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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Honorable 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.

---

RECORD ON APPEAL – VOLUME II

---

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104 South Main Street, Suite 700  
Greenville, SC 29601  
(864) 271-4940

Robert L. Widener, Esquire  
Celeste Tiller Jones, Esquire  
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(803) 799-9800

*Counsel for the Appellants*

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David B. Summer, Esquire  
Katon E. Dawson, Jr., Esquire  
Ashley W. Johnson, Esquire  
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Columbia, South Carolina 29201  
(803) 255-8000

*Counsel for the Defendants/Respondents*

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### **Certificate of Counsel**

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHARLESTON )

MEDICAL UNIVERSITY OF SOUTH )  
CAROLINA and UNIVERSITY MEDICAL )  
ASSOCIATES OF THE MEDICAL UNIVERSITY )  
OF SOUTH CAROLINA, )

Plaintiffs, )

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. )  
\_\_\_\_\_ )

Civil Action No. \_\_\_\_\_

# EXHIBIT 21

## TO MASTER EXHIBITS

From the desk of Terry Day, MD

Paul Lambert, MD  
Professor and Chair  
Department of Otolaryngology-Head and Neck Surgery  
MUSC  
135 Rutledge Ave  
Charleston, SC 29425

August 19, 2021

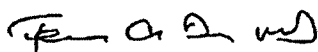
Dear Dr. Lambert:

Our many years of working together and friendship have been unequalled and quite rewarding. Your recent decisions and career transitions have opened my eyes to allow some perspective on the future. The department has great potential with new leadership to grow beyond what we've accomplished. My father's recent passing further allowed me to reflect on the next phases of my life and career and so I present this to you after much thought and consideration.

Please accept this letter as formal notification of my resignation of my faculty and clinical position at the Medical University of South Carolina, effective to be determined on or before November 30, 2021. I will continue my full-time clinical practice as well as my academic, research and administrative responsibilities through this date as well.

I appreciate the professional and personal development opportunities I have had as a faculty member of the department and thank you for the support you have provided myself and so many others during my tenure at MUSC.

Sincerely,



Terry A. Day, MD  
Wendy and Keith Wellin Endowed Chair in Head and Neck Surgery  
Head and Neck Tumor Center

STATE OF SOUTH CAROLINA )  
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ERIC J. LENTSCH, DAVID M. NESKEY, and )  
ANAND K. SHARMA, )

Defendants. )  
\_\_\_\_\_ )

Civil Action No. \_\_\_\_\_

# EXHIBIT 22

## TO MASTER EXHIBITS

**To:** Neville, Brad W.[nevilleb@muscc.edu]  
**Cc:** Good Alicia[Alicia.Good@hcahealthcare.com]  
**From:** hrAnswers Provider Pre Employment Support[hrAnswers.ProviderPreEmploymentSupport@HCAHealthcare.com]  
**Sent:** Tue 8/24/2021 1:52:02 PM (UTC-04:00)  
**Subject:** PSG PRE Brad Neville 23110 SC - Missing PreCheck Consent Form

**CAUTION: External**

Good Afternoon,

Enclosed, you will find a link you need to take action on. This is a necessary part of the interviewing process that will facilitate transitioning to the next step. This form is time sensitive; please complete through the link below:

1. Authorize your background check: [Background Check Authorization Form Link](#)

[Note: This needs to be completed on a desktop computer in internet explorer, google chrome or Firefox. (Not Safari compatible).]

If you have any questions, please contact 1-844-422-5627 we are available 24 hours a day, 7 days a week for your convenience, please choose option 5 for Onboarding Administration team and reference LVG2YWB1.

**Onboarding Administration**

HR Operation Center

HCA Healthcare

One Park Plaza, Nashville, TN 37203

P 844-HCA-JOBS (844.422.5627)

[HCAhealthcare.com](http://HCAhealthcare.com) | [HCAhrAnswers.com](http://HCAhrAnswers.com)

**PSG Request:**

**Pre-EA (Prior to the interview)**

Division, PL, Facility, Hiring Manager, and Position

[hrAnswers.ProviderPreEmploymentSupport@HCAHealthcare.com](mailto:hrAnswers.ProviderPreEmploymentSupport@HCAHealthcare.com)

**Post- EA (Offer has been accepted)**

[hcahranswers.com](http://hcahranswers.com)

STATE OF SOUTH CAROLINA )  
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ANAND K. SHARMA, )

Defendants. )  
\_\_\_\_\_ )

Civil Action No. \_\_\_\_\_

# EXHIBIT 23

## TO MASTER EXHIBITS

**To:** Day, Terry[dayt@musc.edu]; Brad Neville[nevillebw@gmail.com]  
**Cc:** Ruch Sandra[Sandra.Ruch@Parallon.com]; Williams Albert[Albert.Williams@hcahealthcare.com]  
**From:** Gonzalez Mario - Tampa[Mario.Gonzalez2@hcahealthcare.com]  
**Sent:** Thur 8/26/2021 2:57:45 PM (UTC-04:00)  
**Subject:** ENT Practice and Dental Pathology

CAUTION: External

Terry and Brad

I hope both of you are doing well. I will be in Charleston next week. I was wondering if you had sometime to get together for lunch, dinner or whatever is convenient.

Please let me know.

Thank you.

Mario Gonzalez, MD, FCAP, FASCP, FCPE.

SATL Pathology Division Medical Director.

FPS National Director of Assessment, Implementation, and Process Improvement.

HCA Physician Services Group | PSG

C. 609-647-1423

E. mario.gonzalez2@hcahealthcare.com

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHARLESTON )

MEDICAL UNIVERSITY OF SOUTH )  
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ERIC J. LENTSCH, DAVID M. NESKEY, and )  
ANAND K. SHARMA, )

Defendants. )  
\_\_\_\_\_ )

Civil Action No. \_\_\_\_\_

# EXHIBIT 24

## TO MASTER EXHIBITS

August 27, 2021

Dear Dr. Lambert:

Please accept this letter as formal notification of my resignation of my faculty and clinical position at the Medical University of South Carolina, effective December 1, 2021. I will continue my full-time clinical practice as well as my academic and administrative responsibilities through November 30, 2021.

I appreciate the professional and personal development opportunities I have had as a faculty member of the Department of Otolaryngology – Head and Neck Surgery. The clinical and research support provided by the department and Hollings Cancer Center during my tenure at MUSC have provided the foundation for the next phase in my career. Thank you for your leadership and mentorship.

Sincerely,

A handwritten signature in black ink, appearing to be 'DN' or similar initials, written in a cursive style.

David M. Neskey, M.D. FACS

STATE OF SOUTH CAROLINA )  
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HCA HEALTHCARE, INC., )  
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ERIC J. LENTSCH, DAVID M. NESKEY, and )  
ANAND K. SHARMA, )

Defendants. )  
\_\_\_\_\_ )

Civil Action No. \_\_\_\_\_

## EXHIBIT 25

### TO MASTER EXHIBITS



Paul R. Lambert, M.D.  
Department Chair  
lambertp@musc.edu

Otolaryngology - Head & Neck Surgery  
135 Rutledge Avenue, MSC 550  
Charleston, SC 29425  
Office: 843-792-8299  
Fax: 843-792-0546  
muscd.edu/ent

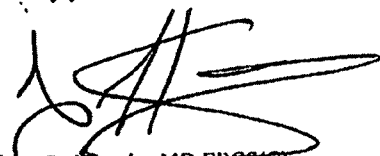
August 31, 2021

Dear Dr. Lambert,

Please accept this letter as a formal notification of my resignation of my faculty and clinical position at the Medical University of South Carolina, effective December 1, 2021. I will continue to my full time clinical practice as well as my academic and administrative responsibilities through Nov 30, 2021.

I appreciate the professional and personal development opportunities I have had as a faculty member in the Department of Otolaryngology-Head & Neck Surgery. I also appreciate your willingness to help assist me in moving on to a new position. It has been a pleasure being a part of the development and growth of this department into a national recognized one over the last 17 years. Your mentorship, guidance for growth personally, professionally and academically has been exceptional. I am excited about my new opportunity and feel well equipped to succeed because of the lessons I have learned from you over these two decades.

Sincerely yours,



Joshua D. Hornig, MD FRCS(C)

**Otology & Neurotology**  
Paul R. Lambert, M.D., Director  
Theodore R. McRackan, M.D., MSCR  
Ted A. Meyer, M.D., Ph.D.  
Habib G. Rizk, M.D., MSC  
**Head & Neck Oncology**  
Torry A. Day, M.D., Director  
Evan M. Graboyes, M.D., FACS  
Joshua D. Hornig, M.D., FRSC(C)  
Eric J. Lentsch, M.D., FACS  
David M. Neskey, M.D., FACS

**Rhinology & Sinus Surgery**  
Rodney J. Schlosser, M.D., Director  
Zachary M. Soler, M.D., MSC  
**Facial Plastic & Reconstructive Surgery**  
Krishna G. Patel, M.D., Ph.D., Director  
Samuel L. Oyer, M.D., FACS  
Judith M. Skoner, M.D.

**Voice & Swallowing**  
Lucinda A. Halstead, M.D., Director  
Ashli K. O'Rourke, M.D.  
**General Otolaryngology & Allergy**  
Mark J. Hoy, M.D., Director  
Robert C. Waters, M.D.  
**Maxillofacial Prosthodontics**  
Betsy K. Davis, DMD, Director  
J Rhet Tucker, DMD

**Pediatric Otolaryngology**  
David R. White, M.D., Director  
Clarice S. Clemmens, M.D.  
Chris M. Discolo, M.D., MSCR  
Phavanh S. Pecha, M.D.  
**Audiology**  
Kimberly A. Orr, AuD, CCC-A, Director  
Kara Leyzac, AuD, CCC-A, CI Director  
**Clinical Research**  
Shaun A. Nguyen, M.D., FAPCR, Director

*"An equal opportunity employer, promoting workplace diversity"*

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHARLESTON )

MEDICAL UNIVERSITY OF SOUTH )  
CAROLINA and UNIVERSITY MEDICAL )  
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v. )

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TERRY A. DAY, )  
BETSY KAY DAVIS, JOSHUA D. HORNIG, )  
ERIC J. LENTSCH, DAVID M. NESKEY, and )  
ANAND K. SHARMA, )

Defendants. )  
\_\_\_\_\_ )

Civil Action No. \_\_\_\_\_

## EXHIBIT 26

### TO MASTER EXHIBITS

**To:** Lentsch, Eric J.[elentsch@musc.edu]  
**From:** Gillespie, Jayne Susan[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=6C881D6EFE0146E0B77A53DCF39D11CB-JSG5]  
**Sent:** Tue 8/31/2021 12:18:19 PM (UTC-04:00)  
**Subject:** Emailing: Lentsch MUSC resignation letter- 8-27-21  
Lentsch MUSC resignation letter- 8-27-21.docx

Attached as requested.

Thanks and take care.

Jayne Gillespie  
 Administrative Assistant to:  
 Eric J. Lentsch, MD  
 David M. Neskey, MD  
 Ted R. McRackan, MD  
 Judith M. Skoner, MD  
 Alana Aylward, MD  
 Julian Amin, MD  
 Caitlin Mengler, NP  
 Kiely St. Germain, NP  
 HN Fellowship Program Coordinator  
 Medical University of South Carolina  
 Department of Otolaryngology-Head and Neck Surgery  
 135 Rutledge Ave. MSC 550  
 Charleston, SC 29425  
 Phone 843-792-6012  
 Fax 843-792-0546  
 MUSCHealth.org/ent

If you have received this communication in error, please notify the MUSC Compliance Office immediately at (843) 792-4037 or 1-800-296-0269. Thank you. The documents accompanying this email transmission contain confidential information intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure. If the reader of this message is not the intended recipient, or an employee responsible for delivering the message to the intended recipient, you are hereby notified that any disclosure, dissemination, distribution, or copying of this information is strictly prohibited.

Your message is ready to be sent with the following file or link attachments:

Lentsch MUSC resignation letter- 8-27-21

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

August 27, 2021

Dear Dr. Lambert:

Please accept this letter as formal notification of my resignation of my faculty and clinical position at the Medical University of South Carolina, effective December 1<sup>st</sup>, 2021. I will continue my full-time clinical practice as well as my academic and administrative responsibilities through November 30<sup>th</sup>, 2021.

I will always be grateful for the opportunity you gave me to join this wonderful Department 15 years ago, and I will always be proud that I played a small part in helping you build this Department into what it is today. Please know it is with great sadness that I leave now. But also know that your leadership, mentorship and friendship is one of the things I will always cherish about my time at MUSC.

Sincerely,

Eric J. Lentsch, MD, FACS  
Professor  
Head and Neck Oncologic Surgery  
Hollings Cancer Center Head & Neck Tumor Program  
Medical University of South Carolina

|                                       |   |                              |
|---------------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA               | ) |                              |
|                                       | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF CHARLESTON                  | ) |                              |
|                                       |   |                              |
| MEDICAL UNIVERSITY OF SOUTH           | ) |                              |
| CAROLINA and UNIVERSITY MEDICAL       | ) |                              |
| ASSOCIATES OF THE MEDICAL UNIVERSITY  | ) |                              |
| OF SOUTH CAROLINA,                    | ) |                              |
|                                       | ) |                              |
| Plaintiffs,                           | ) | Civil Action No. _____       |
|                                       | ) |                              |
| 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.                           | ) |                              |
| _____                                 | ) |                              |

**EXHIBIT 27**  
**TO MASTER EXHIBITS**

**From the desk of Dr. Betsy Kay Davis**

**August 30, 2021**

**Dear Dr. Lambert,**

**Some twentyseven years ago, I began my professional career at MUSC to develop the MUSC Maxillofacial Prosthodontic Clinic. I am grateful for the opportunities afforded me to advance my professional and personal growth as a clinician and academician at the Medical University of South Carolina. Most importantly, I am grateful for your support throughout the years.**

**Upon reflection of recent changes both within the University and within the Department, I am writing to give formal notification of my retirement of my faculty and clinical position at the Medical University of South Carolina effective December 1, 2021. I will continue my full-time clinical practice and my academic and administrative responsibilities through November 30, 2021.**

**Again, thank you for your support and friendship throughout my time at the Medical University of South Carolina. I am truly grateful.**

**Sincerely,**

*Betsy K. Davis, DMD, MS*

**Betsy K. Davis, DMD, MS**

**Director, Maxillofacial Prosthodontic Clinic**

**Department of Otolaryngology/H&N Surgery**

STATE OF SOUTH CAROLINA )  
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MEDICAL UNIVERSITY OF SOUTH )  
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 ERIC J. LENTSCH, DAVID M. NESKEY, and )  
 ANAND K. SHARMA, )

Defendants. )

# EXHIBIT 28

## TO MASTER EXHIBITS

To: Brisbin, Andrea[brisbina@musc.edu]; Drachman, Annette R.[drachmar@musc.edu]  
Cc: Amy Gaffney[agaffney@gaffneylewis.com]  
From: Amy Gaffney[agaffney@gaffneylewis.com]  
Sent: Wed 9/1/2021 11:19:51 AM (UTC-04:00)  
Subject: David Neskey  
Neskey Non-Compete.pdf

**CAUTION: External**

Andrea and Annette:

I represent Dr. David Neskey. Dr. Neskey has submitted his resignation. His non-compete is attached. How do we determine the amount that is owed to pay to relieve him of his non-compete, and to whom and when is that payment to be made?

Thanks,  
Amy

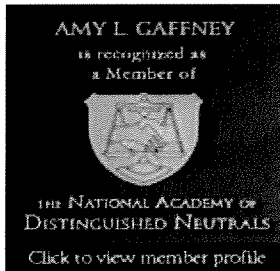
*Amy L. Gaffney*

**GAFFNEYLEWIS LLC**

171 Church Street, Suite 160  
Charleston, South Carolina 29401  
t: 803.790.8838 f: 803.790.8841  
[agaffney@gaffneylewis.com](mailto:agaffney@gaffneylewis.com)  
[www.gaffneylewis.com](http://www.gaffneylewis.com)



**GAFFNEYLEWIS LLC**



<https://naden.org/amy-gaffney>

**NAMWOLF**



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ELECTRONICALLY FILED - 2021 Nov 22 10:41 AM - CHARLESTON - COMMON PLEAS - CASE#2021CP1005289

## **RESTRICTIVE COVENANTS AND ENFORCEMENT**

### **Introduction**

I acknowledge that University Medical Associates of the Medical University of South Carolina ("UMA") will make a significant investment in my development and medical practice, and that I will receive, and/or have access to, Confidential Information belonging to UMA, including, but not limited to, patient lists, contracting processes and terms, and other Confidential Information. I acknowledge that UMA will suffer damages if I terminate my Membership in UMA and use or divulge Confidential Information or compete with the business of UMA. In consideration of the above, I agree to the following terms and conditions:

### **Restrictions on Competition and Solicitation**

I agree that during the term of my Membership in UMA, and for a period of 18 months immediately following the date of Termination of my Membership, I will not, directly or indirectly, on my own behalf or on behalf of any physician practice, hospital, health care provider or facility, or third party other than UMA, and regardless of whether I am acting as a private practitioner, shareholder, director, officer, employee, consultant, agent, or contractor:

- (i) Engage in the practice of medicine in my "Specialty" within the "Restricted Area" (as such terms are defined below);
- (ii) Solicit any UMA/MUSC physician or non-physician to terminate their employment or Membership with UMA for any employment or personal services arrangement other than with UMA;
- (iii) Solicit any patient to whom I provided medical services on behalf of UMA during the 18-month period immediately prior to Termination of my Membership in UMA, for the purpose of providing medical services within my Specialty; however, it is understood that nothing in this agreement shall limit any patient's rights to select a physician of their choosing, including the undersigned Member, to provide medical services, or limit any patient's ability to obtain their medical records from UMA as provided for pursuant to applicable state law;
- (iv) Solicit any referral source on whose behalf I provided medical services during the 18-month period immediately prior to my Termination, for the purpose of providing medical services within my Specialty;
- (v) Use UMA's Confidential Information for any purpose other than the performance of my duties on behalf of UMA or disclose Confidential Information to any other person or entity, except as required by law or medical ethics;
- (vi) Take any action that would interfere with, diminish, or impair the valuable relationships that UMA has with referral sources, patients, hospitals, or health care providers.

Initial \_\_\_\_\_

**"Confidential Information"** includes but is not limited to, patient lists and patient contact information, contracting processes and contract terms, and financial information related to UMA.

**"Specialty"** shall mean all area(s) of medicine in which I rendered medical services within the last 18 months of my Membership with UMA.

**"Restricted Area"** shall mean the geographic area within a twenty (20) mile radius of the UMA/MUSC facility/location where I provided the majority of my services (i.e., the greatest portion of my patient billings) during the 18-month period immediately preceding Termination.

**"Termination"** shall mean any termination of my Membership in UMA (regardless of whether initiated by me or UMA), except a termination of Membership by UMA for lack of resources or program discontinuance.

