center in North Charleston. **(R. 143, R. 159, R. 172, R. 177)**. Thus, this case pits the competing hospital systems on opposite ends of the spectrum as it relates to their head and neck cancer practices in the Charleston area. **(R. 105-06)**. On the one end, there is MUSC's more than two-decade old, nationally renowned practice. (***Id.***). On the other, there is the new, upstart practice of the Hospital Defendants in North Charleston. (***Id.***).

One of the drivers of the success of MUSC's head and neck cancer practice has been the development of the Property, in essence a playbook, that has enabled MUSC's head and neck cancer practice to operate efficiently and effectively. **(R. 106-07, R. 144-47, R. 160-63, R. 171-72)**. The Property was not developed by any one person and it was not developed overnight; instead, it was developed over the course of the last two decades by various members of MUSC's head and neck cancer team. **(R. 106-07, R. 144, R. 160, R. 171-72)**.

The Individual Defendants are at the center of the dispute between the Moving Parties and the Hospital Defendants. The Individual Defendants are highly trained practitioners who specialize in treating head and neck cancer. **(R. 105, R. 142, R. 158)**. The Individual Defendants were long-term employees and faculty members at MUSC. **(R. 142, R. 158)**. The Individual Defendants decided to leave their employment with MUSC and commence work for the Hospital Defendants' upstart head and neck cancer practice at Trident Regional Medical Center in North Charleston. **(R. 105, R. 142-43, R. 159)**.

While still employed by MUSC and while still members of UMA, the Individual Defendants coordinated with each other and their new employer, the Hospital Defendants, for almost a year to effect a wholesale departure of MUSC's head and neck cancer team to Trident effective December 1, 2021. **(R. 104-05, R. 142, R. 144-47, R. 159, R. 160-63)**. As part of the

wholesale departure, the Individual Defendants misappropriated the Property and disseminated it to the Hospital Defendants. (**R. 104-05, R. 144-47, R. 160-63, R. 468-90**). Prior to the unlawful actions of the Individual Defendants, the Hospital Defendants never had any right to access the Property. (**R. 108-09, R. 144-47, R. 160-63**).

The misappropriation occurred even though MUSC took reasonable steps to protect the Property. (**R. 144-45, R. 161, 466**). The Property is not available in the public domain, access is limited only to those individuals who have a legitimate need to access it, policies and procedures safeguard these materials from disclosure to unauthorized recipients, and a two-factor authentication system protects this information from remote access. (***Id.***). In addition, the Individual Defendants were contractually obligated to preserve and protect MUSC's confidential information, which includes the Property. (**R. 144-45, R. 161, R. 359, R. 405, R. 466**).

MUSC filed this lawsuit after learning of the misappropriation of the Property. (**R. 168-69**). As part of this lawsuit, MUSC moved for a temporary injunction, requesting, among other things, the return of the Property from the Individual Defendants and the Hospital Defendants. (**R. 132-39**). The Individual Defendants agreed to settle with MUSC shortly after the filing of this lawsuit. (**R. 280-353**). As part of this settlement, the Individual Defendants agreed to return the Property and to refrain from using it in the future. (**R. 280-81, R. 293-94, R. 305-06, R. 317-18, R. 339-30, R. 341-42**). The Hospital Defendants, however, refused (and continue to refuse) to return the Property. The Hospital Defendants have boldly claimed that the Property in their possession is "unrestricted," and they have asserted that the Individual Defendants can use the Property while working for them, even though such use would be in direct violation of the

settlement agreements between the Moving Parties and the Individual Defendants. **(R. 272)**.[3]

The only plausible reason the Hospital Defendants could have for refusing to return the Property is that they intend to use it for their own economic gain in unlawful competition with MUSC, and they believe it would jeopardize or delay the return on their investment to take the time to develop these materials from scratch. The Hospital Defendants' counsel admitted as much during the supersedeas hearing before the circuit court, where counsel stated that if the court granted supersedeas relief to MUSC, "Trident now will have its hands tied." **(R. 125)**. Clearly, the Hospital Defendants are relying on the Property to build and develop a competing head and neck cancer program.

Despite the facts of this case, the circuit court unjustifiably denied MUSC's request for injunctive relief. **(R. 1)**. The circuit court never explained the rationale for its decision, so it is difficult to say why the circuit court refused to order the return of stolen Property to its rightful owner.[4] ***(Id.)***. Instead, all the parties received was a series of Form 4 Orders denying the motion for temporary injunction, denying the Rule 59(e) motion, and denying the petition for supersedeas.[5] **(R. 1-9)**. MUSC timely filed a notice of appeal on March 21, 2022, appealing the circuit court's denial of its motion for injunctive relief. **(R. 40-41)**. That appeal is currently pending before this Court.

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[3] The Hospital Defendants have asserted, "the [Individual Defendants] had merely agreed to destroy certain documents and records but never agreed they could not or would not use any knowledge or information ... reflected in the various documents and records at issue to carry on their practice of medicine at Trident." **(R. 272)**.

[4] Rule 52(a), SCRCP requires the circuit court to set forth findings of fact and conclusions of law in support of its decision to grant or deny an injunction. Even when MUSC brought this to the attention of the circuit court in its Rule 59(e) motion, the circuit court still refused to set forth any basis for its decision. **(R. 247-48)**.

[5] The circuit court issued a Form 4 Order denying the Moving Parties' motion for temporary injunction on December 15, 2021. **(R. 1)**. The circuit court issued a Form 4 Order denying the Moving Parties' motion to alter or amend on February 18, 2022. **(R. 4)**. The circuit issued a Form 4 Order denying the Moving Parties petition for supersedeas relief on June 29, 2022. **(R. 7)**.

MUSC now petitions this Court to order the Hospital Defendants to return the Property and to refrain from using it while this appeal is pending. This relief would last only during the pendency of the appeal. If this relief is not granted, the Hospital Defendants will continue to erode the competitive advantage MUSC has gained through lawful means.

Legal Standard

Upon serving a notice of appeal, "any party may move for an order imposing a supersedeas of matters decided in the order." Rule 241(c)(1), SCACR. An application for supersedeas should first be made to the lower court that entered the order, except in extraordinary circumstances. Rule 241(d)(1), SCACR. When determining whether to issue an order under Rule 241, the court "should consider whether such an order is necessary . . . to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. Supersedeas relief under Rule 241(c) may include issuing a temporary injunction during the pendency of an appeal. *See, e.g., Sea Pines Ass'n for Protection of Wildlife, Inc. v. S.C. Dep't of Natural Res. & Comty. Serv. Assoc., Inc.*, 345 S.C. 594, 598 (2001) (referencing a circumstance where the appellate court properly issued an injunction via writ of supersedeas after the trial court denied appellant's motion for a temporary injunction).

The purpose of issuing an injunction pending appeal is "to preserve the status quo pending the determination of the appeal and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him." *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Svcs. Info. Tech. Mgmt. Office*, No. 98-CP-40-3945, 2000 WL 35456881, at *9 (S.C. Comm. Pl. 2000) (citing *Graham v. Graham*, 301 S.C. 128, 390 S.E.2d 468 (Ct. App. 1990)). Courts consider the following when determining whether to grant an injunction during the pendency of appeal: (1) the potential for irreparable harm to the appellant if the injunction is not granted; (2) the likelihood

of success on the merits; (3) the prejudice (if any) that could be sustained by the respondent if the injunction is granted; and (4) the public interest. *Unisys*, 2000 WL 35456881, at *9.

Analysis

I. The Hospital Defendants are in unlawful possession of the Property and have no basis in law or equity to retain or use it.

The analysis should begin and end with this uncontroverted fact: the Hospital Defendants are in possession of Property that belongs to MUSC. There is no proposition of law or equity that would allow the Hospital Defendants to retain and use misappropriated materials of another in any context. *See* John Adams, 6 *The Works of John Adams, Second President of the United States* 9 (Charles Francis Adams, ed. 1851) ("The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. If 'Thou shalt not covet' and 'Thou shalt not steal' were not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free."). Rather than address this issue head-on, the Hospital Defendants have resorted to distraction and misdirection to attempt to explain why their possession of the Property is not a problem.

For example, the Hospital Defendants have made much of the fact that the Individual Defendants helped develop some of the Property (specifically, the physician preference cards and instrument lists) "based on their know-how." **(R. 83, R. 222)**. Presumably, the implication is that the Individual Defendants have some ownership or other rights to the Property because they helped develop some of it. What the Hospital Defendants ignore is that these tangible materials were developed within the scope of the Individual Defendants' employment with MUSC. South Carolina courts consistently find that materials developed by an employee (even using his or her know-how) within the scope of employment belong to the employer. *See, e.g., Milliken & Co. v.*

Morin, 399 S.C. 23, 35, 731 S.E.2d 288, 294 (2012) ("An employer therefore has a legitimate interest in protecting inventions that are the fruits of its employees' efforts while working for the company. Indeed, such provisions are simply a recognition of the fact of business life that employees sometimes carry with them to new employers inventions or ideas so related to work done for a former employer that in equity and good conscience the fruits of that work should belong to the former employer.") (internal citations and quotations omitted).

The Hospital Defendants argue that *Milliken* is distinguishable because it involved "an assignment of intellectual rights in ... employment contracts," which is not at issue in this case because no "such contractual right" existed between MUSC and the Individual Defendants. **(R. 125-26)**. This assertion is patently wrong. MUSC's Code of Conduct, which is part of MUSC's Faculty Handbook and incorporated into the employment contract with the Individual Defendants, explicitly prohibits employees from disclosing MUSC's confidential information (which includes the Property) or using such information for the employee's personal benefit. **(R. 359, R. 405, R. 466)**. Thus, the Individual Defendants maintained a contractual obligation not to disclose the Property to the Hospital Defendants, and the finding in *Milliken* is directly on point.

However, even if there were no contract between MUSC and the Individual Defendants with regard to the Property, the law prohibits the Individual Defendants from misappropriating the Property, and the law prohibits the Hospital Defendants from receiving and using the misappropriated Property. The South Carolina Trade Secrets Act, S.C. Code § 39-8-10, *et seq.* ("SCTSA"), and the common law duty of loyalty owed by an employee to his employer prohibit such conduct. *See Colgate-Palmolive Co. v. Carter Prod., Inc.*, 230 F.2d 855, 864 (4th Cir. 1956) ("One may not escape liability for appropriating the business secrets of another by employing one who has been entrusted with the secrets and permitting him to make use of them"); *Nucor Corp.*

v. Bell, 482 F.Supp.2d 714, 723 n.5 (D.S.C. 2007) ("[A] company that hires its competitor's employees and then induces them to divulge their former employer's trade secrets, or aids or assists them to violate their trust, is liable to the former employer"); *Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 337, 191 S.E.2d 761, 769 (1972) (per curiam) (When a new employer obtains confidential and proprietary information from a new employee belonging to the former employer or uses information or gains an advantage deriving from the employee's breach of duties of loyalty to his former employer, the new employer is "jointly and severally" liable with the employee for any profits it received from the employee's wrongful conduct as it relates to his former employer); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 606–07, 518 S.E.2d 591, 595 (1999) ("Fairness dictates that an employee not be permitted to exploit the trust of his employer so as to obtain an unfair advantage in competing with the employer in a matter concerning the latter's business....").

The Hospital Defendants have also asserted they were not on notice that the Property received from the Individual Defendants was confidential and proprietary because it was not specifically marked as such. (**R. 85, R. 223**). What the Hospital Defendants ignore is that the law does not require confidential and proprietary property to be marked as such. *See* S.C. Code § 39-8-20(5)(a) (in order for a document or piece of information to have trade secret protection under the SCTSA, a party is only required to engage in reasonable efforts to maintain the secrecy of the documents or information). Moreover, the Hospital Defendants gloss over the fact that upon being informed that the Property was confidential and proprietary, the Hospital Defendants still refused to return it.

The Hospital Defendants have also boldly claimed that when they received the Property from the Individual Defendants, they were unaware that the Individual Defendants took and

disseminated the Property without authorization from MUSC. **(R. 85, R. 223-24)**. Even if this absurd assertion were true, MUSC subsequently put the Hospital Defendants on notice that they did not authorize the taking and dissemination of the Property, and yet the Hospital Defendants still refuse to return it.

As a final Hail Mary, the Hospital Defendants argue that in seeking injunctive relief, MUSC is circuitously attempting to prevent the Individual Defendants from using their expertise to perform surgeries as employees of the Hospital Defendants. **(R. 125, R. 274)**. To be clear, MUSC is requesting that the Hospital Defendants return and refrain from using the Property that the Individual Defendants misappropriated, which is exactly what the Individual Defendants already agreed to in their settlement agreements. MUSC is not attempting to do anything else. MUSC has made this clear time and time again. During the hearing on the motion for temporary injunction, counsel for MUSC stated, "[W]hat they [the Individual Defendants] know between their head, in their head, they can use. They can't use our proprietary information." **(R. 89)**. During the supersedeas hearing, counsel for MUSC repeated this sentiment, "Trident HCA is going to . . . say MUSC is just trying to keep these physicians from practicing medicine or MUSC is trying to keep these physicians from using what's in their head. To be clear, we are not and that's never been MUSC's aim. We're saying you have our materials and we want it back, that's all we're saying in this case". **(R. 111-12)**.

The Hospital Defendants have consistently and repeatedly shown, they are either unable or unwilling to engage in fair competition by investing the time and effort to work with their new employees to independently create their own materials. Instead, the Hospital Defendants accepted misappropriated Property from the Individual Defendants and refuse to return it despite having no

right to it. This Court should not allow the Hospital Defendants to continue possessing and using the Property while this appeal is pending.

II. A temporary injunction during the pendency of the appeal is necessary to preserve the status quo, to preserve the fruits of a meritorious appeal, and to prevent a contested issue from becoming moot.

"The only purpose of an injunction is to preserve the status quo to avoid possible irreparable injury to a party pending litigation." *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 454, 626 S.E.2d 34, 36-37 (Ct. App. 2005). "The status quo to be preserved by a preliminary injunction, however, is not the circumstances existing at the moment the lawsuit or injunction request was actually filed, but the 'last uncontested status between the parties which preceded the controversy.'" *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012) (quoting *Stemple v. Bd. of Ed. of Prince George's Cnty.*, 623 F.2d 893, 898 (4th Cir. 1980). "'To be sure, it is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions, but ... "'[s]uch an injunction restores, rather than disturbs, the status quo ante.'" *Aggaro*, 675 F.3d at 378 (quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004)).

Supersedeas relief involves the imposition of an injunction that lasts during the pendency of an appeal. *See* Rule 241(c)(4), SCACR ("If an order is issued pursuant to Rule 241(c)(1), the terms of that order continue in effect during the pendency of the appeal ...."). Supersedeas relief is thus equitable in nature. *See Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) ("The power of the court to grant an injunction is in equity."). The relevant consideration in deciding a petition for supersedeas is whether it is necessary to prevent a contested issue from becoming moot. Rule 241(c)(2), SCACR. Alternatively stated, the inquiry is whether the requested relief is necessary to preserve the fruits of a meritorious appeal where they might otherwise be lost. *Graham*, 301 at 130, 390 S.E.2d at 470. Equitable relief, which includes the

requested supersedeas relief, is "not bound by cast-iron rules" but instead "exists to do fairness and is flexible and adaptable to particular exigencies." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009).

Here, the status quo is unmistakable: MUSC is the rightful and sole owner of the Property, and the Hospital Defendants have no right to the Property. The Hospital Defendants never had access to, possession of, or any claim of right to the Property prior to the unlawful misappropriation by the Individual Defendants that precipitated the current lawsuit. Thus, allowing the Hospital Defendants to retain and use the Property during the pendency of the appeal upsets the status quo.

An order requiring the Hospital Defendants to return the Property and refrain from using it during the pendency of appeal is necessary to prevent the contested issue on appeal (*i.e.*, whether the Moving Parties are entitled to a temporary injunction pending a resolution on the merits) from becoming moot. The Hospital Defendants gain an unfair competitive advantage every day they continue to possess the Property—they gain the use of their competitor's playbook. MUSC's playbook—the Property—is a product of its experience, innovation, investment of time, and investment of resources over the last two decades. As more time passes with the Hospital Defendants possessing and using the Property, MUSC's competitive advantage continues to erode. Preserving what remains of MUSC's competitive advantage can only be achieved through an order protecting the Property during the pendency of this appeal.

