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.

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The Medical University of South Carolina ("MUSC") and the University Medical Associates of the Medical University of South Carolina ("UMA") respectfully submit this Reply to Respondents' Initial Brief.

INTRODUCTION

The central issue in this appeal is whether the circuit court erred in allowing Respondents to continue possessing and using Plaintiffs' Property during the pendency of this case. Respondents do not dispute that they are in possession of Plaintiffs' Property, that they obtained the Property through employee misappropriation, and that Respondents are using the Property to compete with MUSC. These uncontested facts should make for an easy case. It is beyond comprehension that the law would allow the Respondents to retain Property that belongs to one of their competitors and that was acquired through unlawful means. If Plaintiffs cannot obtain an injunction under the facts of this case, courts should do away with an injunction as a remedy altogether.

The Court's decision in this case has significant implications for the parties. But more broadly than that, the Court's decision has significant public policy implications. The Court will decide either to reward those who accept and use purloined materials, or the Court will protect those who spend the time, money, and energy to innovate and develop the materials in the first place. Further, beyond the ongoing harm to Plaintiffs and the implications for employers across this State, the Court should be concerned about the downstream impact of Respondents' behavior. The physician defendants each signed binding Settlement Agreements with Plaintiffs agreeing to destroy and refrain from using the Property. (**Settlement Agreements and Releases between Plaintiffs and Physician Defendants**). It is unclear how Respondents could retain and use the Property for their competing head and neck cancer program without causing the physician defendants to violate their Settlement Agreements. This concerning situation alone warrants an

injunction until Respondents can provide a satisfactory answer as to why they, and their new employees ***who explicitly agreed not to***, should be allowed to retain and use the Property.

Plaintiffs have used this Introduction as a means of reminding the Court what is most important about this case, and why it is on appeal. Plaintiffs must do so because Respondents ignored these issues in their Brief. Respondents can offer no justification (in law or in logic) to allow them to retain and use Property that does not belong to them and that they acquired through employee misappropriation.

Plaintiffs now turn to addressing Respondents' arguments below. As the Court will see, Respondents' arguments are designed to distract and confuse rather than address the substance of this appeal.

ARGUMENTS

I. Respondents' personal jurisdiction arguments are incorrect.

In making their personal jurisdiction arguments, Respondents fail to point out that they already moved for this Court to hold the entire appeal in abeyance until the lower court decides HCA's motion to dismiss for lack of personal jurisdiction. After considering Plaintiffs' Return, this Court denied Respondents' motion to hold the appeal in abeyance. The Court stated, "After careful consideration, Respondents' motion to hold this appeal in abeyance pending the lower court's ruling on their motion to dismiss is denied." Thus, this Court has already told Respondents in no uncertain terms that the appeal will go forward despite HCA's pending motion to dismiss.

On appeal, it is unclear what Respondents seek. It seems as though Respondents seek for this Court to decide HCA's pending motion to dismiss for lack of personal jurisdiction ***before*** the lower court decides it. Aside from being a strange request, Respondents point to no authority to allow this Court to decide such an issue before it is decided by the lower court. Respectfully,

Plaintiffs do not believe this Court has the jurisdictional power to decide this issue before the lower court does so.

Furthermore, in making their arguments, Respondents say repeatedly that the "circuit court" has not decided HCA's motion to dismiss for lack of personal jurisdiction. This case is not in circuit court; it is in Business Court and has been in Business Court for almost a year. (**Order for Case Assignment to the Business Court**). On February 24, 2022, this case was assigned to the Business Court. The Business Court functions differently than the circuit court in two important ways. For one, the same judge, Judge Murphy in this instance, presides over the case for its entire duration. *See* S.C. Sup. Ct. Order dated Jan. 30, 2019 ("The Business Court Judge shall retain jurisdiction over the case regardless of where he or she is assigned to hold court ….). For another, unlike circuit court where hearings are scheduled by court administrative staff (such as the clerk of court), in Business Court, parties schedule their own hearings in conjunction with the assigned Business Court judge. *See id*. ("The Business Court Judge … may schedule hearings as may be necessary at any time without regard to whether there is a term of court scheduled.").