**"Shareholder"** shall mean (i) having an ownership interest in any entity that derives revenues from any business in competition with UMA (except for passive ownership of one percent (1%) or less of any entity whose securities are publicly traded on a national securities exchange or market or five percent (5%) or less of any entity whose securities are not publicly traded on a national securities exchange or market); or (ii) participating in the operation, management or control of any firm, partnership, corporation, entity, or business described in clause (i) of this sentence.

I understand that nothing in this section shall preclude me, or any physician practice, hospital, or health care provider or facility, from placing general advertising notices in the local media announcing that I am practicing medicine on my own behalf or with a physician practice, hospital, health care provider or facility other than UMA.

I agree that the 18-month restriction referenced in the Restrictions on Competition and Solicitation section above shall be automatically tolled and extended by any length of time during which I am in breach of any provision of this Agreement.

I agree that these restrictive covenants are supported by valuable and sufficient consideration, including one, or more, of the following: (i) a one-time lump sum payment by UMA to me of One Thousand and 00/100 Dollars (\$1,000.00); and (ii) offer of Membership in UMA, including all of the rights and privileges accorded to me pursuant to the Amended and Restated Bylaws of UMA. I acknowledge and agree that UMA would not have offered the consideration above but for my agreement to abide by these restrictive covenants. I further agree that it is in the mutual interest of me, and other Members of UMA, that Members practicing medicine through UMA sign restrictive covenants limiting their ability to compete with UMA. I also agree that the scope of restrictions set forth above are reasonable in light of the nature of my medical practice and the geographic area from which my patients come.

**Enforcement**

I agree that if I violate the Restrictions on Competition and Solicitation set forth above, I shall pay to UMA "Actual Damages." I acknowledge that the elements of UMA's Actual Damages shall include, but not be limited to the following:

- (i) If I was recruited to MUSC, and entered into this Agreement within 60 months of Termination of this Agreement, the actual monetary amounts incurred or expended by UMA to recruit and relocate me to MUSC/UMA including but not limited to investments in research, equipment, practice development, and staff;
- (ii) The amount of compensation paid to me by UMA for the performance of professional services ("Professional Services Compensation") during the 12 month period immediately preceding Termination of my Membership.
- (iii) The amounts incurred or expended by UMA to recruit a replacement Member to UMA and MUSC.

Based upon these components, I understand and agree that these Actual Damages are estimated to be in excess of one times my annual Professional Services Compensation. I understand that in lieu of compliance with subparagraphs (i) – (vi) of the Restrictions on Competition and Solicitation above, I can elect to pay to UMA a lump sum amount equal to one times the amount of my Professional Services Compensation funded by UMA during the 12-month period immediately preceding my Termination.

In addition, I agree that if a court of competent jurisdiction enters a judgment holding that I breached any of the Restrictions on Competition and Solicitation in this Agreement, UMA shall be entitled to recover (i) injunctive relief; (ii) reasonable attorneys' fees incurred in enforcing this Agreement; (iii) Actual Damages as set forth above; and (iv) any other damages or other remedies allowed by common law or equity.

In the event that UMA brings an action alleging that I have violated the Restrictions on Competition and Solicitation in this Agreement and a court of competent jurisdiction enters a final judgment holding that I was not in violation of any of my obligations in the "Restrictions on Competition and Solicitation," then I understand that I shall be entitled to recover from UMA reasonable attorneys' fees incurred by me in defending the action.

**Interpretation**

In the event that any paragraph, or any provision or sub-paragraph within any paragraph, of this Agreement shall be held to be invalid, overbroad, or unenforceable, I agree that such paragraph, or provision(s) or sub-paragraph(s) within such paragraph, shall be deemed severed from this Agreement without, in any manner, affecting the remaining portion hereof (all of which shall remain in full force and effect). I agree that this Agreement shall be interpreted under the laws of the state of South Carolina.

**Requests for Relief**

Any requests for relief from the above restriction shall be made in writing to the Executive Committee of UMA, which shall advise the Vice President for Medical Affairs, whose decision shall be final. No provision in any writing or contract shall supersede, modify, or extinguish this Agreement unless this Agreement is specifically mentioned by name in writing signed by the Vice President for Medical Affairs.

Agreed to:

Member:

 \_\_\_\_\_  
Signature Date 09/01/2014

DAVID NEJKEY  
\_\_\_\_\_  
Print Name

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHARLESTON )

MEDICAL UNIVERSITY OF SOUTH )  
CAROLINA and UNIVERSITY MEDICAL )  
ASSOCIATES OF THE MEDICAL UNIVERSITY )  
OF SOUTH CAROLINA, )

Plaintiffs, )

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. )  
\_\_\_\_\_ )

Civil Action No. \_\_\_\_\_

# EXHIBIT 29

## TO MASTER EXHIBITS

**To:** Day, Terry[dayt@musc.edu]  
**From:** King, Margaret Ann[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=FA628D9FA83846DCB259CFD7699AF03B-MAK55]  
**Sent:** Thur 9/2/2021 8:03:37 AM (UTC-04:00)  
**Subject:** RE: Residents  
Residents 2021-22.pdf

Yes - here it is!

Margaret Ann King  
Head & Neck Coordinator  
Wellin Head & Neck Tumor Center  
MUSC Hollings Cancer Center  
Charleston, SC  
P 843-792-2998  
F 843-792-6083  
headneck@musc.edu

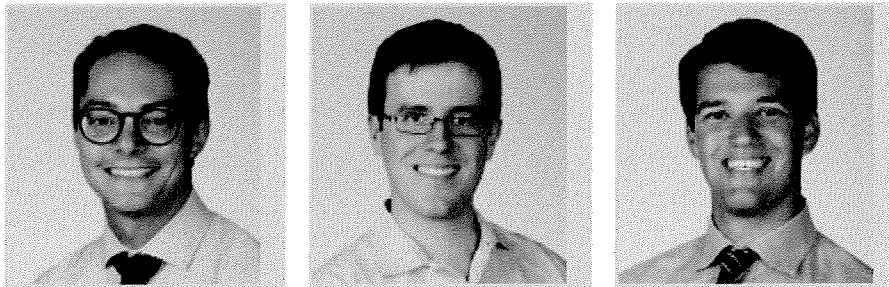
Confidentiality Notice: This message is for the designated recipient only and may contain privileged, proprietary or otherwise private information and is legally protected. If you have received it in error, please notify the sender immediately and delete the original. Any other use of the email by you is prohibited.

-----Original Message-----

From: Day, Terry  
Sent: Wednesday, September 1, 2021 4:51 PM  
To: King, Margaret Ann <kinmaa@musc.edu>  
Subject: Residents

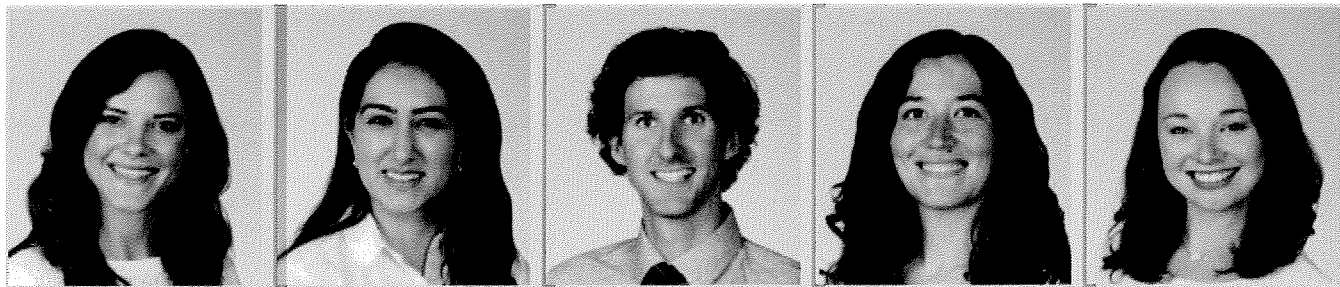
Hey do you have the composite pic of the residents? Want to send them an email

PGY-5 Chiefs



Michael R. Bobian, M.D. James R. Dornhoffer, M.D. Mitchell J. Isaac, M.D.

PGY-4



Katherine A. Gossett, M.D. Preet Kohli, M.D. David Macias, M.D. Lindsey L. Shehee, M.D. Courtney B. Tipton, M.D.

PGY-3



Joshua E. Fabie, M.D. Leo D. Gonzalez-Parrilla, M.D. Brendan M. Hardy, M.D. Tyler M. Rist, M.D.

PGY-2



Jenna H. Barengo, M.D. Corin M. Kinkhabwal, M.D. James D. Sullivan, M.D. Elizabeth R. Walker, M.D.

PGY-1



Michaela F. Close, M.D. Noah Z. Feit, M.D. Sydney L. Moseley, M.D. Erick Yuen, M.D.

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHARLESTON )

MEDICAL UNIVERSITY OF SOUTH )  
CAROLINA and UNIVERSITY MEDICAL )  
ASSOCIATES OF THE MEDICAL UNIVERSITY )  
OF SOUTH CAROLINA, )

Plaintiffs, )

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. )  
\_\_\_\_\_ )

Civil Action No. \_\_\_\_\_

**EXHIBIT 30**  
**TO MASTER EXHIBITS**

---

**Sara Jasper**

54 Kennedy Street  
Charleston, SC 29403  
(803) 238-6642  
sara.jasper@gmail.com

21st September 2021

**Paula Thies**

Administrative Manager, MUSC Otolaryngology  
135 Rutledge Ave, MSC 550  
Charleston SC, 29425

Dear Ms. Thies,

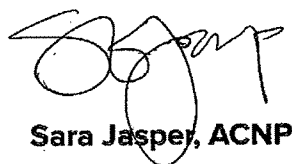
Please accept this as my formal notice of resignation from the position of Nurse Practitioner in Otolaryngology at the Medical University of South Carolina effective four weeks from today, making my last day of employment October 22th 2021.

After careful consideration, I have made the decision to resign in order to support the best interests of my family.

This was not an easy decision to make, and I would like to sincerely thank the entire Head and Neck Surgery team for the opportunity to learn and grow here over the past three years.

Please feel free to reach out to me with any questions. I am happy to help with the transition in any way I can.

Sincerely,



**Sara Jasper, ACNP**

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHARLESTON )

MEDICAL UNIVERSITY OF SOUTH )  
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Plaintiffs, )

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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. )  
\_\_\_\_\_ )

Civil Action No. \_\_\_\_\_

# EXHIBIT 31

## TO MASTER EXHIBITS

**From:** Victoria Brandon[interview@HCACareers.com]  
**Attendees:** Kittle, Kimberley  
**Location:** HCA Healthcare Phone Interview  
**Importance:** Normal  
**Subject:** You are invited to interview with HCA Healthcare for RN OR Lead (00062-28147)  
**Start Time:** Fri 9/24/2021 2:00:00 PM (UTC-04:00)  
**End Time:** Fri 9/24/2021 2:30:00 PM (UTC-04:00)  
**Required Attendees:** Kittle, Kimberley

**CAUTION: External**

**Required Attendees:** Kittle, Kimberley

Hello Kym Kittle,

Thank you for your interest in the RN OR Lead position at HCA Healthcare.

**You are scheduled for a phone interview.**  
9/24/2021 2:00 PM Eastern Time (US & Canada)

At the time of your interview, dial in using the phone number and access code given below:

+1 262-264-7499

**Access Code:** 728 12 92

**Host Code:** 728 12 92

**Thank You**

Thank you,  
Victoria Brandon  
HCA Healthcare

Need help?

- [Modern Hire Help Center](#)

To reschedule this interview, click [here](#).

do not enable your video or audio.

If the above button isn't working, copy and paste this link in a browser.  
[\[https://router.modernhire.com/40f948cc-31a9-4fd3-af17-b71783ee11ab\]](https://router.modernhire.com/40f948cc-31a9-4fd3-af17-b71783ee11ab)

[Unsubscribe](#)

STATE OF SOUTH CAROLINA )  
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COUNTY OF CHARLESTON )

MEDICAL UNIVERSITY OF SOUTH )  
CAROLINA and UNIVERSITY MEDICAL )  
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Plaintiffs, )

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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. )  
\_\_\_\_\_ )

Civil Action No. \_\_\_\_\_

# EXHIBIT 32

## TO MASTER EXHIBITS

**To:** Sharma, Anand K[sharmaak@musc.edu]  
**From:** CSCSharp@musc.edu[CSCSharp@musc.edu]  
**Sent:** Fri 9/24/2021 8:19:40 AM (UTC-04:00)  
**Subject:** [Send Secure] Scanned image from MUSC-MUHA  
CSC Sharp 20210924\_081940.pdf

Reply to: CSC Sharp <CSCSharp@musc.edu>  
Device Name: MUSC-MUHA  
Device Model: MX-6071  
Location: MH 1st fl rm 168 Radiation

File Format: PDF (Medium)  
Resolution: 200dpi x 200dpi

Attached file is scanned image in PDF format.  
Use Acrobat(R)Reader(R) or Adobe(R)Reader(R) of Adobe Systems Incorporated to view the document.  
Adobe(R)Reader(R) can be downloaded from the following URL:  
Adobe, the Adobe logo, Acrobat, the Adobe PDF logo, and Reader are registered trademarks or  
trademarks of Adobe Systems Incorporated in the United States and other countries.

<http://www.adobe.com/>



a new tradition

8330 Medical Plaza Drive

Charleston, SC 29406

Phone: (843) 847-4000

Fax: (843) 847-4088

www.tridenthealthsystem.com

September 26, 2021

Dear Dr. Anand Sharma:

Trident Health ("Hospital") is pleased to confirm your agreement to participate as a resource in the Hospital's physician recruiting process regarding Jeffrey Houlton, MD ("Candidate"). Your participation will include advising as to the relevant skills and qualifications needed by Candidate, interviewing Candidate to determine if he/she is a suitable match for the Hospital's service needs, and providing a recommendation regarding the suitability of Candidate. The Hospital appreciates your willingness to serve in this important role.

In exchange for your services in preparing for recruiting sessions, and attending interviews and other recruiting functions, the Hospital agrees to pay, as fair market value, the reasonable expenses, consistent with Hospital policies and approved by Hospital in advance, which are associated with your services, including the costs of meals in connection with recruiting functions, interviews, or other similar events. This letter is not intended to include additional compensation for your time.

As part of this Agreement, you represent and warrant to the Hospital that you are not currently excluded, suspended, debarred or otherwise ineligible to participate in Federal health care programs. Any payments made by the Hospital under this Agreement are fair market value for the services provided and the parties agree that nothing in this Agreement requires you to refer or admit patients to, or order any goods or services from, Hospital. Neither party will knowingly or intentionally conduct themselves in a manner that violates the prohibition against fraud and abuse under the Medicare and Medicaid programs (42 USC § 1320a-7b).

If applicable to this Agreement, you agree that many Providers are "covered entities" as that term is defined at 45 C.F.R. §160.103. Physician agrees to comply with the Health Information Technology for Economic and Clinical Health Act of 2009 (the "HITECH Act"), the Administrative Simplification Provisions of the Health Insurance Portability and Accountability Act of 1996, as codified at 42 U.S.C.A. §1320d et seq. ("HIPAA") and any current and future regulations promulgated under the HITECH Act or HIPAA, including without limitation the federal privacy regulations contained in 45 C.F.R. Parts 160 and 164 (the "Federal Privacy Regulations"), the federal security standards contained in 45 C. F. R. Parts 160, 162, and 164 ( the "Federal Security Regulations"), and the federal standards for electronic transactions contained in 45 C.F.R. Parts 160 and 162 (the "Federal Electronic Transaction Regulations"), all as amended from time to time and collectively referred to herein as the "HIPAA Requirements". Physician agrees not to use or further disclose any "Protected Health Information", including "Electronic Protected Health Information", (as such terms are defined in the HIPAA Requirements) other than as permitted by the HIPAA Requirements and the terms of this Agreement and the Business Associate Agreement.

This agreement is effective beginning on the date of this letter and terminating on the date Candidate notifies Hospital of his/her intentions regarding practicing in the Hospital's community.

**- Signatures on Following Page -**  
**Physicians Recruiting Resource Letter (Page 1 of 2)**  
**[Revised 01/2010]**

Per Hospital Policy LL.001. General Statements on Agreements with Referral Sources:  
 Approved process  
 et., seq., Payments pursuant to this agreement, if any, **will be made only for services performed after the agreement has been signed** by both the Contractor and the Facility. Services performed prior to this date will not be compensated.

**HOSPITAL**

\_\_\_\_\_  
Hospital CEO Signature

Christina Oh

\_\_\_\_\_  
Print Full Name

\_\_\_\_\_  
Date

**PHYSICIAN**

  
\_\_\_\_\_  
Signature

Anand Sharma, MD

\_\_\_\_\_  
Print Full Name

9/24/21  
\_\_\_\_\_  
Date

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF CHARLESTON )

MEDICAL UNIVERSITY OF SOUTH )  
 CAROLINA and UNIVERSITY MEDICAL )  
 ASSOCIATES OF THE MEDICAL UNIVERSITY )  
 OF SOUTH CAROLINA, )

Plaintiffs, )

Civil Action No. \_\_\_\_\_

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, )

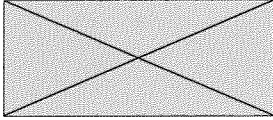
Defendants. )

# EXHIBIT 33

## TO MASTER EXHIBITS

**To:** Meyer, Ted A.[meyerta@muscd.edu]  
**From:** Tammy Lindsay[tammy.lindsay@physicianrecruitment.hcahealthcare.com]  
**Sent:** Sun 9/26/2021 9:00:54 PM (UTC-04:00)  
**Subject:** Dr. Meyer, join the nation's largest healthcare provider today

**CAUTION: External**



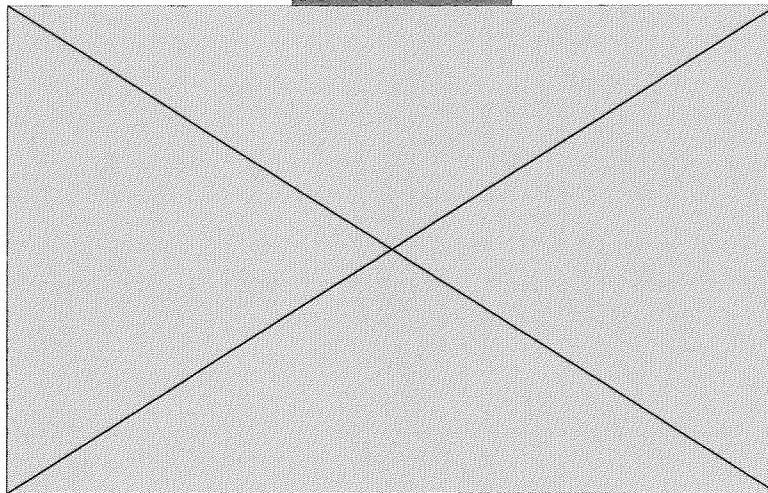
Hello Dr. Meyer,

HCA Healthcare currently has ENT career opportunities available at our facilities across the country. As an industry leader in clinical innovation, we empower our physicians to deliver better patient outcomes through the strongest dedicated community of care. We offer competitive salary and benefits, along with professional development and leadership opportunities.