III. MUSC meets the required elements for granting a temporary injunction during the pendency of the appeal.

Courts consider the following when determining whether to grant an injunction during the pendency of appeal: (1) the potential for irreparable harm to the appellant if the injunction is not granted, (2) the likelihood of success on the merits, (3) the prejudice (if any) that could be sustained

by the respondent if the injunction is granted, and (4) the public interest. *Unisys*, 2000 WL 35456881, at *9. MUSC succeeds on each of these considerations with regard to the Property.

First, MUSC will suffer irreparable harm if this Court does not enter the requested injunction. A litany of courts have found irreparable harm when a competitor is in possession of specific property belonging to another. *See Boone Ins. Agency, Inc. v. Lloyd*, No. 3:20-CV-02980-JMC, 2020 WL 5052956 (D.S.C. Aug. 27, 2020); *Indus. Packaging Supplies, Inc. v. Martin*, No. CA 6:12-713-HMH, 2012 WL 1067650 (D.S.C. Mar. 29, 2012); *Rockford Mfg., Ltd. v. Bennet*, 296 F.Supp.2d 681 (D.S.C. 2003); *Milliken*, 399 S.C. at 37, 731 S.E.2d at 295; *Lewallen Automation, LLC v. Lewallen*, 2014 WL 7925812 (S.C. Comm. Pl. 2014); *see also Vessel Med., Inc. v. Elliott*, C/A No. 6:15-cv-00330-MGL, 2015 WL 5437173, at *9 (D.S.C. Sept. 15, 2015) (finding that in cases involving the misappropriation or threatened misappropriation of trade secrets, courts generally presume that the harm from a wrong will be irreparable and "difficult to measure in monetary damages because once the secret is lost, it is indeed lost forever"). Courts have consistently shown disdain for this type of conduct and routinely issue injunctions to protect the former employer's confidential and proprietary information from exploitation by a new employer. *See, e.g., Indus. Packaging Supplies,* 2012 WL 1067650, at *7 (enjoining both the former employee and the new employer from using and/or selling any products based on former employer's trade secrets and confidential information, and ordering the return of the information to the former employer).

Second, MUSC has made a prima facie showing of success on the merits. The Court need examine the merits of the plaintiff's underlying claims "only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief." *Compton v. S.C. Dep't of Corrs.*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011); *see Peek*, 367 S.C. at 456,

626 S.E.2d at 37 ("The determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made."). "Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate [determination] of the case on the merits." *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1991). "Prima facie evidence is evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *LaCount v. Gen. Asbestos & Rubber Co.*, 184 S.C. 232, 192 S.E. 262, 266 (1937).

MUSC has made a prima facie showing of success on the merits on its cause of action under the SCTSA. Under the SCTSA, information may be a trade secret only if it "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." S.C. Code § 39–8–20(5)(a). "In order to decide whether something is a trade secret, one must consider the extent to which the information is known outside of his business and the ease or difficulty with which the information could be properly acquired or duplicated by others." *Wilson v. Gandis*, 430 S.C. 282, 315, 844 S.E.2d 631, 649 (2020).

MUSC satisfied the elements for a prima facie case for violation of the SCTSA through the affidavits submitted by Dr. Patrick Cawley (CEO of MUSC Health) and Dr. Raymond DuBois (former Dean of the College of Medicine at MUSC). **(R. 144-47, R. 160-63)**. The fight the Hospital Defendants have put up to try to retain and use the Property demonstrates the independent economic value it possesses and the difficulty associated with recreating it. If it were not valuable and if it were easy to recreate, the Hospital Defendants would have returned the Property long ago

and developed their own materials. The fact that they have not speaks volumes and demonstrates that the Property possesses the attributes necessary to constitute a trade secret—it derives independent economic value and it is difficult to replicate. In addition, as set forth above in Roman Numeral I, the Hospital Defendants are liable under the SCTSA for receiving and using the misappropriated Property. *See* S.C. Code § 39-8-30(C) (allowing a party to bring an action under the SCTSA it the party is "aggrieved by a misappropriation, wrongful disclosure, or wrongful use of his trade secrets").

MUSC has also made a prima facie showing that the Individual Defendants breached their duty of loyalty, for which the Hospital Defendants as the new employers of Individual Defendants are jointly and severally liable. To establish a claim for breach of duty of loyalty, a plaintiff must show the existence of a duty of loyalty, a breach of that duty by the defendant, and damages proximately resulting from the wrongful conduct of the defendant. *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335–36, 732 S.E.2d 166, 173 (2012). An employee owes a duty of loyalty to his employer to remain faithful to the employer's interests throughout the term of employment, to abide by his employer's instructions and policies, and to carry out those instructions and policies. *Nucor*, 482 F.Supp.2d at 727 n.9; *Foreign Academic & Cultural Exch. Servs., Inc. v. Tripon*, 394 S.C. 197, 204, 715 S.E.2d 331, 334 (2011); *Young v. McKelvey*, 286 S.C. 119, 122, 333 S.E.2d 566, 567 (1985); *Berry v. Goodyear Tire and Rubber Co.*, 270 S.C. 489, 491, 242 S.E.2d 551 (1978).

Here, the Individual Defendants breached their duties of loyalty by misappropriating valuable materials belonging to MUSC and providing them to MUSC's competitor and their new employer, the Hospital Defendants. By receiving the materials and using them, the Hospital Defendants are liable as well. In *Lowndes Prods., Inc. v. Brower*, the Supreme Court held that

when a new employer obtains confidential and proprietary information from a new employee belonging to the former employer or uses information or gains an advantage deriving from the employee's breach of duties of loyalty to his former employer, the new employer was "jointly and severally" liable with the employee for any profits it received from the employee's wrongful conduct as it relates to his former employer. 259 S.C. at 337-38, 191 S.E.2d at 769-70.

Third, the Hospital Defendants will not sustain prejudice as a result of being enjoined from continuing to retain and use the Property during the pendency of the appeal. Two federal district courts in South Carolina have found that the defendants will suffer no harm at all when an injunction is issued protecting the confidential and proprietary information of the former employer, because all the injunction does is prevent the defendants from using information that does not belong to them in the first place. *Rockford Mfg.*, 296 F.Supp.2d at 685; *Boone*, 2020 WL 5052956, at *6. Again, the Hospital Defendants have never argued the Property belongs to them. Instead, puzzlingly, counsel for the Hospital Defendants argued at the supersedeas hearing that enjoining the Hospital Defendants' use of the Property would "tie Trident's hands" and cause the "shutting down [of] the care of patients." **(R. 121, R. 125)**. But in the ***same hearing***, counsel for the Hospital Defendants also stated that "HCA has lots of hospitals around and they have lots of preexisting head and neck units like this one . . . The idea that they needed equipment lists in order to set up an HNO operation is ridiculous." **(R. 122-23)**. He also stated that the physicians have the requisite knowledge and "likely [don't] need those cards or those lists." **(R. 121)**. So, if the Individual Defendants already have the knowledge they need to treat patients and HCA already has this same

information from its other facilities, how would an injunction related to the Property tie the Hospital Defendants' hands or cause the shutting down of patient care?[6]

In contrast, MUSC would suffer significant prejudice if the Hospital Defendants are allowed to retain and use the Property during the pendency of the appeal. MUSC will have no adequate remedy at law to redress the Hospital Defendants' use of the Property at this crucial stage of developing their competing head and neck cancer program. Courts have recognized that the loss of a trade secret is "difficult to measure in monetary damages because '[a] trade secret lost is, of course, lost forever.'" *Nucor Corp. v. Bell*, No. 2:06-CV-02972-DCN, 2008 WL 9894350, at *20 (D.S.C. Mar. 14, 2008) (citing *FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 62 (2d Cir.1984)). Money alone cannot replace the loss of the Property. And if the Hospital Defendants are allowed to continue using the Property in these early, crucial stages of developing their head and neck cancer program, there is no way to make MUSC whole for the damage they would sustain. The only way to protect the Property during the pendency of the appeal and prevent a contested issue from becoming moot is to enjoin the Hospital Defendants from possessing and using the Property.

Fourth, the public interest favors issuing an injunction during the pendency of the appeal. Even if the Moving Parties prevail at trial and are awarded damages, the fact remains that the Hospital Defendants have been allowed to jump-the-line. They have received the unfair competitive advantage of having unlawful access to the Property. If courts refuse to enter injunctions under this particular set of facts, it could encourage competitors to receive misappropriated information, knowing that it may be more economically desirable to receive such

[6] The Hospital Defendant offer no evidence in support of the bald assertion that patient care would be impacted by the grant of the supersedeas relief. *See Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) (arguments from counsel are not evidence).

information and pay damages later. Such a policy might prompt competitors to accept misappropriated property, if it saves them time and money on research and development. But issuing an injunction during the pendency of the appeal acknowledges that the value of an employer's confidential and proprietary materials lies in its secrecy and exclusive use in the marketplace, and demonstrates that marketplace competitors cannot gain competitive advantage from misappropriated property while running out the clock on the litigation process.

IV. This Court is not bound by the circuit court's orders denying injunctive relief to the Moving Parties.

The three circuit court Form 4 orders are devoid of any factual findings or legal analysis (which is one basis for the Moving Parties' appeal). The closest indication of the court's reasoning for the denials came from statements made by the circuit court at the end of the hearing on the motion for supersedeas. The court stated that the instant case is distinguishable from "cases involving textile mills or protection of wildlife" because "the Court must view these healthcare cases through a slightly different lens for obvious public policy purposes." **(R. 130)**. The circuit court offered no further explanation.

While the Moving Parties are sensitive to the fact that access to safe, quality healthcare is of paramount importance to the public at large, it does not follow that longstanding South Carolina laws protecting employers from misappropriation of their confidential and proprietary materials and imposing duties of loyalty on employees do not apply to hospitals. Hospitals are often the largest employers in their communities, and must be afforded the same protections as other South Carolina employers in order to thrive and provide quality patient care. In the case of MUSC, such protection is necessary to enable it to fulfill its tri-partite mission of education, research, and providing clinical excellence the citizens of South Carolina. **(R. 143, R. 159)**. The Moving Parties do not intend to prevent the Hospital Defendants or the Individual Defendants from developing a

competing head and neck cancer program that potentially benefits patients and the community at large. The Moving Parties simply want the Hospital Defendants to compete on a fair playing field by returning and refraining from using the Property.

Notwithstanding the fact that the circuit court's statements are contrary to South Carolina law and the circuit court's orders violate Rule 52(a), SCRCP, the standard for this Court to issue a writ of supersedeas granting a temporary injunction does not require finding an error by the circuit court. Rather, the standard for issuing a writ of supersedeas is set forth in Rule 241(c), SCACR: the Court should consider whether such an order is necessary to prevent a contested issue from becoming moot. Rule 241 does not mandate a particular standard of review (*i.e.,* de novo or abuse of discretion), nor does Rule 241 require this Court to defer to the circuit court's findings and analysis (which is fortunate because the circuit court in this case did not issue any findings or analysis). This is because the petition for supersedeas under Rule 241 is not an appeal of the circuit court's findings (that appeal is pending separately); instead, it is a direct petition to this Court to protect the fruits of a meritorious appeal and prevent mooting an issue while the appeal is pending.

The circuit court's decision to deny supersedeas relief to the Moving Parties was unjustifiable and contrary to law. If this case remains in the posture in which the circuit court left it, a competitor of MUSC, the Hospital Defendants, will remain in possession of Property that does not belong to them and that they acquired through employee misappropriation. This Court should not allow this to continue.

Conclusion

Pursuant to the authority in Rule 241 of the South Carolina Appellate Court Rules, the Moving Parties submit this petition for writ of supersedeas to Chief Judge Bruce H. Williams, and ask that Chief Judge Williams grant the Moving Parties' petition and require the Hospital Defendants to return the Property to MUSC and order the Hospital Defendants to refrain from

using it while this appeal is pending. This relief would last only while the appeal is pending and would return the parties to status quo—that point in time prior to the misappropriation by the Individual Defendants.

Rule 241(d)(2) of the South Carolina Appellate Court Rules presents Chief Judge Williams with at least two options in deciding this petition. Chief Judge Williams could: (i) grant the requested relief to last during the pendency of the appeal without a full hearing from the entire appellate court, or (ii) grant the requested relief on a temporary basis and refer this matter to the full appellate court for a later hearing to determine whether the temporary relief should continue during the pendency of the appeal. *See* Rule 241(d)(2), SCACR.

The Moving Parties specifically and respectfully request a hearing before either Judge Williams or the full appellate court to decide this petition. This petition details very serious matters that are of significant importance to the Moving Parties.

[signature page to follow]

Respectfully submitted,

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ATTORNEYS FOR APPELLANTS MEDICAL UNIVERSITY OF SOUTH CAROLINA and the UNIVERSITY MEDICAL ASSOCIATES OF THE MEDICAL UNIVERSITY OF SOUTH CAROLINA

Columbia, South Carolina
July 22, 2022

RECEIVED
Jul 22 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2022-000352
Case No. 2021-CP-10-05289

Medical University of South Carolina and University Medical Associates of the Medical University of South Carolina,..... Appellants,

v.

HCA Healthcare, Inc.; Trident Medical Center, LLC; Terry A. Day; Betsy Kay Davis; Joshua D. Hornig; Eric J. Lentsch; David M. Neskey; and Anand K. Sharma,..... Defendants,

Of Which HCA Healthcare, Inc. and Trident Medical Center, LLC, are the ..... Respondents.

VERIFICATION OF APPELLANTS

Annette R. Drachman, General Counsel for the Medical University of South Carolina, and Andrea H. Brisbin, General Counsel for the University Medical Associates of the Medical University of South Carolina, who being duly sworn, do depose and state that they have reviewed Appellants' Petition for Writ of Supersedeas and that the matters set forth therein are true to the best of their knowledge. They specifically submit the verification in support of the factual assertions in the motion.

Annette R. Drachman, General Counsel for the Medical University of South Carolina

SWORN to and subscribed before
Me this 21st day of July, 2022.

NOTARY PUBLIC

My Commission Expires: August 13, 2023

Andrea H. Brisbin, General Counsel for the University Medical Associates of the Medical University of South Carolina

SWORN to and subscribed before
Me this 21st day of July, 2022.

NOTARY PUBLIC

My Commission Expires: August 13, 2023

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Of Which HCA Healthcare, Inc. and Trident Medical Center, LLC, are the ..... Respondents.

PROOF OF SERVICE

I, Amy C. Elkins, an employee of Burr & Forman LLP, hereby certify that a true and correct copy of the Petition for Writ of Supersedeas was served upon counsel for the Respondents in the above-captioned matter via email at the email addresses shown below, this 22nd day of July, 2022, as follows:

James Lynn Werner, Esquire
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s/Amy C. Elkins
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BURR.COM

July 22, 2022

Chief Judge H. Bruce Williams
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Medical University of South Carolina et al vs. HCA Healthcare, Inc. et al
Appellate Case Number 2022-00352
Civil Case Number 2021-CP-10-05289
Our File Number 2018000.0000026

Dear Judge Williams:

Pursuant to Rule 241(d)(2) of the South Carolina Appellate Court Rules, the Medical University of South Carolina and the University Medical Associates of the Medical University of South Carolina (collectively "Moving Parties") are directing this Petition for Writ of Supersedeas to you for resolution. *See* Rule 241(d)(2), SCACR (allowing a moving party to petition an individual judge to resolve a petition for writ of supersedeas). The Moving Parties have filed the following documents with the Court of Appeals on July 20, 2022:

- Petition for Writ of Supersedeas,
- Verification of the Moving Parties,
- Appendix to the Petition for Writ of Supersedeas
- Proof of Service

Please let me know if you need anything more from the Moving Parties.