Thus, when Respondents complain that HCA's motion to dismiss remains pending, they have only themselves to blame. If Respondents desired to have the motion to dismiss heard, all they would need to do is schedule a hearing with the Business Court. Of course, Respondents know this. If they did not know it before, they certainly knew it after reading Plaintiffs' Return to Respondents' motion to hold the appeal in abeyance. Interestingly, HCA has only made one attempt to schedule its motion to dismiss. This occurred long ago on June 1, 2022. Since that time, HCA has made no attempts to schedule a hearing before the Business Court. If Respondents desire to have the motion to dismiss heard before this Court decides the appeal, they could easily do so,

but this Court should not (and from a jurisdictional perspective, cannot) concern itself with this matter.

While no further analysis should be required,[1] Plaintiffs would substantively respond that they have sufficiently demonstrated the Court's jurisdiction over HCA. 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. & Rsch., Inc.*, 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996); *Mid–State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 332, 426 S.E.2d 779 (1993). 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 this standard, Plaintiffs 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 Plaintiffs submitted to the court (including affidavits, publicly available websites and regulatory filings, and emails).

Rather than repeating all of Plaintiffs' arguments and citations to the record on this issue, Plaintiffs crave reference to their memorandum opposing HCA's motion to dismiss. (**Plaintiffs' Memorandum in Opposition to Defendant HCA Healthcare, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction**). As demonstrated in Plaintiffs' memorandum, the Complaint and evidence viewed in the light most favorable to Plaintiffs 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. *See Cockrell v. Hillerich & Bradsby Co.*,

[1] Even if Respondents are correct that no personal jurisdiction exists over HCA (they are not), Respondents concede personal jurisdiction over Trident.

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 Plaintiffs 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. *See* S.C. CODE ANN. § 36-2-803; *Cribb*, 382 S.C. at 484-88, 676 S.E.2d at 711-13.

For the foregoing reasons, HCA's pending motion to dismiss is of no concern on appeal.

II. Respondents misapprehend the applicable standard of review for this appeal.

While some cases[2] have identified the standard of review as "abuse of discretion" for reviewing an order denying an injunction, further analysis of the relevant case law and the particular circumstances in this case indicates that the applicable standard is, effectively, *de novo*.

To begin, an abuse of discretion standard of review is a two-pronged inquiry, asking whether the lower court's decision is (1) unsupported by the evidence **or** (2) controlled by an error of law. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). First, with regard to assessing whether a decision is supported by the evidence, our Supreme Court has stated, "[i]n equitable actions, an appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence." *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). An injunction is an equitable claim. *Id.* Thus, generally, a reviewing court ***may*** find its own facts in reviewing whether the circuit court erred in denying an injunction. But, in this case particularly, this Court ***must*** make its own findings

[2] *See Greenville Bistro, LLC v. Greenville Cnty.*, 435 S.C. 146, 160, 866 S.E.2d 562, 569 (2021); *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006).

of fact because the circuit court did not issue any in its two Form 4 Orders denying Plaintiffs' motion for temporary injunction and Plaintiffs' motion to alter or amend. Second, with regard to errors of law, appellate courts review questions of law *de novo* on appeal. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 570, 776 S.E.2d 397, 403 (Ct. App. 2015). Thus, in general, this Court would review the lower court's legal conclusions *de novo* in reviewing an injunction order. Here, this is even more necessary than in other cases because the circuit court's two Form 4 Orders are devoid of anything more than sparse legal conclusions pertaining to some of the elements for an injunction.

In summary, the standard of review in this case does not grant deference to the circuit court. A reviewing court can make its own findings of fact and conclusions of law in assessing whether the circuit court erred in denying Plaintiffs' motion for temporary injunction. Practically speaking, this Court could not grant any deference to the circuit court if it wanted to because the circuit court's two Form 4 Orders provide this Court with effectively nothing to review.

III. Respondents are incorrect about the requirements of Rule 52(a), SCRCP.

Rule 52(a) requires the circuit court to make factual and legal findings so the reviewing court can "ensure the law is faithfully executed below." *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002). Here, the circuit court's two Form 4 Orders fail to comply (substantially or otherwise) with Rule 52(a).