As the national ENT recruiter for HCA Healthcare, I am here to assist you in finding the right location and opportunity that best meets your needs.

I would love to connect with you about our available opportunities at your earliest convenience.

Schedule A Call



HCA Healthcare is one of the nation's leading providers of healthcare services and is comprised of more than 180 hospitals and 2,000+ sites of care in 21 states and the United Kingdom.

**Tammy Lindsay**  
National Physician Recruiter  
P 423.290.0719

**Manage your subscriptions** to choose the types of emails you receive or **unsubscribe from all future emails**.

Physician Services Group, 2000 Health Park Drive, Brentwood, TN, 37027 USA

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHARLESTON )

MEDICAL UNIVERSITY OF SOUTH )  
CAROLINA and UNIVERSITY MEDICAL )  
ASSOCIATES OF THE MEDICAL UNIVERSITY )  
OF SOUTH CAROLINA, )

Plaintiffs, )

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. )  
\_\_\_\_\_ )

Civil Action No. \_\_\_\_\_

# EXHIBIT 34

## TO MASTER EXHIBITS

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**From:** Wilsgard, Jamie  
**Sent:** Tuesday, October 5, 2021 12:13 PM  
**To:** Dunn, Monica R <[dunnmon@musc.edu](mailto:dunnmon@musc.edu)>; Smith, Laura <[smlaura@musc.edu](mailto:smlaura@musc.edu)>  
**Subject:** FW: Trident Medical Center, Offer Details

Monica and Laura,

I was offered the position as Head and Neck Coordinator at Trident Medical yesterday. In order to fully weigh all of my options to make the best decision for myself and my family, I would like to present the below quote to HR in the hopes of a base pay increase. I understand my current hourly rate at just under \$40 per hour does not reflect the 10% OR differential received for every working hour. I would like to request adjusting my current rate closer to the quote offered below. I have attached my resume for review. I have been working as an RN for over 15 years, 10 of those years spent at MUSC and over 5 years in my current role as ENT/OMFS/Plastics coordinator. Please let me know if there is anything I can do to facilitate this request.

Thank you,

Jamie Wilsgard BSN RN  
Clinical Coordinator, Main Operating Room  
ENT/OMFS/Plastic Surgery  
Medical University of South Carolina  
UE Room 427  
Office: 843-792-8742  
Fax: 843-792-0753  
muscd.edu

*If you have received this communication in error, please notify the sender immediately. The documents accompanying this facsimile/electronic transmission contain confidential information intended only for the use of the individual or entity to which this address and may contain information that is privileged, confidential, and exempt from disclosure. If the reader of this message is not the intended recipient, or an employee responsible for delivering the message to the intended recipient, you are hereby notified that any disclosure, dissemination, distribution, or copying of this communication is strictly prohibited.*

---

**From:** Tallon Taylor <Taylor.Tallon@HCAHealthcare.com>  
**Sent:** Monday, October 4, 2021 12:00:50 PM  
**To:** jamiewilsgard@gmail.com <jamiewilsgard@gmail.com>  
**Subject:** Trident Medical Center, Offer Details

Hi Jamie!

I spoke to the team regarding your interview and they think you would be a fantastic fit for the position! I have attached the benefit information for you to review, please let me know if you have any questions at all. I have also listed out the shift differentials and the next few orientation dates for you to pick from. I will email you over a formal offer letter with a tentative orientation date but we can always change that, just let me know what works best. If everything looks correct and you decide to accept, you'll just accept that formal offer letter electronically to start onboarding paperwork. Congratulations! We hope you decide to join the Trident Health team!

**Fulltime Operating Room Inpatient Surgery Coordinator, Head & Neck Program**

**Hourly Rate: \$47.50** \*Shift differentials will be on top of your base rate

**Shift Differentials**

Weekends \$3.00

Night Shift \$4.00

Evenings \$2.00

**Sign on Bonus: \$10,000** \*paid out in full within your first pay check (terms of sign on are included in your formal offer letter)

**Orientation Dates:** 10/18/2021, 11/1/2021, 11/15/2021, 11/29/2021 or 12/13/2021

**TALLON TALLON, RACR**  
**HCA Healthcare, South Atlantic Division**  
**Talent Acquisition Recruiter**

**HCA Healthcare**  
**115 Central Island Street**  
**Suite: 400**  
**Charleston, SC 29492-7319**  
**M 843.992. 4672**



STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS

MEDICAL UNIVERSITY OF SOUTH )  
CAROLINA and UNIVERSITY MEDICAL )  
ASSOCIATES OF THE MEDICAL )  
UNIVERSITY OF SOUTH CAROLINA, )

Civil Action No. \_\_\_\_\_

Plaintiffs,

v.

**MOTION FOR  
TEMPORARY INJUNCTION**

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.

The Plaintiffs Medical University of South Carolina (“MUSC”) and University Medical Associates of the Medical University of South Carolina (“UMA”) (collectively “Plaintiffs”) respectfully submit their Motion for Temporary Injunction pursuant to Rule 65 of the South Carolina Rules of Civil Procedure against HCA Healthcare, Inc. (“HCA”), Trident Medical Center, LLC (“Trident”), Terry A. Day (“Day”), Betsy Kay Davis (“Davis”), Joshua D. Hornig (“Hornig”), Eric J. Lentsch (“Lentsch”), David M. Neskey (“Neskey”) and Anand K. Sharma (“Sharma”) (collectively as “Defendants”). Importantly, MUSC requests a hearing on this Motion for Preliminary Injunction **on or before December 1, 2021**, as Defendant physicians will no longer be employed by MUSC as of this date, and the risk of harm to MUSC exponentially increases with their departure and transition to competitor Defendants Trident and HCA.

The individual Defendants have been employed at MUSC in the Department of Otolaryngology, Head and Neck Oncology Division of MUSC (“HNO”) and have served as members of the UMA for a significant number of years. Beginning in July and August, 2021, the individual Defendants began submitting their resignations *en masse*, and it became known that they were transitioning to MUSC’s competitors, Defendants Trident and HCA. The individual Defendants thereafter began obtaining Plaintiffs’ confidential and proprietary information to take and utilize during their employment with Defendants Trident and HCA. In addition, Defendant Neskey, Program Director of the Head and Neck Fellowship, began to attempt to take MUSC’s current Fellows with him to Defendants Trident and HCA and sabotage MUSC’s HNO Fellowship Training Program. Lastly, in violation of their duties of loyalty as employees of MUSC, Defendants have recruited and solicited numerous employees from MUSC and UMA to work for Defendants Trident and HCA. The individual Defendants have committed these unlawful acts during their employment with Plaintiff MUSC and as members of UMA. Plaintiffs incorporate by reference all of the allegations in the Complaint filed herein and all facts as asserted in the affidavits attached to this motion.

### **INTRODUCTION**

MUSC’s Otolaryngology Department, which includes the HNO Division, is a prestigious Integrated Center of Clinical Excellence (“ICCE”).<sup>1</sup> MUSC has expended millions of dollars of resources over the last two decades to build its HNO Division.<sup>2</sup> Along the way, MUSC created detailed and proprietary methods for complex patient procedures, which have been taken by the individual Defendants and given to Trident and HCA. In the time period leading up to their

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<sup>1</sup> Integrated Centers of Clinical Excellence are organizational units of MUSC.

<sup>2</sup> (See Affidavit of Patrick J. Crawley).

departure from MUSC, the individual Defendants have gathered MUSC's confidential and proprietary information (procedure lists, procedure preference cards, instrument lists, and billing and revenue information) and provided it to Trident and HCA for the purpose of using it when they begin their employment at Trident and HCA, in direct competition with Plaintiffs.

All unlawful actions by the individual Defendants have been engaged in during their employment with MUSC and while members of the UMA. In addition to taking Plaintiffs' confidential and proprietary information, the individual Defendants (while employed by MUSC), and in conjunction with Defendants Trident and HCA, have recruited and solicited numerous HNO Division employees to join them in their transition to HCA and Trident. Defendants Neskey and Day are even attempting to sabotage MUSC's accredited Head and Neck Fellowship Program by unauthorized communications with the accrediting body and solicitation of the current fellows.

Temporary injunctive relief is critical to preserve Plaintiffs' confidential and proprietary property before the individual Defendants transition their employment to MUSC's competitors, Defendants Trident and HCA, and before the Defendants use it to compete with MUSC. To the extent that the individual Defendants have already provided Plaintiffs' confidential and proprietary property to Defendants Trident and HCA, the return of such property is imperative while this Court decides the merits of Plaintiffs' causes of action, and Defendants must be enjoined from further attempts to interfere with MUSC's HNO Fellowship Program.

#### **STANDARD FOR TEMPORARY INJUNCTION**

"The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it." *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 366; 709 S.E.2d 639, 642 (2011). The moving party must allege sufficient facts to demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *Id.*

Plaintiffs must establish that (1) they will suffer immediate, irreparable harm without the injunction; (2) they have a likelihood of success on the merits; and (3) they have no adequate remedy at law. *Id.* In evaluating whether Plaintiffs are entitled to a preliminary injunction, the court “must examine the merits of the underlying case only to the extent necessary to determine whether [Plaintiffs have] made a sufficient prima facie showing of entitlement to relief.” *Id.* at 367, 709 S.E.2d at 642. Whether to grant a preliminary injunction is within the sound discretion of the trial court, and will be upheld unless clearly erroneous. *Id.* at 366, 709 S.E.2d at 642.

### **PLAINTIFFS ARE ENTITLED TO A TEMPORARY INJUNCTION.**

#### **I. Plaintiffs are likely to succeed on the merits.**

This element of the preliminary injunction test does not require a litigant to “prove an absolute right”; rather, it “**need only present ‘a fair question to raise as to the existence of such a right.’**” *Peek v. Spartanburg Reg’l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005) (emphasis added) (quoting *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912)), holding modified on other grounds by *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010). As long as a litigant can make a “*prima facie* showing,” the injunction should be issued. *Id.*

#### **A. Plaintiffs are likely to succeed in their action regarding Defendants’ misappropriation of trade secrets.**

As set forth in the Complaint and as shown by the supporting affidavits of Dr. Patrick Cawley, Dean Raymond DuBois and Timothy Brendle, Defendants have taken highly confidential, proprietary information that is of great value to Plaintiffs and which constitutes trade secrets within the meaning of the South Carolina Trade Secrets Act. As further set forth in the Complaint and as shown by the supporting affidavits, the misappropriation of these trade secrets is causing and will continue to cause irreparable harm to Plaintiffs that money cannot fix.

**B. MUSC is likely to succeed in its action regarding the unlawful interference with its Head and Neck Fellowship Program.**

MUSC's Head and Neck Fellowship Program is one of less than fifty programs throughout the country accredited by the American Head and Neck Society ("AHNS"). The accreditation of MUSC's Head and Neck Fellowship program was accomplished by MUSC through years of preparation and significant financial investment. Defendants HCA and Trident do not have an AHNS-accredited fellowship program.<sup>3</sup>

As set forth in the Complaint and as shown by the supporting affidavits of Dr. Cawley and Dean DuBois, Defendant Neskey, Director of the Head & Neck Oncology Fellowship Program, has taken various actions to interfere with and damage MUSC's Fellowship Program, including engaging in unauthorized communications with ANHS, the accrediting body for the fellowship program.

**C. Plaintiffs are likely to succeed in their action regarding the solicitation of their employees.**

As stated previously, Defendant physicians (while employed by MUSC) and together with HCA, have recruited and solicited numerous HNO Division employees away from MUSC and UMA to work for Defendants Trident and HCA. These actions by the individual Defendants were clearly committed during their employment with MUSC and while members of the UMA and constitute a breach of the duty of loyalty they owed to MUSC and UMA. *See Berry v. Goodyear Tire & Rubber*, 270 S.C. 489, 242 S.E.2d 551 (1978). *See also Sonoco Prods. Co. v. Güven*, No. 4:12-CV-00790-BHH, 2015 WL 127990, at \*1 (D.S.C. Jan. 8, 2015) (unreported) (finding that an employee's solicitation of its employers' employees in forming competitor business could constitute a breach of loyalty to employer).

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<sup>3</sup> See Affidavit of Patrick J. Crawley and Affidavit of Raymond N. DuBois.

**II. Plaintiffs will face permanent and irreparable harm without issuance of an injunction.**

The individual Defendants are in possession of MUSC's confidential, proprietary information. Plaintiffs' confidential and proprietary information has been misappropriated by Defendants and should be immediately returned, together with any and all copies, pictures, photographs, mock-ups, and any other memorialization of the information by any and all means. In addition, MUSC's Head and Neck Fellowship Program faces potential irreparable harm without issuance of this requested injunctive relief.

**III. Plaintiffs have no adequate remedy at law and the equities favor the granting of temporary injunctive relief.**

Plaintiffs have no adequate remedy at law. The only way to safeguard Plaintiffs' rights to their confidential and proprietary information during this litigation is to grant preliminary injunctive relief requiring Defendants to return the information and to cease utilization of the information. In addition, a balance of the benefit in granting the injunction against the potential inconvenience and damage to the Defendants certainly weighs in favor of Plaintiffs. MUSC and UMA's employees, their trade secrets, and MUSC's Head and Neck Fellowship Program are being taken by Defendants Trident and HCA as HCA is attempting to build its own Head and Neck program using Plaintiffs' confidential and proprietary information.

Moreover and most importantly, the public interest weighs heavily in favor of granting the injunction. MUSC is a public academic health system, as well as an educational and research institution, whose mission is education, research and clinical care to preserve and optimize human life in South Carolina and beyond. UMA is MUSC's faculty practice plan, which is a non-profit 501(c)(3), organized exclusively for charitable purposes. In contrast, Defendant Trident is a private, for-profit healthcare facility and HCA is a publicly traded for-profit corporation, with obligations to generate profits for its shareholders. Accordingly, the balance of equities tips in

favor of granting the temporary injunction to protect Plaintiffs' proprietary and confidential information from being taken by their for-profit competitors, Defendants Trident and HCA during this litigation.

In summary, Plaintiffs seek preliminary injunctive relief in accordance with the South Carolina Trade Secrets Act, and the common law of South Carolina and request this Court to execute an Order which:

- (1) prohibits Defendants from further utilizing Plaintiffs' confidential and proprietary information, including instrument lists, patient lists, physician preference cards and financial data;
- (2) requires the return of all confidential and proprietary information taken, including, but not limited to instrument lists, patient lists, physician preference cards, and financial data;
- (3) prohibits Defendants from 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) prohibits Defendants from further interfering with MUSC's Fellowship Program in any way or recruiting any MUSC Fellow;
- (5) prohibits Defendants from contacting any fellowship accreditation bodies regarding MUSC; and
- (6) prohibits Defendants from further recruiting or soliciting, or otherwise contacting current MUSC and UMA employees, associates, agents, and fellows regarding any potential employment with HCA.

### **CONCLUSION**

For the above reasons, as well as those set forth in the supporting affidavits, any memoranda later submitted, and such further evidence and argument presented at any hearing, the Court should enter a temporary injunction to provide Plaintiffs with the foregoing relief.

Respectfully submitted,

BURR & FORMAN LLP

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Columbia, SC

November 19, 2021

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF CHARLESTON )

MEDICAL UNIVERSITY OF SOUTH )  
 CAROLINA and UNIVERSITY MEDICAL )  
 ASSOCIATES OF THE MEDICAL UNIVERSITY )  
 OF SOUTH CAROLINA, )

Plaintiffs, )

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. )

Civil Action No. \_\_\_\_\_

AFFIDAVIT OF.  
 PATRICK J. CAWLEY

I, Patrick J. Cawley, M.D., MHM, FACHE, being duly sworn deposes and says:

**I. Background about Dr. Cawley**

1. I am of sound mind and body, over the age of eighteen (18), and competent to offer testimony.

2. I offer this affidavit based upon my personal knowledge and based upon information and records maintained by the Medical University of South Carolina ("MUSC").

3. I am currently the Chief Executive Officer of MUSC Health and Vice-President for Health Affairs of MUSC, and Associate Professor of Medicine.

4. I started working at MUSC in 2003 as the Associate Chief Medical Officer. In 2006, I became the Chief Medical Officer of the Medical University Hospital Authority ("MUHA"), which operates hospitals, clinics and other health care and related facilities as set forth

in section 59-123-60 of the South Carolina Code of Laws. In 2013, I became the Chief Executive Officer of MUSC Health.

5. I am a Member of the University Medical Associates (“UMA”), the Faculty Practice Plan of MUSC, and I serve on UMA’s Board of Directors and its Executive Committee. The UMA is a South Carolina not-for-profit corporation pursuant to Title 33 Chapter 11 of the South Carolina Code of Laws.

## **II. MUSC’s Head & Neck Oncology Division**

6. MUSC has provided specialty care in Otolaryngology (colloquially known as “ear, nose, and throat”) to South Carolina citizens for over a century. Over the past twenty (20) years, the Department of Otolaryngology has maintained national recognition, including ranking in the top ten (10) departments in its specialty in National Institute of Health (“NIH”) research funding, offering a top ten (10) residency program, and achieving U.S. News and World Report rankings in the top fifteen (15) ear, nose, and throat services in the country. The Department’s faculty conduct education, research, and clinical services in nine (9) different subspecialties, including Head and Neck Oncology.

7. MUSC’s Department of Otolaryngology in the Division of Head and Neck Oncology (“HNO Division”) is one of the largest programs in the country devoted to the care of the head and neck cancer patient. It was developed and has continuously evolved since the current Department Chair, Paul Lambert, M.D., and defendant physician Day arrived at MUSC in 1999. In 2015, MUSC opened the Wendy and Keith Wellin Head and Neck Oncology Center after receiving a generous donation from the Wellin family. The Center is a partner with MUSC Hollings Cancer Center (“the Center”), the only NCI-designated cancer center in South Carolina, and the Department contributed \$500,000 to the capital needed to establish a state-of-the-art center.

8. At the Center, a comprehensive multi-disciplinary team comprised of surgeons, radiation oncologists, medical oncologists, maxillofacial prosthodontists, speech and swallowing specialists, nutritionists, and social workers have provided point-of-service, coordinated care from an initial patient encounter through treatment and survivorship. Overall, 750 to 800 new patients with head and neck cancer are evaluated at MUSC annually.

9. Prior to their effective resignation dates, each of the defendant physicians in this action were long-term faculty members and medical care providers, working in MUSC's HNO Division. In addition, each of the defendant physicians in this action were, at all relevant times, Members of the UMA.

