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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. 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.

RESPONDENTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Plaintiffs met their burden of establishing that any South Carolina court has personal jurisdiction over HCA Healthcare, Inc. such that any injunctive relief can be ordered against it.

II. Whether the circuit court properly denied Plaintiffs' Motion for Temporary Injunction after having found that (1) Plaintiffs failed to demonstrate sufficiently the absence of an adequate remedy at law and (2) Plaintiffs failed to demonstrate sufficiently that they will be irreparably harmed in the absence of the issuance of temporary injunctive relief.

III. Whether the circuit court erred in failing to rule on the issue of whether Plaintiffs are likely to succeed on the merits of their claims when the court already found that Plaintiffs failed to meet their burden of proof in relation to all other required elements of the claim for temporary injunctive relief.

IV. Whether the circuit court's order denying Plaintiffs' Motion for Temporary Injunction complies with Rule 52 of the South Carolina Rules of Civil Procedure when it expressly identifies the legal principles applicable to the analysis of the claim and had plainly stated that Plaintiffs failed to establish two of the three essential elements for obtaining injunctive relief.

STATEMENT OF THE CASE

The underlying litigation began with the filing of a lawsuit by Plaintiffs Medical University of South Carolina ("MUSC") and University Medical Associations of the Medical University of South Carolina ("UMA" and collectively with MUSC, "Plaintiffs") against Respondents Trident Medical Center, LLC ("Trident") and HCA Healthcare, Inc. ("HCA" and collectively with Trident, "Respondents") and six (6) individual physicians (the "Defendant Physicians") who were formerly employed by UMA and who conducted their medical practices at MUSC's facility. Those Defendant Physicians gave notice and resigned their employment with Plaintiffs in July and August 2021. The Defendant Physicians' resignations were effective December 1, 2021.

Prior to the Defendant Physicians' resignations becoming effective, Plaintiffs commenced this litigation by filing the Complaint on November 21, 2021. (R. __). Plaintiffs alleged the following five (5) causes of action against HCA and Trident: (1) Intentional Interference with

Contractual Relationships; (2) Civil Conspiracy; (3) South Carolina Unfair Trade Practices Act; (4) South Carolina Trade Secrets Act; and (5) Temporary and Permanent Injunction.[1]

The first cause of action in Plaintiffs' Complaint alleged a breach of the duty of loyalty against only the Defendant Physicians. (R. __). That cause of action makes no allegations against and, indeed, never even mentions Respondents. (R. __). The Complaint never even alleges—not even in conclusory fashion—that Respondents owe a duty of loyalty to Plaintiffs. The essence of Plaintiffs' Complaint and the *sine qua non* of the claim for temporary injunctive relief, is the allegation that prior to the end of the Defendant Physicians' employment, the Defendant Physicians obtained information from their employment with Plaintiffs which is now alleged to be secret, proprietary and confidential which was then transmitted to Trident. The allegation that the information at issue is secret, proprietary, or confidential is alleged in wholly conclusory fashion. (R. __).

The Complaint alleges only that the Defendant Physicians took the so-called secret, confidential or proprietary information. Specifically, Plaintiffs allege that the materials misappropriated by the Physician Defendants consist of the following items:

1. Case logs (R. __; Complaint ¶¶ 68, 69, 70);
2. Physician preference cards (R. ___; Complaint ¶ 59);
3. Instrument lists (R. ___; Complaint ¶ 59);
4. Financial information showing the amount of revenue generated by four of the Physician Defendants during their

[1] Plaintiffs also alleged additional claims against the Defendant Physicians including: (1) breach of duty of loyalty; (2) intentional interference with contractual relationships; (3) civil conspiracy; (4) breach of contract; (5) breach of contract accompanied by a separate fraudulent act; (6) violation of the South Carolina Unfair Trade Practices Act; (7) violation of the South Carolina Trade Secrets Act; (8) breach of covenant not to compete (against only three (3) of the physicians); (9) breach of contract accompanied by a fraudulent act (against only one of the physicians); and (11) temporary and permanent injunction.

employment with MUSC and MUHA hospital and their RVUs (R. ___; Complaint ¶¶ 65, 66);

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

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

On the same day Plaintiffs filed their Complaint against Respondents (November 21, 2021), Plaintiffs moved the circuit court for a temporary injunction and requested that the Defendant Physicians, Trident, and HCA be enjoined from:

(1) Utilizing Plaintiffs' confidential and proprietary information, including instrument lists, patient lists, physician preference cards and financial data;

(2) Maintaining (requiring 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) Billing or collecting money for services performed utilizing any of Plaintiffs' confidential and proprietary information, including instrument lists, patient lists, physician preference cards, and financial data;

(4) Interfering with MUSC's Fellowship Program in any way or recruiting any MUSC Fellow;

(5) Contacting any fellowship accreditation bodies regarding MUSC; and

(6) Recruiting or soliciting, or otherwise contacting current MUSC and UMA employees, associates, agents, and fellows regarding any potential employment with HCA.

(R. __).

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. That same day, HCA filed an affidavit of Michael Bray and a Memorandum of Law in Support of its

Motion to Dismiss. (R. __). The circuit court has not ruled on HCA's Motion to Dismiss for Lack of Personal Jurisdiction and, therefore, neither the circuit court, nor any other South Carolina court has made a determination as to whether Plaintiffs have met their burden of establishing a South Carolina court's jurisdiction over HCA in this case.

On December 9, 2021[2], the circuit court held a hearing on the Plaintiffs' Motion for Temporary Injunction. (R. __). At that time, Plaintiffs had the opportunity and the burden to prove their entitlement to the injunctive relief requested.