Respondents argue that Rule 52(a) does not require the circuit court to issue findings of fact and conclusions of law on each element for an injunction. (**Respondents' Initial Brief, pp. 11-14**). Respondents also argue that so long as the circuit court's ultimate ruling is clear, it is not necessary for the circuit court to make specific findings of fact or conclusions of law for an

appellate court to review. *Id.* Therefore, Respondents argue the circuit court's Form 4 Orders were sufficient. Respondents' reasoning fails for several reasons.

First and most fundamentally, the circuit court's Form 4 Orders denying Plaintiffs injunctive relief contain ***no findings of fact***. This is in direct contravention of Rule 52(a), which provides, "in granting or denying interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action." The Supreme Court has stated "Rule 52(a) . . . requires a trial court to make specific findings of fact so that the parties and the appellate court may determine the basis for the ruling." *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 320, 698 S.E.2d 773, 784 (2010). Without setting forth any findings of fact, it is impossible for the appellate court to assess whether the circuit court had sufficient grounds for its action. *See id.* ("The requirement for appropriately detailed findings is designed ... to allow the appellate courts to perform their proper function in the judicial system.") (citing *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (N.C. 1980) (applying North Carolina's equivalent of our Rule 52(a), SCRCP).

Second, the circuit court's Form 4 Orders did not set forth any conclusions of law based on findings of fact. Instead, the circuit court summarily stated that Plaintiffs did not meet two of the three elements for an injunction. (**Order Denying Motion for Temporary Injunction; Order Denying Plaintiffs' Motion to Alter or Amend**). The mere recitation of the elements and the groundless conclusion that Plaintiffs did not meet two of them is not sufficient to enable the appellate court "to ensure the law is faithfully executed below." *Luckabaugh*, 351 S.C. at 133, 568 S.E.2d at 343. Rule 52(a) requires more.

Third, while Rule 52(a) does not "require a lower court to set out findings on all the myriad factual questions arising in a particular case," the circuit court must "***substantially*** compl[y] with

Rule 52(a) and ***adequately*** state[] the basis for the result in reaches." *Id.* at 131-133, 345-346 (emphasis added). Here, the circuit court's Form 4 orders do not substantially comply with the requirements of Rule 52(a) due to a complete lack of factual findings and do not adequately state the basis for the circuit court's legal conclusions. As such, this Court is empowered either to remand the issue to the circuit court or to make its own findings of fact. *See Walterboro Comty. Hosp. v. Meacher*, 392 S.C. 479, 485-86, 709 S.E.2d 71, 74 (Ct. App. 2011) (The Court of Appeals found that the circuit court violated Rule 52(a) and stated that if it were action at law, "we would remand for further factual findings. However, in this equitable action we are free to make findings of fact in accordance with our own view of the preponderance of the evidence.") (internal citations omitted).

Finally, from a policy perspective, it is important that circuit courts be required to issue findings of fact and conclusions of law upon which they base their decisions. Not only does this ensure the appellate courts have an adequate record upon which to base their review, but it requires the circuit courts to engage in meaningful analysis and justify their reasoning. In this case, the circuit court never articulated why it is lawful for Respondents, as Plaintiffs' competitor, to possess and use Property that does not belong to them and which they obtained through employee misappropriation. Plaintiffs posit that it would be impossible to justify such a result if a court were to reduce its findings to writing as required under Rule 52(a). In simpler terms, the circuit court would have never reached the conclusion it reached if it complied with Rule 52(a), and this appeal would have been unnecessary.

IV. Respondents misstate and misapply the law governing the necessary showings for a temporary injunction.

Respondents assert that Plaintiffs have not established a likelihood of success on the merits of their claims, and therefore an injunction cannot lie. In support of this assertion, Respondents rely on misstatements and/or misapplication of relevant South Carolina law.

a. Respondents apply the incorrect standard to establish a likelihood of success on the merits.