10. Defendant Davis joined the Department of Otolaryngology in 1995. After completing his own fellowship at MUSC in 2005, Defendant Hornig joined the Division. Defendant Lentsch joined the Division in 2006. Defendant Neskey joined the Division in 2014. Defendant Sharma joined the Department of Radiation Oncology in 2001, and has held a faculty appointment in the Department of Otolaryngology since 2003. Over time, MUSC developed and nurtured a comprehensive team of clinicians to furnish the highest levels of care to the hundreds of patients MUSC treats annually. The complete list of the team members providing this treatment to patients on behalf of MUSC is attached hereto as Exhibit #3.

11. With certain exceptions,<sup>1</sup> the individuals reflected in Exhibit #3 are current employees of MUSC as of the date of this affidavit. Effective December 1, 2021, the defendant physicians will no longer be a part of this team, as they have resigned from MUSC, and they will,

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<sup>1</sup> Sara Jasper, Caitlin Mengler, Kiely St. Germain, and Hannah Feltner all resigned and left MUSC during October 2021 and, upon information and belief, are or will be working at Trident Medical Center in North Charleston for HCA.

upon information and belief, work for Trident Medical Center in North Charleston, which is operated by defendant HCA Healthcare, Inc. ("HCA").

12. Unlike MUSC, which is a public academic health system with a tri-partite mission of education, research, and providing clinical excellence to all citizens of South Carolina and beyond, Trident Medical Center is a private for-profit healthcare facility and its parent company, HCA, is a publicly-traded corporation obligated to earn profits for its shareholders.

13. Historically, Trident Medical Center has not performed the complex type of head and neck procedures at its North Charleston location that MUSC's HNO Division performs. The types of medical procedures performed by MUSC's HNO Division are long, multi-phase and complicated procedures, often lasting up to ten (10) to fifteen (15) hours.

14. Upon information and belief, Trident Medical Center does not have the facilities, equipment, manpower, and know-how to provide patients with the level of care that MUSC's HNO Division provides. Notably, simultaneously with the defendant physicians' resignations from MUSC, Trident Medical Center filed a Certificate of Need Application, attached hereto as Exhibit #4, to expand its facility in an attempt to achieve the capability to perform the complex type of head and neck procedures at its North Charleston location. In addition, even if Trident's facilities are currently sufficient to support a ten (10) to fifteen (15) hour surgery, but for defendant HCA's wholesale poaching of MUSC's HNO Division's valuable resources and know-how, Trident would be incapable of providing any quality head and neck oncology surgical services for many years.

15. MUSC built its HNO Division over two decades and developed the processes to perform these operations over the course of the last two decades. MUSC did so not with an eye not towards maximizing revenue, but with the goal of fulfilling its institutional and statutory

mission, which is to preserve and optimize human life in South Carolina and beyond through education, research and patient care.

### **III. MUSC's Confidential & Proprietary Information**

16. During the last two decades, when MUSC has been building its HNO Division, it has identified and purchased the equipment necessary to perform these procedures, identified the team members necessary to perform these procedures, and developed physician preference cards and instrument lists to perform these procedures.

17. MUSC's physician preference cards are catalogues of specific tools, supplies, and room setup that a surgeon prefers for a particular type of surgery. MUSC's physician preference cards are confidential and proprietary information belonging to MUSC, not to any individual employee.

18. MUSC's instrument lists identify the instruments specific surgeons need to perform certain procedures. MUSC's instrument lists are confidential and proprietary information belonging to MUSC, not to any individual employee.

19. MUSC's physician preference cards and instrument lists enable the team members to perform the complicated head and neck procedures MUSC's HNO Division has historically performed.

20. MUSC's physician preference cards and instrument lists are not disclosed to the public and are not available in the public domain.

21. MUSC maintains policies and procedures to protect its confidential and proprietary information from disclosure to unauthorized recipients. In addition, MUSC limits access to its confidential and proprietary information. MUSC only allows those persons to access such

information who have a legitimate need to do so. To the extent one attempts to access such information remotely, MUSC uses a two-factor authentication system.

22. An example of the confidentiality obligations imposed on MUSC's employees can be found in the Code of Conduct, which is part of the MUSC Faculty Handbook. The Code of Conduct expressly states that "[n]o employee shall disclose confidential information or use such information for his or her personal benefit." Exhibit #5.

23. While still employed by MUSC but after notifying MUSC of their intent to resign, upon information and belief, defendant physicians Day, Hornig, Lentsch, and Neskey directed a registered nurse employed by MUSC, Jamie Wilsgard, to send physician preference cards from MUSC to HCA. The email correspondence where Ms. Wilsgard transmitted these physician cards to HCA is identified as Exhibit #6<sup>2</sup>.

24. Defendant physicians Day, Hornig, Lentsch, and Neskey did not have the authority to transmit MUSC's physician preference cards to HCA, and by doing so, defendant physicians Day, Hornig, Lentsch, and Neskey violated MUSC's policies and procedures.

25. While still employed by MUSC but after notifying MUSC of his intent to resign, defendant physician Hornig obtained MUSC's instrument list and sent this information to HCA. Defendant Hornig's transmission of this information to HCA is reflected in Exhibit #7.<sup>3</sup>

26. Upon information and belief, Trident Medical Center never had the physician preference cards and instrument lists necessary to enable defendant physicians (or other

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<sup>2</sup> By its very nature, the part of Exhibit #6 that contains the physician preference cards is highly confidential and will be provided to the court on a confidential basis. It will not be part of the public record.

<sup>3</sup> The email from defendant physician Hornig has been filed with the court, but the instrument list attached to the email is highly confidential and will be provided to the court on a confidential basis. It will not be part of the public record.

physicians) to quickly develop a facility, processes, and procedures to efficiently perform the type of head and neck procedures that have been historically performed by and at MUSC.

27. Without the physician preference cards and instrument lists, the defendant physicians would not be able to quickly establish the facilities, processes, and procedures to perform the complicated head and neck procedures at Trident Medical Center in North Charleston that the team members have historically performed at MUSC.

28. MUSC's patient lists are also confidential and proprietary information belonging to MUSC, not to any individual employee. This information is not available to the general public and is not in the public domain.

29. On August 31, 2021, defendant Davis attempted to obtain MUSC's patient lists. Exhibit #8.

30. The amount of revenue generated by MUSC and the physician's relative value unit or "RVU" are confidential and proprietary information belonging to MUSC, not to any individual employee. This information is not available to the general public and is not in the public domain.

31. Approximately six (6) months prior to announcing his resignation from MUSC, defendant physician Day obtained his RVU and salary for the past ten (10) years. In addition, defendant physician Day obtained this information for defendant physicians Sharma, Lentsch, and Hornig as well. Defendant physician Day obtained this information as evidenced by the email correspondence in Exhibit #9.

32. MUSC's case logs are also confidential and proprietary information belonging to MUSC. This information is not available to the general public and is not in the public domain.

33. After resigning from MUSC, defendant physician Day obtained his case logs for fiscal years 2019, 2020, and 2021. Defendant physician Day obtained this information as evidenced by the email correspondence in Exhibit #10.

34. In addition, defendants Davis and Neskey obtained confidential information concerning MUSC's residents and fellows as evidenced by Exhibit #14 and Exhibit #15.

35. In Exhibit #14, defendant Davis obtained information about MUSC's residents' salaries.

36. In Exhibit #15, defendant Neskey obtained the signed contracts for the incoming fellows in MUSC's Fellowship Program.

37. The information reflected in Exhibits #14 and #15 are confidential and proprietary information belonging to MUSC. This information is not available to the general public and is not in the public domain.

#### **IV. Defendants' Plan to Leave MUSC for HCA and to Solicit Others**

38. The documents and emails located on the defendant physicians' MUSC.edu email show the defendant physicians' orchestrated plan to leave MUSC *en masse* and attempt to transport and deliver an entire practice to HCA:

a. On February 11, 2021, defendants Day and Neskey are invited by HCA agent Dax Kurbegov to meet in Nashville following defendant Neskey's "productive ongoing dialogues with the South Atlantic team . . . ." Exhibit #16. In the email, Mr. Kurbegov states to defendant Neskey, "Terry Day may have already spoken to you about this opportunity."

- b. On March 4, 2021, defendants Day, Sharma, and Davis communicate regarding “discussions around non-compete and legal concerns with future plans.” Exhibit #17.
- c. On June 2, 2021, defendant Day confirms HCA meeting to finalize contracts with HCA and discuss departure from MUSC. Exhibit #18.
- d. On June 30, 2021, defendant Sharma drafts list of questions related to timing of giving MUSC notice of the defendants’ plans to resign, and buy-out of non-compete agreements. Exhibit #19.
- e. On June 14, 2021, defendant Lentsch provides copy of his Employment Contract with HCA to First National Bank. Exhibit #20.
- f. On August 19, 2021, defendant Day resigns. Exhibit #21.
- g. On August 24, 2021, HCA Onboarding Administration emails Dr. Brad W. Neville (part of the oral pathology as reflected in Exhibit #3) to perform background check prior to HCA’s hiring of Dr. Neville. Exhibit #22.
- h. On August 26, 2021, HCA Physician Services Group schedules meeting with defendant Day and Dr. Neville. Exhibit #23.
- i. On August 27, 2021, defendant Neskey resigns. Exhibit #24.
- j. On August 31, 2021, defendant Hornig resigns. Exhibit #25.
- k. On August 31, 2021, defendant Lentsch asks MUSC administrative assistant to put his resignation on letterhead. Exhibit #26.
- l. On August 29, 2021, defendant Davis resigns. Exhibit #27.
- m. On September 1, 2021, defendant Neskey’s counsel asks amount of Neskey’s non-compete buy-out. Exhibit #28.

n. On September 2, 2021, defendant Day obtains composite pictures of MUSC ENT Residents 2021-22. **Exhibit #29.**

o. On August 31, 2021, defendant Davis attempted to obtain MUSC's patient lists. **Exhibit #8.**

p. On September 9, 2021, defendant Day obtains his case logs 2019-21 from MUSC personnel. **Exhibit #10.**

q. On September 21, 2021, Acute Care Nurse Practitioner Sara Jasper resigns. **Exhibit #30.** Ms. Jasper is part of the team reflected in **Exhibit #3.**

r. On September 24, 2021, HCA contacts Kym Kittle, Registered Nurse for the Operating Room, for a position at HCA. **Exhibit #31.** Ms. Kittle is part of the team reflected in **Exhibit #3.**

s. On September 26, 2021, defendant Sharma enters into Recruiting Agreement with HCA to recruit a physician for HCA. **Exhibit #32.** Defendant Sharma entered into this Agreement while still an employee of MUSC.

t. On September 26, 2021, HCA recruiter contacts Dr. Ted Meyer at MUSC. **Exhibit #33.** Dr. Meyer is part of the team reflected in **Exhibit #3.**

u. On October 4, 2021, HCA offers employment to Jamie Willsgard, a MUSC registered nurse. **Exhibit #34.**

v. On October 12, 2021, HCA solicits Kym Kittle, Registered Nurse for the Operating Room, to work for HCA. **Exhibit #35 (tab 65).** Ms. Kittle is part of the team reflected in **Exhibit #3.**

39. During the six (6) month period prior to notifying MUSC of their resignations, Defendant physicians collectively took over 1,000 hours of leave. In addition, their collective

productivity dropped approximately twenty-five percent (25%) from the same time period during the prior year.

## **V. MUSC's HNO Fellowship Program**

40. In 2003, in furtherance of its tri-partite mission of education, research, and clinical excellence, a fellowship program was established in the HNO Division, the Fellowship in Surgical Oncology and Microvascular Reconstruction of the Head and Neck at MUSC ("HNO Fellowship Program"). Each academic year, two fellows who have completed their residencies are employed by MUSC and, through the HNO Fellowship Program, receive the highest level of training in the management and surgical treatment of head and neck cancer to physicians.

41. The HNO Fellowship Program became accredited by the American Head and Neck Society ("AHNS"), the largest organization in North America for the advancement of research and education in head and neck oncology. In 2010, the first fellow graduated from the HNO Fellowship Program.

42. AHNS-accredited fellowship programs are surveyed by AHNS's Advanced Training Council ("ATC"), which evaluates each program by applying established criteria set forth in its published Qualifications and Duration of Fellowship in Head and Neck Surgical Oncology and Research ("ATC Guidelines"). Each fellowship program is re-evaluated at five (5) year intervals or upon significant changes to the program. There are less than fifty (50) AHNS-accredited fellowship programs in the United States.

43. The reputational benefits and distinction to MUSC because of the AHNS accreditation of its HNO Fellowship Program cannot be quantified. In my career in academic

medicine, such distinction materially assists an academic health system, including MUSC, with recruiting high-quality faculty and attracting research funding opportunities and students interested in research.

44. Because there are a limited number of AHNS-accredited fellowship programs in the United States, completion of an accredited fellowship provides physician fellows with critical credentials to enter into a career in academic medicine. Although other non-accredited institutions may offer what they label as a “fellowship,” lack of AHNS accreditation is a negative factor considered by academic institutions when hiring physicians who have participated in an unaccredited fellowship. This primarily is because there is a lack of oversight and accountability for the qualitative and quantitative multidisciplinary experiences required by an AHNS-accredited fellowship program.

45. MUSC’s HNO Fellowship Program has maintained continuous accreditation since 2010. In 2019, AHNS re-accredited the MUSC’s HNO Fellowship Program based on the following information:

- a. Patients are referred from the Southeast Region of the United States with over ninety percent (90%) of referrals from South Carolina through the Head & Neck Nurse Navigator, Julie Akers.<sup>4</sup> All patients with advanced stage HNSCC, endocrine, skull base, cutaneous, and sarcoma are coordinated to see all multidisciplinary specialists at their first visit as appropriate. This would include Head and Neck Surgery, Medical Oncology, Radiation Oncology, Dental, Speech, Endocrine, Dermatology, Geneticist, and Neurosurgery as indicated.

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<sup>4</sup> On November 17, 2021, Julie Molony (f/k/a Julie Akers) submitted her resignation to MUSC. On information and belief, Ms. Molony is leaving MUSC to work at Trident.

- b. Interdisciplinary surgical activities include that all specialists noted above coordinate surgical care prospectively and joint cases are performed often with Head and Neck Surgery, Head and Neck Reconstructive Surgery, Neurosurgery, Vascular Surgery, Thoracic Surgery and GI Surgery as needed.
- c. During the previous academic year, MUSC evaluated 1,628 head and neck cancer patients, of which 485 patients were treated surgically.
- d. During each fellow's one-year HNO Fellowship, he or she is expected to operate on over 700 patients and participate in over 80 major head and neck operations.

46. Currently, Trident Medical Center in North Charleston does not have a fellowship program for head and neck oncology, and it will not have a fellowship program when the defendant physicians begin work at Trident Medical Center. For purposes of evaluating defendant physicians' motivations for bringing the current fellows with them to Trident, it is important to note that in addition to providing educational experiences, the use of fellows has been an integral part of the success and innovation of MUSC's HNO Division. Fellows are essential in providing necessary physician-hours during the long and complicated procedures. Without the fellows, the physicians themselves would be required to be present at all times for these long operations.

47. One of the defendant physicians, David M. Neskey, served as the Fellowship Director for MUSC's HNO Fellowship Program.

48. After announcing his intent to resign from MUSC but while still employed by MUSC and while still serving as Director of MUSC's HNO Fellowship Program, defendant physician Neskey stated that the defendant physicians "plann[ed] on having [the fellows] transition with us." **Exhibit #11.**

49. Based on defendant Neskey's statement, the defendant physicians planned on taking the fellows at MUSC to Trident Medical Center, once the defendant physicians started working for HCA.

50. In addition, as reflected in the email correspondence identified as Exhibit #12, after announcing his intent to resign from MUSC but while still employed by MUSC and while still serving as Director of MUSC's HNO Fellowship Program, defendant physician Neskey contacted the AHNS to attempt to transfer the existing fellows at MUSC to HCA despite the lack of any AHNS-accredited program at Trident. Specifically, Defendant Neskey, without notifying anyone else at MUSC, directly contacted the AHNS ATC to advise them of the planned departures of the defendant physicians and engaged in multiple subsequent correspondence with the AHNS Co-Chairs, Drs. Don Weed and Amy Hessel, without notifying anyone at MUSC of this correspondence. Instead, defendant Neskey prepared a written statement to the ATC responding to the specific questions posed by them.

51. In further attempts to transfer the existing fellows from MUSC to Trident, on or before September 8, 2021, Defendant Neskey requested that defendant Day's administrative assistant forward him a copy of the ATC Accreditation Package for the MUSC HNO Fellowship Program that was completed in October 2019—a forty-six (46) page document containing all of the detailed information needed for MUSC to obtain its ATC Accreditation of the HNO Fellowship Program. Subsequently, on or before September 13, 2021, Defendant Neskey requested that the AHNS Associate Executive Director forward him a blank AHNS Fellowship Program application, reflecting Defendant Neskey's clear intent to use the MUSC 2019 detailed packet to support an application for a new accredited fellowship program to be established at defendant HCA's facilities.

52. Following defendant physician Neskey's email, the AHNS sent formal correspondence to MUSC, which is identified as Exhibit #13, regarding the continued accreditation of the HNO Fellowship Program at MUSC. This correspondence was copied to MUSC's current two (2) fellows and the incoming Academic Year 2022-2023 fellows who have committed to MUSC's HNO Fellowship Program.

53. On November 9, 2021, AHNS sent out a mass email to its approximately fifty (50) Fellowship Program Directors nationwide, advising of the "major disruption" to MUSC's HNO Fellowship Program due to the impending departure of the defendant physicians. In this correspondence, AHNS advised that given the efforts by MUSC to devote and recruit resources to the HNO Division, the current fellows' education experience will be sufficient to meet the AHNS accreditation requirements. However, AHNS further advised that for the incoming 2022-2023 MUSC fellows, they would be released from their commitments to come to MUSC next year. In addition, AHNS has deferred any decision as to whether MUSC can participate in the 2023-2024 fellowship "match" cycle, which is scheduled to begin within the next two (2) months.

## **VI. Irreparable Harm**

54. As a result of the actions set forth in this affidavit, MUSC's confidential and proprietary information is in the hands of a for-profit healthcare facility, HCA, and of soon-to-be HCA employees.

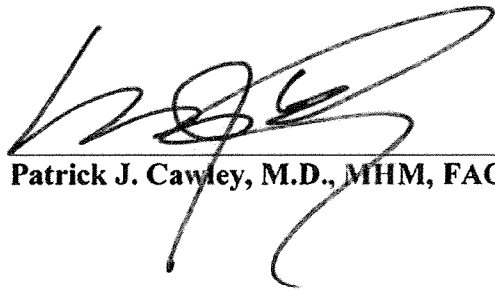
55. MUSC is concerned for patients suffering from head and neck cancers. It is concerned that another healthcare facility (and former MUSC employees) may seek to use MUSC's confidential and proprietary information to try to emulate those complex procedures that have been historically performed by and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

56. In addition, as a result of the actions set forth in this affidavit, MUSC's HNO Fellowship Program is under attack and pursuit by soon-to-be HCA employees.