Prior to the hearing on the Plaintiffs' Motion for Temporary Injunction, Trident submitted affidavits establishing that none of the documents or information for which Plaintiffs requested the circuit court impose the extraordinary remedy of injunctive relief are, in fact, confidential, proprietary, or protectable trade secrets. (R. __). Specifically, the affidavits submitted by Trident establish (a) the case logs at issue are records of the procedures performed by the Defendant Physicians in the past, and such logs are widely and traditionally used to demonstrate those physicians' competency to perform such procedures, (R. ___; Meuli Aff. ¶ 7); (b) it is standard and routine in the practice of medicine for case logs maintained at prior institutions where a physician practiced to be provided to a new hospital where the physician seeks to obtain privileges, (R. __; Meuli Aff. ¶ 7); (R. __; Horwich Aff. ¶ 6); (c) a physician preference card is a catalogue of the specific tools, supplies, instruments, pharmaceuticals and processes preferred for use by a particular physician, (R. ___); (d) an instrument list is a list of the specific instruments that a particular physician prefers to have available when he/she performs a specific procedure, (R. __); (e) the instrument lists and physician preference cards at issue in this case were developed by each

[2] On December 8, 2021—the day prior to the circuit court hearing on the Motion for Temporary Injunction—Plaintiffs finalized a Settlement Agreement with each of the six (6) Defendant Physicians.

of the six Defendant Physicians themselves based on each's individual, personal knowledge, experience and preferences. (R. ___; Brendle Aff. ¶¶ 4 - 5).

Trident also submitted to the circuit court an affidavit executed by Dr. Peter Horwich. In his affidavit, Dr. Horwich—a MUSC Fellow who studied under the Defendant Physicians at MUSC from July 1, 2019 to June 30, 2020—attested to the fact that when he was in the process of leaving his fellowship at MUSC and being hired at his second fellowship at LSU Health Shreveport ("LSU"), he was required to obtain privileges at LSU and to do so he provided his case logs from MUSC to LSU. Dr. Horwich's affidavit states that he obtained those case logs from MUSC upon request with no issues being raised by MUSC such as in this case. Additionally, Dr. Horwich's affidavit states that he asked his mentor at MUSC (Dr. Hornig) for copies of his preference cards and the MUSC Nurse Coordinator provided him with Dr. Hornig's preference cards to forward to LSU. (R. ___; Horwich Aff. ¶ 6-7). According to Dr. Horwich, at no time did anyone from MUSC assert that the case logs or preference cards were a trade secret, or confidential or proprietary materials, and no one at MUSC objected to the transfer of the case logs or Dr. Hornig's preference cards to LSU. (R. __; Horwich Aff. ¶ 8).

In addition to the affidavits submitted to the circuit court, the records and exhibits submitted to the circuit court established that the instrument lists and physician preference cards which are alleged in wholly conclusory fashion to be secrets, and proprietary and confidential documents that were provided to Trident were not: (i) labeled or identified in any way as coming from, belonging to or involving Plaintiffs; (ii) labeled or identified in any way as being "Trade Secrets"; or (iii) labeled or identified in any way as being "confidential" or "proprietary." Furthermore, the evidence submitted to the circuit court reflects that the transmissions of those lists and cards to Trident were actually made by employees of MUSC using MUSC emails. (R.

__). No evidence was submitted to the circuit court that Trident knew such lists or cards were claimed by MUSC to be secrets or to be confidential or proprietary; had been "misappropriated" from MUSC; or that the transmissions of those lists and cards (by way of MUSC employees and MUSC's email system) were not authorized.

On December 15, 2021, the circuit court, after receiving the submissions and hearing the arguments of the parties, issued an order denying Plaintiffs' Motion for Temporary Injunction. (R. __). The circuit court denied Plaintiffs' Motion with specific reference to the findings and conclusions that (a) Plaintiffs had failed to demonstrate that irreparable harm would occur if the temporary injunction were not granted, and (b) Plaintiffs failed to demonstrate sufficiently that they lack an adequate remedy at law for their purported claims. (R. __). The circuit court did not address the jurisdictional issues raised by HCA's Motion to Dismiss for lack of Personal Jurisdiction and that Motion remains pending before the circuit court.

On December 28, 2021—the last possible day—Plaintiffs filed a Motion to Alter or Amend the circuit court's order denying the Motion for Temporary Injunction. (R. __).

On February 18, 2022, the circuit court issued its order denying Plaintiffs' Motion to Alter or Amend. (R. __). Thirty (30) days after the circuit court issued its order, on March 21, 2022—the last possible day—Plaintiffs filed a Notice of Appeal of the circuit court's orders denying Plaintiffs' request for temporary injunctive relief.

STANDARD OF REVIEW

"An order granting or denying an injunction is reviewed for abuse of discretion." *Richland Cnty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018) (citation omitted); *Greenville Bistro, LLC v. Greenville Cnty.*, 435 S.C. 146, 160, 866 S.E.2d 562, 569 (2021) (same); *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 8, 760 S.E.2d 785, 788 (2014) (same). "An abuse of discretion arises where the trial court was controlled by an error of law or where its order is

based on factual conclusions that are without evidentiary support." *Id*. at 307, 811 S.E.2d at 766 (citation omitted). Thus, the circuit court's order denying MUSC's Motion for Temporary Injunction must be affirmed if the Court is unable to conclude that the circuit court's decision lacked evidentiary support or was the product of an error of law. *Hook Point, LLC v. Branch Banking & Tr. Co.*, 397 S.C. 507, 511, 725 S.E.2d 681, 683 (2012).

This is an appeal from an order denying a motion for temporary injunctive relief, not an appeal from an order denying relief or a garden variety equitable claim. Plaintiffs seek to rely on the holdings in *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011) and *Belle Hall Plantation Homeowner's Association, Inc. v. Murray*, 419 S.C. 605, 615, 799 S.E.2d 310, 315 (Ct. App. 2017), in an attempt to evade the direct and unequivocal decisions by South Carolina courts deciding appeals from circuit court orders granting or denying motions for temporary injunctions. The Court in *Lewis*, 392 S.C. at 386, 709 S.E.2d at 652, analyzed the applicable standard of review for cases originating in the family court and held that on appeal family court orders are reviewed *de novo*. The Court in *Belle Hall* addressed the standard of reviewing an appeal involving a foreclosure sale. Neither of those cases addresses the proper standard of review for an order granting or denying an injunction.