In several sections of their Initial Brief, Respondents incorrectly describe Plaintiffs' burden to establish the merits of their case in order to obtain injunctive relief. Respondents seek to impose a burden on Plaintiffs that South Carolina law does not support.

First, Respondents state that, in order to obtain an injunction, "[Plaintiffs] have the burden of establishing that the [Property] at issue is ***actually*** a trade secret, or confidential, or proprietary." (**Respondents' Initial Brief, p. 14**) (emphasis added). This statement is incorrect. A party seeking an injunction must demonstrate that it has a likelihood of success on the merits based on the facts alleged. *Greenville Bistro*, 435 S.C. at 160, 866 S.E.2d at 569-70. In deciding whether the moving party has satisfied his burden of demonstrating a likelihood of success on the merits, the court considers only "whether a *prima facie* showing has been made." *Id.* (quoting *Curtis v. State*, 345 S.C. 557, 577, 549 S.E.2d 591, 601 (2001)). "*Prima facie*" is defined as "sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue." BLACK'S LAW DICTIONARY (11th ed. 2019). So, Respondents are simply wrong when they state Plaintiffs must show that the Property is "actually" a trade secret, confidential, or proprietary in order to obtain an injunction. All Plaintiffs must do is present a *prima facie* showing in support of its allegations.

Second, Respondents state that Plaintiffs must establish "a probability (not mere possibility) of success of the ultimate trial on the merits." (**Respondents' Initial Brief, p. 22**, citing *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 813 (4th Cir. 1991)).

Respondents pull this language from *Direx Israel, Ltd.*, which is a Fourth Circuit case that applied the federal standard for imposing injunctions. There, the Fourth Circuit stated that the "probability (not mere possibility)" standard applies ***only if*** the balance of equities (which is a required element for injunctions under federal case law) does not tip decidedly in favor of the moving party. *Direx Israel, Ltd.*, 952 F.2d at 813. As an initial matter, while "probability of success on the merits" may be the standard the Fourth Circuit considers in deciding whether to grant an injunction, that is not the law in South Carolina. Furthermore, the South Carolina Supreme Court has stated explicitly that South Carolina courts need not engage in a separate "balancing the equities" test because it "is neither necessary nor appropriate in a preliminary injunction case." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 587, 694 S.E.2d 15, 17 (2010). Thus, a South Carolina court would never have occasion to apply the "probability (not mere possibility)" standard because it does not engage in a separate "balance of equities" examination that would necessitate it.

Third, Respondents state "[t]he 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." (**Respondents' Initial Brief, p. 15**). As a threshold matter, Respondents appear to impose a requirement for "verified facts" on Plaintiffs that is not required for issuing an injunction. *Compare,* Rule 65(b), SCRCP (requiring an affidavit or verified complaint as a prerequisite to granting a temporary restraining order), *with* Rule 65(a), SCRCP (only requiring notice to the adverse party when issuing an injunction). Substantively, Respondents simply ignore the numerous specific factual allegations Plaintiffs provided in their Complaint and motion for temporary injunction, along with four (4) affidavits and thirty-four (34) exhibits. The fact that some of Plaintiffs' allegations are based on information and belief does not

preclude temporary injunctive relief. Such a high bar would make temporary injunctions nearly impossible to obtain prior to engaging in discovery. Moreover, Respondents' posturing ignores the reality—the important facts are not in dispute. Respondents do not dispute the following: they are in possession of Property belonging to Plaintiffs; Respondents obtained the Property through employee misappropriation; and Respondents are using the Property to compete with Plaintiffs.

In summary, the incredibly high burden Respondents would have this Court impose for showing a likelihood of success on the merits is simply unsupported under South Carolina law.

b. Plaintiffs made a *prima facie* showing of likelihood of success on their South Carolina Trade Secret Act ("SCTSA") and duty of loyalty claims.

i. SCTSA

Respondents first argue that Plaintiffs "alleged their [SCTSA] Cause of Action in only conclusory terms. They simply say (*ipse dixit*) that the information at issue in this case is 'confidential and properitary' and has independent economic value.'" (**Respondents' Initial Brief, p. 25**). Respondents are incorrect.