Sincerely,
Burr & Forman LLP

James K. Gilliam
JKG/ace
Enclosures

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results matter

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July 22, 2022

VIA EMAIL (cctappfilings@sccourts.org)

Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Medical University of South Carolina et al vs HCA Healthcare, Inc., et al
Appellate Case Number 2022-00352
Civil Case Number 2021-CP-10-05289
Our File Number 2018000.0000026

Dear Ms. Kitchings:

Attached for filing with the Appellate Court are the following documents:

- Petition for Writ of Supersedeas,
- Verification of the Moving Parties,
- Appendix to the Petition for Writ of Supersedeas
- Proof of Service

Thank you very much. A check for the filing fees of $50.00 is being mailed this same date.

Sincerely,
Burr & Forman LLP

James K. Gilliam
JKG/ace
Attachments
cc: All Counsel of Record (w/Attachments, via Email)

RECEIVED
Aug 01 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2021-CP-10-05289
Appellate Case No. 2022-000352

Medical University of South Carolina and University Medical Associates of the Medical University of South Carolina,..... Appellants,

v.

HCA Healthcare, Inc.; Trident Medical Center, LLC; Terry A. Day; Betsy Kay Davis; Joshua D. Hornig; Eric J. Lentsch; David M. Neskey; and Anand K. Sharma..... Defendants.

Of whom HCA Healthcare, Inc. and Trident Medical Center, LLC; are the..... Respondents.

RETURN TO APPELLANTS' PETITION FOR WRIT OF SUPERSEDEAS

Respondent Trident Medical Center, LLC ("Trident"), respectfully submits the following Return to the Appellants' Petition for Writ of Supersedeas.

INTRODUCTION

In truth, there is no existing writ or order existing in this case to supersede. Appellants have filed what they have styled a Petition for Writ of Supersedeas, which is – in fact – a request for new injunctive relief during the pendency of the appeal. The injunctive relief Appellants now seek to obtain is a variation on the injunctive relief they have requested three times from the circuit court and have been denied. Appellants now shop for a different court to give them what they want, but what they have been unable to establish a right to obtain.

Appellants' Petition should be denied because: (1) they have not established personal jurisdiction over HCA and, therefore, any purported order against HCA would be improper and a nullity; (2) Rule 241, SCACR, does not apply in this case to provide justification or authorization for the Court to impose injunctive relief against Respondents in this case; (3) Appellants have never satisfied their burden to establish the elements necessary to obtain injunctive relief and have not established that the Circuit Court (on three separate occasions) has committed a clear error of law or abused its discretion in denying the requests for injunctive relief; and (4) the injunctive relief requested by Appellants is improperly vague, ambiguous and overbroad.

FACTUAL BACKGROUND

The underlying litigation involves a lawsuit by Appellants against the Respondents and six (6) individual physicians who were formerly employed by or practiced at the Appellants, but who gave notice to and resigned their employment with Appellants in the period of July/August 2021. The resignations were effective December 1, 2021. Appellants alleged a collection of causes of action against only one or more of the physicians and several other causes of action against both the physicians and the Respondents.

In their Complaint, Appellants alleged a cause of action for injunctive relief. At the same time, Appellants filed a Motion for Temporary Injunction. In summary, Appellants seek preliminary injunctive relief which (1) prohibits Respondents from further utilizing Appellants' confidential and proprietary information, including instrument lists, patient lists, physician preference cards and financial data; (2) requires the return of all confidential and proprietary information taken, including, but not limited to instrument lists, patient lists, physician preference cards, and financial data; (3) prohibits Respondents from billing or collecting money for services performed utilizing any of Appellants' confidential and proprietary information, including instrument lists, patient lists, physician preference cards, and financial data; (4) prohibits

Respondents from further interfering with MUSC's Fellowship Program in any way or recruiting any MUSC Fellow; (5) prohibits Respondents from contacting any fellowship accreditation bodies regarding MUSC; and (6) prohibits Respondents from further recruiting or soliciting, or otherwise contacting current MUSC and UMA employees, associates, agents, and fellows regarding any potential employment with HCA.

On the day prior to the circuit court hearing on the Motion for Temporary Injunction, Appellants finalized a Settlement Agreement with each of the six (6) individual physician Defendants. In each of those Settlement Agreements, Appellants and the individual physicians agreed only that the Physician "has destroyed, or shall destroy . . . the following specific documents or records (including photocopies) to the extent that any are in Physician's possession, custody or control: physician preference cards, case logs, or instrument lists created during his employment with MUSC and membership with UMA . . . Physician hereby warrants that . . . he will refrain from using any of the documents or records specifically referenced in this Section 2." (emphasis added).

In their Complaint, Appellants allege that prior to the end of the Defendant Physicians' employment, the Defendant Physicians obtained proprietary information from Appellants which was transmitted to Trident. (R. 29; Complaint ¶ 111). Specifically, Appellants allege that the materials misappropriated by the Physician Defendants consist of the following items:

1. Case logs for Defendant Day (R. 23; Complaint ¶¶ 69 and 70);

2. Physician preference cards (R. 22; Complaint ¶ 59);

3. Instrument lists (R. 22; Complaint ¶ 59);

4. Financial information showing the amount of revenue generated by four of the Physician Defendants during their employment with MUSC and MUHA hospital and their RVUs (R. 23; Complaint ¶¶ 65 and 66);

5. Financial information showing the salaries for four of the Individual Defendants received while employed by MUSC (R. 23; Complaint ¶ 66); and

6. Salaries for MUSC's residents and signed contracts for incoming fellows in the Head and Neck Fellowship Program (R. 23-24; Complaint ¶¶ 71, 72, and 73).

However, the Record developed at the circuit court as part of the deliberative process for the Motion for Temporary Injunction reveal that: (a) the case logs at issue in the case are the records of the procedures performed by the physicians in the past, and those documents are used to demonstrate the physicians' competency to perform procedures (R. 524; Affidavit of E. Meuli ¶ 7); (b) it is a standard and routine practice in the practice of medicine for case logs from prior institutions where the physician practiced to be provided to a new hospital where the physician seeks to obtain privileges (R. 524; Affidavit of E. Meuli ¶ 7); (R. 519; Affidavit of P. Horwich ¶ 6); (c) the case logs for the individual physician Defendants presented to Trident bear no designation or notation that they came from MUSC, or that they are trade secrets, or proprietary, or confidential (R. 525; Affidavit of E. Meuli ¶ 11); (d) a physician preference card is a catalogue of the specific tools, supplies, instruments, pharmaceuticals and processes that a particular physician prefers to (R. 17; Complaint ¶ 49); (e) an instrument list is a list of the specific instruments that a particular physician prefers to have available when he/she performs that specific procedure (R. 21; Complaint ¶ 51); (f) the instrument lists and physician preference cards at issue in this case were developed by each of the six individual Defendant Physicians based on their personal knowledge and preferences. (R.170-171; Affidavit of T. Brendle ¶¶ 4-5). Importantly, the Record before the circuit court plainly revealed that the "instrument lists" and "physician preference cards" alleged to have been provided to Trident were not: (i) labeled or identified in any way as coming from, belonging to or involving MUSC or UMA; (ii) labeled or identified in any way as being "Trade Secret;" or (iii) labeled or identified in any way as being "confidential"

or "proprietary." Furthermore, the evidence, (R. 468 - 476; Appellants' Master Exhibits 6 and 7), reflects that the transmissions of those lists and cards to Trident were actually made by employees of MUSC using MUSC emails. There is no allegation or evidence that Trident knew such lists or cards had been "misappropriated" from MUSC, or that the transmissions of those lists and cards (by way of MUSC employees and MUSC email system) were not authorized. In fact, Respondents vigorously dispute such conclusions (which have no factual basis and exist only as naked, conclusory allegations by Appellants).

Additionally, the Record before the Circuit Court reflected that Dr. Peter Horwich—a former MUSC Fellow who studied under the individual Defendant Physicians from July 1, 2019 to June 30, 2020—attested to the fact that when he was being hired at his second fellowship and needed to become privileged at LSU Health Shreveport, he was required to provide his case logs from MUSC to LSU. To accomplish this, he asked the MUSC Nurse Coordinator to provide him with his mentor's (Dr. Hornig) preference cards so that Dr. Horwich could use those preference cards as a template to prepare and submit his preferred instruments to LSU. (R. 519-520; Affidavit of P. Horwich ¶ 6-7). Those preference cards were provided for Dr. Horwich and, at no time did anyone from MUSC assert that the case logs or preference cards were a trade secret, or confidential or proprietary, and no one at MUSC objected to the transfer of the case logs or Dr. Hornig's preference cards to LSU. (R. 520; Affidavit of P. Horwich ¶ 8).

PROCEDURAL HISTORY

1. On November 22, 2021, Appellants filed a Complaint against Trident, HCA (collectively with Trident, "Respondents")[1], and six individual physicians[2] who were, at the time, employed by UMA. (R. 10)

2. On the same day Appellants filed their Complaint against Respondents, Appellants filed a Motion for Temporary Injunction. The relief sought by Appellants was an injunction that specifically:

   a. Prohibits Respondents from further utilizing Appellants' allegedly confidential and proprietary information, including instrument lists, patient lists, physician preference cards and financial data;

   b. Prohibits Respondents from billing or collecting money for services performed utilizing any of Appellants' allegedly confidential and proprietary information, including instrument lists, patient lists, physician preference cards, and financial data;

   c. Prohibits Respondents from further interfering with MUSC's Fellowship Program in any way, or recruiting any MUSC Fellow;

   d. Prohibits Respondents from contacting any Fellowship accreditation bodies regarding MUSC;

   e. Prohibits Respondents from further recruiting or soliciting, or otherwise contacting current MUSC and UMA employees, associates, agents, and fellows regarding any potential employment with HCA; and

   f. Requires Respondents to return all allegedly confidential and proprietary information taken, including, but not limited to instrument lists, patient lists, physician preference cards, and financial data.

(R. 38-39).

3. On December 7, 2021, HCA filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(2), SCRCP, based upon the circuit court's lack of personal jurisdiction over HCA.

---

[1] As discussed more fully in the Rule 12(b)(2) Motion to Dismiss filed by HCA, Appellants have not met their burden of establishing that any South Carolina State Court has personal jurisdiction over HCA, and given that, the Court cannot order injunctive relief against HCA.

[2] After filing the above-captioned lawsuit, Appellants settled their claims with the Individual Defendant Physicians.

That same day, HCA filed an affidavit of Michael Bray and a Memorandum of Law in Support of its Motion to Dismiss. (R. 497).

4. On December 9, 2021, the circuit court held a hearing on the Appellants' Motion for Temporary Injunction against Respondents. Prior to that hearing, Trident submitted a memorandum of law in opposition to Appellants' Motion for Temporary Injunction. In that memorandum, Trident again asserted the argument that Appellants have not met their burden to establish that the circuit court has personal jurisdiction over HCA and, therefore, the circuit court could not properly order injunctive relief against HCA. (R. 213).

5. On December 9, 2021, the circuit court held a hearing on the Appellants' Motion for Temporary Injunction.

6. Six (6) days later, on December 15, 2021, without conducting any hearing on HCA's Motion to Dismiss or issuing any decision on the issue of personal jurisdiction over HCA, the circuit court issued an order denying Appellants' Motion for Temporary Injunction. The circuit court's order denied Appellants' Motion on the grounds that Appellants failed to demonstrate that irreparable harm would occur if the temporary injunction is not granted and Appellants failed to sufficiently demonstrate that they do not have an adequate remedy at law for their purported claims. (R. 1).

7. On December 28, 2021—the last possible day—Appellants filed a Motion to Alter or Amend the Court's order denying their Motion for Temporary Injunction. (R. 237).

8. On February 18, 2022, the circuit court denied Appellants' Motion to Alter or Amend. (R. 4).

9. On March 11, 2022, the circuit court granted Appellants' request for protection for Appellants' counsel "and her clients from the scheduling of hearings or trial" between

March 24, 2022, and April 15, 2022, because "Counsel has long standing vacation out of the country and has purchased airline tickets and hotel accommodations." (R. 494).

10. Thirty (30) days after the circuit court issued the Order denying the Motion to Alter or Amend, on March 21, 2022—the last possible day—Appellants filed a Notice of Appeal of the circuit court's two prior orders denying Appellants' request for injunctive relief.

11. On March 25, 2022, one hundred twenty-three (123) days after their initial Motion for Temporary Injunction was filed, 100 days after it was denied, and 35 days after denial of their Motion to Alter or Amend, Appellants filed a Motion to Supersede Prior Orders Denying Appellants Injunctive Relief and to Grant a Temporary Injunction During Pendency of Appeal. That motion sought, for a third time, an order from the circuit court imposing injunctive relief to which the circuit court had twice previously found Appellants were not entitled. However, in that Motion Appellants altered their request for injunctive relief and asked the circuit court to issue an injunction prohibiting Respondents "from retaining and using Plaintiffs' Property while the appeal is pending." (R. 250; 253)

12. On June 29, 2022, the circuit court issued an order denying Appellants' Motion to Supersede Prior Orders Denying Appellants Injunctive Relief and to Grant a Temporary Injunction During Pendency of Appeal. (R. 7).

13. On July 22, 2022—twenty-three (23) days after the circuit court denied the Motion to Supersede Prior Orders Denying Appellants Injunctive Relief and to Grant a Temporary Injunction During Pendency of Appeal—Appellants filed a Petition for Writ of Supersedeas with the Court requesting the Court to issue an order: (a) superseding the circuit court orders denying the Appellants' requested injunctive relief, and (b) imposing a temporary injunction on Respondents that would "require the [Respondents] to return the Property and to refrain from using it while this appeal is pending."

STANDARD OF REVIEW

A writ of supersedeas is an order suspending another writ previously issued. A writ of supersedeas merely directs the officer to whom it is issued to refrain from executing or acting on another writ which may have previously been issued. *See Melton v. Walker*, 209 S.C. 330, 336, 40 S.E.2d 161, 164 (1946). Supersedeas suspends proceeding; it does not impose new proceedings or obligations.

In this case, Appellants have specifically and expressly couched their Petition as being one "[p]ursuant to Rules 240(a) and 241(c) of the South Carolina Appellate Court Rules . . . ." (Appellants' Petition p. 1). While it has been said that the purpose of a supersedeas is to preserve the status quo pending the determination of an appeal, *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990); *see also* 83 C.J.S. *Supersedeas* § 8 at 896 (1953) (a supersedeas suspends the judgment but does not annul the judgment itself), in fact, a review of a petition for writ of supersedeas pursuant to Rule 241, SCACR, has as its premise that the "appellate court . . . should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR.

South Carolina appellate courts are historically reluctant to grant injunctive relief during the pendency of an appeal. *See Kuhn v. Elec. Mfg. & Power Co.*, 92 S.C. 488, 75 S.E. 791, 791 (1912) (denying a motion for injunctive relief during the pendency of an appeal "on the ground that petitioners have not clearly shown that, pending the appeal, it will result in irreparable injury or the miscarriage of justice."). In *Silverthorne v. Barnwell Lumber Company*, Justice Fraser denied the appellant's request for an injunction during the pendency of the appeal and found:

> A justice of this court has the power to make the order of injunction; **but it ought not to be exercised unless the right of the appellant is very clear and beyond reasonable question**. I cannot say that the appellant's right is clear and beyond reasonable question . . . The questions [in this case] are not **so clear as to warrant a single**

> **justice of this court in practically reversing the judgment of the circuit judge.**

96 S.C. 32, 79 S.E. 519, 519-20 (1913) (emphasis added).

The United States Supreme Court has applied a similar heightened standard when reviewing requests for injunctive relief during the pendency of an appeal. Like Rule 241, SCACR, the All Writs Act, 28 U.S. C. § 1651(a), provides the United States Supreme Court with the authority to issue writs necessary or appropriate to preserve jurisdiction. *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403, 133 S. Ct. 641, 642–43, 184 L. Ed. 2d 448 (2012). The Supreme Court has found that this Act authorizes the issuance of temporary injunctive relief during the pendency of an appeal; however, in deciding whether to grant an injunction while an appeal is pending, the United States Supreme Court has stated that, "a request for an injunction pending appeal 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Id.* (citation omitted). In analyzing whether to provide relief that was previously denied by a lower court, the United States Supreme Court has repeatedly found that injunctions during the pendency of an appeal should only be issued "when it is '[n]ecessary or appropriate in aid of [the court's] jurisdiction' and '**the legal rights at issue are indisputably clear.**'" *Id.* (emphasis added); *Respect Maine PAC v. McKee*, 562 U.S. 996, 131 S. Ct. 445, 178 L. Ed. 2d 346 (2010).