The cases directly on point and expressly addressing the standard of review for an order granting or denying a motion for temporary injunction plainly establish that a circuit court's order on such motions will not be overturned absent an abuse of discretion. *See Richland Cnty.*, 422 S.C. at 309, 811 S.E.2d at 767; *Greenville Bistro, LLC*, 435 S.C. at 160, 866 S.E.2d at 569. Notably, the opinions in both *Richland County* and *Greenville Bistro* were issued after the *Lewis* and *Belle Hall* opinions and both cases unequivocally establish that an order granting or denying

a motion for temporary injunctive relief should not be overturned absent an abuse of discretion. *Id.*

ARGUMENTS

A temporary injunction is an extraordinary remedy. *Hampton v. Haley*, 403 S.C. 395, 409, 743 S.E.2d 258, 265 (2013). In colloquial terms, a temporary injunction must be earned. Such relief is not a matter of entitlement and cannot be granted on mere conclusory allegations. *S.C. Pub. Serv. Auth. v. Carolina Power & Light Co.*, 244 S.C. 466, 474, 137 S.E.2d 507, 510 (1964).

A plaintiff seeking to obtain the extraordinary relief of a temporary injunction must meet a heavy burden of proving its right to such relief. That right may only be established when the plaintiff satisfies all of the legal requirements for such relief and presents the necessary evidence of the required factual components.

The legal standard a plaintiff must satisfy involves all of the following elements:

1. Plaintiffs would suffer irreparable harm if the injunction is not granted;

2. Plaintiffs have no adequate remedy at law; and

3. Plaintiffs are likely to succeed on the merits of their claims.

Scratch Golf Co. v. Dunes West Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004).

In order to establish that each of those legal tests is satisfied, a plaintiff seeking the injunctive relief must meet a burden of proof on the necessary facts to satisfy each element. A plaintiff cannot satisfy its burden through a "close enough for hand grenades" standard. In order to warrant a grant of injunctive relief, a plaintiff must satisfy all of the legal elements. Failure by the plaintiff to satisfy or establish <u>any one</u> of the elements or requirements means injunctive relief is unwarranted and must be denied. *See Shelley v. Stirling*, No. 4:20-CV-3025-JD-TER, 2022 WL

2975106, at *4 (D.S.C. July 6, 2022), *report and recommendation adopted*, No. 4:20-CV-03025-JD-TER, 2022 WL 2974613 (D.S.C. July 27, 2022). In this case, where the request for injunctive relief is specifically and expressly based on Plaintiffs' claim that there has been a violation of the Trade Secrets Act and on the allegation that confidential and proprietary information exists and was misappropriated, Plaintiffs' burden includes establishing under the applicable legal standards that the martials in issue are in fact trade secrets or confidential and proprietary information qualifying for protection under South Carolina law and that Respondents committed an unauthorized misappropriation of such materials. *See Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 295, 471 S.E.2d 721, 724 (Ct. App. 1996). Plaintiffs failed to establish such elements and, therefore, the circuit court reasonably and properly denied Plaintiffs' request for injunctive relief.

I. Plaintiffs have failed to establish that any South Carolina court has personal jurisdiction over HCA Healthcare, Inc.

As a preliminary matter, the Court must first decide whether Plaintiffs met their burden of establishing that the South Carolina courts have personal jurisdiction over HCA. Personal jurisdiction must be decided in order for the Court to impose relief (the injunction) against HCA, because the Court must have jurisdiction over HCA to issue an injunction that is binding on HCA. *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"). In response to the Complaint, HCA filed a Motion to Dismiss for Lack of Personal Jurisdiction prior to the circuit court conducting any hearing on the Plaintiffs' Motion for Temporary Injunction; however, that motion has not been heard or decided by the circuit court.

Rule 65 of the South Carolina Rules of Civil Procedure governs the issuance of temporary injunctions, *Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 608, 790 S.E.2d 430, 434 (Ct. App. 2016), and Rule 65(d), SCRCP, plainly states that an injunction is binding only upon the parties to an action. Without jurisdiction over HCA, no injunction issued by the Court is binding over HCA. Moreover, any order issued that purports to bind HCA—an entity over whom the Court lacks jurisdiction—is void and has no legal effect. *See 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); *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995).

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. *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2012). Plaintiffs failed to carry their burden of establishing that any South Carolina court has either general jurisdiction, S.C. CODE ANN. § 36-2-802, or specific jurisdiction, S.C. CODE ANN. § 36-2-803, over HCA.

In the Complaint, Plaintiffs disregard the corporate forms of HCA and Trident and attempt to unify those separate and distinct entities by mere conclusory and self-serving assertions. Specifically, the Complaint imputes the alleged actions of a subsidiary company (Trident) on a distant parent corporation (HCA) by using the collective moniker "HCA" to reference alleged actions by Trident. HCA is the ultimate corporate parent of Trident, which is the entity that owns and operates Trident Medical Center. The Complaint does not allege that HCA had an "enduring relationship" with the State of South Carolina, such that the assertion of general jurisdiction over HCA is permissible under the South Carolina long-arm statute and comports with the due process clause. *See Cribb v. Spatholt*, 382 S.C. 475, 481-84, 676 S.E.2d 706, 709-11 (Ct. App. 2009). South Carolina law is clear that HCA's remote ownership interest in a domestic subsidiary—like

Trident—does not subject HCA to the jurisdiction of this Court. *See Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153, 268 S.E.2d 42, 44 (1980).

HCA has no direct connection to South Carolina or the claims at issue in the captioned litigation. HCA is a non-operating holding company whose assets consist solely of investments, directly and indirectly, in the stock or other equity interests of its subsidiaries. (R. __; Bray Aff. ¶¶ 4-5). HCA is headquartered in Nashville, Tennessee and organized under the laws of the State of Delaware. (R. __; Bray Aff. ¶¶ 6-8). HCA does not do business in South Carolina. (R. __; Bray Aff. ¶ 11). HCA has no employees in South Carolina and none of its holding company activities take place in South Carolina. (R. __; Bray Aff. ¶ 12). Although HCA is the ultimate parent company in Trident's corporate family, there are at least three levels of subsidiaries between HCA and Trident. (R. __; Bray Aff. ¶ 22).

These facts negate the Plaintiffs' bald allegations that South Carolina courts have personal jurisdiction over HCA. Judgments made by courts which lack personal jurisdiction are void and a complete nullity; therefore, Plaintiffs' failure to establish any South Carolina court's jurisdiction over HCA results in the failure of all of their claims against HCA. *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). Without established jurisdiction over HCA, no injunction issued by the Court can be binding over HCA.