Plaintiffs properly pled and produced sufficient evidence to make a *prima facie* showing under the SCTSA. Specifically, Plaintiffs provided evidence demonstrating 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 the Property from disclosure to unauthorized recipients, and a two-factor authentication system protects the materials from remote access. (**Affidavit of Patrick J. Cawley, ¶¶ 16-22**; **MUSC Code of Conduct**). In addition, Plaintiffs demonstrated that faculty physicians are contractually prohibited from disclosing Plaintiffs' confidential materials, and faculty physicians are prevented from using Plaintiffs' confidential materials for their own benefit. (**MUSC Faculty Handbook, p. 1**; **MUSC Code of Conduct**). With regard to the independent economic value of the Property, Plaintiffs provided two affidavits

with their motion for temporary injunction explaining the value of the Property. *See* (**Affidavit of Dr. Patrick Cawley; Affidavit of Dr. Raymond DuBois**) (explaining, for example, how access to the Property would allow a competitor to reduce the time it takes to develop a new head and neck cancer program by up to a decade).

Respondents go on to argue the merits of whether the Property was *in fact* a trade secret and whether Plaintiffs' efforts to protect its secrecy were *in fact* sufficient. (**Respondents' Initial Brief, pp. 25-27**). But Respondents' arguments miss the mark because all Plaintiffs must do is produce sufficient evidence to make a *prima facie* showing under the SCTSA.[3] Plaintiffs have carried that burden.

Respondents' attempts at rebutting Plaintiffs' *prima facie* case fall woefully short. Respondents cite to two affidavits from Respondents' current employees. *Id.* at 27. The first affidavit is from Dr. Peter Horwich, who was previously a fellow at MUSC's head and neck program. His affidavit states in relevant part that ***he*** provided case logs (presumably his, but he does not say) to LSU in order to obtain a subsequent fellowship; ***he*** requested one of the physician defendant's physician preference cards from an unidentified MUSC Nurse Coordinator; ***he*** used the physician's preference cards as a template for selecting his instruments at the subsequent LSU fellowship; and, no one at MUSC objected to the transfer of the case logs or preference cards to LSU. (**Affidavit of Dr. Peter Horwich, ¶¶ 7-8**).[4] His affidavit conspicuously does not state whether he ever asked MUSC if he could provide the physician preference cards or case logs to LSU, whether MUSC was aware of the transfer, nor whether MUSC gave him permission to make

[3] Notably, Respondents' arguments continue to focus on issues that, even if true, do not defeat a successful SCTSA claim, such as Plaintiffs not labeling their Property as "confidential" or Respondents' alleged lack of knowledge that Plaintiffs' Property was misappropriated.

[4] As a reminder, two subsets of the Property at issue in this case are the physician defendants' preference cards and case logs.

the transfer. In other words, his affidavit establishes nothing about the confidentiality of the Property or Plaintiffs' steps to protect its secrecy. The second affidavit is from Elaine Meuli, who is Director of Medical Staff Services at Trident Medical Center. She 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." (**Affidavit of Elaine Meuli, ¶ 7**). This statement from Ms. Meuli about her personal experience does not rebut whether the Property is confidential or whether Plaintiffs took the requisite steps to protect it. In sum, Respondents' cited affidavits do nothing to keep Plaintiffs' 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.

ii. Duty of Loyalty

Respondents argue that Plaintiffs "have not pled a claim for breach of the duty of loyalty against [Respondents]. Therefore, [Plaintiffs] cannot be assumed to have any likelihood of success on the merits of such an unpled claim." (**Respondents' Initial Brief, pp. 27-28**). Again, Respondents are incorrect.

The Complaint names the Respondents (Trident and HCA Healthcare) and the physician defendants as Defendants. The Complaint includes a cause of action for breach of duty of loyalty (**Complaint, ¶¶ 96-99**), which incorporates the following allegations:

- "On information and belief, Physicians acted in concert, with each other and with HCA and Trident, to engage in unlawful conduct . . ." *Id.* at ¶ 88.
- "But for the misappropriation of MUSC's . . . confidential proprietary information, Trident and HCA would have limited if any ability to provide head and neck oncological surgical services." *Id.* at ¶ 93.
- "[Respondents], in concert with [physician defendants], raided [Petitioner's] HNO Division, intending to effectively convert that practice to its own." *Id.* at ¶ 94.