ARGUMENTS

I. The Court must deny the Petition which seeks to impose injunctive relief over HCA because the Court lacks personal jurisdiction over HCA and, in the absence of such jurisdiction, the Court may not impose an injunction on HCA.

Appellants' Petition for a Writ of Supersedes requests the Court issue an injunction that is binding on both HCA and Trident during the pendency of the above-captioned appeal. In order for the Court to impose relief (the injunction) against HCA, the Court must have jurisdiction over

HCA to issue an injunction that is binding on HCA.[3] *See* Rule 65(d), SCRCP; *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 957 (4th Cir. 1999) (stating that "a party cannot obtain injunctive relief against another without first obtaining *in personam* jurisdiction over that person").

It is the burden of the party seeking to have the injunctive relief imposed to establish that personal jurisdiction over the other party exists in the first place. As demonstrated by HCA's pending Motion to Dismiss, pursuant to Rule 12(b)(2), for lack of jurisdiction, Appellants have not satisfied their burden of establishing that any South Carolina State Court has personal jurisdiction over HCA. *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2012). Without established jurisdiction over HCA, no injunction issued by the Court can be binding over HCA. Whether South Carolina courts have personal jurisdiction over HCA must be decided first – because judgements made by courts which lack personal jurisdiction are void and a complete nullity. *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002); *Belle Hall Plantation Homeowner's Ass'n, Inc. v. Murray*, 419 S.C. 605, 617-18, 799 S.E.2d 310, 316 (Ct. App. 2017).

II. Granting Appellants' Petition is not necessary or appropriate under Rule 241(c)(2), SCACR, to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.

In reviewing a Rule 241 Petition, the Court "should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. That consideration is the lynch-pin for the Court to grant any relief under Rule 241(c). In this case, no such action by the Court is necessary for that purpose and, therefore, no relief under Rule 241 is appropriate. Granting Appellants' Petition would not

[3] On July 12, 2022, Respondents filed a Motion to Hold the Appeal in Abeyance until the lower court rules on HCA's pending Motion to Dismiss pursuant to Rule 12(b)(2). That Motion is pending.

serve these limited purposes or objectives established by the Rule; therefore, the Petition should be denied.

Appellants' Petition does not seek to prevent the issues on appeal from being rendered moot. The purpose of Rule 241, is not to allow Appellants another bite at the apple, or to grant relief that materially alters the status of the issues on appeal, or renders the issues on appeal moot. *Melton v. Walker*, 209 S.C. 330, 336, 40 S.E.2d 161, 164 (1946).

Appellants are, in fact, not asking the Court to supersede any existing writ of the circuit court, but rather to *grant* an injunction which has three times been denied to them after full hearing. Appellants seek to have this Court, while the case is already on appeal, completely overrule the prior decisions by the Circuit Court and simply grant them their ultimate relief – an injunction – which they have not earned and do not deserve.

When a case is already in the appeal stage, the standard for issuance of an injunction is altered. In reviewing requests for injunctive relief pending appeal, South Carolina courts have found that the legitimate purpose of the injunction must be to maintain the status quo at the time the order on appeal was issued. *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010); *Cnty. Council of Charleston v. Felkel*, 244 S.C. 480, 483-84, 137 S.E.2d 577, 578 (1964) ("It is apparent upon its face that the Order appealed from is a temporary restraining Order. The sole object of a temporary injunction is to **preserve the subject of controversy in the condition which it is at the time of the Order** until opportunity is offered for full and deliberate investigation." (emphasis added) (citations omitted)).

When the original request for injunctive relief is denied, and the matter is already on appeal, the status quo that is then relevant is the status quo at the time of the appeal. When an appeal

exists, the purported status quo at the time the original suit was filed, or when the original request for injunctive relief was made, is not the relevant concern. *See id.*

While Appellants attempt to argue that their Settlement Agreements with the individual Physician Defendants should somehow alter the perspective of their current efforts to obtain injunctive relief against Respondents, which relief has never before been granted or existed, their argument is meritless. The Settlement Agreements with the individual Physician Defendants should have no bearing or preclusive effect with regard to the Respondents.

At the time the circuit court first denied Appellants' Motion for Temporary Injunction: (i) all claims against the original Physician Defendants had been released and dismissed; (ii) contrary to Appellants' misrepresentations, in the Settlement Agreements between the physicians and Appellants, the physicians merely agreed that they "destroyed, or shall destroy . . . the following specific documents or records (including photocopies) to the extent that any are in Physician's possession, custody or control: physician preference cards, case logs, or instrument lists created during his employment with MUSC and membership with UMA . . . Physician hereby warrants that . . . he will refrain from using any of the documents or records specifically referenced in this Section 2" (emphasis added); and (iii) the physicians never agreed that they could not or would not use any knowledge or information they had, even if acquired while employed by Appellants or even if reflected in the various documents or records at issue. This was the status quo at the time the circuit court denied Appellants' Motion for Temporary Injunction. Indeed, this status quo is what is specifically at issue in Appellants' appeal.

Appellants' Petition does not seek to protect this status quo. Instead, Appellants improperly ask the Court to materially alter the status quo – in their favor. The law does not sanction Appellants' manufacturing a fictional status quo as the basis for obtaining a writ of supersedeas, which is not really a supersedeas, but a newly imposed injunction. The status quo in

this case at the time the circuit court denied Appellants' Motion for Temporary Injunction, and when the pending appeal was filed, was that there was no injunction in place.

The Settlement Agreements executed by and between the Defendant Physicians and Appellants do not bar the Defendant Physicians from using the knowledge and skills associated with providing head and neck oncology treatment at Trident's facilities. For Appellants to have voluntarily executed settlements with the physicians on these terms but then seek to prevent Trident (where the physicians carry on their medical practices) from "using" the same information that the physicians are free to use, is not merely inconsistent, it is incongruous.

For example, the disputed physician preference cards indicate how a particular physician prefers to have his or her operating room set up for surgery. Appellants' own Affidavits offered to the circuit court in support of their Motion for Temporary Injunction admits explicitly that the preference cards and equipment lists were created by the individual Physician Defendants. There is no evidence offered that the Physicians could not recreate those cards and lists from their own knowledge or experience, or that the Physicians or Trident could not operate the HNO practice at Trident without them. Nonetheless, Appellants' requested injunctive relief in the original Motion for Temporary Injunction was that "[Respondents] be prohibited from further utilizing [Appellants]' confidential and proprietary information, including instrument lists, patient lists, physician preference cards and financial data" (emphasis added); and "prohibit[ing] [Respondents] from billing or collecting money for services performed utilizing any of [Appellants]' confidential and proprietary information, including instrument lists, patient lists, physician preference cards, and financial data." (emphasis added) If Trident's "use" of information about the physicians' preferences were enjoined, MUSC might argue that any surgeries at Trident that reflected a Defendant Physician's past preferences were also enjoined. So construed, the requested injunction would gut a key provision of the Defendant Physicians' settlements with MUSC, making it

difficult if not impossible for them to perform their surgeries at Trident. Therefore, Appellants' Petition does not preserve the status quo at the time the orders on appeal were issued or prevent the issues of appeal from being rendered moot. Accordingly, Appellants' Petition should be denied.

III. Appellants have never satisfied their heavy burden of establishing entitlement to the extraordinary remedy of injunctive relief.

Appellants assert that Rule 241(c)(3), SCACR, permits the Court to "order other affirmative relief upon such terms as are deemed appropriate." In truth, this language in the Rule does not alter the aforementioned condition that any relief under Rule 241 is first predicated on it being established that the relief sought is necessary to "preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." And, while there may be a case when the Court has authority to grant injunctive relief while an appeal is pending, South Carolina courts analyzing whether to issue an injunction while an appeal is pending have applied a heightened standard of review (compared to the issuance of a temporary injunction pursuant to Rule 65, SCRCP). The courts have concluded that an injunction should not be issued unless "the right of the appellant is very clear and beyond reasonable doubt." *Silverthorne v. Barnwell Lumber Company*, 96 S.C. 32, 79 S.E. 519, 519-20 (1913). Similarly, South Carolina Courts have found that the entitlement to such relief must be "clearly shown." *Kuhn v. Elec. Mfg. & Power Co.*, 92 S.C. 488, 75 S.E. 791, 791 (1912). This heightened standard apparently increases the burden applied by courts analyzing whether to issue a Rule 62, SCRCP, injunction during the pendency of an appeal. To obtain such injunctive relief during the pendency of an appeal pursuant to Rule 62, Appellants bear the burden of establishing:

1. Appellants are likely to succeed on the appeal;
2. Appellants would suffer irreparable harm if the injunction is not granted; and

3. Appellants have no adequate remedy at law.

Alcala v. Hernandez, No. 4:14-CV-04176-RBH, 2015 WL 7312891, at *7 (D.S.C. Nov. 19, 2015); *George Sink PA Inj. Laws. v. George Sink II L. Firm LLC*, No. 2:19-CV-01206-DCN, 2019 WL 6318778, at *7 (D.S.C. Nov. 26, 2019); *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 WL 1987042, at *2 (N.D. Cal. June 4, 2012).[4]

A. Appellants do not, and cannot, establish that there is a likelihood of success on their appeal.

1. Appellants are not likely to succeed on the appeal of the merits of their claim for violation of the South Carolina Trade Secrets Act.

In order to find that Appellants have established a likelihood of success on the merits on the pending appeal, the Court must conclude that Appellants have established:

> a probability (not mere possibility) of success of the ultimate trial on the merits. "Probability of success" implies that the plaintiff must have a very clear and strong case. Some courts have stated this in terms by the maxim that in considering preliminary injunctive relief "to doubt is to deny." That is, if there is doubt as to the probability of plaintiff's ultimate success on the merits, the preliminary injunction must be denied.

Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 816 (4th Cir. 1991) (citing 2 McCarthy on Trademarks and Unfair Competition, §30.16, at 485-86 (2d ed. 1980)).

Because Appellants have specifically and expressly grounded their Petition on the assertion that they have a valid claim under the South Carolina Trade Secrets Act, it is necessary and critical to assess whether Appellants have established that they are likely to succeed on the merits of their Trade Secrets Act claim. As the circuit court has previously concluded, examination of that issue

[4] "In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules." *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) (citing *Gardner v. Newsome Chevrolet–Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991)).

leads overwhelmingly to the conclusion that Appellants are not likely to be successful on the merits of their claim.

In this case, Appellants have alleged their Trade Secrets Act Cause of Action in only the broadest, most conclusory terms. They simply say (*ipse dixit*) that the information at issue in this case "is proprietary to MUSC and UMA." (R. 32; Complaint ¶ 128). They merely say the information has independent economic value. (R. 32; Complaint ¶ 129). They simply conclude that they make "reasonable efforts to maintain the secrecy . . . including but not limited to confidentiality agreements." (R. 32; Complaint ¶ 130).

To the contrary, other allegations of the Complaint, as well as the Exhibits attached to the Complaint, and the Affidavits filed in support of the Motion for Temporary Injunction, reveal a more complete, and very different, story. In particular, facts (rather than merely self-serving conclusory statements) reveal:

a. The instrument lists and physician preference cards at issue in the case were developed by the Defendant Physicians. (R. 170; Affidavit of Timothy Brendle, ¶ 4-5).

b. The so-called "Code of Conduct" incorporated in the bowels of the so-called "MUSC Faculty Handbook" merely states that "No employee shall disclose confidential information or use such information for his or her personal benefit." (R. 466). Nowhere is there evidence that Appellants ever identified what information was "confidential," and certainly not that the information and documentation at issue in this case was "confidential."

c. The "instrument lists" and "physician preference cards" which are alleged in this case to have been provided to Trident: (i) were not labeled or identified in any way as involving or belonging to MUSC or UMA; (ii) were not labeled or identified in any way as being "Trade Secret;" and (iii) were not labeled or identified in any way as being "confidential" or "proprietary." (R. 468 – 476).

d. The evidence (Appellants' Master Exhibits 6 and 7) reflects that the transmissions of those lists and cards to Trident were made by employees of MUSC using MUSC emails. There is no evidence that Trident knew such lists or cards had been misappropriated from MUSC or that the transmissions of those lists and cards (by way of

MUSC employees and MUSC email system) were not authorized. (R. 468 – 476).

It is axiomatic that there can be no claim or protection available under the Trade Secrets Act unless Appellants establish that there is a trade secret. To constitute a trade secret, the information must be secret. *Carolina Chem. Equip., Co. v. Muckenfuss*, 322 S.C. 289, 296, 471 S.E.2d 721, 724 (Ct. App. 1996). When the information claimed to be a trade secret is readily ascertainable from other sources, it does not qualify for protection under the Trade Secrets Act, S.C. CODE ANN. §39-8-20 (5). Information does not qualify for trade secret protection when the information can, with reasonable effort, be properly acquired or duplicated by or through others. *See Carolina Chem. Equip., Co.*, 322 S.C. at 296, 471 S.E.2d at 724. Even the affidavits submitted by Appellants in support of the Motion for Temporary Injunction admits that the lists and cards were, in fact, prepared by the individual physicians. There is not a scintilla of evidence that those physicians were not capable of duplicating such cards and lists from their own knowledge, skill and general memory.

One of the alleged trade secrets at issue in this case is "financial information" such as physician salaries. In *Campbell v. Marion Cty. Hospital Dist.*, 354 S.C. 274, 289, 580 S.E.2d 163, 170 (Ct. App. 2003), the court held that such information does not constitute a trade secret and is not even exempted from FOIA by a public hospital. So, Appellants cannot succeed on a claim to protect or restrict access to such information.

More broadly, a person otherwise entitled to trade secret protection must take all proper and reasonable steps to keep it secret, in order to maintain legal protection. *See Lowndes Prod., Inc. v. Brower*, 259 S.C. 322, 331, 191 S.E.2d 761, 766 (1972). When Appellants fail to demonstrate that they, in fact, took proper and reasonable steps to protect their alleged secrets – and how they did that – their lack of proper precautions supports the conclusion that a secret (or

its protection) was not intended and does not exist. *See id.* at 329, 191 S.E.2d at 765. As the Supreme Court of South Carolina declared:

> [E]ternal vigilance in the form of constant warnings to all persons to whom the trade secret has become known and obtaining from each an agreement, preferably in writing, acknowledging its secrecy and promising to respect it, is required.

Id. at 331, 191 S.E.2d at 766.

Appellants utterly failed to make any demonstration that they exercised such "eternal vigilance." As the *Lowndes* court stated, to prove it exercised the kind of "eternal vigilance" required, a claimant must [prove it has taken steps to provide "constant warnings to all persons to whom the trade secret has become known" along with requiring an] acknowledgement from such persons that they have been advised of the secrecy of the information and a promise to respect it, preferably in writing. *Id.* Further, South Carolina law is clear that "warnings alone are insufficient to place a trade secret within the sphere of protection provided by the [Trade Secrets] Act." *Hill Holliday Connors Cosmopulos, Inc. v. Greenfield*, 433 Fed App's 207, 215 (4th Cir. 2011). In order to enjoy protection under the Trade Secrets Act, a plaintiff must demonstrate reasonable efforts to maintain secrecy and "isolated steps" toward secrecy are not enough. *See Lowndes Prods.*, 259 S.C. at331, 191 S.E.2d at 766.

In addition to Appellants' failure to demonstrate that they took proper and reasonable steps to protect the purported trade secrets, Appellants make no substantiated allegation that Respondents knew or should have known the physician cards, equipment lists, and case logs were considered to be Appellants' trade secrets. In fact, as stated in the affidavits of Dr. Horwich and Elaine Meuli, this information (equipment cards, lists, and case logs) is not confidential, proprietary, or considered to be a trade secret. (R. 520; Horwich Affidavit ¶¶ 7, 8); (R. 524-525; Meuli Affidavit ¶¶ 7 -13).