II. The Circuit Court's order complies with Rule 52 of the South Carolina Rules of Civil Procedure.

Plaintiffs argue the circuit court's order denying the Motion for Temporary Injunction fails to satisfy the direction of Rule 52(a), SCRCP, which provides in relevant part:

> [I]n granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.

In asserting this argument, Plaintiffs seek to strain the interpretation of Rule 52(a). The Rule expressly requires only that the Order set forth the findings and conclusions which "constitute the grounds of its action."

The Circuit Court Order did exactly that. Recognizing that the law requires Plaintiffs to satisfy all three of the essential elements of a claim for injunctive relief or else the claim fails, the circuit court set forth in its Order the grounds for its "action," which was the denial of the motion for injunctive relief. Since the circuit court's findings and conclusions were that Plaintiffs had failed to establish at least two of the three essential elements of their claim for injunctive relief, the Circuit Court Order satisfies the Rule 52(a) standard. Rule 52(a) does not state or require that the circuit court include in its Order any and all possible grounds for its action of denying the Motion. The Rule merely indicates the Order justify "its action."

The Circuit Court Order stated its findings and conclusions constituting grounds for its action as follows:

> This Court finds that Plaintiffs Medical University of South Carolina and University Medical Associates of the Medical University of South Carolina have not sufficiently demonstrated that irreparable harm would occur if the temporary injunction was not granted, nor that an inadequate remedy at law exists. . .

(R. __). Based on this plainly stated conclusion of law and findings of fact, the circuit court denied Plaintiffs' Motion for Temporary Injunction. *See May v. Cavender,* 29 S.C. 598, 7 S.E. 489 (1888) (where the evidence was conflicting, the South Carolina Supreme Court upheld as sufficient the lower court's order stating simply, "[a]fter a careful consideration of the testimony in the case, I am satisfied that the plaintiff is not entitled to the relief demanded"); *Pawley's Island Civic Ass'n v. Johnson,* 292 S.C. 208, 209–10, 355 S.E.2d 541, 542 (Ct. App. 1986); *see also Fasolino Foods*

Co. v. Banca Nazionale del Lavoro, 961 F.2d 1052, 1058 (2d Cir.1992) ("All that is required by Rule 52(a) is that the trial court provide findings that are adequate to allow a clear understanding of its ruling.").

In *Noisette v. Ismael*, 304 S.C. 56, 58, 403 S.E. 2d 122, 123-124 (1991), the Court addressed the application of Rule 52(a) and the requirement that a court (in a non-jury case) find the facts specially and state separately its conclusions of law thereon and held:

> This court has previously determined this requirement to be directory and that noncompliance would not form the basis for invalidating a judgment. Rather, where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding.

(citations omitted).

Plaintiffs' citation to the decision in *In re: the Treatment and Care of Clair Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002), is inapposite. The court in *Luckabaugh* was confronted with a voluminous record containing competing evidence and expert opinions regarding the commitment of a sexually violent predator. That case did not involve the more straight-forward issue of whether Plaintiffs had satisfied their burden of proof on two essential elements of their claim for injunctive relief.

Despite the circuit court stating that it found Plaintiffs failed to carry their burden of proof on two of the essential elements for obtaining injunctive relief, Plaintiffs now seek to impose a requirement that the circuit court specifically state its analysis and conclusion on the third element of the claim—an element which would not alter the outcome of the Court's decision in any event because the other two essential elements were already decided adversely to Plaintiffs. Neither Rule 52(a), nor the law generally, entitle the Plaintiffs to such elaboration, nor require such an

exercise from the circuit court. Accordingly, the circuit court's orders denying Plaintiffs' requests for injunctive relief do not violate Rule 52(a), SCRCP.

III. The Circuit Court properly denied Plaintiffs' Motion for Temporary Injunction.

A temporary injunction is an extraordinary and drastic measure to preserve the status quo of the parties and should only be applied with extreme caution. *Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006); *see also LeFurgy v. Long Cove Club Owners Assoc.*, 313 S.C. 555, 558, 443 S.E.2d 577, 578 (Ct. App. 1994). For a temporary injunction to be granted, Plaintiffs bear the burden of establishing each and every one of the following elements:

1. Plaintiffs would suffer irreparable harm if the injunction is not granted;
2. Plaintiffs have no adequate remedy at law; and
3. Plaintiffs are likely to succeed on the merits of their claims.

Strategic Resources Co., 367 S.C. at 544, 627 S.E.2d at 689; *Scratch Golf Co. v. Dunes West Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). In addition to these three more broad legal elements for the claim for injunctive relief, there are the additional substantive elements relating to the underlying claims upon which a plaintiff must build their claim for injunctive relief. In other words, to succeed, Plaintiffs must have established the merits of their claim for violation of the Trade Secrets Act or for misappropriation of actual confidential or proprietary materials. Therefore, to obtain the requested injunctive relief Plaintiffs have the burden of establishing that the information or documentation at issue truly is actually a trade secret, or confidential, or proprietary. They have not met that burden. The failure to establish any of these elements prohibits a court from granting a temporary injunction. *See Shelley*, 2022 WL 2975106, at *4.

The burden imposed upon Plaintiffs requires that they establish each of the above elements by verified facts, and not merely by conclusory statements or allegations set forth merely upon information and belief. *See S.C. Pub. Serv. Auth. v. Carolina Power & Light Co.*, 244 S.C. 466, 473-74, 137 S.E.2d 507, 509 (1964); *see also Pickman v. Georgetown Cty.*, 130 S.C. 18, 125 S.E. 191 (1924). When a complaint and the record before the Court in connection with a request for injunctive relief "are devoid of any factual allegations or showing" which would allow the reasonable conclusion to be drawn that irreparable damage will result from the defendant's conduct, the claim is insufficient to constitute a cause of action for injunctive relief. *Id.* More general allegations that the plaintiff will suffer irreparable injury, without specific factual allegations to support the claim, will not suffice. *Id.*

The circuit court correctly found that Plaintiffs failed to satisfy their heavy burden of demonstrating that the facts and circumstances of this case warrant the issuance of a temporary injunction. *Strategic Resources Co.*, 367 S.C. at 544, 627 S.E.2d at 689; *Calcutt v. Calcutt*, 282 S.C. 565, 320 S.E.2d 55 (Ct. App. 1984).