In the Complaint, Plaintiffs seek to recover against all defendants and assert they are jointly and severally liable. Plaintiffs have also put Respondents on notice several times since filing the Complaint that Respondents are jointly and severally liable under South Carolina law for the physician defendants' breach of the duty of loyalty to their employer. *See*, *e.g.*, (**Plaintiffs' Memorandum of Law in Support of Motion for Temporary Injunction, pp. 16-17**; **Plaintiffs' Motion to Supersede Prior Orders Denying Plaintiffs Injunctive Relief and to Grant a Temporary Injunction During Pendency of Appeal, pp. 11-12**).

The relevant case law states that "[t]he purpose of a pleading is fair notice to the opponent and the court," and "[a] complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever." *Watts v. Metro Sec. Agency*, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001); *see Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Further, "[w]hen a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment." *Id*.

The Complaint put Respondents on notice that Plaintiffs assert an entitlement to relief against Respondents for the physician defendants' breach of duty of loyalty. Further, the facts pled in the Complaint support an "inference" of Respondents' joint and several liability for aiding and benefitting from the physician defendants' breach of duty of loyalty under established South Carolina law. *Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 337, 191 S.E.2d 761, 769 (1972).

In addition to providing Respondents adequate notice of the breach of duty of loyalty claim against them, Plaintiffs made a *prima facie* showing on its breach of duty of loyalty claim that is sufficient to satisfy the likelihood of success on the merits element for an injunction. 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 Corp. v. Bell*, 482 F.Supp.2d 714, 727 n.9 (D.S.C. 2007); *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 physician defendants breached their duties of loyalty by misappropriating valuable materials belonging to Plaintiffs and providing them to their new employer. By receiving the materials and using them (which Respondents do not deny doing), Respondents are liable as well. In *Lowndes*, 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. This well-established law is an obvious and simple way for this Court to impose the requested injunction and to remedy the wrong associated with Respondents' continued possession and use of the Property. *See Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 687 S.E.2d 29, 33 (2009) ("The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.").

V. Respondents ignore settled South Carolina law on what constitutes irreparable harm.

Respondents argue that Plaintiffs' alleged irreparable harm was merely "potential" and therefore did not warrant an injunction. Respondents also argue that Plaintiffs did not provide any evidence of irreparable harm. Respondents are incorrect on both counts.

Plaintiffs stated the irreparable harm was "potential" in their original motion for temporary injunction, which Petitioners filed ***before*** commencement of the physician defendants' employment with Respondents *(i.e.*, before the harm was ongoing). Similarly, the affidavits provided in support of Plaintiffs' motion for temporary injunction that discuss "potential" harm were given before the physician defendants started their employment with Respondents. Respondents fail to point out this context to the Court in making their argument. In reality, the irreparable harm has now been ongoing for over a year and is no longer "potential." Respondents do not deny that they have and are using the Property (*i.e.*, the "potential" harm Plaintiffs alleged). Regardless, the circuit court was well aware that the "potential" harm would commence imminently and the use of the word "potential" did not provide grounds for denying a temporary injunction.

With regard to whether the alleged harm (Respondents' use of the Property to compete with Plaintiffs) constitutes "irreparable harm," South Carolina law is clear on this point. 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 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, 685 (D.S.C. 2003); *Milliken & Co. v. Morin*, 399 S.C. 23, 37, 731

S.E.2d 288, 29 (2012); *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"). Respondents have not and cannot rebut this.