Appellants clearly have failed to demonstrate that they are likely to succeed on the merits of their claim in a manner that is "very clear and beyond reasonable question." Accordingly, the Court should deny Appellants' Petition and decline to grant Appellants' their requested temporary injunctive relief pending the resolution of the appeal.

B. Appellants have not, and cannot, show that they will suffer irreparable harm if the Petition is denied.

It is fundamental that an injunction cannot issue unless Appellants satisfy their heavy burden of demonstrating that they **will** suffer an irreparable harm if the temporary injunction is not issued. *Twin City Power Co. v. Savannah River Electric Co.*, 163 S.C. 438, 161 S.E. 750 (1930), *app. dism'd*, 284 U.S. 574, 52 S. Ct. 17 (1931); *see also S.C. Pub. Serv. Auth.*, 244 S.C. at 474, 137 S.E.2d at 509-10.

To satisfy this burden, Appellants must demonstrate "more than the mere 'possibility' of being irreparably harmed; rather, the [Appellants] must 'demonstrate that irreparable injury is likely in the absence of an injunction.'" *George Sink, P.A. Inj. Laws.*, 407 F. Supp. 3d at 559.

At this point, the only proper inquiry is how Appellants will be irreparably harmed from this point forward. They seek to impose an injunction now. So, why is it necessary now to prevent irreparable harm in the future. The individual physician Defendants have been performing the medical procedures away from MUSC for eight (8) months. It is not enough for Appellants to assert or argue that the irreparable harm is "merely problematic" or "conditioned on possible future events." *Direx Israel, Ltd.*, 952 F.2d at 816. Appellants must present probative evidence that there exists a "present threat of irreparable harm." *Id.*

In this case, Appellants have couched their allegations of irreparable harm as being "potential." Specifically, in their original Motion for Temporary Injunction (Page 6, Section II), Appellants candidly admitted that "MUSC's Head and Neck Fellowship Program faces potential irreparable harm without issuance of this requested injunctive relief." (emphasis added). Now, at

this stage, Appellants can make no specific allegation of even "potential" irreparable harm from now into the future.

Furthermore, while Appellants assert that they will suffer irreparable harm without the requested extraordinary (injunctive) relief, Appellants own actions belie this assertion. If the Appellants were to actually suffer an imminent and irreparable harm without the issuance of an injunction, then Appellants would have acted urgently after each instance when the circuit court denied Appellants' request for such relief. However, instead of taking immediate action following the circuit court's denials of Appellants' requests for injunctive relief, Appellants waited days—if not weeks—to take another action attempting to obtain the requested injunctive relief. Such delay and a complete lack of urgency on behalf of the Appellants further evidences the fact that Appellants will not suffer irreparable harm if the Court denies Appellants' Petition.

Because there is no viable assertion or claim of irreparable harm going forward, and there is no presumption of irreparable harm applicable in this case, the Petition must fail. *Atwood Agency v. Black*, 374 S.C. 68, 72-73, 646 S.E.2d 882, 884 (2007).

IV. The injunctive relief Appellants request is improperly vague, ambiguous, and overbroad.

Every order granting injunctive relief "shall be specific in terms" and "shall describe in reasonable detail . . . the act or acts sought to be restrained." Rule 65(d), SCRCP. The use of the word "shall" means an action is mandatory. *Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 608-09, 790 S.E.2d 430, 434 (Ct. App. 2016). As observed in Federal Court decisions, since an injunction prohibits conduct under threat of judicial punishment and contempt, the terms of the injunction must be sufficiently specific and clear so as to provide explicit notice to the litigant of precisely what conduct is prohibited. *See Lau v. Meddaugh*, 229 F. 3d 121, 123 (2d Cir. 2000).

In this case, the injunctive relief requested by Appellants lacks the necessary specificity. Moreover, the requested relief has been changing from the original Motion for Temporary

Injunction (now on appeal) to the current Petition for Writ of Supersedeas. For instance, Appellants seek an Order prohibiting Respondents from "using" Appellants' "Property," which they argue includes the instrument lists and physician preference cards. What does it mean to "use" the preference cards or instrument lists? Of course, in their original Motion for Temporary Injunction, we know plainly that Appellants were asking for far more than merely Defendants not using the physical cards and lists. They demanded that Defendants be prohibited from "utilizing" the "information," which apparently Appellants assert merely "includ[es]" the lists and cards. So Appellants clearly want an injunction that allows them the opening to argue that the experience and knowledge gathered and developed by the Defendant Physicians, which Appellants admitted in their Affidavits is what was used by the Physicians who developed the cards and lists, is now to go to waste. In effect, Appellants seek to enjoin the Defendant Physicians from practicing medicine at Trident, since Trident would be prohibited from "using" (whatever that means) the information on the instrument lists and physician preference cards. Trident cannot conform its behavior to an injunction (or any restriction) which does not define what it means to "use" Appellants' "Property." And how does one possibly understand a restriction not to "use" information – particularly when that use will actually be by the Physicians who developed the information.

Despite Appellants' arguments that they are not seeking to prevent Trident from providing healthcare services, the express goal of Appellants' Petition is to obtain an order prohibiting Trident employees from "using" information related to the provision of healthcare services. An order barring the use of such information is an order barring the provision of healthcare services to patients in need of them. At a minimum, the requested relief is non-specific, vague and ambiguous. Imposing the threat of contempt on a party based on such non-specific, vague and ambiguous terms cannot be condoned. South Carolina law does not allow it.

CONCLUSION

Based on the foregoing, the Court should DENY the Petition for Writ of Supersedeas.

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August 1, 2022
Columbia, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2022-000352
Case No. 2021-CP-10-05289

Medical University of South Carolina and University Medical Associates of the Medical University of South Carolina,..... Appellants,

v.

HCA Healthcare, Inc.; Trident Medical Center, LLC; Terry A. Day; Betsy Kay Davis; Joshua D. Hornig; Eric J. Lentsch; David M. Neskey; and Anand K. Sharma,..... Defendants,

Of Which HCA Healthcare, Inc. and Trident Medical Center, LLC, are the ..... Respondents.

REPLY TO TRIDENT'S RETURN TO PETITION FOR WRIT OF SUPERSEDEAS

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ATTORNEYS FOR APPELLANTS

Appellants Medical University of South Carolina ("MUSC") and University Medical Associates of the Medical University of South Carolina ("UMA") respectfully submit this Reply to the Hospital Defendants' Return to the Petition for Writ of Supersedeas.[1]

INTRODUCTION

The Hospital Defendants' Return does not articulate a single reason why this Court should permit them to remain in possession of Property that does not belong to them and that they acquired through misappropriation. In the Return, the Hospital Defendants do not dispute that they are in possession of the Property and that the Property in fact belongs to MUSC. Logic and fairness (fairness of course being the touchstone of equity) dictate that the Hospital Defendants, as competitors of MUSC, must return and refrain from using the misappropriated Property during the pendency of this appeal. If such relief is not granted, the fruits of the pending appeal will be devoured, as the Hospital Defendants will continue to possess and use the Property until this appeal is decided. Every day the Hospital Defendants continue to possess and use the Property constitutes further erosion of the competitive advantage MUSC enjoys over the Hospital Defendants as the first-in-time innovator and creator of the Property. To preserve this advantage, MUSC seeks supersedeas relief to protect the Property until this appeal can be decided.

ARGUMENT

I. The Hospital Defendants do not respond to MUSC's argument that supersedeas relief is necessary to prevent this appeal from becoming moot.

Rule 241(c)(2), SCACR identifies two reasons why supersedeas relief will be granted—to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot. The latter reason is applicable here.

[1] There were several defined terms in the Petition, such as "Property," "Individual Defendants," and "Hospital Defendants." Those defined terms in the Petition continue to have the same meaning in this Reply.

Courts perform the mootness analysis by inquiring whether a supersedeas is necessary to preserve the fruits of a meritorious appeal where they otherwise might be lost. *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 468, 470 (Ct. App. 1990). In the Petition, MUSC argued and presented evidence that Hospital Defendants' retention and use of the Property during the pendency of appeal irreversibly erodes MUSC's competitive advantage in having developed the Property over several decades prior to the Hospital Defendants starting a competing head and neck cancer practice in North Charleston. Thus, an injunction is necessary to preserve what is left of MUSC's competitive advantage during the pendency of the appeal.

The Hospital Defendants' several-page diatribe purportedly addressing the mootness issue never actually discusses or responds to MUSC's arguments. **(Return pp. 11-15)**. This is because the Hospital Defendants cannot deny that the fruit of a meritorious appeal in this case is MUSC's competitive advantage, and the Hospital Defendants cannot deny that this competitive advantage will be lost the longer the Hospital Defendants retain unfettered access to the Property. Lacking the ability to effectively rebut MUSC's mootness arguments, the Hospital Defendants instead summarily declare that a supersedeas would not prevent issues on appeal from becoming moot. The Court should disregard the Hospital Defendants' conclusory statement and find that supersedeas relief is necessary to preserve the fruits of MUSC's appeal.

II. The Hospital Defendants seek to define "status quo" in such a way as to strip this Court of its power to grant supersedeas relief as contemplated by Rule 241.

The Hospital Defendants opine at length on the concept of "status quo" for purposes of granting supersedeas relief. The condensed version of their argument is that the relevant time-period for defining status quo is the date of the circuit court order, and this Court cannot require the Hospital Defendants to return and refrain from using the Property because it was in the Hospital

Defendants' possession at the time the circuit court denied MUSC's motion for temporary injunction.[2] The Hospital Defendants' arguments are incorrect for four reasons.

First, the Hospital Defendants have sought to define status quo in such a way as to make supersedeas relief impossible. If the Hospital Defendants were correct, neither this Court, nor the Supreme Court would ever have the power to grant supersedeas relief after the circuit court issues an order, because the status quo would be the way things are at the time of the circuit court's order. The Hospital Defendants' argument disregards the plain language of Rule 241(c)(1), SCACR, which states "any party may move for an order imposing a supersedeas ***of matters decided in the order . . . on appeal.***"[3] (emphasis added). Under the Hospital Defendants' view of things, this State's appellate courts are powerless to grant supersedeas relief after the circuit court enters an order. That is not what Rule 241 says, and that is not how appellate courts function. Appellate courts were not created to sit idly by and remain powerless. Rule 241 recognizes this and empowers appellate courts to grant supersedes relief to prevent contested issues on appeal from becoming moot.

Second, the Hospital Defendants' reading of Rule 241 disregards case law. In *Sea Pines Ass'n for Protection of Wildlife, Inc. v. S.C. Dep't of Natural Res. & Comty. Serv. Assoc., Inc.*, 345 S.C. 594, 598, 550 S.E.2d 287, 290 (2001), the South Carolina Court of Appeals granted a petition for writ of supersedeas, which imposed an injunction during the pendency of appeal, after the

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[2] The Hospital Defendants argue "[t]he status quo in this case at the time the circuit court denied [MUSC's] Motion for Temporary Injunction, and when the pending appeal was filed, was that there was no injunction in place." **(Return pp. 13-14)**.

[3] Similarly, the Hospital Defendants argue without citation that there is nothing to supersede in this case. **(Return pp. 1, 12)**. This argument ignores the plain language of Rule 241(c)(1). Rule 241(c)(1) allows a party to move to supersede any matter decided in an order on appeal. Furthermore, the Hospital Defendants' position disregards case law, where courts have granted the exact relief requested in the Petition. *See Sea Pines, supra.*

circuit court denied the motion for a temporary injunction. Thus, either this Court was wrong (its decision was not reversed), or the Hospital Defendants' reading of Rule 241(c) is simply incorrect.

Third, the rigidity of how the Hospital Defendants seek to define status quo is antithetical to how equity works. *See Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009) (Equitable relief is "not bound by cast-iron rules" but instead "exists to do fairness and is flexible and adaptable to particular exigencies."). The Hospital Defendants' tortured definition of the applicable status quo aims to distract from the real purpose of the relief MUSC seeks, which is to prevent the Hospital Defendants from devouring the fruits of its meritorious appeal during the pendency of the appeal. If the Court is persuaded that MUSC has a meritorious claim, the Court may use its equitable powers to impose the injunction without being bound by a rigid (and nonsensical) application of the status quo.

Fourth, the Hospital Defendants have not defined status quo in the correct manner. The term "status quo" refers to "the last uncontested status between the parties which preceded the controversy." *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012). Status quo, like equity itself, cannot be defined in a way that results in rigidity and robs the court of the flexible powers it must have to respond to particular situations. For instance, a court would not allow the definition of status quo to prevent it from addressing conduct that violates the law. *See, e.g., LeFurgy v. Long Cove Club Owners Ass'n, Inc.*, 313 S.C. 555, 558, 443 S.E.2d 577, 578 (Ct. App. 1994) (holding that an injunction may issue "when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected").

This Court should disregard the Hospital Defendants' attempts to define status quo in such an artificial and rigid way as to prevent the granting of the relief requested in the Petition.

III. MUSC made the required showing for supersedeas relief on its breach of duty of loyalty cause of action.

MUSC relies on two causes of action in support of its request for supersedeas relief: (1) breach of duty of loyalty[4] and (2) violation of SCTSA. Before proceeding any further, it is important to identify the injunction elements this Court should consider with respect to these causes of action.

The Hospital Defendants contend MUSC must establish the following three elements to obtain an injunction during the pendency of appeal: (1) likelihood of success on the appeal, (2) irreparable harm if the injunction is not granted, and (3) no adequate remedy at law. **(Return pp. 15-16)**. The Hospital Defendants cite two federal cases in support of this proposition: *Alcala v. Hernandez*, No. 4:14-CV-04176-RBH, 2015 WL 7312891, at *7 (D.S.C. Nov. 19, 2015) and *George Sink PA Inj. Laws. v. George Sink II L. Firm LLC*, No. 2:19-CV-01206-DCN, 2019 WL 6318778, at *7 (D.S.C. Nov. 26, 2019). The Hospital Defendants misquote the elements enumerated in these cases. Both the cases cited by the Hospital Defendants and the South Carolina case cited in the Petition set forth the following elements to consider when determining whether to grant an injunction during the pendency of appeal: (1) potential for irreparable harm to appellant if the injunction is not granted, (2) likelihood of success on the merits, (3) prejudice (if any) that could be sustained by the respondent if the injunction is granted, and (4) the public interest. *Id.*; *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Svcs. Ino. Tech. Mgmt. Office*, No. 98-CP-40-3945, 2000 WL 35456881, at *9 (S.C. Comm. Pl. 2000) (citing *Graham, supra*).

As discussed below, MUSC satisfied all of the injunction elements with respect to its breach of duty of loyalty cause of action.

a. The Hospital Defendants concede that MUSC established a likelihood of success on the merits on the breach of duty of loyalty cause of action.

[4] The Hospital Defendants are jointly and severally liable for the Individual Defendants' breach of their duties of loyalty. *Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 337, 191 S.E.2d 761, 769 (1972).

The Hospital Defendants do not respond to MUSC's argument that it established a likelihood of success on the merits with respect to its breach of duty of loyalty cause of action. In South Carolina, if a party fails to respond to an issue, "the [appellate] court may treat the failure to respond as a confession that the appellant's position is correct." *First Union Nat'l Bank of South Carolina v. FCVS Commc'ns*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1997) (quoting 5 Am.Jur.2d *Appellate Review* § 555, at 254 (1995)); *see also In re Infinity Bus. Group*, 628 B.R. 213, 231 (D.S.C. 2021) ("[A]n appellee's wholesale failure to respond to a conspicuous, nonfrivolous argument in the appellant's brief ordinarily constitutes a forfeiture."). MUSC argued in the Petition that it made the necessary prima facie showing that the Hospital Defendants are liable for the Individual Defendants' breaches of their duties of loyalty under well-established South Carolina law. *See* **Petition pp. 16-17** (citing relevant cases). Because the Hospital Defendants failed to respond, the Court should find that the Hospital Defendants conceded this issue.

b. The Hospital Defendants did not properly articulate the legal standard for establishing irreparable harm, and the Hospital Defendants did not rebut MUSC's arguments.