A. The Circuit Court properly found that Plaintiffs failed to demonstrate sufficiently that irreparable harm would occur if the temporary injunction was not granted.

The circuit court reasonably and properly concluded that Plaintiffs failed to 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); *S.C. Pub. Serv. Auth.*, 244 S.C. at 474, 137 S.E.2d at 509-10; *see also Shelley*, 2022 WL 2975106, at *3 ("As to irreparable harm, the movant must show the harm to be 'neither remote nor speculative, but actual and imminent.' 'Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only

be awarded upon a clear showing that the plaintiff is entitled to such relief.'" (alteration in original) (citations omitted)).

In the Complaint in this case, Plaintiffs couched their allegations of irreparable harm as being merely "potential." Specifically, in their Motion for Temporary Injunction, Plaintiffs candidly admitted that "MUSC's Head and Neck Fellowship Program faces potential irreparable harm without issuance of this requested injunctive relief." (R. __) (emphasis added). Mere potential irreparable harm is not sufficient to satisfy the requirement for existing or likely irreparable harm necessary to justify awarding pre-trial temporary injunctive relief. *See S.C. Pub. Serv. Auth.*, 244 S.C. at 474, 137 S.E.2d at 509-10.

Additionally, the affidavits submitted by Plaintiffs in support of the Motion for Temporary Injunction fail to provide any evidence of an irreparable harm that was occurring or even that necessarily will occur. In Dr. Raymond Dubois's affidavit, under the heading "Potential Irreparable Harm" he expressed that:

> MUSC is concerned for patients suffering from head and neck cancers. It is concerned that another healthcare facility (and former MUSC employees) **may seek** to use MUSC's confidential and proprietary information to try to emulate those complex procedures that have been historically performed by and at MUSC at a facility that, **upon information and belief**, is not capable of accommodating such procedures.

(R. __; Dubois Aff. ¶ 55) (emphasis added). The affidavit of Dr. Patrick Cawley expressed the exact same "concern" on behalf of MUSC. (R. __; P. Cawley Aff. ¶ 55). Both affidavits express only a concern for a potential harm that is ultimately based upon their personal speculation and "upon information and belief" regarding Trident's capability to perform HNO procedures. *See Pickman*, 130 S.C. at 18, 125 S.E. at 191 ("[A]n injunction . . . ought not to issue upon allegations made on information and belief, without the sources of such information and the grounds of belief being given.").

Contrary to the speculation in Dr. Cawley and Dr. Dubois's affidavits, the affidavit of Dr. Horwich provides evidence that Trident's HNO practice is currently performing surgeries for patients in need of such care. (R. __; Horwich Aff.¶ 16). Dr. Horwich also provides his opinion that "[h]aving previously worked at MUSC and LSU, [he] believe[s] that the facilities and infrastructure of the Trident head and neck oncology program are state-of-the-art, and the best with which [he] ha[s] ever worked." (R. __; Horwich Aff. ¶ 17). Dr. Horwich's express statements discredit the bald and unsupported speculation expressed in the affidavits of Dr. Dubois and Dr. Cawley.

Plaintiffs have submitted no evidence that any irreparable harm is being or will be suffered by anyone if the Court does not grant Plaintiffs' requested injunctive relief. Accordingly, the circuit court reasonably and properly found that Plaintiffs failed to demonstrate sufficiently that irreparable harm would occur if the temporary injunction were not granted.

1. Plaintiffs' arguments regarding the potential loss of business do not support a finding that the Plaintiffs will suffer an irreparable harm if the injunction is not issued.

Plaintiffs argue that the potential loss of "its competitive advantage (and loss of business) for the time it would have taken [Respondents] to develop their head and neck cancer practice" is an irreparable harm. Plaintiffs' argument lacks merit.

Courts issuing injunctions based upon the loss of business have done so only when the evidence indicates that the plaintiff is at risk of "[t]he complete loss of a professional practice." *See Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 37 (Ct. App. 2005). In *Peek*, 367 S.C. at 455, 626 S.E.2d at 37, the Court issued an injunction to protect a physician who sufficiently demonstrated that she would suffer a **complete loss** of her professional practice and career if the injunction were not issued. *See also Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 465, 626 S.E.2d 38, 41-42 (Ct. App. 2005) (holding that a physician

might suffer a complete loss of her career and professional practice if a temporary injunction was not granted).

Plaintiffs presented no actual evidence to the circuit court that they will suffer any loss, much less a **complete loss**, of their business if the temporary injunction is not issued. The loss of a portion of a business is insufficient to issue an injunction. *See, e.g., Pro. Wiring Installers, Inc. v. Sims*, No. 2008-UP-173, 2008 WL 9840409, at *3 (S.C. Ct. App. Mar. 12, 2008) (holding that a plaintiff who alleged it would lose thirty percent (30%) of its business based upon a former employee working for a competitor and taking one of the largest customers was not sufficent to satisfy the requirement of showing an irreparable harm would be suffered without the issuance of a temporary injunction). Plaintiffs failed to demonstrate that they will face a "complete loss" in the absence of a temporary injunction. *See Peek*, 367 S.C. at 455, 626 S.E.2d at 37.

Accordingly, the circuit court reasonably and properly found that Plaintiffs failed to demonstrate sufficient facts establishing that they will suffer irreparable harm in the absence of a temporary injunction. The circuit court plainly did not abuse its discretion in so finding.

2. Plaintiffs failed to present evidence that they will suffer irreparable harm if Trident is permitted to recruit qualified medical professionals to work at its hospital.

Plaintiffs are also requesting an injunction barring Trident from recruiting qualified medical professionals to work at its hospital, because they assert without any basis that the loss of an employee may have a negative impact on Plaintiffs. Plaintiffs presented no evidence that the employees who may leave MUSC or UMA (under unknown and undefined circumstances) in the future are irreplaceable. If the employee is replaceable, then there is no irreparable harm. *See Katch, LLC v. Sweetser*, 143 F. Supp. 3d 854, 876 (D. Minn. 2015) (denying a motion for temporary injunction that would bar a former employee from working for the competition because "[a] person's right to labor in any occupation in which he is fit to engage is a valuable right, which

should not be taken from him, or limited, by injunction, except in a clear case showing the justice and necessity therefor.").