57. As long as MUSC's HNO Fellowship Program has existed, it has been an integral part of innovation, research and training. It has assisted tremendously in the extremely important task of training the next generation of healthcare providers, and it has played a significant part in extending and making more enjoyable the lives of those who have been touched by cancer.

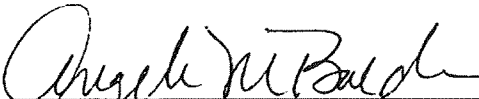
58. MUSC needs to preserve its confidential and proprietary information and its HNO Fellowship Program, so it may continue with its mission to preserve and optimize human life in South Carolina and beyond through education, research and patient care.

**FURTHER AFFIANT SAYETH NOT.**



Patrick J. Cawley, M.D., MHM, FACHE

SWORN TO AND SUBSCRIBED before  
me this 19<sup>th</sup> day of November, 2021.



Notary Public for S.C.

Angelia M Baldwin  
Print Name

My Commission Expires: August 13, 2023

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON ) IN THE COURT OF COMMON PLEAS

MEDICAL UNIVERSITY OF SOUTH )  
CAROLINA and UNIVERSITY MEDICAL )  
ASSOCIATES OF THE MEDICAL UNIVERSITY )  
OF SOUTH CAROLINA, )

Plaintiffs,

Civil Action No. \_\_\_\_\_

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.

AFFIDAVIT OF.  
RAYMOND N. DUBOIS

I, Raymond N. DuBois, MD, PhD being duly sworn deposes and says:

**I. Background about Dr. DuBois**

1. I am of sound mind and body, over the age of eighteen (18), and competent to offer testimony.
2. I offer this affidavit based upon my personal knowledge, based upon information and records maintained by the Medical University of South Carolina ("MUSC"), and based upon information and records maintained in the Dean's office.
3. I currently hold the positions of Dean of the College of Medicine at MUSC and Director of the MUSC Hollings Cancer Center.
4. I became Dean of the College of Medicine at MUSC in March 2016, and I became the Director of the MUSC Hollings Cancer Center in 2020. I have worked in academic medicine for

over thirty-five (35) years and have faculty and leadership positions at multiple institutions, including the University of Texas MD Anderson Cancer Center, the Mayo Clinic, Vanderbilt University Medical Center, and the American Association for Cancer Research.

5. As Dean, I serve as the Chief Academic Officer for the College of Medicine at MUSC, and I perform the roles and responsibilities set forth in the position description, which is attached hereto as **Exhibit #1**.

6. As the Director of the MUSC Hollings Cancer Center, I am generally responsible for the overall administration related to the basic, population, and clinical research activities within the Hollings Cancer Center and the cancer service line for the Hollings Cancer Center in conjunction with the College of Medicine and MUSC Health. A more thorough description of my job duties as Director of the MUSC Hollings Cancer Center is attached hereto as **Exhibit #2**.

7. I am a Member of the University Medical Associates (“UMA”), the Faculty Practice Plan of MUSC, and I serve on UMA’s Board of Directors and its Executive Committee. The UMA is a South Carolina not-for-profit corporation pursuant to Title 33 Chapter 11 of the South Carolina Code of Laws.

## **II. MUSC’s Head & Neck Oncology Division**

8. MUSC has provided specialty care in Otolaryngology (colloquially known as “ear, nose, and throat”) to South Carolina citizens for over a century. Over the past twenty (20) years, the Department of Otolaryngology has maintained national recognition, including ranking in the top ten (10) departments in its specialty in National Institute of Health (“NIH”) research funding, offering a top ten (10) residency program, and achieving U.S. News and World Report rankings in the top fifteen (15) ear, nose, and throat services in the country. The Department’s faculty

conduct education, research, and clinical services in nine (9) different subspecialties, including Head and Neck Oncology.

9. MUSC's Department of Otolaryngology in the Division of Head and Neck Oncology ("HNO Division") is one of the largest programs in the country devoted to the care of the head and neck cancer patient. It was developed and has continuously evolved since the current Department Chair, Paul Lambert, M.D., and defendant physician Day arrived at MUSC in 1999. In 2015, MUSC opened the Wendy and Keith Wellin Head and Neck Oncology Center after receiving a generous donation from the Wellin family. The Center is a partner with MUSC Hollings Cancer Center ("the Center"), the only NCI-designated cancer center in South Carolina, and the Department contributed \$500,000 to the capital needed to establish a state-of-the-art center.

10. At the Center, a comprehensive multi-disciplinary team comprised of surgeons, radiation oncologists, medical oncologists, maxillofacial prosthodontists, speech and swallowing specialists, nutritionists, and social workers have provided point-of-service, coordinated care from an initial patient encounter through treatment and survivorship. Overall, 750 to 800 new patients with head and neck cancer are evaluated at MUSC annually.

11. Prior to their effective resignation dates, each of the defendant physicians in this action were long-term faculty members and medical care providers, working in MUSC's HNO Division. In addition, each of the defendant physicians in this action were, at all relevant times, Members of the UMA.

12. Defendant Davis joined the Department of Otolaryngology in 1995. After completing his own fellowship at MUSC in 2005, Defendant Hornig joined the Division. Defendant Lentsch joined the Division in 2006. Defendant Neskey joined the Division in 2014. Defendant Sharma joined the Department of Radiation Oncology in 2001, and has held a faculty appointment in the

Department of Otolaryngology since 2003. Over time, MUSC developed and nurtured a comprehensive team of clinicians to furnish the highest levels of care to the hundreds of patients MUSC treats annually. The complete list of the team members providing this treatment to patients on behalf of MUSC is attached hereto as Exhibit #3.

13. With certain exceptions,<sup>1</sup> the individuals reflected in Exhibit #3 are current employees of MUSC as of the date of this affidavit. Effective December 1, 2021, the defendant physicians will no longer be a part of this team, as they have resigned from MUSC, and they will, upon information and belief, work for Trident Medical Center in North Charleston, which is operated by defendant HCA Healthcare, Inc. ("HCA").

14. Unlike MUSC, which is a public academic health system with a tri-partite mission of education, research, and providing clinical excellence to all citizens of South Carolina and beyond, Trident Medical Center is a private for-profit healthcare facility and its parent company, HCA, is a publicly-traded corporation obligated to earn profits for its shareholders.

15. Historically, Trident Medical Center has not performed the complex type of head and neck procedures at its North Charleston location that MUSC's HNO Division performs. The types of medical procedures performed by MUSC's HNO Division are long, multi-phase and complicated procedures, often lasting up to ten (10) to fifteen (15) hours.

16. Upon information and belief, Trident Medical Center does not have the facilities, equipment, manpower, and know-how to provide patients with the level of care that MUSC's HNO Division provides. Notably, simultaneously with the defendant physicians' resignations from MUSC, Trident Medical Center filed a Certificate of Need Application, attached hereto as Exhibit

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<sup>1</sup> Sara Jasper, Caitlin Mengler, Kiely St. Germain, and Hannah Feltner all resigned and left MUSC during October 2021 and, upon information and belief, are or will be working at Trident Medical Center in North Charleston for HCA.

#4, to expand its facility in an attempt to achieve the capability to perform the complex type of head and neck procedures at its North Charleston location. In addition, even if Trident's facilities are currently sufficient to support a ten (10) to fifteen (15) hour surgery, but for defendant HCA's wholesale poaching of MUSC's HNO Division's valuable resources and know-how, Trident would be incapable of providing any quality head and neck oncology surgical services for many years.

17. MUSC built its HNO Division over two decades and developed the processes to perform these operations over the course of the last two decades. MUSC did so not with an eye not towards maximizing revenue, but with the goal of fulfilling its institutional and statutory mission, which is to preserve and optimize human life in South Carolina and beyond through education, research and patient care.

### **III. MUSC's Confidential & Proprietary Information**

18. During the last two decades, when MUSC has been building its HNO Division, it has identified and purchased the equipment necessary to perform these procedures, identified the team members necessary to perform these procedures, and developed physician preference cards and instrument lists to perform these procedures.

19. MUSC's physician preference cards are catalogues of specific tools, supplies, and room setup that a surgeon prefers for a particular type of surgery. MUSC's physician preference cards are confidential and proprietary information belonging to MUSC, not to any individual employee.

20. MUSC's instrument lists identify the instruments specific surgeons need to perform certain procedures. MUSC's instrument lists are confidential and proprietary information belonging to MUSC, not to any individual employee.

21. MUSC's physician preference cards and instrument lists enable the team members to perform the complicated head and neck procedures MUSC's HNO Division has historically performed.

22. MUSC's physician preference cards and instrument lists are not disclosed to the public and are not available in the public domain.

23. MUSC maintains policies and procedures to protect its confidential and proprietary information from disclosure to unauthorized recipients. In addition, MUSC limits access to its confidential and proprietary information. MUSC only allows those persons to access such information who have a legitimate need to do so. To the extent one attempts to access such information remotely, MUSC uses a two-factor authentication system.

24. An example of the confidentiality obligations imposed on MUSC's employees can be found in the Code of Conduct, which is part of the MUSC Faculty Handbook. The Code of Conduct expressly states that "[n]o employee shall disclose confidential information or use such information for his or her personal benefit." Exhibit #5.

25. While still employed by MUSC but after notifying MUSC of their intent to resign, upon information and belief, defendant physicians Day, Hornig, Lentsch, and Neskey directed a registered nurse employed by MUSC, Jamie Wilsgard, to send physician preference cards from MUSC to HCA. The email correspondence where Ms. Wilsgard transmitted these physician cards to HCA is identified as Exhibit #6<sup>2</sup>.

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<sup>2</sup> By its very nature, the part of Exhibit #6 that contains the physician preference cards is highly confidential and will be provided to the court on a confidential basis. It will not be part of the public record.

26. Defendant physicians Day, Hornig, Lentsch, and Neskey did not have the authority to transmit MUSC's physician preference cards to HCA, and by doing so, defendant physicians Day, Hornig, Lentsch, and Neskey violated MUSC's policies and procedures.

27. While still employed by MUSC but after notifying MUSC of his intent to resign, defendant physician Hornig obtained MUSC's instrument list and sent this information to HCA. Defendant Hornig's transmission of this information to HCA is reflected in Exhibit #7.<sup>3</sup>

28. Upon information and belief, Trident Medical Center never had the physician preference cards and instrument lists necessary to enable defendant physicians (or other physicians) to quickly develop a facility, processes, and procedures to efficiently perform the type of head and neck procedures that have been historically performed by and at MUSC.

29. Without the physician preference cards and instrument lists, the defendant physicians would not be able to quickly establish the facilities, processes, and procedures to perform the complicated head and neck procedures at Trident Medical Center in North Charleston that the team members have historically performed at MUSC.

30. MUSC's patient lists are also confidential and proprietary information belonging to MUSC, not to any individual employee. This information is not available to the general public and is not in the public domain.

31. On August 31, 2021, defendant Davis attempted to obtain MUSC's patient lists. Exhibit #8.

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<sup>3</sup> The email from defendant physician Hornig has been filed with the court, but the instrument list attached to the email is highly confidential and will be provided to the court on a confidential basis. It will not be part of the public record.

32. The amount of revenue generated by MUSC and the physician's relative value unit or "RVU" are confidential and proprietary information belonging to MUSC, not to any individual employee. This information is not available to the general public and is not in the public domain.

33. Approximately six (6) months prior to announcing his resignation from MUSC, defendant physician Day obtained his RVU and salary for the past ten (10) years. In addition, defendant physician Day obtained this information for defendant physicians Sharma, Lentsch, and Hornig as well. Defendant physician Day obtained this information as evidenced by the email correspondence in Exhibit #9.

34. MUSC's case logs are also confidential and proprietary information belonging to MUSC. This information is not available to the general public and is not in the public domain.

35. After resigning from MUSC, defendant physician Day obtained his case logs for fiscal years 2019, 2020, and 2021. Defendant physician Day obtained this information as evidenced by the email correspondence in Exhibit #10.

36. In addition, defendants Davis and Neskey obtained confidential information concerning MUSC's residents and fellows as evidenced by Exhibit #14 and Exhibit #15.

37. In Exhibit #14, defendant Davis obtained information about MUSC's residents' salaries.

38. In Exhibit #15, defendant Neskey obtained the signed contracts for the incoming fellows in MUSC's Fellowship Program.

39. The information reflected in Exhibits #14 and #15 are confidential and proprietary information belonging to MUSC. This information is not available to the general public and is not in the public domain.

#### IV. MUSC's HNO Fellowship Program

40. In 2003, in furtherance of its tri-partite mission of education, research, and clinical excellence, a fellowship program was established in the HNO Division, the Fellowship in Surgical Oncology and Microvascular Reconstruction of the Head and Neck at MUSC ("HNO Fellowship Program"). Each academic year, two fellows who have completed their residencies are employed by MUSC and, through the HNO Fellowship Program, receive the highest level of training in the management and surgical treatment of head and neck cancer to physicians.

41. The HNO Fellowship Program became accredited by the American Head and Neck Society ("AHNS"), the largest organization in North America for the advancement of research and education in head and neck oncology. In 2010, the first fellow graduated from the HNO Fellowship Program.

42. AHNS-accredited fellowship programs are surveyed by AHNS's Advanced Training Council ("ATC"), which evaluates each program by applying established criteria set forth in its published Qualifications and Duration of Fellowship in Head and Neck Surgical Oncology and Research ("ATC Guidelines"). Each fellowship program is re-evaluated at five (5) year intervals or upon significant changes to the program. There are less than fifty (50) AHNS-accredited fellowship programs in the United States.

43. The reputational benefits and distinction to MUSC because of the AHNS accreditation of its HNO Fellowship Program cannot be quantified. In my career in academic medicine, such distinction materially assists an academic health system, including MUSC, with recruiting high-quality faculty and attracting research funding opportunities and students interested in research.

44. Because there are a limited number of AHNS-accredited fellowship programs in the United States, completion of an accredited fellowship provides physician fellows with critical credentials

to enter into a career in academic medicine. Although other non-accredited institutions may offer what they label as a “fellowship,” in my experience, lack of AHNS accreditation is a negative factor considered by academic institutions when hiring physicians who have participated in an unaccredited fellowship. This primarily is because, in my opinion, there is a lack of oversight and accountability for the qualitative and quantitative multidisciplinary experiences required by an AHNS-accredited fellowship program.

45. MUSC’s HNO Fellowship Program has maintained continuous accreditation since 2010. In 2019, AHNS re-accredited the MUSC’s HNO Fellowship Program based on the following information:

(a) Patients are referred from the Southeast Region of the United States with over ninety percent (90%) of referrals from South Carolina through the Head & Neck Nurse Navigator, Julie Akers.<sup>4</sup> All patients with advanced stage HNSCC, endocrine, skull base, cutaneous, and sarcoma are coordinated to see all multidisciplinary specialists at their first visit as appropriate. This would include Head and Neck Surgery, Medical Oncology, Radiation Oncology, Dental, Speech, Endocrine, Dermatology, Geneticist, and Neurosurgery as indicated.

(b) Interdisciplinary surgical activities include that all specialists noted above coordinate surgical care prospectively and joint cases are performed often with Head and Neck Surgery, Head and Neck Reconstructive Surgery, Neurosurgery, Vascular Surgery, Thoracic Surgery and GI Surgery as needed.

(c) During the previous academic year, MUSC evaluated 1,628 head and neck cancer patients, of which 485 patients were treated surgically.

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<sup>4</sup> On November 17, 2021, Julie Molony (f/k/a Julie Akers) submitted her resignation to MUSC. On information and belief, Ms. Molony is leaving MUSC to work at Trident.

(d) During each fellow's one-year HNO Fellowship, he or she is expected to operate on over 700 patients and participate in over 80 major head and neck operations.

46. Currently, Trident Medical Center in North Charleston does not have a fellowship program for head and neck oncology, and it will not have a fellowship program when the defendant physicians begin work at Trident Medical Center. For purposes of evaluating defendant physicians' motivations for bringing the current fellows with them to Trident, it is important to note that in addition to providing educational experiences, the use of fellows has been an integral part of the success and innovation of MUSC's HNO Division. Fellows are essential in providing necessary physician-hours during the long and complicated procedures. Without the fellows, the physicians themselves would be required to be present at all times for these long operations.

47. One of the defendant physicians, David M. Neskey, served as the Fellowship Director for MUSC's HNO Fellowship Program.

48. After announcing his intent to resign from MUSC but while still employed by MUSC and while still serving as Director of MUSC's HNO Fellowship Program, defendant physician Neskey stated that the defendant physicians "plann[ed] on having [the fellows] transition with us." **Exhibit #11**.

49. Based on defendant Neskey's statement, the defendant physicians planned on taking the fellows at MUSC to Trident Medical Center, once the defendant physicians started working for HCA.

50. In addition, as reflected in the email correspondence identified as **Exhibit #12**, after announcing his intent to resign from MUSC but while still employed by MUSC and while still serving as Director of MUSC's HNO Fellowship Program, defendant physician Neskey contacted the AHNS to attempt to transfer the existing fellows at MUSC to HCA despite the lack of any

AHNS-accredited program at Trident. Specifically, Defendant Neskey, without notifying anyone else at MUSC, directly contacted the AHNS ATC to advise them of the planned departures of the defendant physicians and engaged in multiple subsequent correspondence with the AHNS Co-Chairs, Drs. Don Weed and Amy Hessel, without notifying anyone at MUSC of this correspondence. Instead, defendant Neskey prepared a written statement to the ATC responding to the specific questions posed by them.

51. In further attempts to transfer the existing fellows from MUSC to Trident, on or before September 8, 2021, Defendant Neskey requested that defendant Day's administrative assistant forward him a copy of the ATC Accreditation Package for the MUSC HNO Fellowship Program that was completed in October 2019—a forty-six (46) page document containing all of the detailed information needed for MUSC to obtain its ATC Accreditation of the HNO Fellowship Program. Subsequently, on or before September 13, 2021, Defendant Neskey requested that the AHNS Associate Executive Director forward him a blank AHNS Fellowship Program application, reflecting Defendant Neskey's clear intent to use the MUSC 2019 detailed packet to support an application for a new accredited fellowship program to be established at defendant HCA's facilities.

52. Following defendant physician Neskey's email, the AHNS sent formal correspondence to MUSC, which is identified as **Exhibit #13**, regarding the continued accreditation of the HNO Fellowship Program at MUSC. This correspondence was copied to MUSC's current two (2) fellows and the incoming Academic Year 2022-2023 fellows who have committed to MUSC's HNO Fellowship Program.

53. On November 9, 2021, AHNS sent out a mass email to its approximately fifty (50) Fellowship Program Directors nationwide, advising of the "major disruption" to MUSC's HNO

Fellowship Program due to the impending departure of the defendant physicians. In this correspondence, AHNS advised that given the efforts by MUSC to devote and recruit resources to the HNO Division, the current fellows' education experience will be sufficient to meet the AHNS accreditation requirements. However, AHNS further advised that for the incoming 2022-2023 MUSC fellows, they would be released from their commitments to come to MUSC next year. In addition, AHNS has deferred any decision as to whether MUSC can participate in the 2023-2024 fellowship "match" cycle, which is scheduled to begin within the next two (2) months.