The Hospital Defendants begin with the assertion that MUSC must show "that [it] **will** suffer an irreparable harm if the temporary injunction is not issued." **(Return p. 20)** (emphasis in original). In the very next sentence, the Hospital Defendants state that the law requires MUSC to "demonstrate that irreparable harm is <u>likely</u> in the absence of an injunction." ***(Id.)*** (emphasis in original). The Hospital Defendants then attack MUSC's allegations of irreparable harm as being merely "potential," and suggests that the harm has already occurred and is therefore no longer "potential." ***(Id.* at 20-21)**.

Ultimately, it is unnecessary to parse out which of the two standards articulated by the Hospital Defendants (imminent versus likely harm) are in fact correct. South Carolina courts have consistently found irreparable harm when a competitor is in possession of specific property belonging to another and have routinely issued injunctions to protect those materials from exploitation by the new employer. *See* **Petition p. 14** (citing relevant cases). MUSC is losing its competitive advantage in real time as the Hospital Defendants continue possessing and using the Property. The Hospital Defendants effectively concede this in the Return. But that does not mean MUSC could not retain some of its competitive advantage if the Court issues an injunction requiring the Hospital Defendants to return and refrain from using the Property during the pendency of appeal. This would prevent further irreparable harm and preserve the fruits of MUSC's appeal.

The Hospital Defendants also argue that MUSC did not act with sufficient expediency in seeking injunctive relief. The Hospital Defendants offer no support for this arbitrary conclusion. In reality, MUSC took all of the procedural steps necessary and met all of the applicable deadlines in order to preserve the relevant issues for appeal and to pursue supersedeas relief from this Court.

c. The Hospital Defendants did not address the public interest and prejudice prongs for seeking an injunction during the pendency of appeal; thus the Hospital Defendants conceded these issues.

The Hospital Defendants provide no analysis or discussion of the last two elements for issuing an injunction pending appeal, which are potential prejudice to the respondent and the public interest. MUSC made substantive arguments about both of these elements. **(Petition pp. 17 -19).** Again, the Court can assume that the Hospital Defendants' failure to respond is a concession that MUSC is correct. *First Union Nat'l Bank of South Carolina*, 321 S.C. at 502, 469 S.E.2d at 617.

The Hospital Defendants' statements in the Return actually provide support for the conclusion that the Hospital Defendants will suffer no prejudice if they were ordered to return the Property and to refrain from using it. In the Return, the Hospital Defendants stated multiple times that they do not need the Property. *See* **Return p. 14** ("There is no evidence offered that the Physicians could not recreate those cards and lists from their own knowledge or experience, or that the Physicians and Trident could not operate the HNO practice at Trident without them."); ***Id.* p. 18** ("There is not a scintilla of evidence that those physicians were not capable of duplicating such cards and lists from their own knowledge, skill and general memory."). By contrast, MUSC has presented evidence and made arguments revealing that it will experience significant hardship in the form of loss of competitive advantage if the Hospital Defendants are allowed to continue possessing and using the Property during the pendency of appeal. **(Petition p. 18)**.

Based on the foregoing, this Court should grant the requested supersedeas relief because MUSC has demonstrated the elements necessary to receive such relief with respect to its breach of duty of loyalty cause of action.

IV. The Hospital Defendants applied the wrong standard when arguing likelihood of success on the merits on the SCTSA cause of action, and the Hospital Defendants did not effectively rebut MUSC's prima facie showing that it was likely to succeed on the SCTSA claim.

As set forth above, there were two causes of action for this Court to consider in ruling on the Petition: (1) breach of duty of loyalty and (2) violation of SCTSA. As set forth above in Roman Numeral III, the requisite elements for supersedeas relief have been established with respect to the breach of duty of loyalty cause of action. Thus, no further analysis is necessary, and the supersedeas should be issued. Nonetheless, for purposes of thoroughness, MUSC will respond

to the Hospital Defendants' arguments about whether there is a likelihood of success on the merits on its SCTSA claim.[5]

The Hospital Defendants first argue that MUSC must show a "probability" of success on the merits, requiring a "very clear and strong case." *See* **Return p. 16**) (citing *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 813 (4th Cir. 1991)). This is not controlling South Carolina law. Under South Carolina law, a party seeking injunctive relief is only required to make a prima facie showing of success on the merits. *See Compton v. S.C. Dep't of Corrs.*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011) (The Court need examine the merits of the plaintiff's underlying claims "only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief"); *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005) ("The determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made.").

The Hospital Defendants argue that MUSC did not demonstrate the necessary elements of secrecy and reasonable steps to protect secrecy as it relates to the Property. In order to argue that the Property was not secret, the Hospital Defendants assert that the Individual Defendants helped develop the Property and would be capable of "duplicating" the Property. When determining whether something is a trade secret, courts must consider "the ease or difficulty with which the information could be properly acquired or duplicated by others." *Wilson v. Gandis*, 430 S.C. 282, 315, 844 S.E.2d 631, 649 (2020). In response, MUSC simply asks: if the Individual Defendants could so easily create new instrument lists and preference cards to use, why are the Hospital

[5] The analysis for the other elements for an injunction during the pendency of appeal (irreparable harm, prejudice, and public interest) are the same for the breach of duty of loyalty and SCTSA claims. To avoid redundancy, MUSC will not repeat these arguments.

Defendants vigorously litigating this issue instead of simply returning the Property and creating their own? Why did the Hospital Defendants' counsel state to the circuit court that enjoining their use of the Property would "tie Trident's hands" and cause the "shutting down [of] the care of patients"? **(R. 121, R. 125)**. Clearly, the Property would be difficult to duplicate, supporting MUCS' prima facie showing that it is trade secret.

The mere fact that the Individual Defendants helped create some of the Property within the scope of their employment with MUSC does nothing to diminish the SCTSA cause of action. If MUSC's employees did not develop trade secrets for it, who would? The argument that MUSC's Property is somehow not a trade secret because its employees helped develop it is nonsensical and contrary to clear South Carolina law recognizing that materials developed by an employee (even using his or her know-how) within the scope of employment belong to the employer. *See, e.g., Milliken & Co. v. Morin*, 399 S.C. 23, 35, 731 S.E.2d 288, 294 (2012) ("An employer therefore has a legitimate interest in protecting inventions that are the fruits of its employees' efforts while working for the company.").

In addition, the Hospital Defendants argue that MUSC did not label or identify the Property as belonging to MUSC or as confidential and proprietary. But labels are not required under the SCTSA or South Carolina case law. Thus, this argument is nothing more than a red herring. Under the SCTSA a party is only required to engage in reasonable efforts to maintain the secrecy of the documents or information. S.C. Code § 39–8–20(5)(a). There is no requirement that documents or information be marked or labeled in any particular way. Based on the evidence presented in the Petition, MUSC made the required prima facie showing to demonstrate that the Property is a trade secret. To summarize that evidence, the Property is not available in the public domain, access is limited only to those individuals who have a legitimate need to access it, policies and procedures

safeguard these materials from disclosure to unauthorized recipients, and a two-factor authentication system protects this information from remote access. **(R. 144-45, R. 161, 466)**. In addition, faculty physicians, including the Individual Defendants, are contractually prohibited from disclosing MUSC's confidential materials, and faculty physicians are prevented from using MUSC's confidential materials for their own benefit. **(R. 359, R. 466)**.

The Hospital Defendants also point to an affidavit filed by Dr. Peter Horwich, who is a current employee of Trident. **(R. 519-22)**. According to Dr. Horwich, he was a fellow at MUSC for approximately one year. **(R. 519, ¶ 4)**. Because of the COVID-19 pandemic, Dr. Horwich states "there were few opportunities for employment," so after completing his fellowship with MUSC, he applied for another fellowship at LSU Health Shreveport. **(R. 519, ¶ 5)**. Dr. Horwich claims he did not have his own physician preference cards; thus, he asked an unidentified nurse at MUSC if he could review Dr. Hornig's preference cards to create his own. **(R. 520, ¶ 7)**. Dr. Horwich does not identify how he obtained Dr. Hornig's "case logs," but he appears to claim that despite creating his own preference cards, Dr. Hornig's preference cards and case logs were transferred to LSU Health Shreveport. **(R. 520, ¶ 8)**. It is not clear how this alleged transfer occurred, and Dr. Horwich does not attach documents showing how these materials were sent to LSU (if they were). Then, Dr. Horwich summarily claims, "no one at MUSC objected to the transfer of the case logs or Dr. Hornig's preference cards to LSU." ***(Id.)***.

There is a lot to unpack with Dr. Horwich's affidavit. According to Dr. Horwich, he spoke to an unidentified nurse about reviewing Dr. Hornig's physician preference cards for the sole purpose of creating his own physician preference cards, not for sending Dr. Hornig's physician preference cards to LSU. ***(Id.)***. Dr. Horwich claims the unidentified nurse provided him with Dr. Hornig's physician preference cards to review based on that request. ***(Id.)***. Dr. Horwich does not

identify any occasion when he asked the unidentified nurse (or anyone else at MUSC) whether he could send Dr. Hornig's physician preference cards to LSU. Dr. Horwich does not identify how he obtained Dr. Hornig's case logs. Again, Dr. Horwich does not identify any occasion when he asked the unidentified nurse (or anyone else at MUSC) whether he could send Dr. Hornig's case logs to LSU. Thus, when Dr. Horwich claims no one at MUSC objected to the transfer of Dr. Hornig's case logs and preference cards to LSU, this is not a compelling statement given the facts testified to by Dr. Horwich. The facts testified to by Dr. Horwich demonstrate two things: (1) Dr. Horwich never asked anyone at MUSC whether he could send Dr. Hornig's case logs and physician preference cards to LSU; and (2) MUSC never gave him permission to transfer Dr. Hornig's case logs and physician preference cards to LSU.

In addition to Dr. Horwich's affidavit, the Hospital Defendants rely on the affidavit of Elaine Meuli, the Director of Medical Staff Services at Trident. **(R. 523-25)**. Ms. Meuli summarily states she has "never heard of such case logs ever being identified as trade secrets or as protected confidential information or proprietary records or documents." **(R. 524)**. This statement from Ms. Meuli and the affidavit of Dr. Horwich do nothing to keep MUSC from clearing the low bar of a prima facie case with respect to their SCTSA cause of action, which they have easily done based on the evidence presented.

Accordingly, this Court should grant supersedeas relief to MUSC with respect to their SCTSA cause of action.

V. The Hospital Defendants have repeatedly attempted to expand the scope of the relief MUSC has requested, in an effort to avoid returning the Property.

The Hospital Defendants' argument that MUSC's request for an injunction is "improperly vague, ambiguous, and overbroad" is disingenuous (at best). **(Return pp. 21-22)**. From this

platform, the Hospital Defendants renew their argument that MUSC is surreptitiously attempting to prevent the Individual Defendants from practicing medicine at Trident.

MUSC has been very clear about the specific ***documents and materials*** that constitute the Property. MUSC has further confirmed in two hearings before the circuit court and both petitions for supersedeas that they are NOT attempting and will not attempt to prevent the Individual Defendants from performing surgeries at Trident or from using their own knowledge and expertise. **(Petition p. 11)**. MUSC is happy to reiterate, yet again, that it simply seeks to enjoin the Hospital Defendants from possessing and using the Property.

In the Settlement Agreements, the Individual Defendants agreed to destroy and refrain from using the exact same Property that is at issue here. **(R. 280-81, R. 293-94, R. 305-06, R. 317-18, R. 329-30, R. 341-42)**. Logically, it makes no sense that Hospital Defendants could somehow possess and use the Property without causing the Individual Defendants to violate their Settlement Agreements. For example, who exactly is supposed to use the physician preference cards that Hospital Defendants refuse to return, if not the Individual Defendants who are contractually bound to refrain from using them? It is also preposterous to imply that the Individual Defendants could agree, as consideration for a Settlement Agreement, to destroy and refrain from using the Property they misappropriated but that their employer ***to whom the Individual Defendants provided the misappropriated Property*** could then provide the Individual Defendants with separate copies. The Settlement Agreements would be meaningless if that were the case.

MUSC's request for injunctive relief is specific and clear. The Hospital Defendants' attempts to muddy the waters are simply a continuation of a pattern of misdirection and obfuscation to distract from the undeniable fact that the Hospital Defendants have MUSC's Property, and they refuse to return it despite their employed physicians agreeing to the same.

VI. There is no "heightened standard" MUSC must clear to obtain supersedeas relief, but even if there were, MUSC has cleared it.

The Hospital Defendants argue MUSC must meet a "heightened standard" in order to obtain an injunction pending appeal. (**Return p. 15**). In support of this assertion, the Hospital Defendants cite a 1912 opinion from a lone justice—Justice Woods—in *Kuhn Elec. Mfg. & Power Co.*, 92 S.C. 488, 75 S.E. 791 (1912), a 1913 opinion from a lone justice—Justice Fraser—in *Silverthorne v. Barnwell Lumber Co.*, 96 S.C. 32, 79 S.E. 519, 519 (1913), and an opinion issued by Justice Sotomayor in *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401 (2012). In *Kuhn*, Justice Woods denied the request to issue an injunction during the pendency of appeal, remarking that the issue involved "difficult questions of law." 75 S.E. at 79. In *Silverthorne*, Justice Fraser stated an injunction during the pendency of appeal "ought not to be exercised ***unless the right*** ... is very clear and beyond reasonable question." 79 S.E.2d at 519 (emphasis added). In *Hobby Lobby*, Justice Sotomayor denied a party's motion for an injunction pending resolution of the appeal, stating the right asserted was not "indisputably clear." 568 U.S. at 1403-04.

The Hospital Defendants cherry pick statements from *Kuhn*, *Silverthorne*, and *Hobby Lobby* to try to create a new standard for supersedeas relief. These cases do not create a standard. This is evidenced by the fact that these statements did not find their way to Rule 241, SCACR, and subsequent courts (including this one) have not cited them when considering supersedeas relief in other instances. *See, e.g.*, *Sea Pines*, 345 S.C. at 598, 550 S.E.2d at 290.

The statements in *Kuhn*, *Silverthorne*, and *Hobby Lobby* are a reflection of the type of cases they were. In all three cases, the moving parties sought an injunction during the pendency of appeal for rights that were uncertain. In *Kuhn*, the appellant asked for a supersedeas and a writ of mandamus (the highest judicial writ available) to require the Secretary of State to sign and issue certificates of the proposed amendments to the charter of a corporation. 75 S.E. at 79. In

Silverthorne, the appellant sought an injunction reinstating him to the position of superintendent and general manager of the respondent company, which appellant claimed he was "entitled to." 96 S.C. at 32, 79 S.E. at 519-20. Justice Fraser noted that appellant's claimed contractual right to a position at the company was unclear in the record and therefore did not warrant reversing the circuit court's ruling. *Id.* In *Hobby Lobby*, two closely-held corporations sought an injunction to prevent enforcement of the contraception-coverage requirement in the Patient Protection and Affordable Care Act, claiming that enforcement violated the corporations' rights under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act. 568 U.S. at 1402. Justice Sotomayor found that the corporations' rights were not "indisputably clear" because the Supreme Court had never previously addressed a similar claim and because the lower courts were split on whether to grant injunctions in similar cases. *Id.* at 1403-04.

By contrast, the legal claims that are the subject of this Petition—claims for breach of duty of loyalty and violation of the SCTSA—are well-developed and established legal concepts. South Carolina courts have routinely granted injunctions in cases just like this one where a competitor is in possession of specific property belonging to another. *See Boone Ins. Agency, Inc. v. Lloyd*, No. 3:20-CV-02980-JMC, 2020 WL 5052956 (D.S.C. Aug. 27, 2020); *Vessel Med., Inc. v. Elliott*, C/A No. 6:15-cv-00330-MGL, 2015 WL 5437173, at *9 (D.S.C. Sept. 15, 2015); *Indus. Packaging Supplies, Inc. v. Martin*, No. CA 6:12-713-HMH, 2012 WL 1067650 (D.S.C. Mar. 29, 2012); *Rockford Mfg., Ltd. v. Bennet*, 296 F.Supp.2d 681 (D.S.C. 2003); *Milliken*, 399 S.C. at 37, 731 S.E.2d at 295; *Lewallen Automation, LLC v. Lewallen*, 2014 WL 7925812 (S.C. Comm. Pl. 2014). Thus, the situations in *Kuhn, Silverthorne, and Hobby Lobby* are not analogous here.