B. The Circuit Court properly found that Plaintiffs failed to demonstrate they lack an adequate remedy at law.

The circuit court reasonably and properly found that Plaintiffs failed to demonstrate that it is impracticable for them to obtain full and adequate compensation at law for the claims alleged without the issuance of a temporary injunction. *See Milliken & Co. v. Morin*, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009), *aff'd as modified*, 399 S.C. 23, 731 S.E.2d 288 (2012) (citing *Strategic Res. Co.*, 367 S.C. at 544, 627 S.E.2d at 689); *Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011).

Plaintiffs' misconstrue the holding in *Milliken & Co. v. Morin*, 399 S.C. 23, 731 S.E.2d 288 (2012), in an effort to support their argument that the Defendant Physicians' transfer of their case logs and preference cards to Trident is sufficient to support a finding that Plaintiffs do not have an adequate remedy at law. In *Milliken*, the company ("Milliken") sued a former employee after he resigned from the company and started a new venture using Milliken's confidential and proprietary information. As a condition of the defendant's employment with Milliken, the defendant executed an "Associate Agreement" which contained confidentiality provisions containing express statements regarding the confidentiality of information learned during the course of employment and an express assignment of the defendants "inventions" (discoveries, improvements, ideas, etc.) "(1) which relate directly to the business of Milliken, or (2) which relate to Milliken's actual or demonstrably anticipated research or development, or (3) which result from any work performed by me for Milliken, or (4) for which any equipment, supplies, facility or Trade Secret or Confidential Information of Milliken is used, or (5) which is developed on any Milliken time." *Milliken*, 399 S.C. at 28, 731 S.E.2d at 290. The Supreme Court "granted certiorari to

review the narrow issue of whether these agreements are overbroad as a matter of law" and subsequently analyzed whether such restrictive covenants in an employment agreement are valid and enforceable. *Id*. at 27, 731 S.E.2d at 290.

The Court in *Milliken* analyzed express and detailed contractual provisions in an employment contract which attempted to restrict a former employee's use of information obtained during the course of his employment. In this case, by contrast, the Plaintiffs argue that the Defendant Physicians are bound by the vague and sweeping references to "confidentiality" in the MUSC Faculty Handbook and MUSC Code of Conduct. The totality of these so-called "confidentiality obligations" imposed by MUSC is the statement, "No employee shall disclose confidential information or use such information for his or her personal benefit." (R. __). Neither the MUSC Faculty Handbook nor the MUSC Code of Conduct define what is "confidential." They certainly do not identify or state in any way that physician preference cards, instrument lists, or case logs are confidential or protected trade secrets. (R. __; Plaintiffs' Exhibit 5). Unlike in *Milliken*, there is nothing in the Record of this case which indicates that the Defendant Physicians executed any express agreement that would bar the Defendant Physicians from taking the physician preference cards or case logs to a new employer. The *Milliken* court's opinion does not stand for the proposition that an employer has an unimpeded right to thwart former employees from using any and all information obtained or developed in the course of their employment at a new employer. The Court in *Milliken* only addressed such restrictions on the basis that there was a contractual agreement to limit such actions. Therefore, the Plaintiffs' reliance on the *Milliken* opinion as a basis for establishing an employer's right—in the absence of express contractual provisions—to protect any and all information obtained or developed by an employee during the course of their employment is misplaced. Accordingly, the Supreme Court's analysis of specific

and express confidentiality provisions in an employment agreement in *Milliken* has no bearing on whether Plaintiffs' have an adequate remedy at law in this case.

In this case, Plaintiffs allege an entitlement to money damages for each and every cause of action. Because the availability of money damages contradicts and disproves the contention that there is no adequate remedy at law, Plaintiffs own Complaint, and the allegations therein, reflect that there is available an adequate remedy at law for Plaintiffs. *See Charleston Dev. Co., LLC v. Alami*, 433 S.C. 533, 860 S.E.2d 687, 693 (Ct. App. 2021) (finding a plaintiff who asserted claims for monetary damages and was unsure if it would suffer an irreparably injury was not entitled to injunctive relief); *see also Bethesda Softworks, L.L.C. v. Interplay Ent. Corp.*, 452 F. App'x 351, 353-54 (4th Cir. 2011) ("a preliminary injunction is not normally available where the harm at issue can be remedied by money damages"); *Hughes Network Systems, Inc. v. InterDigital Communications Corp.*, 17 F.3d 691 (4th Cir. 1994); *Macro Specialties, Inc. v. Legacy Cir. Enterprises, LLC*, No. 3:12-CV-1274-JFA, 2021 WL 1963597, at *1 (D.S.C. May 31, 2012).

Plaintiffs argue that no adequate remedy at law exists based on the hypothesis that if an injunction is not entered, then Trident will be able to "enter the market" and provide medical services that compete with the services provided by Plaintiffs. There is nothing in the law which prevents Trident from engaging in competition with Plaintiffs. The mere fact that Plaintiffs may lose business as a result of lawful competition does not mean that Plaintiffs do not have an adequate remedy at law.

Furthermore, Plaintiffs make only unsupported assertions in their brief—with no citation to evidence in the record or otherwise—that "there is no way to make Plaintiffs whole for the damage they would sustain" if the injunction is not granted. (Appellants' Brief p. 15). Courts analyzing similar unsupported and conclusory assertions that no adequate remedy at law exists

have repeatedly found that unsupported and speculative statements are insufficient to satisfy the special circumstances justifying the extraordinary relief of a temporary injunction. *See* Z-*Man Fishing Prod., Inc. v. Renosky*, 790 F. Supp. 2d 418, 433-34 (D.S.C. 2011) ("the Court cannot conclusively determine money damages are inadequate without some evidence of inadequacy"); *see also Nutrition 21 v. United States*, 930 F.2d 867, 871–72 (Fed. Cir. 1991) ("[N]either the difficulty of calculating losses in market share, nor speculation that such losses might occur, amount to proof of special circumstances justifying the extraordinary relief of an injunction prior to trial. Indeed, . . . there is no *presumption* that money damages will be inadequate in connection with a motion for an injunction . . . Some evidence and reasoned analysis for that inadequacy should be proffered." (emphasis in original)).