Instead, Respondents argue that because Plaintiffs will not suffer a "complete loss" of business due to Respondents' actions, Plaintiffs will not suffer irreparable harm. To make this argument, Respondents look to two cases addressing whether a hospital denying privileges to a physician could constitute irreparable harm, and to one case where a former employer sought an injunction to enforce an overbroad non-compete agreement. (**Respondents' Initial Brief, pp. 17-18**).[5] The facts in those cases were completely different from the facts in this case. Those cases did not involve employee misappropriation or the wrongful use of a competitor's property acquired through employee misappropriation. These cases are simply inapposite, unlike the numerous cases cited by Plaintiffs where courts have found irreparable harm in similar scenarios to this case. In addition, Respondents' position is illogical and creates negative policy implications. To Respondents' way of thinking, a competitor could use the misappropriated materials of another with impunity so long as it did not result in a complete business loss to the party to whom the materials belonged. Such a policy favors the thief over the creator. That is not the way our laws work. Instead, our laws seek to foster creativity, hard work, and innovation, not misappropriation and the receipt and use of misappropriated property.

[5] In the latter case, the court found there was not a sufficient allegation of irreparable harm where the only allegation was a loss of one client representing thirty percent of the former employer's business. *Prof'l Wiring Installers, Inc. v. Sims*, No. 2008-UP-173, 2008 WL 9840409, at *3 (S.C. Ct. App. Mar. 12, 2008).

Based on settled South Carolina employment law, Respondents' possession and use of the Property constitutes irreparable harm and Plaintiffs have met that element for an injunction.

VI. Respondents misunderstand the concept of no adequate legal remedy.

Respondents argue that Plaintiffs have an adequate remedy at law because they "allege an entitlement to money damages for each and every cause of action." (**Respondents' Initial Brief, p. 21**). Respondents' analysis is incorrect.

The questions of irreparable harm and adequate remedy at law involve a similar analysis. *See MercExchange, L.L.C. v. eBay, Inc.*, 500 F.Supp.2d 556, 569 n. 11 (E.D. Va. 2007) ("The irreparable harm inquiry and remedy at law inquiry are essentially two sides of the same coin …."). Courts do not decide the questions of irreparable harm and available legal remedies under narrow and artificial rules. *CBS v. Custom Recording Co.*, 258 S.C. 465, 477-478, 189 S.E.2d 305, 311-312 (1972). An injunction is appropriate if no legal remedy exists, **or** if the legal remedy would not make the party whole, **or** if quantifying the damage caused by conduct to be enjoined is difficult or uncertain. *Peek v. Spartanburg Reg'l Healthcare Sys*., 367 S.C. 450, 457, 626 S.E.2d 34, 36-37 (Ct. App. 2005); *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 370, 588 S.E.2d 635, 639 (Ct. App. 2003). Economic harm becomes irreparable when it is not easily calculated in pecuniary terms. *Peek*, 367 S.C. 457, 626 S.E.2d at 37 n.2. Moreover, South Carolina courts routinely find irreparable harm when a defendant wrongly acquires the confidential and proprietary materials of a competitor. *See supra*, p. 12.

Here, Plaintiffs spent two decades of time and resources to develop the confidential and proprietary Property and the Head and Neck Oncology Division. (**Affidavit of Patrick J. Cawley, ¶¶ 6-7**; **Affidavit of Raymond M. DuBois, ¶¶ 8-9**). It would have taken Respondents eight to ten years to develop independently the type of head and neck cancer practice developed by Plaintiffs.

(**Affidavit of Timothy Brendle, ¶ 7**). By acquiring the Property through the physician defendants, Respondents avoided the time and expense necessary to do it on their own.

Monetary compensation alone cannot replace the loss of the Property and the competitive advantage it affords. The value of the Property to Plaintiffs is its confidentiality and exclusive use in the marketplace. The value of such property to Respondents is the avoidance of the time and money necessary to develop it independently, the resulting ability to enter the market more quickly and more cheaply, and the ability to use all of that in competition with the true owner. If the Court allows Respondents to continue using the Property during this litigation, there is no way to make Plaintiffs whole for the damage they will sustain.[6]

VII. Respondents misstate the relevance and applicability of *Milliken* to this case.

Respondents spend a significant amount of time attempting to explain why Plaintiffs misconstrued the holding in *Milliken & Co. v. Morin*. (**Respondents' Initial Brief, p. 19-21**). Plaintiffs quoted *Milliken* for the proposition that an employer may restrain a former employee from disclosing and using confidential information developed during the scope of employment. (**Plaintiffs' Initial Brief, p. 16-17**). In that regard, *Milliken* is directly on point and does not require additional discussion.