But even if a heightened standard applied, MUSC has cleared it. The Hospital Defendants have never disputed that the Property belongs to MUSC. The Hospital Defendants have conceded

that MUSC developed the Property with assistance from the Individual Defendants while they were employed by MUSC. (**Return pp. 4, 14**). South Carolina law is clear that materials developed by employees within the scope of their employment belong to their employer. South Carolina law is also clear that employees owe a duty of loyalty to their employer, which necessarily includes not misappropriating a former employer's property and providing it to a new employer. *See* **Petition p. 16**. Thus, MUSC's rights to the Property and to a duty of loyalty from the Individual Defendants (a breach of which Hospital Defendants are jointly and severally liable under South Carolina law) are indisputably clear, and MUSC would meet the heightened standard, if it applied.

VII. The Hospital Defendants' argument that the Court must deny supersedeas relief because of HCA's pending Motion to Dismiss is erroneous.

The Hospital Defendants argue that the Court must deny the Petition because it would impose injunctive relief over HCA despite a lack of personal jurisdiction. This argument fails for several reasons.

First and foremost, HCA's Motion to Dismiss and supporting Memorandum of Law blatantly disregard the controlling rule that, at the pre-trial stage of the proceedings, a plaintiff need only make a prima facie showing that a court has personal jurisdiction over the defendant. *Brown v. Inv. Mgmt. & Research, Inc.*, 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996). In making the determination whether a plaintiff made a prima facie showing of the court's jurisdiction, a court must accept as true the allegations in the complaint and other evidentiary submissions, and all evidence must be viewed in the light most favorable to the plaintiff. *Id.* Under those standards, MUSC easily made a prima facie showing of the court's general and specific jurisdiction over HCA through the allegations in the complaint and the pre-discovery evidence submitted to the court (including affidavits, publicly available websites and regulatory filings, and emails).

More specifically, the complaint and evidence viewed in the light most favorable to MUSC demonstrate HCA's enduring relationship with South Carolina and its continuous and systematic affiliations with the State, sufficient to find the court has general personal jurisdiction over HCA. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 495, 611 S.E.2d 505, 510 (2005); *Cribb v. Spatholt*, 382 S.C. 475, 483, 676 S.E.2d 706, 710 (Ct. App. 2009). Further, the complaint and evidence viewed in the light most favorable to MUSC demonstrate that HCA engaged in tortious conduct in South Carolina, that HCA directed its activities to residents of South Carolina resulting in the instant cause of action, and that the State has an interest in exercising jurisdiction, sufficient to find the court has specific jurisdiction over HCA. S.C. Code § 36-2-803; *Cribb*, 382 S.C. at 484-488, 676 S.E.2d at 711-713. As such, HCA's Motion to Dismiss must fail under the applicable standard for determining personal jurisdiction at the pre-trial stage, and this Court can and should exercise jurisdiction over HCA.

Second, HCA has taken almost no action to have its Motion to Dismiss for lack of personal jurisdiction heard by the Business Court, where the underlying case is pending. In Business Court, the parties maintain responsibility for scheduling their hearings with the Business Court Judge. *See* S.C. Sup. Ct. Order dated Jan. 30, 2019. For the first three months when this case was pending before the Business Court, HCA took no action whatsoever to have a hearing scheduled on its Motion to Dismiss. HCA could have reached out to the Business Court to obtain dates when a hearing could occur, but instead, HCA did nothing. HCA made its lone request for a hearing to the Business Court on June 1, 2022. From June 1, 2022 to present date (over two months' time), HCA has again done nothing. HCA did not even bother asking the Business Court for a hearing on its Motion to Dismiss before filing its Motion to Hold the Appeal in Abeyance or before filing its Return.

The Hospital Defendants prefer delay because it inures to their benefit. The longer they can impede this Court from addressing MUSC's urgent requests for relief, the longer they can remain in unfettered possession of the Property and irreparably erode MUSC's competitive advantage. The Hospital Defendants' consistent dilatory conduct confirms the reasons this Court should grant immediate relief to MUSC; to do otherwise is inequitable and rewards bad behavior.

Third, even assuming this Court does not have personal jurisdiction over HCA, there is no allegation that this Court does not have personal jurisdiction over Trident. If the Court is so inclined, it could fashion an order that preserves the fruits of a meritorious appeal to MUSC without asserting personal jurisdiction over HCA. Specifically, the Court could grant supersedeas relief to MUSC in the form of an injunction requiring Trident to return and refrain from using the Property pending a determination on HCA's Motion to Dismiss. Further, the Court could order Trident to collect from HCA any of the Property that it may have shared with HCA and to return the same to MUSC.

CONCLUSION

MUSC urges this Court to view the Petition for Writ of Supersedeas through the appropriate lens, which is at its core an equitable request. The Hospital Defendants are in possession of MUSC's Property, and the Hospital Defendants have articulated no reason why they have any right to possess the Property. The balance of equities and hardships tips decidedly in MUSC's favor. Therefore, MUSC respectfully request this Court to grant supersedeas relief and impose an injunction requiring the Hospital Defendants to return and refrain from using the Property while this appeal is pending.

[signature block to follow]

Respectfully submitted,

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ATTORNEYS FOR APPELLANTS MEDICAL UNIVERSITY OF SOUTH CAROLINA and the UNIVERSITY MEDICAL ASSOCIATES OF THE MEDICAL UNIVERSITY OF SOUTH CAROLINA

Columbia, South Carolina
August 8, 2022

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Aug 08 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2022-000352

Medical University of South Carolina and University Medical Associates of the Medical University of South Carolina,..... Appellants,

v.

HCA Healthcare, Inc.; Trident Medical Center, LLC; Terry A. Day; Betsy Kay Davis; Joshua D. Hornig; Eric J. Lentsch; David M. Neskey; and Anand K. Sharma,..... Defendants,

Of Which HCA Healthcare, Inc. and Trident Medical Center, LLC, are the ..... Respondents.

PROOF OF SERVICE

I, Amy C. Elkins, an employee of Burr & Forman LLP, hereby certify that a true and correct copy of the Reply to Trident's Return to Petition for Writ of Supersedeas was served upon counsel for the Respondents in the above-captioned matter via email at the email addresses shown below, this 8th day of August, 2022, as follows:

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Aug 16 2022
SC Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
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Of Which HCA Healthcare, Inc. and Trident Medical Center, LLC, are the ..... Respondents.

PETITION FOR FULL APPELLATE COURT REVIEW OF ORDER DENYING SUPERSEDEAS

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ATTORNEYS FOR APPELLANTS

Appellants Medical University of South Carolina ("MUSC") and University Medical Associates of the Medical University of South Carolina ("UMA") respectfully petition this Court, pursuant to Rule 241(d)(2) of the South Carolina Appellate Court Rules ("SCACR"),[1] for a full appellate court review of the Order filed on August 11, 2022 denying Appellants' Petition for Writ of Supersedeas.

PROCEDURAL HISTORY

Appellants filed a Petition for Writ of Supersedeas with this Court on July 22, 2022, in accordance with the requirements of Rule 241, SCACR. In the Petition, Appellants requested review by Chief Judge Bruce H. Williams, and requested that Judge Williams either (1) issue an order granting the requested relief during the pendency of the appeal or (2) issue an order granting the requested relief on a temporary basis and refer the matter to the full appellate court for a hearing.

Appellants and Respondents completed briefing on the Petition for Writ of Supersedeas on August 8, 2022. Three days later, on August 11, 2022, Judge James E. Lockemy issued a two-sentence Order that did not address the merits of the Petition. Instead, Judge Lockemy's Order states, "After careful consideration, Appellants' petition for supersedeas is denied. Appellants' request for a hearing on their petition is denied."

PETITION FOR HEARING

Under Rule 241(d)(2), "upon issuance of a final order by an individual judge or justice [on the petition for supersedeas], an aggrieved party may petition the full appellate court for review of that decision." Rule 241(d)(7), SCACR, further states "[a]ny party aggrieved by a decision of . . . an individual judge or justice may petition under this Rule for a review of that decision." Finally,

[1] Alternatively, Appellants move for an *en banc* hearing to hear or rehear the Petition under Rule 219(a), SCACR.

under Rule 219(a), SCACR, this Court has the authority to hear or rehear an appeal or other proceeding *en banc*.

Appellants respectfully request that the full Court of Appeals review Judge Lockemy's Order. Respectfully, Judge Lockemy's Order is procedurally and substantively incorrect.

Procedurally, Judge Lockemy's Order violates Rule 220(b), SCACR. *See* Rule 220(b), SCACR ("In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case."); *see also In re Memorandum Decisions by Ct. of Appeals*, 322 S.C. 53, 54, 471 S.E.2d 456, 457 (1993) (explaining the Court of Appeals' limited authority to issue an opinion without giving a reason for each issue). Judge Lockemy's Order fails to address any of the arguments made in the Petition, and for this reason, it violates Rule 220(b) and the Supreme Court's opinion in *In re Memorandum Decisions by Ct. of Appeals*.

Substantively, Judge Lockemy's Order fails to grant supersedeas relief where it is warranted. The Petition seeks to preserve the fruits of Appellants' appeal of the circuit court's order denying its motion for temporary injunction. Rule 241(c)(2), SCACR; *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 468, 470 (Ct. App. 1990). If the Petition is not granted, the fruits of Appellants' appeal will be lost before the appeal can ever be decided. In moving for temporary injunction, Appellants asked the circuit court to order Respondents to return MUSC's Property.[2] The circuit court refused, and Appellants appealed that decision to this Court. While the appeal is pending, Respondents, a competitor of MUSC, remain in possession of MUSC's Property. By

[2] MUSC's Property is specifically defined in the Petition.

remaining in possession of the Property, Respondents erode the competitive advantage MUSC has gained through lawful means.

There is no dispute that Respondents are in possession of MUSC's Property. Respondents came into possession of the Property through employee misappropriation. The Individual Defendants[3] were long-term employees and faculty members at MUSC. The Individual Defendants decided to leave their employment with MUSC and commence work for the Respondents' head and neck cancer practice at Trident Regional Medical Center in North Charleston.

While still employed by MUSC and while still members of UMA, the Individual Defendants misappropriated the Property and disseminated it to the Respondents. Prior to the unlawful actions of the Individual Defendants, the Respondents never had any right to access the Property. MUSC seeks an immediate return of this Property to preserve the fruits of its meritorious appeal.

Due to the very serious matters raised in the Petition, Appellants hereby petition the full Court of Appeals for a review of Judge Lockemy's Order denying Appellants' Petition. Appellants specifically request a hearing before the full Court so their Petition may be considered.

[*signature block to follow*]

[3] The Individual Defendants are Terry Day, Betsy Davis, Joshua Hornig, Eric Lentsch, David Neskey, and Anand Sharma.

Respectfully submitted,

BURR & FORMAN, LLP

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ATTORNEYS FOR APPELLANTS MEDICAL UNIVERSITY OF SOUTH CAROLINA and the UNIVERSITY MEDICAL ASSOCIATES OF THE MEDICAL UNIVERSITY OF SOUTH CAROLINA

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Of Which HCA Healthcare, Inc. and Trident Medical Center, LLC, are the ..... Respondents.

PROOF OF SERVICE

I, Amy C. Elkins, an employee of Burr & Forman LLP, hereby certify that a true and correct copy of the Petition for Full Appellate Court Review of Order Denying Supersedeas was served upon counsel for the Respondents in the above-captioned matter via email at the email addresses shown below, this 16th day of August, 2022, as follows:

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s/Amy C. Elkins
Amy C. Elkins

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Aug 26 2022
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Of whom HCA Healthcare, Inc. and Trident Medical Center, LLC; are the..... Respondents.

RETURN TO APPELLANTS' PETITION FOR FULL APPELLATE COURT REVIEW OF ORDER DENYING SUPERSEDEAS

Respondent Trident Medical Center, LLC ("Trident"), respectfully submits the following Return to the Appellants' Petition for Full Appellate Court Review of Order Denying Supersedeas.[1]

[1] Appellants have never met their burden of establishing that any South Carolina court has personal jurisdiction over HCA Healthcare, Inc. and given that, the Court cannot issue an order awarding Appellants any of their requested relief against HCA Healthcare, Inc. Due to the ongoing jurisdictional issues related to HCA Healthcare, Inc., Respondents filed a Motion to Hold Appeal in Abeyance requesting the entire appeal be held in abeyance until the circuit court rules on HCA Healthcare, Inc.'s Motion to Dismiss for Lack of Jurisdiction which was filed on December 7, 2021.

INTRODUCTION

Appellants Medical University of South Carolina and University Medical Associates of the Medical University of South Carolina (collectively, "Appellants") Petition for Full Appellate Court Review of Order Denying Supersedeas (the "Petition"). In their Petition Appellants raise two arguments: (1) the Court's prior order, dated August 11, 2022, denying the Petition for Supersedeas is procedurally incorrect because it does not comply with Rule 220(b), SCACR, due to a purported failure to state details supporting the Court's denial of that petition; and (2) the Court's prior order, dated August 11, 2022, is substantively incorrect because Appellants claim that without the relief they request they will lose "the fruits" of their appeal. Appellants request the Court grant them a hearing en banc.

Appellants' Petition should be denied because:

1. The Court's Order denying Appellants' Petition for Supersedeas is procedurally sufficent and correct;

2. The Court's Order denying Appellants' Petition is substantively correct and Appellants offer nothing new or of substance to support reversing this Court's Order denying the Petition for Supersedeas; and

3. Appellants present no argument that would justify en banc consideration.

ARGUMENTS

I. The Court's Order denying Appellants' Petition for Supersedeas is procedurally sufficent and correct.

The Court's order denying Appellants' Petition for Supersedes is brief, direct and correct. The Order states:

> After careful consideration, Appellants' petition for supersedeas is denied. Appellants' request for a hearing on their petition is denied.

In issuing an order on a motion or petition, the Court is not obligated under any rule or statute to provide anything more than the direct, clear, unambiguous decision on the motion or petition. The August 11, 2022 Order denying Appellants' Petition for Supersedeas did exactly that.

Appellants argue that the Court's Order violates Rule 220(b) and the directives set forth in *In re Memorandum Decisions by Ct. of Appeals*, 322 S.C. 53, 471 S.E.2d 456 (1993). Appellants' argument is wrong and based upon the assertion of an incorrect application of Rule 220(b), SCACR, and an unjustified interpretation of *In re Memorandum Decisions by Ct. of Appeals.* Rule 220(b) states:

> In every decision rendered by an appellate court, every point distinctly stated in the case **which is necessary to the decision of the appeal** and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case.

Of course, Rule 220, SCACR, is explicitly titled "Opinions," and as plainly stated in Rule 220(b), it applies to "the decision of the appeal." The Order dated August 11, 2022, is not the "decision of the appeal." The appeal was filed March 21, 2022, and remains pending. The August 11, 2022 Order, was issued in response to a petition and is not an opinion expressing the Court's decision of the appeal. Rule 220(b), SCACR, does not address any requirement regarding the form or content of an order denying a petition or motion filed with the Court.

Appellants' reliance on the Supreme Court's Order, *In re Memorandum Decisions by Ct. of Appeals*, 322 S.C. 53, 471 S.E.2d 456 (1993), is similarly misplaced. That Order is "intended to clarify the authority of the South Carolina Court of Appeals to issue memorandum opinions." *In re Memorandum Decisions by Ct. of Appeals*, 322 S.C. at 53, 471 S.E.2d at 456 (emphasis added). The plain language of *In re Memorandum Decisions by Ct. of Appeals* makes it clear that the instructions set forth therein are related to the issuance of memorandum opinions pursuant to Rule 220(b)(1), SCACR—not orders ruling on motions addressed by the appellate court. *See also*

ORDER, Black's Law Dictionary, (11th ed. 2019) ("An order is the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings." (quoting 1 Henry Campbell Black, *A Treatise on the Law of Judgments* § 1, at 5 (2d ed. 1902)).