Accordingly, the Court should affirm the circuit court's denial of Plaintiffs' Motion for Temporary Injunction on the grounds that the circuit court reasonably and properly found that Plaintiffs failed to carry their burden and sufficiently demonstrate that no adequate remedy at law exists for their purported claims.

IV. Plaintiffs are not likely to succeed on the merits of their claims.

In order to find that Plaintiffs have established a likelihood of success on the merits, the Court must conclude that Plaintiffs 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, 813 (4th Cir. 1991) (quoting 2 McCarthy on Trademarks and Unfair Competition, §30.16, at 485-86 (2d ed. 1980)).

On appeal, Plaintiffs only argue that they are likely to succeed on the merits of their claims for violation of the South Carolina Trade Secrets Act and Breach of Duty of Loyalty.[3]

A. Plaintiffs are not likely to succeed on the merits of the claim for Violation of the South Carolina Trade Secrets Act.

"The threshold issue in any trade secrets case is not whether there was a confidential relationship or a breach of contract or some other kind of misappropriation, but whether there was a trade secret to be misappropriated." *Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 295, 471 S.E.2d 721, 724 (Ct. App. 1996). Thus, it is axiomatic that there can be no claim or protection available under the Trade Secrets Act unless Plaintiffs establish that a protectable trade secret exists in the first place. *Id.*; *Lowndes Prod., Inc. v. Brower*, 259 S.C. 322, 331, 191 S.E.2d 761, 766 (1972).

The South Carolina Trade Secrets Act, S.C. Code Ann. § 39-8-20, defines a trade secret as information that (1) "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 (2) "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Thus, in addition to establishing that a protectable trade secret actually exists, Plaintiffs must establish that they took reasonable steps to protect the trade secret. *See Lowndes Prod., Inc.*, 259 S.C. at 331, 191 S.E.2d at 766 ("A court . . . will not grant injunctive relief in a case where the owner of the trade secrets

[3] Plaintiffs make no argument regarding the likelihood of success on the merits of their claims against HCA and Trident for tortious interference with contractual relations, civil conspiracy, or violation of the South Carolina Unfair Trade Practices Act; therefore, any argument that Plaintiffs are likely to succeed on the merits of those claims is not preserved for review by the Court. *See* Rule 208(b)(1)(B), SCACR ("no point will be considered which is not set forth in the statement of the issues on appeal"); *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (stating that issues set forth in the statement of issues on appeal but that are not pursued within the brief are not properly before the Court).

did not endeavor to protect itself."); *Wilson v. Gandis*, 430 S.C. 282, 315, 844 S.E.2d 631, 649 (2020); *see also Hill Holliday Connors Cosmopulos, Inc. v. Greenfield*, 433 F. App'x 207, 215 (4th Cir. 2011); *Uhlig LLC v. Shirley*, No. 6:08-CV-01208-JMC, 2012 WL 2923242, at *16–17 (D.S.C. July 17, 2012).

Plaintiffs' Complaint, motions to the circuit court, and supporting exhibits all failed to present *facts* that would permit the circuit court to find the documentation and information in issue is a protected trade secret. Just as obvious is Plaintiffs' failure to establish they took reasonable steps to protect the purported secret or confidential information.

First, to constitute a trade secret, the information must be secret. S.C. CODE ANN. §39-8-20-5; *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. *Carolina Chem. Equip., Co.*, 322 S.C. at 296, 471 S.E.2d at 724. Information does not qualify for trade secret protection when the information can, with reasonable effort, be properly acquired or duplicated by or through others. *Id*.

Second, 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—"isolated steps" toward secrecy are not enough. *See Lowndes Prod., Inc. v. Brower*, 259 S.C. 322, 331, 191 S.E.2d 761, 766 (1972). When Plaintiffs 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.

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.*, 433 Fed App's at 215.

In this case, Plaintiffs failed to present any evidence or to establish that the documentation and information at issue was actually a confidential trade secret that has independent economic value. Moreover, they utterly failed to present evidence or to establish that they took reasonable steps to protect these so-called trade secrets or confidential/proprietary information.

First, Plaintiffs alleged their Trade Secrets Act Cause of Action in only conclusory terms. They simply say (*ipse dixit*) that the information at issue in this case is "confidential and proprietary" and has independent economic value. (R. __; Complaint ¶¶ 128 - 129); (R. __; Cawley Aff. ¶¶ 17-18); (R. __; Dubois Aff. ¶¶ 19-20). There are no facts alleged or presented to justify these conclusory and self-serving allegations. There is nothing in the record that establishes the information or documentation in issue is, in fact, secret, or confidential, or proprietary. Plaintiffs' failure to present anything to support the bald allegation that the information is protectable as a trade secret or confidential or proprietary material leads to the undeniable conclusion that Plaintiffs have failed to meet their burden for obtaining injunctive relief.

Second, the purported trade secrets or confidential information at issue in this case include the Defendant Physicians' preference cards and case logs. The Defendant Physicians' preference cards relate to the individual Defendant Physicians' personal preferences when performing specific procedures and the case logs are merely the records of the procedures performed by those physicians. Plaintiffs present no evidence as to how documents containing the Defendant

Physicians' personal preferences and the records of past procedures performed by the Defendant Physicians qualify as secrets, or how these records cannot be properly acquired or duplicated through others (such as the Defendant Physicians themselves), and certainly provide no basis for the conclusion that such information derives any independent economic value or has any ongoing value to Plaintiffs (since those physicians work for another healthcare provider).