Nonetheless, Respondents assert that the Supreme Court in *Milliken* examined the narrow question of whether specific restrictive covenants in an employment agreement were overbroad. (**Respondents' Initial Brief, pp. 19-20**). The Supreme Court ultimately found that contractual

[6] Respondents boldly argue that "[t]here is nothing in the law which prevents [Respondents] 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." (**Respondents' Initial Brief, p. 21**). Unsurprisingly, Plaintiffs agree that ***lawful*** competition is legal and necessarily requires no remedy at law. But Respondents' use of the Property acquired through employee misappropriation is anything but lawful and Plaintiffs require an equitable remedy to avoid irreparable harm.

provisions restraining an employee's use of confidential information gained during employment were not overbroad and were enforceable. *Milliken*, 399 S.C. at 39, 731 S.E.2d at 296.

Like the employer in *Milliken*, the physician defendants were contractually obligated to preserve the confidential materials of Plaintiffs. Plaintiffs incorporated into the physician defendants' contracts confidentiality obligations from MUSC's Faculty Handbook and MUSC's Code of Conduct. (**MUSC Faculty Handbook, p. 1; MUSC Code of Conduct**). By disclosing the Property to their new employer (Trident/HCA) while still employed by MUSC and while still members of UMA, the physician defendants breached their contractual confidentiality obligations. For this reason as well, *Milliken* is directly on point, and a *prima facie* showing has been made.

The question is whether Respondents' narrow construction of *Milliken* and analysis of the physician defendants' contractual obligations rebut Plaintiffs' *prima facie* case. They do not. Our courts have never required the specificity that Respondents seem to argue must exist in order to enforce confidentiality obligations in an employment context. The confidentiality obligations in the physician defendants' agreements put them on notice that they should preserve and refrain from disclosing confidential materials to others. The physician defendants are highly-trained, well-educated individuals. They knew full well when they took (and directed their subordinates to take) the Property and disseminate it to Respondents, that they were delivering valuable, confidential materials to one of MUSC's fiercest competitors. Any other construction of the physician defendants' confidentiality obligations and conduct are simply arguments to excuse the conduct of the physician defendants and the Respondents. Such a construction would only encourage conduct that the law has long found abhorrent.

CONCLUSION

The Property functions as MUSC's playbook, enabling its head and neck cancer practice to operate efficiently and effectively. The Property was not developed overnight; instead, it was developed over the course of the last two decades by various members of Plaintiffs' head and neck cancer team.

Because Respondents have not historically maintained a significant head and neck cancer practice at Trident Regional Medical Center in North Charleston, Respondents do not have their own playbook. It would take a significant amount of time and resources for Respondents to develop their own playbook.[7] Rather than doing the hard work themselves, Respondents are using MUSC's playbook to build their own competitive head and neck cancer practice in North Charleston. By retaining the Property, Respondents have (and continue to) jump-the-line and erode the competitive advantage Plaintiffs otherwise enjoy over Respondents as the first-in-time creator and innovator of the Property. This Court should not allow this to happen for a second longer, and it should reverse the circuit court's decision and enter an injunction requiring Respondents to return the Property and to refrain from using it during the pendency of this case.

[*signature block to follow*]

[7] On this issue, Respondents have spoken out of both sides of their mouth. For example, counsel for Respondents argued at the circuit court supersedeas hearing that enjoining Respondents' use of the Property would "tie Trident's hands" and cause the "shutting down [of] the care of patients." (**Transcript of Hearing for Motion to Supersede, p. 23, lines 11-13, and p. 27, lines 13-17**). But at the same hearing, counsel for Respondents 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." *Id.* at p. 24, lines 19-25, and p. 25, lines 1-3. Respondents' counsel also stated that the physicians have the requisite knowledge and "likely [don't] need those cards or those lists." *Id.* at p. 23, lines 8-10. This of course begs the question why Respondents do not simply return the Property, end this litigation, and create their own playbook.

Respectfully Submitted,

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