The distinction between an order and an opinion was recently exemplified by the South Carolina Supreme Court in *The Protestant Episcopal Church in the Diocese of S.C., et. al, v. The Episcopal Church (a/k/a, The Protestant Episcopal Church in the United States of Am., et. al.*, No. 2020-000986, 2022 WL 3560664, at *1 (August 17, 2022). In that case, the South Carolina Supreme Court issued an order ruling on eight petitions for rehearing stating:

ORDER

> The Court received eight separate petitions for rehearing. On June 7, we denied one petition in its entirety and denied three petitions in part. We requested briefing on two arguments: (1) revocation based on subsection 62-7-602(a) of the South Carolina Code (2022), and (2) no trust was created because the language purporting to constitute accession existed in the bylaws or constitutions before 1979. After careful consideration of these two arguments in the remaining petitions for rehearing, we grant the following petitions for rehearing . . . . We deny the following petition . . . .

The Supreme Court's order in *The Protestant Episcopal Church in the Diocese of S.C.* contains no discussion of the facts or law supporting the Court's rulings on the petitions for rehearing. After issuing its order granting the petitions for rehearing, the Supreme Court—in a separately captioned filing—issued a lengthy substitute opinion (Opinion No. 28095) detailing the facts and authorities supporting its decision of the merits of the appeal.

Like this Court's August 11, 2022 Order, the Supreme Court's order in *The Protestant Episcopal Church in the Diocese of S.C.* is brief and states simply that the Court reached its decision "after careful consideration." The Supreme Court's handling epitomizes that there is no

rule or statue that renders such orders procedurally improper. Appellants' reliance on authorities related to the issuance of opinions is misplaced. Accordingly, Appellants' contention that the Court's Order denying the Petition for Supersedeas is procedurally improper lacks merit and the Court should deny Appellants' Petition.

II. The Court's Order denying Appellants' Petition for Supersedes is substantively correct, and Appellants offer nothing to support the immediate reversal of this Court's order denying the request for supersedeas—one that aligns with three prior orders issued by the circuit court.

Appellants' Petition is tantamount to a petition for rehearing, *see* Rule240(j), SCACR; however, in the Petition Appellants identify nothing that would require or justify reconsideration or rehearing of the Court's August 11, 2022 Order denying the Appellants' Petition for Supersedeas. Appellants merely offer a brief regurgitation of the same arguments that were denied by this Court and denied three (3) times by the circuit court. Nothing has changed, and nothing new or substantive is provided in the Appellants' arguments. Appellants provide no basis to change the outcome previously reached by this Court and the circuit court. To the extent the Court gives any consideration to the arguments about the merits of the Appellants' claims (for a fifth time), Trident incorporates the arguments set forth in Trident's Return to Appellants' Petition for Supersedeas, filed July 22, 2022, as the explanation and justification that Appellants' Petition should be denied on the merits yet again.

III. Appellants present no argument that would justify en banc consideration by the Court.

En banc consideration is not favored. Rule 219(a), SCACR. Ordinarily en banc review will not be granted except: (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions; or (2) when the proceeding involves a question of exceptional importance. *Id.* Appellants provide no basis to allow a conclusion that either of these conditions

exist and, in fact, this case does not satisfy either exception. Therefore, the Court should deny Appellants' Petition.

CONCLUSION

Based on the foregoing, the Court should DENY the Petition for Full Appellate Court Review of Order Denying Supersedeas.

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Of whom HCA Healthcare, Inc. and Trident Medical Center, LLC; are the..... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on August 26, 2022, copies of the **RETURN TO APPELLANTS' PETITION FOR FULL APPELLATE COURT REVIEW OF ORDER DENYING SUPERSEDEAS** and were served on all counsel of record via emails containing the above referenced document to counsels' individual AIS email addresses:

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Of Which HCA Healthcare, Inc. and Trident Medical Center, LLC, are the ..... Respondents.

REPLY TO RESPONDENTS' RETURN TO PETITION FOR FULL APPELLATE COURT REVIEW OF ORDER DENYING SUPERSEDEAS

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ATTORNEYS FOR APPELLANTS

Appellants Medical University of South Carolina ("MUSC") and University Medical Associates of the Medical University of South Carolina ("UMA") respectfully submit the following Reply to Respondents' Return to Appellants' Petition for Full Appellate Court Review of Order Denying Supersedeas.

ARGUMENT

I. Judge Lockemy's Order denying Appellants' Petition for Writ of Supersedeas is procedurally and substantively incorrect, and results in further injustice to Appellants who have never received any analysis or reasoning from a court as to why their urgent requests for injunctive and supersedeas relief have been denied.

Appellants filed a Petition for Full Appellate Court Review ("Petition"), asking the full Court of Appeals to review Judge Lockemy's Order denying Appellants' Petition for Writ of Supersedeas. *See* Rule 241(d)(2), SCACR ("Upon the issuance of a final order by an individual judge or justice, an aggrieved party may petition the full appellate court for review of that decision."). Respectfully, Judge Lockemy's Order is procedurally and substantively incorrect. Procedurally, the Order does not conform to Rule 220(b) of the South Carolina Appellate Court Rules because it fails to include any reasoning for the decision. Substantively, the Order fails to grant supersedeas relief under circumstances where it is warranted.

In the Return, Respondents spend significant time attempting to parse what differences they perceive to exist between the word "order" and the word "opinion." Respondents argue that the Court of Appeals need only provide the reasoning for its decision when issuing an opinion, not an order. Respondents then argue that Judge Lockemy's Order was substantively correct (without actually addressing the substance of the issue) and that Appellants offered nothing new in the Petition to support what effectively amounts to a petition for rehearing. Appellants address Respondents' arguments below.

a. Under Rule 220, appellate courts must state the reasons for their decisions.

Respondents argue that appellate ***orders*** are distinguishable from appellate ***opinions***, and that Rule 220, SCACR applies only to opinions, not to orders. In an attempt to cite some authority in support of their position, Respondents claim to cite to Black's Law Dictionary to define the term "order." In actuality, Respondents do not cite to the Black's Law Dictionary definition of "order"; instead, they rely on a quotation from a 1902 treatise referenced in the dictionary entry. Black's Law Dictionary defines "order" as, "A written direction or command delivered by a government official, esp. a court or judge. The word generally embraces final decrees as well as interlocutory directions or commands." ORDER, Black's Law Dictionary (11th Ed. 2019). Presumably, this definition did not help Respondents' argument; thus, they relied on the 1902 treatise instead.

In a further attempt to rely on some authority for their argument, Respondents point to recent orders and opinions issued by the South Carolina Supreme Court in *Protestant Episcopal Church in Diocese of S.C. v. Episcopal Church*, No. 2020-000986, 2022 WL 3560664 (S.C. Aug. 17, 2022). It is not clear why Respondents believe the orders and opinions issued in this case help their cause. After all, as Respondents admit, the Court in that case "issued a lengthy substitute opinion" to explain its ruling on the petitions for rehearing at issue. To be sure, that is exactly what Appellants contend is required to dispose of their petition for supersedeas—a reason for the decision. *See* Rule 220(b), SCACR.

Respondents' arguments ignore the operative term in Rule 220, SCACR, which is "decision." Rule 220(a) states that "[t]he appellate court shall make its decisions in writing by published opinions or memorandum opinions . . . ." (emphasis added). Rule 220(b), SCACR goes on to state:

> In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated

> in writing and must, with the reason for the court's decision, be preserved in the record of the case.

(emphasis added).

Black's Law Dictionary defines "decision" as "a judicial . . . determination after consideration of the facts and the law; esp., a ruling, **order**, or judgment pronounced by a court when considering or disposing of a case." DECISION, Black's Law Dictionary (11th Ed. 2019) (emphasis added). *See Berkeley Cnty. Sch. Dist. v. S.C. Dep't of Revenue*, 383 S.C. 334, 345, 679 S.E.2d 913, 919 (2009) ("Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning."). Thus, according to Black's Law, the term "decision" as used in Rule 220 is broad enough to include the term "order." Under a plain reading of Rule 220, and applying the definition of "decision" as found in Black's Law, it follows that when the appellate court or an individual judge of the appellate court renders a determination after consideration of the facts and the law, the appellate court or judge must provide a determination in the form of a written opinion that states the court or the judge's reasoning on the necessary points supporting the decision.

As a practical matter, not every decision requires the same amount of analysis or reasoning. Some matters require very little, such as motions for additional time or for additional pages. Other, more substantive matters, require more analysis or reasoning. Here, the petition before Judge Lockemy was one for supersedeas. A petition for supersedeas is not a generic petition or motion contemplated by Rule 240, SCACR. Petitions for supersedeas are of such importance that a Rule—Rule 241, SCACR—is dedicated to them. Petitions for supersedeas are, in effect, motions for temporary injunction that last during the pendency of the appeal. *See Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 598, 550 S.E.2d 287, 291 (2001). The Rules of Civil Procedure require courts to make findings of fact and conclusions of law in deciding

injunctions. Rule 52(a), SCRCP. So does our case law. *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002). By extension, these authorities, on their own, support Appellants' position that Judge Lockemy was required to provide a reason for his decision when he decided Appellant's petition for supersedeas.

Petitions for supersedeas involve substantive matters that operate to preserve the fruits of a meritorious appeal in the time span between when the notice of appeal is filed and a decision is rendered on the underlying appeal. *See* Rule 241(c)(2), SCACR. As such, petitions for supersedeas deserve the Court's attention. Rule 220(b), SCACR, like Rule 52(a), SCRCP, exists to ensure that the court or an individual judge gives due attention to the matters raised in a petition for supersedeas, and that the reviewing court has something to review. There is certainly no page requirement, but some reason must be given for the decision. With all due respect to Judge Lockemy's Order, there is no reason set forth in his Order. For this reason, the Order violates Rule 220(b).

b. Respondents ignore the plain language and purpose of Rule 241, SCACR, which governs petitions for supersedeas.

Respondents next argue that Appellants' request is "tantamount to a petition for rehearing," and that Appellants offer no new arguments justifying reconsideration or rehearing. Respondents cite to Rule 240(j), SCACR in support of this position. Rule 240(j) states, "[a]ny review of an order issued by an individual judge or justice shall be by petition for rehearing." But Respondents' argument ignores Rule 241, SCACR, which again is the Rule dedicated to petitions for supersedeas. Rule 241 establishes its own procedure for the exact situation before the Court.

Rule 241(d)(2) allows an aggrieved party (here, Appellants), upon receipt of a final order by an individual judge or justice, to "petition the full appellate court for review of that decision." Rule 241(d)(7) reaffirms this, stating, "[a]ny party aggrieved by the decision of . . . an individual

judge or justice may petition under this Rule for a review of that decision." These provisions in Rule 241 bespeak the purpose of supersedeas relief, which is set forth at Rule 241(c)(2) as either "to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Because preserving jurisdiction and avoiding mootness are important threshold issues necessary for a party's appeal to meaningfully proceed, it follows that a party is entitled to petition for immediate review by the full appellate court if aggrieved by an order from an individual justice or judge related to supersedeas relief.

Rather than looking to Rule 241 which governs the procedure related to petitions for supersedeas, Respondents cite to Rule 240(j). Respondents give the Court no reason why it should look anywhere other than to Rule 241 to decide the matter before it. Furthermore, Respondents give the Court no reason why it should ignore the clear procedure established by Rule 241. The Court should not. Rule 241 ***explicitly allows*** an aggrieved party to petition for full appellate review of an order by an individual justice or judge. That is exactly what Appellants have done. Therefore, this Court should grant Appellants' Petition in accordance with Rule 241 and afford Appellants a hearing in which to present the substance of their request for relief.

c. Despite the issuance of several orders, no court has issued findings on Appellants' arguments for injunctive relief or given any reasoning for denying Appellants' requested relief.

By way of a brief history, Appellants first sought a temporary injunction before the circuit court, and the circuit court denied Appellant's motion in a Form 4 Order without issuing any analysis or basis for its decision. Appellants then filed a Motion to Alter or Amend under Rule 59(e), SCRCP, which the circuit court denied by way of a second Form 4 Order, again without

issuing any findings or analysis.[1] Appellants filed a Notice of Appeal, which is presently pending before this Court. Four days later, in conformity with Rule 241(c), SCACR, Appellants submitted a Motion to Supersede to the circuit court, which the circuit court denied by way of another Form 4 Order, again issuing no findings or analysis. Appellants then filed a Petition for Writ of Supersedeas to this Court, which Judge Lockemy denied without providing any analysis or reasoning. To date, no court has provided any reasoning, analysis, or findings in support of the decisions to deny Appellants' the relief they seek.

The simple premise of Appellants' urgent and repeated requests for injunctive relief is this: Respondents are direct competitors of MUSC; Respondents came into possession of MUSC's valuable property via unlawful means; and Respondents continue to wrongfully possess MUSC's property. Appellants are not aware of any legal justification for Respondents to remain in possession of MUSC's property. Respondents have provided no legal justification for their ability to remain in possession of MUSC's property. This is because there are no legal justifications under South Carolina law for an employer to be in possession of property that belongs to another. This is especially true in a case such as this one, where Respondents came into possession of MUSC's property through employee misappropriation.

Respondents have made a number of arguments that skirt the issue at hand, for example arguing both that they do not have any need for MUSC's property (despite refusing to return it) ***and*** that it would be disastrous if the Court required Respondents to return MUSC's property. Respondents have also argued that they were unaware the property was misappropriated (which, even if true at one time, has not been true for nearly a year), and that to require Respondents to

[1] Both circuit court orders clearly violate Rule 52(a), SCRCP, because there were no factual findings in either order.

return the property would disturb the (unlawful) status quo. Meanwhile, Respondents continue possessing (and upon information and belief, using) MUSC's property while the appeal is pending, eroding MUSC's competitive advantage from being the lawful, first-in-time creators of the property.

The courts' continued refusal to issue any findings or reasoning for denying Appellants' requests for relief rewards Respondents for bad faith and dilatory tactics. Respondents have been allowed to continue possessing MUSC's property and devouring the fruits of a meritorious appeal for almost a year. Respondents' continued possession of MUSC's property that was admittedly acquired through employee misappropriation presents a critical issue for Appellants, and for South Carolina employers generally. For these reasons, Appellants respectfully request full appellate review of the Petition and the opportunity to be heard at a hearing.

II. Respondents' argument about *en banc* consideration is misplaced and incorrect.

Respondents argue that *en banc* consideration is not favored under Rule 219(a), SCACR, and that Appellants have provided no basis for meeting the two exceptions justifying *en banc* review: (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Again, Respondents are ignoring Rule 241, SCACR, which specifically addresses the propriety of full appellate court review of petitions for supersedeas. Petitions for supersedeas are treated differently than other requests for *en banc* consideration. But, even assuming Appellants must meet an exception for *en banc* consideration (they do not), the issue before the court is of exceptional importance. MUSC, the State's flagship healthcare provider, is suffering ongoing and irreparable injury while their direct competitor continues using MUSC's lawfully-created property to erode its competitive advantage. But more than that, the precedent set by allowing employees

to surreptitiously deliver their former employer's property to a new employer and then allowing the new employer to blatantly retain and use such property will have dire consequences for South Carolina businesses. As such, the Petition involves an issue of exceptional importance justifying *en banc* consideration.

CONCLUSION

For the reasons set forth above, Appellants respectfully request full appellate court review of Judge Lockemy's Order, and Appellants further request a hearing before the full Court.

Respectfully submitted,

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Columbia, South Carolina
September 2, 2022

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2022-000352

Medical University of South Carolina and University Medical Associates of the Medical University of South Carolina,..... Appellants,

v.

HCA Healthcare, Inc.; Trident Medical Center, LLC; Terry A. Day; Betsy Kay Davis; Joshua D. Hornig; Eric J. Lentsch; David M. Neskey; and Anand K. Sharma,..... Defendants,

Of Which HCA Healthcare, Inc. and Trident Medical Center, LLC, are the ..... Respondents.

PROOF OF SERVICE

I, Amy C. Elkins, an employee of Burr & Forman LLP, hereby certify that a true and correct copy of the Reply to Respondents' Return to Petition for Full Appellate Court Review of Order Denying Supersedeas was served upon counsel for the Respondents in the above-captioned matter via email at the email addresses shown below, this 2nd day of September, 2022, as follows:

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