Additionally, Plaintiffs simply conclude that they make "reasonable efforts to maintain the secrecy . . . including but not limited to confidentiality agreements." (R. __; Complaint ¶ 130). To the contrary, the Record reflects plainly that Plaintiffs did not take reasonable steps to protect the purported trade secrets:

a. There is no evidence in the record that the "instrument lists," "patient lists," "physician preference cards," or "financial data" at issued were identified to anyone, or labeled in any way as "Trade Secret," or "confidential," or "proprietary" at any time prior to the initiation of this case. (R. __; Plaintiffs' Exhibits 6 and 7);

b. The "instrument lists" and "physician preference cards" which are alleged in this case to have been provided to Trident were not labeled or identified in any way as involving or belonging to MUSC or UMA. (R. __; Plaintiffs' Exhibits 6 and 7);

c. The preference cards and case logs were previously transferred by the MUSC Nurse Coordinator to a doctor who was transferring to a hospital operated by Louisiana State University and it is standard and routine in the practice of medicine for case logs from prior institutions where a physician practiced to be provided to a new hospital where the physician seeks to obtain privileges. (R. __; Meuli Aff. ¶ 7); (R. __; Horwich Aff. ¶ 6);

d. The MUSC Faculty Handbook and Code of Conduct do not identify physician preference cards, instrument lists, or case logs as being confidential or protected trade secrets (R. __; Plaintiffs' Exhibit 5);

e. The confidentiality obligations imposed on MUSC employees—which MUSC and UMA conclude to be "reasonable efforts to maintain the secrecy"—consist of no more than a provision of the so-called "Code of Conduct" incorporated in the bowels of the so-called "MUSC Faculty Handbook." (R. ___; Dubois Aff. ¶ 24). The totality of these so-called "confidentiality obligations" imposed by MUSC is the statement, "No

> employee shall disclose confidential information or use such information for his or her personal benefit." (R. __).

Furthermore, Plaintiffs incorrectly assert that certain financial information (such as physician salaries) qualifies as a protected trade secret. 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 (physician salaries) does not constitute a trade secret and is not even exempted from a FOIA request to a public hospital. Furthermore, it is inconceivable that each Physician could not independently provide information about his/her own salary. Thus, Plaintiffs cannot succeed on a claim to protect or restrict access to such information.

In addition to Plaintiffs' failure to demonstrate that they took proper and reasonable steps to protect the purported trade secrets, Plaintiffs make no substantiated allegation that Trident or HCA knew or should have known the physician cards, equipment lists, case logs and physician compensation information were considered to be Plaintiffs' 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. __; Horwich Aff. ¶¶ 7, 8); (R. __; Meuli Aff. ¶¶ 7 -13).

Plaintiffs' failure to present facts demonstrating that the "property" at issue is, in fact, subject to trade secret or confidential protection, or that Plaintiffs, in fact, took reasonable steps to protect their purported trade secrets or confidential information requires the Court to find that Plaintiffs are not likely to succeed on the merits of their claim for violation of the South Carolina Trade Secrets Act.

B. Plaintiffs are not likely to succeed on the merits of their claim for Breach of Duty of Loyalty.

Plaintiffs have not pled a claim for breach of the duty of loyalty against either HCA or Trident. Therefore, Plaintiffs cannot be assumed to have any likelihood of success on the merits

of such an unpled claim. In support of their claim for breach of duty of loyalty, which is plainly pled against only the Defendant Physicians, Plaintiffs allege:

> 97. As employees of MUSC and Members of UMA, the Physicians owed duties of loyalty to MUSC and UMA.
>
> 98. Based on the conduct alleged above, acting individually and in concert while employed by MUSC and a member of UMA, Physicians breached their duties of loyalty to MUSC and UMA, including but not limited to the following wrongful and unlawful conduct: (a) misappropriation of the plaintiffs' confidential information, proprietary information, and trade secrets; (b) soliciting other healthcare professionals to leave MUSC and UMA; and (c) interfering with the operation and accreditation of the HNO Fellowship Program.
>
> 99. As a proximate result thereof, MUSC and UMA have suffered and will continue to suffer substantial damages, entitling MUSC and UMA to awards of actual and punitive damages.

(R. __).

Plaintiffs' allegations in support of their claim for breach of duty of loyalty make no reference to either HCA or Trident. The Complaint contains no allegation that HCA or Trident owed a duty of loyalty to Plaintiffs (they plainly did not), or that Plaintiffs are pursuing a determination of joint and several liability against HCA or Trident in relation to this claim for breach of duty of loyalty. The Court cannot find Plaintiffs are likely to succeed on a claim that is not alleged against HCA or Trident.

C. The Circuit Court's silence on Plaintiffs' potential likelihood of success on the merits does not create an implication that the Circuit Court found that Plaintiffs satisfied their burden.

Contrary to Plaintiffs' unwarranted and unsupported pronouncement, the circuit court's silence on the issue of Plaintiffs' failure to satisfy their burden to establish that they are likely to

succeed on the merits of their claims does not justify an inference or presumption that the circuit court found in Plaintiffs' favor on this issue.

What is clear is that the circuit court applied the correct legal standard in considering and deciding Plaintiffs' Motion for Temporary Injunction. The circuit court plainly recognized and stated that Plaintiffs were required to establish each of the three necessary elements for obtaining the requested injunctive relief: (1) irreparable harm in the absence of the injunctive relief; (2) likelihood of success on the merits; and (3) the lack of an adequate remedy at law. *Strategic Resources Co.*, 367 S.C. at 544, 627 S.E.2d at 689. It is equally clear and explicit that the circuit court correctly recognized that upon a finding that Plaintiffs failed to establish any one of those three elements, Plaintiffs' request for injunction relief would necessarily fail. In its Order denying the Motion for Temporary Injunction, the circuit court expressly held that Plaintiffs failed to demonstrate either (a) the existence of irreparable harm or (b) the absence of an adequate remedy at law. (R. __). By stating these holdings, the circuit court clearly concluded that Plaintiffs could not meet their burden of establishing all three required elements for their claim—at which point, nothing more was required from the Court.

The circuit court did not need to address the remaining elements of the Plaintiffs' claim for injunctive relief, because the court's findings with respect to the first two elements of the claim were already dispositive. *See Shelley*, 2022 WL 2975106, at *4 (stating that the failure to satisfy any one of the factors for awarding a party temporary injunctive relief "mandates denial of the preliminary injunction.").

CONCLUSION

Based on the forgoing, the Court should AFFIRM the circuit court's orders denying MUSC and UMA's Motion for Preliminary Injunction.

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