54. Over my entire career, I have never seen or heard of a group of physicians engage in a wholesale abandonment of their students, colleagues, and patients similar to what the defendant physicians have orchestrated over the past several months. In the medical centers I have been associated with, like the Vanderbilt Medical Center in Nashville, Tennessee, from time to time physicians did leave to take an opportunity to work in the HCA Health System in Nashville, but these departures were carried out in an orderly and well-timed fashion so that no harm came to any of the trainees or to the patients. In the current situation outlined above, their continued actions will cause reputational harm to MUSC and will endanger MUSC's ability to recruit new fellows in future years.

## **VI. Potential Irreparable Harm**

55. As a result of the actions set forth in this affidavit, MUSC's confidential and proprietary information is in the hands of a for-profit healthcare facility, HCA, and of soon-to-be HCA employees.

56. 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.

57. In addition, as a result of the actions set forth in this affidavit, MUSC's HNO Fellowship Program is under attack and pursuit by soon-to-be HCA employees.

58. As long as MUSC's HNO Fellowship Program has existed, it has been an integral part of innovation, research and training. It has assisted tremendously in the extremely important task of training the next generation of healthcare providers, and it has played a significant part in extending and making more enjoyable the lives of those who have been touched by cancer.

59. MUSC needs to preserve its confidential and proprietary information and its HNO Fellowship Program, so it may continue with its mission to preserve and optimize human life in South Carolina and beyond through education, research and patient care.

**FURTHER AFFIANT SAYETH NOT.**

*R. N. DuBois*

**Raymond N. DuBois, MD, PhD**

SWORN TO AND SUBSCRIBED before  
me this 14<sup>th</sup> day of November, 2021.

*Michelle M. Shanahan*  
Notary Public for S.C.

*Michelle M. Shanahan*  
Print Name

My Commission Expires: 6/10/2026

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF CHARLESTON )

MEDICAL UNIVERSITY OF SOUTH )  
 CAROLINA and UNIVERSITY MEDICAL )  
 ASSOCIATES OF THE MEDICAL UNIVERSITY )  
 OF SOUTH CAROLINA, )

Plaintiffs, )

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. )

Civil Action No. \_\_\_\_\_

AFFIDAVIT OF  
 DAVID S. LEVITT

I, David S. Levitt, after being duly sworn deposes and says:

1. I am the Managing Partner of Levitt Healthcare Affiliates. I have a Master's in Health Administration ("MHA") from George Washington University and over 30 years of experience in health care planning and health care finance.

2. Over the course of my career, I have assisted more than 675 health care clients with strategic planning, business development, product line planning, and marketing. I have assisted in the preparation of more than 1,250 Certificate of Need ("CON") applications, providing, inter alia, analyses of relevant markets for services, utilization projections, and financial forecasts.

3. I have served and have been qualified as an expert witness in health planning, healthcare finance, and financial feasibility in five States, including South Carolina, and I have

provided testimony on all manner of health care services, including new hospital development. A copy of my CV is included as **Attachment 1**.

4. I have been engaged by Medical University of South Carolina (“MUSC”), Medical University Hospital Authority (“MUHA”), and related organizations for the past 20+ years to assist with strategic planning, business development, product line planning, market analysis, product line profiling, merger, acquisition and joint venture analysis and structure, developing competitor analysis, identifying strategies for market positioning, projecting utilization changes with strategy implementation, projecting financial effect of strategy implementation, financial modeling of market share, patient composition, revenue, payor mix, contractual adjustments, and operating expenses variations, as well as product line development and revenue stream analysis.

5. Over the course of my 20+ years of engagements with MUHA, I have been involved in approximately 75 CON applications for MUHA to develop additional resources, services and facilities in South Carolina.

6. I have testified over 50 times in CON appeal hearings and trials, of which 14 times were in South Carolina.

7. On behalf of my client, Medical University Hospital Authority (“MUHA”), I performed an extensive review of publicly available financial information on HCA as well as Certificate of Need materials, records and correspondences related to the South Carolina Certificate of Need process.

8. In reviewing Certificate of Need records since 2014, Trident and related companies have, as declared affected parties, opposed at least 10 CON applications submitted by MUHA, whose total project expenditures total over **\$463,500,000**. They include:

(a) 4 OR Pediatric ASC - \$26.4 million

- (b) Pediatric Imaging Center - \$39.8 Million
- (c) Additional Linear Accelerator North Charleston - \$8.1 million
- (d) Ambulatory Surgery Center - \$36.0 million
- (e) 6<sup>th</sup> linear Accelerator - \$9.8 million
- (f) Freestanding Emergency Department (FSED) - \$13.6 million
- (g) NICU Expansion - \$2 million
- (h) Community Hospital - \$325 million
- (i) NICU Expansion - \$2.8 million

9. MUHA is both a teaching hospital and referral center and is South Carolina's only academic medical center. As an academic medical center or teaching hospital, MUHA is at the forefront of the latest advances in medicine, with world-class physicians, groundbreaking research and technology that is often among the first of its kind in the world. Patients also benefit from a multidisciplinary team approach to care that involves the close collaboration of specialists from many different areas. MUHA and its affiliates offer a wide range of services to a large population base residing primarily in South Carolina and extending across the state and beyond. Among the services provided on the hospital's campus is a full range of emergency, maternity, pediatric, medical/surgical and diagnostic services. MUHA serves as an academic training facility for numerous medical residency programs. With **54** different medical specialty residency training programs, the hospital serves as a valuable resource for educating and preparing future physicians.

10. MUHA is a nine-hospital integrated healthcare system with multiple service locations throughout the state. The main hospital, MUSC Health University Medical Center in Charleston is one of five Level I adult trauma centers in the state, the only Level 4 NICU provider, and the only Level I pediatric trauma provider.

11. Trident is a two-hospital tertiary community provider that offers Level II trauma services and Intermediate Care level neonatal services. Trident does not offer any subspecialty medical training options and offers only limited **(3)** general medical residency training options (Emergency Medicine, General Surgery and Internal Medicine).

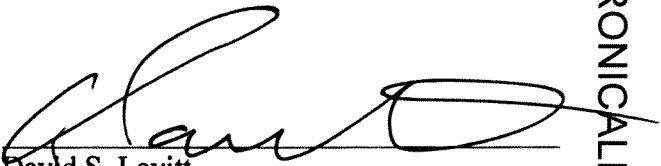
12. Trident routinely transfers many critically ill patients to MUSC because Trident lacks the ability to provide the necessary specialized care and resources to these patients.

13. MUSC Health University Medical Center's current complement of Intensive Care Beds (ICU) includes 59 medical/surgical, 21 critical care, 47 pediatric, 16 neurosurgical/neurological for a total of **143** beds.

14. Trident operates 28 medical surgical ICU beds at Trident Medical Center and 8 medical surgical ICU beds at Summerville Medical Center for a total of **36** beds.

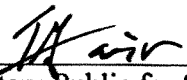
15. Trident filed a CON application on August 30, 2021 to expand its existing operating room and perioperative space at Trident Medical Center with a total project cost of \$20,168,000. The Surgery Department expansion will be composed of 9,785 new Building Gross Square Feet (BGSF) and 2,856 renovated BGSF for a total addition of 12,641 BGSF. The project will add 3 additional, operating rooms ("OR"), 8 pre-/post-operative rooms, and an additional post-anesthesia care unit ("PACU") recovery bay. A new drop-off entry canopy and lobby with a connecting corridor to the existing registration area will also be included, along with storage and other necessary administrative areas. The proposed project also includes shelled space, which will initially be used as storage but could be converted to serve as an additional OR in the future. The renovations and expansion are necessary because the current physical plant cannot accommodate the complex and specialized surgical cases that are expected to be performed by newly recruited physicians.

FURTHER AFFIANT SAYETH NOT.

  
David S. Levitt  
Levitt Healthcare Affiliates

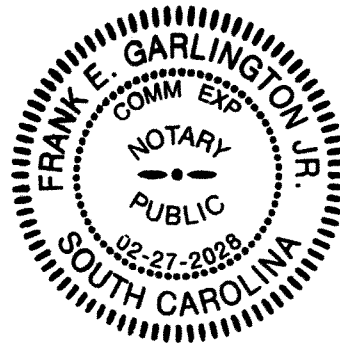
SWORN TO AND SUBSCRIBED before

me this 19<sup>th</sup> day of November, 2021.

  
Notary Public for S.C.

Frank Garlington Jr  
Print Name

My Commission Expires: 2-27-2028



ELECTRONICALLY FILED - 2021 Nov 22 10:41 AM - CHARLESTON - COMMON PLEAS - CASE#2021CP100

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF CHARLESTON )

MEDICAL UNIVERSITY OF SOUTH )  
 CAROLINA and UNIVERSITY MEDICAL )  
 ASSOCIATES OF THE MEDICAL UNIVERSITY )  
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Plaintiffs, )

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 ERIC J. LENTSCH, DAVID M. NESKEY, and )  
 ANAND K. SHARMA, )

AFFIDAVIT OF.  
 TIMOTHY BRENDLE

Defendants. )  
 \_\_\_\_\_ )

I, Timothy Brendle, first being duly sworn deposes and says:

1. I am the Chief Perioperative Operations Officer at MUSC Health, Charleston Division.

2. I earned a Bachelor of Science in Nursing, M.S. in Leadership and a Doctor of Nursing Practice or DNP in Nursing Administration from Regis University. I first obtained my license as a Registered Nurse in South Carolina in 1995. I hold the following certificates and licenses: Certified Nurse Operating Room or CNOR from the Competency & Credentialing Institute and Nurse Executive Certification or NE-BC from the American Nurses Credentialing Center.

3. I have worked at MUSC for approximately twenty-one (21) years. I oversee the Operating Room ("OR") operations for over 50 ORs and hybrid OR suites in all of MUSC Health's

Charleston facilities. The procedures performed in the ORs include a broad range of highly specialized procedures with specific, tailored OR needs for each specialty and subspecialty procedure, including the Head & Neck Oncology procedures performed by the individual defendants.

4. While working for MUSC in the year 2000, I served as the ear, nose, and throat (“ENT”) OR Coordinator, which oversaw all ENT procedures performed in the ORs, including Head and Neck Oncology procedures. At that time, I frequently oversaw day-to-day operations within the ENT service line, which included procedures performed by defendant Day. At that time, defendant Day and others on the Head and Neck team began developing the processes, procedures, and staffing requirements needed for the complex, multi-phase cancer removal and free-flap procedures performed by the defendants that often last up to ten (10) to fifteen (15) hours. These highly complex procedures involve multiple teams and specialized equipment. Over the past several years, MUSC’s Department of Otolaryngology in the Division of Head and Neck Oncology (“HNO Division”) surgeons performed approximately three (3) to four (4) of these long, complex cases per week. This is an increase from what the Head and Neck team could perform when I began working for MUSC in the year 2000. At that time, the Head and Neck surgeons performed approximately one (1) to two (2) cases per week.

5. As new physicians were added to the multidisciplinary team developed to treat Head and Neck cancer patients, surgical “physician preference” cards were developed that specify each surgeon’s preferences with respect to types and brands of instruments, supplies, and pharmaceuticals as well as processes to follow for each specialized type of procedure. The cards and equipment lists for the procedures are highly detailed and technical and have been perfected and assembled over decades of development at MUSC. Defendants Day, Hornig, Lentsch, and

Neskey collectively have developed over 100 preference cards over the years for a broad range of specialized procedures.

6. Access to the procedure cards and instrument lists are restricted access for only certain MUSC employees and they are not accessible by the public.

7. I estimate it would take Trident Medical Center eight (8) to ten (10) years to independently grow the high-quality, multi-disciplinary Head and Neck surgical practice that MUSC has developed to date, and that is assuming that Trident devotes the same level of resources that MUSC has furnished to defendant physicians and their practice over the years.

8. I have reviewed the equipment list in Trident Medical Center's Certificate of Need ("CON") Application, filed on August 30, 2021 and identified in **Exhibit #4**. The items listed in the CON Application are not adequate to perform the procedures performed by the Head and Neck team at MUSC, or to train and educate residents, fellows, surgical nurses and surgical techs.

**FURTHER AFFIANT SAYETH NOT.**

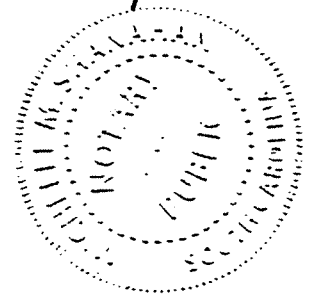
  
Timothy Bredle

SWORN TO AND SUBSCRIBED before  
me this 19<sup>th</sup> day of November, 2021.

  
Notary Public for S.C.

Michelle M Sharahan  
Print Name

My Commission Expires: 6/10/2026





STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

MEDICAL UNIVERSITY OF SOUTH )  
CAROLINA and UNIVERSITY MEDICAL )  
ASSOCIATES OF THE MEDICAL )  
UNIVERSITY OF SOUTH CAROLINA, )

Civil Action No. 2021-CP-10-05289

Plaintiffs, )

v. )

**HCA HEALTHCARE, INC.’S  
MOTION TO DISMISS**

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. )

Defendant HCA Healthcare, Inc. (“HCA”), by and through undersigned counsel, hereby moves the Court, pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure, for an Order dismissing the claims of Plaintiffs Medical University of South Carolina and University Medical Associations of the Medical University of South Carolina (collectively “Plaintiffs”) against HCA on the grounds that the Court lacks either general or specific jurisdiction over HCA.

HCA’s Motion to Dismiss pursuant to Rule 12(b)(2) is based on the grounds that:

1. The Court does not have general jurisdiction over HCA pursuant to S.C. CODE ANN. § 36-2-802, because HCA is not domiciled in, organized under the laws of, doing business, or maintaining its principal place of business in South Carolina. *See* S.C. CODE ANN. § 36-2-802 (“A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action.”). HCA is a holding company headquartered in Nashville, Tennessee and organized under the

laws of Delaware. *See* Affidavit of Michael Bray, attached hereto as **Exhibit 1** and incorporated by reference herein.

2. The Court does not have specific jurisdiction over HCA pursuant to the South Carolina Long-Arm Statute, S.C. CODE ANN. § 36-2-803. HCA does not conduct business in South Carolina; it has no offices, operations, employees, or property in South Carolina. Bray Affidavit ¶¶ 10-12. HCA is a non-operating holding company without employees whose assets consist solely of investments, directly and indirectly, in the stock or other equity interests of its subsidiaries. Bray Affidavit ¶¶ 4-5. HCA has not performed any of its holding company activities in South Carolina. Bray Affidavit ¶¶ 10-11. HCA does not contract to supply services or things in South Carolina. Bray Affidavit ¶ 18. HCA is not a hospital, and is not licensed to be a hospital or healthcare facility in the state of South Carolina. Bray Affidavit ¶ 19. HCA does not have an interest in, and is not using or in possession of, real property in South Carolina. Bray Affidavit ¶ 20. HCA is not involved in, and does not oversee, control, and/or manage the day-to-day operations, management and/or administration of Trident Medical Center, LLC. Bray Affidavit ¶ 23. HCA does not contract to insure any person, property, or risk located in South Carolina. Bray Affidavit ¶ 26. HCA has not entered into a contract to be performed in whole, or in part, by any party to the above-captioned matter in South Carolina. Bray Affidavit ¶ 27. HCA has never participated in, conducted negotiations with, and/or had discussions with the co-defendant doctors in the above-captioned litigation. Bray Affidavit ¶ 30. HCA does not produce, manufacture or distribute goods with the reasonable expectation that those goods

are to be used or consumed in South Carolina. Bray Affidavit ¶ 28. HCA does not maintain a bank account in South Carolina. Bray Affidavit ¶ 31.

3. The exercise of personal jurisdiction over HCA violates due process. *See Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005) (citation omitted). HCA did not purposefully avail itself of the privilege of conducting activities in South Carolina. Bray Affidavit ¶ 33.
4. HCA lacks the requisite minimum contacts with South Carolina such that maintenance of the suit offends the traditional notions of fair play and substantial justice. *See Hidria, USA, Inc. v. Delo*, 415 S.C. 533, 541, 783 S.E.2d 839, 843 (Ct. App. 2016). HCA did not direct any activity to residents of South Carolina. *See id.*
5. HCA does not satisfy any of the factors the Court is to consider under the fairness prong of the requisite jurisdictional due process analysis. *See Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508 (stating the fairness prong of the jurisdictional due process analysis requires the Court to consider the following factors: (1) the duration of the nonresident defendant's activity in South Carolina; (2) the character and circumstances of the nonresident's acts; (3) the inconvenience to the parties; and (4) the State's interest in exercising jurisdiction). HCA does not conduct any activity in South Carolina. Bray Affidavit ¶¶ 10-11. It is inconvenient for HCA to defend itself in the Charleston County Circuit Court because HCA is a holding company with its principal place of business in Nashville, Tennessee that has no contact with the state of South Carolina. Bray Affidavit ¶ 34. The State of South Carolina has no interest in exercising jurisdiction over business entities in other states based upon actions that may have occurred in those states. *See Cribb v.*

*Spatholt*, 382 S.C. 475, 489, 676 S.E.2d 706, 714 (Ct. App. 2009) (finding South Carolina has little interest in exercising jurisdiction and adjudicating a dispute involving the conduct of a business operating solely in another state).

This Motion is based upon the Complaint, the other pleadings on file, the documents referenced therein, the affidavit referenced herein and attached hereto as **Exhibit 1**, the applicable authorities, and upon such arguments and memoranda of law as may be submitted in support hereof.

Respectfully submitted,

s/ James Lynn Werner  
 James Lynn Werner SC Bar No. 6029  
 David B. Summer SC Bar No. 7974  
 Katon E. Dawson Jr. SC Bar No. 101167  
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*Attorneys for Defendants HCA Healthcare, Inc. and  
 Trident Medical Center LLC*

December 7, 2021  
 Columbia, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

MEDICAL UNIVERSITY OF SOUTH )  
CAROLINA and UNIVERSITY MEDICAL )  
ASSOCIATES OF THE MEDICAL )  
UNIVERSITY OF SOUTH CAROLINA, )

Civil Action No. 2021-CP-10-05289

Plaintiffs,

v.

**AFFIDAVIT OF MICHAEL BRAY**

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.

I, Michael Bray, first being duly sworn, do hereby make oath and affirm as follows:

1. I am over (18) years of age, of sound mind, capable of making this oath, and fully competent to testify to the matters stated herein.

2. For the past 34 years, I have been employed in various roles at HCA Management Services, LP and its predecessor organizations. My current title is Director and Assistant VP of Financial Reporting.

3. I have personal knowledge regarding the matters referenced herein.

4. HCA Healthcare, Inc. ("HCA") is a non-operating holding company.

5. HCA's assets consist solely of investments, directly and indirectly, in the stock or other equity interests of its subsidiaries.

6. HCA is headquartered in Nashville, Tennessee.

7. HCA does not maintain a place of business in South Carolina.

8. HCA is organized under the laws of the State of Delaware.

9. HCA is not domiciled in South Carolina.

10. HCA does not conduct any activity in South Carolina.

11. HCA does no business of any kind in South Carolina.

12. HCA has no offices, operations, employees, or property in South Carolina.

13. HCA and its subsidiaries observe corporate formalities, and operate as separate and distinct corporate entities.

14. HCA does not exercise greater control over its subsidiaries than that normally associated with common ownership or directorship.

15. HCA is not, and has never been, registered to do business in South Carolina.

16. HCA does not maintain a registered agent for service of process in South Carolina.

17. HCA maintains its accounting records and other business records in Tennessee.

18. HCA does not contract to supply services or things in South Carolina.

19. HCA is not a hospital, and is not licensed to be a hospital or healthcare facility in South Carolina.

20. HCA does not have an interest in, use, or possess real property in South Carolina.

21. HCA is the ultimate corporate parent of Trident Medical Center, LLC.

22. There are at least three levels of subsidiaries between HCA and Trident Medical Center, LLC.

23. HCA is not involved in, and does not oversee, control and/or manage the day-to-day operations, management and/or administration of Trident Medical Center, LLC—or any other hospital in South Carolina.

24. HCA did not commit a tortious act in South Carolina.

25. HCA did not cause tortious injury or death in South Carolina.

26. HCA does not contract to insure any person, property, or risk located within South Carolina.

27. HCA does not contract for work to be performed in whole or in part in South Carolina with any party to this lawsuit.

28. HCA does not produce, manufacture, or distribute goods with the reasonable expectation that those goods are to be used or consumed in South Carolina.

29. HCA has not entered into a contract to be performed in whole, or in part, by any party to the above-captioned matter in South Carolina.

30. HCA has never participated in, conducted negotiations with, and/or had discussions with the co-defendant doctors in the above-captioned lawsuit.

31. HCA does not maintain any savings, checking, brokerage, or other financial accounts in South Carolina.

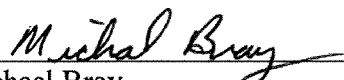
32. HCA does not owe, and has never owed, paid, or been required to pay taxes in South Carolina.

33. HCA has not purposefully availed itself to the privilege of conducting activities in South Carolina.

34. It is inconvenient for HCA to defend itself in the Charleston County Circuit Court because HCA is a holding company with its principal place of business in Nashville, Tennessee that has no contact with the state of South Carolina.

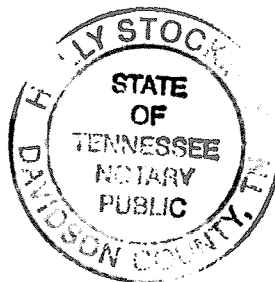
35. I declare under penalty of perjury that the foregoing is true and correct.

**FURTHER AFFIANT SAYETH NOT.**

  
Michael Bray  
Asst. Vice President of Financial Reporting  
HCA Management Services, LP

SWORN and subscribed to before me this  
6<sup>th</sup> day of December 2021

Holly Stockman  
Notary Public for Davidson County  
My Commission expires: 05/09/2023



STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

MEDICAL UNIVERSITY OF SOUTH )  
CAROLINA and UNIVERSITY MEDICAL )  
ASSOCIATES OF THE MEDICAL )  
UNIVERSITY OF SOUTH CAROLINA, )

Civil Action No. 2021-CP-10-05289

Plaintiffs, )

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, )

**HCA HEALTHCARE, INC.'S  
MEMORANDUM OF LAW IN  
SUPPORT OF THE MOTION TO  
DISMISS**

Defendants. )

Defendant HCA Healthcare, Inc. ("HCA"), submits this Memorandum in support of its Motion to Dismiss the Complaint filed 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") pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure for a lack of personal jurisdiction.

**INTRODUCTION**

This lawsuit concerns the decision by a group of physicians (Terry Day, Betsy Davis, Joshua Hornig, Eric Lentsch, David Neskey and Anand Sharma (collectively, "the Physicians")) to resign from their employment with UMA and transition employment to another healthcare provider. Plaintiffs' allege the Physicians obtained proprietary information from Plaintiffs to use while practicing medicine at facilities owned and operated by defendant Trident Medical Center, LLC ("Trident"). [Complaint ¶ 111]. According to the Complaint, Trident is a "wholly owned subsidiary of HCA through other wholly owned subsidiaries of HCA." [Complaint ¶ 28].

Plaintiffs have named HCA as a defendant in this action. Plaintiffs are incorrect in their conclusory assertion that personal jurisdiction exists over HCA. [Complaint ¶ 6]. In the Complaint, Plaintiffs disregard the corporate forms of HCA and Trident and attempt to unify those separate and distinct entities. Specifically, the Complaint imputes the alleged actions of a subsidiary company (Trident) on a distant parent corporation (HCA) by using “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 ownership of 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 without employees whose assets consist solely of investments, directly and indirectly, in the stock or other equity interests of its subsidiaries. *See* Affidavit of Michael Bray, attached hereto as **Exhibit 1**. HCA is headquartered in Nashville, Tennessee and organized under the laws of the State of Delaware. Bray Affidavit ¶¶ 6-8. HCA does not do business in South Carolina. Bray Affidavit ¶ 11. HCA has no employees in South Carolina (or anywhere) and none of its holding company activities take place in South Carolina. Bray Affidavit ¶ 12. HCA does not own or operate any assets or conduct any other business activities in South Carolina. Although HCA is the ultimate parent company in Trident’s

corporate family, there are at least three levels of subsidiaries between HCA and Trident. Bray Affidavit ¶ 22.

These facts negate the Court's assertion of jurisdiction over HCA; therefore, the Court must dismiss the claims against HCA pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure for a lack of personal jurisdiction.

### **STANDARD OF REVIEW**

The plaintiff bears the burden to establish a *prima facie* showing of personal jurisdiction either in the complaint or in affidavits. *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct. App. 2004); *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). "When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction." *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008). The Court may consider evidence outside the pleadings without converting the motion to a summary judgment motion. *Springmasters, Inc. v. D & M Mfg.*, 303 S.C. 528, 532, 402 S.E.2d 192, 194 (Ct. App. 1991).

### **ARGUMENT**

The claims against HCA should be dismissed pursuant to Rule 12(b)(2) for lack of personal jurisdiction. Personal jurisdiction is exercised as "general jurisdiction" or "specific jurisdiction." *Cribb v. Spatholt*, 382 S.C. 475, 481–84, 676 S.E.2d 706, 709-11 (Ct. App. 2009) (citing *Coggeshall v. Reprod. Endocrine Associates of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007)). The Court has neither general, nor specific jurisdiction over HCA. Therefore, Plaintiffs' claims against HCA must be dismissed pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure.

**I. The Court does not have general jurisdiction over HCA.**

General jurisdiction is governed by S.C. CODE ANN. § 36-2-802 which states that “[a] court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action.” A court has general jurisdiction over a defendant if the defendant has an “enduring relationship” with the state of South Carolina. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 495, 611 S.E.2d 505, 510 (2005). To satisfy the “enduring relationship” requirement, a defendant’s contacts must be substantial, continuous, and systematic. *Cribb*, 382 S.C. at 483, 676 S.E.2d at 710.

Recently, in *Daimler AG v. Bauman*, 134 S.Ct. 746, 749 (2014) the Supreme Court significantly narrowed the scope of general personal jurisdiction. The Court in *Daimler* clarified that general jurisdiction over corporate defendants will only exist in three (3) circumstances:

1. in the forum where the defendant is incorporated;
2. in the forum where the defendant has its principal place of business; and
3. in a forum where a “corporation's affiliations with the [forum] are so continuous and systematic as to render [it] essentially at home in the forum State.”

*Carl v. Mazda Motor Corp.*, No. 4:20-CV-00640-DCC, 2020 WL 7360174, at \*3 (D.S.C. Dec. 15, 2020) (citation omitted).

None of the three *Daimler* circumstances necessary for the Court to have general jurisdiction over HCA exist—not one. The first *Daimler* circumstance is not satisfied because HCA is organized under the laws of Delaware—not South Carolina. Bray Affidavit ¶ 8. The second *Daimler* circumstance is not satisfied because HCA’s principal place of business is Tennessee. Bray Affidavit ¶ 6. The third *Daimler* circumstance is not applicable because HCA does not have any relationship, much less a continuous and systematic relationship, with South

Carolina. Bray Affidavit ¶¶ 10-12. HCA does no business of any kind in South Carolina. Bray Affidavit ¶ 11. HCA has not entered South Carolina for any purpose and has no contacts *at all* with the state of South Carolina. Bray Affidavit ¶¶ 10-12. HCA's complete lack of contacts with South Carolina means that HCA does not satisfy any of the requirements for the Court to have general jurisdiction over it.

## **II. The Court does not have specific jurisdiction over HCA.**

Traditionally, courts conduct a two-step analysis to determine whether specific jurisdiction exists. *Cribb*, 382 S.C. at 481-84, 676 S.E.2d at 709-11. First, the court determines whether the Long-Arm Statute, S.C. CODE ANN. § 36-2-803, applies to a defendant. Next, the Court determines whether the non-resident's contacts in South Carolina are sufficient to satisfy the due process requirements. *Id.* (citing *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 431, 665 S.E.2d 660, 664 (Ct. App. 2008)).

HCA did not act in any manner that would, directly or through an agent, permit the exercise of specific jurisdiction in South Carolina pursuant to the Long Arm Statute. Furthermore, HCA does not have contacts with South Carolina that are sufficient to satisfy the due process requirements.

### **A. The Long-Arm Statute, S.C. CODE ANN. § 36-2-803, does not apply to HCA.**

Specific jurisdiction is determined under the South Carolina Long-Arm Statute, S.C. CODE ANN. § 36-2-803. *See Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 329, 594 S.E.2d 878, 883 (Ct. App. 2004). The Long-Arm Statute states that a court may exercise jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's:

1. transacting any business in this State;
2. contracting to supply services or things in the State;
3. commission of a tortious act in whole or in part in this State;

4. causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
5. having an interest in, using, or possessing real property in this State;
6. contracting to insure any person, property, or risk located within this State at the time of contracting;
7. entry into a contract to be performed in whole or in part by either party in this State; or
8. production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

S.C. CODE ANN. § 36-2-803.

HCA does not satisfy any of the requirements of the Long-Arm Statute. HCA does not transact any business in South Carolina. Bray Affidavit ¶ 11. HCA does not contract to supply services or things in South Carolina. Bray Affidavit ¶ 18. HCA did not commit a tortious act in South Carolina. Bray Affidavit ¶ 24. HCA did not cause tortious injury or death in South Carolina. Bray Affidavit ¶ 25. HCA does not have an interest in, use, or possess real property in this State. Bray Affidavit ¶ 20. HCA does not contract to insure any person, property, or risk located within South Carolina. Bray Affidavit ¶ 26. HCA does not contract for work to be performed in whole or in part in South Carolina with any party to this lawsuit. Bray Affidavit ¶ 27. HCA does not produce, manufacture, or distribute goods with the reasonable expectation that those goods are to be used or consumed in South Carolina. Bray Affidavit ¶ 28.

There is no evidence and no verified facts before the Court indicating that HCA engaged in any conduct that would subject it to the South Carolina Long-Arm Statute. Plaintiffs' domicile, or that of Trident, cannot form the basis for the assertion of jurisdiction here. This is insufficient as a matter of law to justify this Court's exercise of jurisdiction over HCA.

**B. The exercise of personal jurisdiction over HCA violates due process.**

Even if the Court were to consider that HCA's conduct is somehow covered by the Long-Arm Statute, HCA does not have contacts with South Carolina that are sufficient to satisfy the due process requirements for the exercise of jurisdiction. The determination of whether the requirements of due process are satisfied involves a two-prong analysis: the "power" prong and the "fairness" prong. *Hidria, USA, Inc. v. Delo*, 415 S.C. 533, 541, 783 S.E.2d 839, 843 (Ct. App. 2016). Neither of these prongs are applicable to HCA.

**1. HCA does not have the necessary minimum contacts to satisfy the "power" prong.**

The "power" prong, requires HCA have minimum contacts with South Carolina to grant the Court the "power" to adjudicate the action. *Id.* To satisfy the power prong, the Court must find HCA purposefully availed itself of the privilege of conducting activities within South Carolina, thus invoking the benefits and protections of the laws of South Carolina. *Cribb*, 382 S.C. at 481–84, 676 S.E.2d at 709-11.

HCA has not purposefully availed itself of the privilege of conducting any activity within South Carolina. Bray Affidavit ¶ 33. HCA is a non-operating holding company without employees whose assets consist solely of investments, directly and indirectly, in the stock or other equity interests of its subsidiaries. Bray Affidavit ¶¶ 4, 5, 12. HCA has not performed any of its holding company activities in South Carolina Bray Affidavit ¶ 10. HCA has no offices, operations, employees, or property in South Carolina. Bray Affidavit ¶ 13. HCA is not involved in, and does not oversee, control and/or manage the day-to-day operations, management and/or administration of Trident. Bray Affidavit ¶ 23. HCA has never participated in, conducted negotiations with, and/or had discussions with the co-defendant doctors in the above-captioned litigation. Bray Affidavit ¶ 30.

The fact that Trident is a distant downstream subsidiary of HCA, and is present and conducts business in South Carolina is not sufficient to establish this Court's personal jurisdiction over HCA. It is well-established that a distant foreign parent corporation does not subject itself to personal jurisdiction in a forum state simply by having subsidiaries that are active or based in that state. *See, e.g., Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153, 268 S.E.2d 42, 44 (1980); *Fancy That! Bistro & Catering, LLC v. Sentinel Ins. Co., Ltd.*, No. 3:20-CV-2382-BHH, 2021 WL 4804974, at \*4 (D.S.C. Oct. 14, 2021) (“[A] parent company is not subject to personal jurisdiction in a particular forum merely due to its relationship with a subsidiary”); *Black Magic, LLC v. Hartford Fin. Servs. Grp., Inc.*, No. 2:20-CV-1743-BHH, 2021 WL 964969, at \*5 (D.S.C. Mar. 15, 2021) (same); *Wright v. Waste Pro USA Inc.*, No. 2:17-CV-02654, 2019 WL 3344040, at \*11 (D.S.C. July 25, 2019) (same); *Fitzhenry v. One on One Mktg. LLC*, No. 2:14-CV-4782-DCN, 2015 WL 4459023, at \*4 (D.S.C. July 21, 2015) (same); *Gray v. Riso Kagaku Corp.*, 82 F.3d 410, 1996 WL 181488 at 3 (4th Cir. 1996) (same). Moreover, the contacts of subsidiaries in the forum state are not attributed to the parent company in determining whether the due process minimum contacts requirement is met. *See Gray*, 1996 WL 181488 at \*3 (rejecting argument that minimum contacts prong was satisfied because defendant's wholly owned subsidiaries marketed its product in South Carolina).

The only connection that HCA has with South Carolina is the presence of its distant downstream subsidiaries in the state. *See Bray Affidavit* ¶ 21. The subsidiaries' presence in and contacts with the state of South Carolina are insufficient to subject their ultimate corporate parent, HCA, to personal jurisdiction in this Court. *Yarborough*, 275 S.C. at, 153, 268 S.E.2d at 44.

These facts plainly demonstrate that the “power” prong is not satisfied and the Court does not have specific jurisdiction over HCA. Accordingly, the Court should grant HCA's Motion and

dismiss Plaintiffs' claims against it pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure.

**2. It is neither reasonable, nor fair, for the Court to exercise specific jurisdiction over HCA.**

The "fairness" prong, requires the exercise of jurisdiction to be "reasonable" or "fair." *Hidria, USA, Inc. v. Delo*, 415 S.C. 533, 541, 783 S.E.2d 839, 843 (Ct. App. 2016) (citing *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992)). In determining fairness and reasonableness of exercising jurisdiction, the Court must consider the following factors: (1) the duration of HCA's activity in this state; (2) the character and circumstances of HCA's acts; (3) the inconvenience to the parties by conferring or refusing to confer jurisdiction over the non-resident; and (4) the state's interest in exercising jurisdiction. *Cribb*, 382 S.C. at 488, 676 S.E.2d at 713 (citing *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 91, 666 S.E.2d 218, 223 (2008)).

HCA conducts no activity in South Carolina. Bray Affidavit ¶ 10. HCA would be burdened by being haled into this Court, because it is a holding company based in Tennessee that conducts no business in South Carolina and has no contact with South Carolina. Bray Affidavit ¶ 34. South Carolina's interest in adjudicating this dispute is limited to its interest in its own citizens—not the purported actions of a foreign holding company several steps removed from a domestic subsidiary. *See Contra Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 303 S.C. 502, 509, 402 S.E.2d 177, 181 (1991) ("[W]hile South Carolina has an interest in providing redress for its citizens, that interest is diminished when no business [of the defendant] was transacted in this State[.]").

Review of each of the factors for the "fairness" prong reveals that none of those factors are apply to HCA in this case. Accordingly, the Court should grant HCA's Motion and dismiss

Plaintiffs' claims against it pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure.

### **CONCLUSION**

Based on the foregoing, Plaintiffs' claims against HCA in the Complaint should be dismissed for lack of personal jurisdiction.

s/ James Lynn Werner  
James Lynn Werner SC Bar No. 6029  
David B. Summer SC Bar No. 7974  
Katon E. Dawson Jr. SC Bar No. 101167  
Ashley W. Johnson, SC Bar No. 101423  
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*Attorneys for Defendants HCA Healthcare, Inc. and  
Trident Medical Center LLC*

December 7, 2021  
Columbia, South Carolina

**STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON**

**IN THE COURT OF COMMON PLEAS**

MEDICAL UNIVERSITY OF SOUTH )  
CAROLINA and UNIVERSITY MEDICAL )  
ASSOCIATES OF THE MEDICAL )  
UNIVERSITY OF SOUTH CAROLINA, )

Civil Action No. 2021-CP-10-05289

Plaintiffs, )

v. )

**NOTICE OF FILING AFFIDAVITS IN  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR TEMPORARY  
INJUNCTION**

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. )

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Defendants, HCA Healthcare, Inc. and Trident Medical Center, LLC, subject to and without waiving the Motion to Dismiss, filed on behalf of HCA Healthcare, Inc., pursuant to Rule 12(b)(2), hereby submit the attached Affidavits in Opposition to the Plaintiffs' Motion for Temporary Injunction, and the hearing scheduled in connection with such Motion for December 9, 2021.

Affidavit of Dr. Peter Horwich as Exhibit A

Affidavit of Elaine Meuli as Exhibit B

Affidavit of Andy Miller as Exhibit C

Defendants will also provide the Court with a Memorandum of Law in Opposition to the Motion and present additional argument at the Hearing.

s/ James Lynn Werner

James Lynn Werner SC Bar No. 6029

David B. Summer SC Bar No. 7974

Katon E. Dawson Jr. SC Bar No. 101167

Ashley W. Johnson SC Bar No. 101423

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[ashleyjohnson@parkerpoe.com](mailto:ashleyjohnson@parkerpoe.com)

*Attorneys for Defendants HCA Healthcare, Inc. and  
Trident Medical Center*

**EXHIBIT A**

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

MEDICAL UNIVERSITY OF SOUTH )  
CAROLINA and UNIVERSITY MEDICAL )  
ASSOCIATES OF THE MEDICAL )  
UNIVERSITY OF SOUTH CAROLINA, )

Civil Action No. 2021-CP-10-05289

Plaintiffs, )

v. )

**AFFIDAVIT OF DR. PETER  
HORWICH**

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. )

I, Dr. Peter Horwich, first being duly sworn, do hereby make oath and affirm as follows:

1. I am over (18) years of age, of sound mind, capable of making this oath, and fully competent to testify to the matters stated herein.
2. I am currently a member of the medical staff and performing surgeries at Trident Medical Center.
3. I have personal knowledge regarding the matters referenced herein.
4. I was a fellow at MUSC from July 1, 2019 to June 30, 2020 studying under the physicians who are parties to this litigation.
5. Because of the COVID pandemic, there were few opportunities for employment so I entered into another fellowship program in head and neck ablation and reconstructive surgery at LSU Health Shreveport.
6. In order to be hired at my second fellowship and be privileged at LSU Health Shreveport, I was required to and did provide case logs from MUSC for purposes of credentialing at LSU and to demonstrate my previous surgical experiences.

7. Because I was a fellow, I did not have my own preference cards to forward to LSU. Instead, because Dr. Hornig was my primary reconstructive mentor, I asked the MUSC Nurse Coordinator to provide Dr. Hornig's preference cards to me, which I then used as a template to choose my preferred instruments at LSU.

8. At no time did anyone from MUSC assert that the case logs or preference cards were a trade secret, or confidential, or proprietary, and no one at MUSC objected to the transfer of the case logs or Dr. Hornig's preference cards to LSU.

9. On or about September 1, 2021, Dr. Hornig contacted me regarding an opportunity to work at the head and neck program at Trident Medical Center.

10. Based upon the information provided by Dr. Hornig, I pursued membership on the medical staff at Trident.

11. As part of my duties at Trident over the past few months, I have been responsible for the establishment of a multidisciplinary clinic for the care of head and neck oncology patients.

12. Additionally, I have provided advice to Trident on the selection and implementation of equipment to be used by physicians and staff at the head and neck oncology program at Trident. The information and advice I have provided to Trident includes such information as that on the equipment lists and physician preference cards at issue in this litigation. Similar information was made available to me, without restriction, during my time at MUSC.

13. I have also provided advice and direction to Trident on the purchase and setup of clinical instruments and all supplies necessary for surgical head and neck oncology and reconstructive surgery at Trident.

14. I have also provided training for new staff members and coordinated with Trident hospital administration regarding all aspects of the head and neck oncology program.

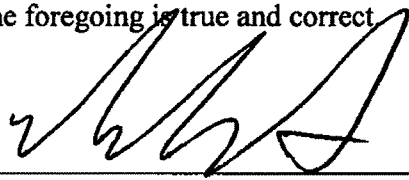
15. I arrived at Trident Medical Center on October 19, 2021, when I began my administrative duties for the program.

16. The head and neck oncology reconstructive practice has been fully implemented at Trident and is currently performing surgeries for patients in need of such care.

17. Having previously worked at MUSC and LSU, I believe that the facilities and infrastructure of the Trident head and neck oncology program are state-of-the-art, and the best with which I have ever worked. For example: a.) Trident has a brand new 10-bed ICU dedicated to head and neck patients and neurosurgery patients. b.) The instruments and supplies provided by Trident are brand new, state-of-the-art, and the best instruments and supplies available for purchase today. c.) The head and neck cancer clinic established by Trident is a brand new custom designed, multidisciplinary focused ambulatory clinic with the ability to treat patients from initial diagnosis through to survivorship. All of the surgical equipment provided at Trident is state-of-the-art and is the best collection of equipment for the treatment of head and neck oncology patients that I have seen in any setting. The clinic that has been established at Trident is a comprehensive, multidisciplinary clinic which includes providers of all ancillary services necessary for the optimal care for head and neck cancer patients.

18. I declare under penalty of perjury that the foregoing is true and correct.

**FURTHER AFFIANT SAYETH NOT.**

  
 Dr. Peter Horwich  
 Physician

SWORN and subscribed to before me this  
17<sup>th</sup> day of December 2021

*Freig R. Butler*  
Notary Public for 08/13/2031 South Carolina  
My Commission expires: 67



**EXHIBIT B**

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON  
PLEAS  
NINTH JUDICIAL CIRCUIT

MEDICAL UNIVERSITY OF )  
SOUTH CAROLINA and )  
UNIVERSITY MEDICAL )  
ASSOCIATES OF THE MEDICAL )  
UNIVERSITY OF SOUTH )  
CAROLINA, )

Civil Action No. 2021-CP-10-05289

Plaintiffs,

v.

**AFFIDAVIT OF ELAINE MEULI**

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.

I, Elaine Meuli, first being duly sworn, do hereby make oath and affirm as follows:

1. I am over (18) years of age, of sound mind, capable of making this oath, and fully competent to testify to the matters stated herein.

2. I have been employed in the role of Director of Medical Staff Services at Trident Medical Center since August 2017.

3. I have personal knowledge regarding the matters referenced herein.

4. I have 37 years of experience in physician credentialing in the hospital setting.

5. Previously, I was the Director of Medical Staff Services at Easter Cooper Medical Center in Mt. Pleasant, as well as St. Elizabeth's Hospital in Brighton, Massachusetts.

6. In my capacity as Director of Medical Staff Services, I coordinated the credentialing of each of the physicians who are parties in the present litigation.

7. In my experience, and to my personal knowledge, in order to demonstrate competency to perform surgical procedures, surgeons who are applicants for privileges at any hospital must provide case logs of each of the types of procedures for which they seek privileges at a new institution. It is the normal and routine practice for such case logs from other institutions to be provided to the hospital when the physician seeks to obtain new privileges. I have never heard of such case logs ever being identified as trade secrets or as protected confidential information or proprietary records or documents.

8. In the present case, consistent with my prior experience, each of the surgeons presented case logs of their historical cases in order to demonstrate current competency to perform each of the procedures for which they sought privileges at Trident.

9. It is standard in the industry at all hospitals that surgeons present case logs to demonstrate current competency.

10. It is a standard practice for hospitals to maintain case logs on surgeons to ensure that these physicians develop and maintain competency to perform specific surgical procedures.

11. The case logs presented to Trident by the physicians who are parties in this action bear no designation or notation that they came from MUSC, or that they are trade secrets, or proprietary, or confidential.

12. In my experience, case logs are regarded and understood to be property of the individual physician.

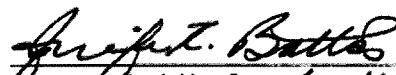
13. I routinely receive case logs from all surgeons from facilities all over the country when seeking credentialing at Trident Medical Center, and I review them.

14. I declare under penalty of perjury that the foregoing is true and correct.

**FURTHER AFFIANT SAYETH NOT.**

  
 Elaine Meuli  
 Director of Medical Staff Services  
 Trident Medical Center

SWORN and subscribed to before me this  
7th day of December 2021

  
 Notary Public for South Carolina  
 My Commission expires: 08/13/2031

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTONIN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

MEDICAL UNIVERSITY OF SOUTH )  
CAROLINA and UNIVERSITY MEDICAL )  
ASSOCIATES OF THE MEDICAL )  
UNIVERSITY OF SOUTH CAROLINA, )

Civil Action No. 2021-CP-10-05289

Plaintiffs,

v.

**AFFIDAVIT OF ANDY MILLER**

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.

I, Andy Miller, first being duly sworn, do hereby make oath and affirm as follows:

1. I am over (18) years of age, of sound mind, capable of making this oath, and fully competent to testify to the matters stated herein.

2. I have been Trident Medical Center's Chief Financial Officer since August 2019.

3. I have personal knowledge regarding the matters referenced herein.

4. In my capacity as Trident Medical Center's Chief Financial Officer, I am ultimately responsible for overseeing the procurement of goods and purchases made by Trident Medical Center.

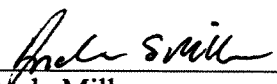
5. After September 1, 2021 and prior to November 22, 2021, I authorized capital expenditures for equipment, surgical instrumentation, office space, furniture and fixtures necessary for the Defendant-Physicians named herein to practice at Trident Medical Center.

6. To date, Trident Medical Center has spent or has committed, through purchase orders, to approximately \$9 million dollars for the above-referenced purchases.

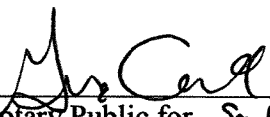
7. Additionally, Trident Medical Center has reserved funds to purchase at least an additional \$6.1M to procure additional goods to support the practices and needs of the Defendant-Physicians named herein.

8. I declare under penalty of perjury that the foregoing is true and correct.

**FURTHER AFFIANT SAYETH NOT.**

  
\_\_\_\_\_  
Andy Miller  
Chief Financial Officer  
Trident Medical Center

SWORN and subscribed to before me this  
7<sup>th</sup> day of December 2021

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission expires: 9-15-2025

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

MEDICAL UNIVERSITY OF SOUTH  
CAROLINA AND UNIVERSITY MEDICAL  
ASSOCIATES OF THE MEDICAL  
UNIVERSITY OF SOUTH CAROLINA,

Case No. 2021-CP-10-05289

Plaintiffs,

**PLAINTIFFS' MEMORANDUM OF LAW  
IN SUPPORT OF MOTION FOR  
TEMPORARY INJUNCTION**

vs.

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.

The Medical University of South Carolina ("MUSC") and University Medical Associates of the Medical University of South Carolina ("UMA") (collectively "Plaintiffs") submit this Memorandum of Law in support of their Motion for Temporary Injunction. Plaintiffs move for injunctive relief following the recent resignation of Terry Day, Betsy Davis, Joshua Hornig, Eric Lentsch, David Neskey, and Anand Sharma ("Individual Defendants") from MUSC. The Individual Defendants were long-term faculty members and medical care providers at MUSC. Four of the Individual Defendants are surgeons (Day, Hornig, Lentsch, and Neskey), one is a dentist (Davis), and one is a radiologist (Sharma). Together, the Individual Defendants were part of a team of healthcare professionals who treated patients suffering from head and neck cancer at MUSC.

While still employed by MUSC and while still members of UMA, the Individual Defendants schemed, plotted, and planned with each other and their new employer, Trident

Medical Center (which is owned by HCA Healthcare, Inc. (“HCA)), to effect a wholesale departure of MUSC’s head and neck cancer team (including its confidential and proprietary information) to Trident Medical Center in North Charleston. Trident Medical Center has never possessed the capabilities to perform advanced head and neck cancer procedures at its North Charleston location, like those historically performed at MUSC. And, to this day, Trident Medical Center, upon information and belief, still does not possess these capabilities.

While still employees of MUSC and while still members of UMA, the Individual Defendants took valuable confidential and proprietary information belonging to Plaintiffs. The Individual Defendants took Plaintiffs’ confidential and proprietary information and disseminated it to Trident Medical Center, LLC and HCA Healthcare, Inc. (collectively “Hospital Defendants”). They did so for the sole purpose of providing themselves and the Hospital Defendants with the capabilities of performing head and neck procedures at Trident’s North Charleston location. At the same time, Trident Medical Center completed a Certificate of Need (“CON”) Application to attempt to expand its operating room and perioperative space at Trident to accommodate the Individual Defendants’ head and neck practice.

Further, the Individual Defendants, while working for MUSC and while members of UMA, took deliberate actions to interfere with and sabotage MUSC’s fully-accredited head and neck fellowship program. The Individual Defendants did so with the hopes of taking the fellows (who are an integral part of the surgical work the Individual Defendants perform) with them to Trident Medical Center. Additionally, the Individual Defendants, while employed by MUSC and while members of UMA, actively solicited current employees on the head and neck cancer team to resign from their employment with MUSC and work with them at Trident Medical Center. The Hospital

Defendants, armed with Plaintiffs' confidential and proprietary information, used this information to solicit current MUSC employees.

Plaintiffs bring this action to put an immediate stop to obvious unlawful conduct. Subsequent to the filing of the Complaint and this motion for temporary injunction, Plaintiffs reached a settlement with the Individual Defendants. At this time, the only claims remaining are against the Hospital Defendants, and Plaintiffs seek injunctive relief only against the Hospital Defendants.

### **Facts**

#### ***The Individual Defendants were part of a specialized head and neck cancer team at MUSC.***

The Individual Defendants were long-term faculty members and medical care providers at MUSC.<sup>1</sup> *Affidavit of Dr. Cawley* ¶¶ 7, 9; *Affidavit of Dean DuBois* ¶¶ 9, 11; *Complaint* ¶ 10. While at MUSC, the Individual Defendants worked in MUSC's Department of Otolaryngology (colloquially known as ear, nose, and throat) in the Division of Head and Neck Oncology ("HNO Division"). *Affidavit of Dr. Cawley* ¶¶ 7, 9; *Affidavit of Dean DuBois* ¶¶ 9, 11. At MUSC, the Individual Defendants were part of a comprehensive team of clinicians who provided world-class treatment to patients suffering from head and neck cancer. *Affidavit of Dr. Cawley* ¶¶ 6-8, 11; *Affidavit of Dean DuBois* ¶¶ 8-10, 12; *Exhibit #3*.

The procedures performed by the Individual Defendants and the rest of the team of clinicians at MUSC were multi-phase and complicated, often lasting up to ten (10) to fifteen (15)

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<sup>1</sup> The Individual Defendants provided clinical care through UMA. UMA is MUSC's faculty practice plan. *Complaint* ¶ 10. MUSC employs faculty medical care providers, which included the Individual Defendants, to provide clinical care through UMA. *Complaint* ¶ 10. The Individual Defendants were members of UMA and were paid, in part, through UMA. *Affidavit of Dr. Cawley* ¶ 9; *Affidavit of Dean DuBois* ¶ 11; *Complaint* ¶ 11.

hours. *Affidavit of Dr. Cawley* ¶ 13; *Affidavit of Dean DuBois* ¶ 15; *Affidavit of Mr. Brendle* ¶ 4. MUSC did not develop its HNO Division overnight. MUSC developed it over the course of the last two decades and dedicated countless hours and resources into making the HNO Division what it is today—one of the largest programs in the country devoted to the care of the head and neck cancer patient. *Affidavit of Dr. Cawley* ¶¶ 6-7; *Affidavit of Dean DuBois* ¶ 8-9.

***The Individual Defendants and Hospital Defendants plan to transport the HNO Division from MUSC to Trident Medical Center.***

While still employed by MUSC and while still members of UMA, the Individual Defendants began planning the mass departure of the HNO Division from MUSC to Trident Medical Center. *Affidavit of Dr. Cawley* ¶ 38. This plan involved the Individual Defendants taking Plaintiffs' confidential and proprietary information and disseminating it to the Hospital Defendants. *Affidavit of Dr. Cawley* ¶¶ 16-37; *Affidavit of Dean DuBois* ¶ 18-39. In July through August 2021, the Individual Defendants announced their plans to resign from MUSC.<sup>2</sup> *Complaint* ¶¶ 82-87. By the time of this announcement, the Individual Defendants and Hospital Defendants' plan was well underway.

In February 2021, HCA emailed Individual Defendant Neskey about traveling Nashville to meet with HCA leaders. *Exhibit #16*; *Complaint* ¶ 77. This email from HCA alludes to prior conversations between Individual Defendants Day and Neskey "about this opportunity." *Exhibit #16*. Based on the email correspondence, it appears as though Individual Defendants Neskey and Day traveled to Nashville to meet with HCA leaders sometime after the aforementioned email. *Id.* In March 2021, Individual Defendant Day emailed Individual Defendants Davis and Sharma to connect them with legal counsel to discuss "non-compete and legal concerns with future plans."

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<sup>2</sup> Their last day of employment with MUSC was November 30, 2021. *Complaint* ¶ 34.

*Exhibit #17; Complaint ¶ 78.* In June 2021, Individual Defendant Day confirmed upcoming meetings with the Hospital Defendants. *Exhibit # 18; Complaint ¶ 79.* The purpose of the meetings was to finalize contracts and to discuss the “departure from current employer and timeline.” *Id.* On August 30, 2021, Trident Medical Center filed a CON Application to attempt to expand its operating room and perioperative space at Trident to accommodate the Individual Defendants’ head and neck practice. *Exhibit #4; Affidavit of David Levitt ¶ 15.*

Meanwhile, the Individual Defendants (while still employed by MUSC and while still members of UMA) began taking confidential and proprietary information belonging to Plaintiffs. *Dr. Cawley’s Affidavit ¶¶ 17-20, 30-37; Dean DuBois’ Affidavit ¶¶ 19-22, 32-39; Mr. Brendle’s Affidavit ¶¶ 5-6.* The Individual Defendants took Plaintiffs’ confidential and proprietary information with the intent of using such information in their new positions as employees of Hospital Defendants. *Dr. Cawley’s Affidavit ¶ 38.* In some cases, the Individual Defendants were careless enough to email Plaintiffs’ confidential and proprietary information directly to the Hospital Defendants from their MUSC email accounts. *Dr. Cawley’s Affidavit ¶¶ 23-25; Dean DuBois’ Affidavit ¶¶ 25-27; Exhibits #6-7.*

While employed by MUSC and while members of UMA, the Individual Defendants took the following confidential and proprietary information from Plaintiffs:

1. Physician preference cards,
2. Instrument lists,
3. Financial information showing the amount of revenue generated by four of the Individual Defendants during their employment with MUSC,<sup>3</sup>

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<sup>3</sup> In the medical industry, this information is commonly referred to as the physician’s relative value unit or RVUs. *Dr. Cawley’s Affidavit ¶ 30.*

4. Financial information showing the salaries four of the Individual Defendants received while employed by MUSC,
5. Case logs for Defendant Day, and salaries for MUSC's residents and signed contracts for incoming fellows in the HNO Fellowship Program.

*Dr. Cawley's Affidavit ¶¶ 17-20, 30-37; Dean DuBois' Affidavit ¶¶ 19-22, 32-39; Mr. Brendle's Affidavit ¶¶ 5-6.*

Plaintiffs' physician preference cards are catalogues of specific tools, supplies, and room setup that a surgeon prefers for a particular type of surgery. *Dr. Cawley's Affidavit ¶ 17; Dean DuBois' Affidavit ¶ 19.* Plaintiffs' instrument lists identify the instruments specific surgeons need to perform certain procedures. *Dr. Cawley's Affidavit ¶ 18; Dean DuBois' Affidavit ¶ 20.* These physician preference cards and instrument lists are extremely important and valuable information, as they enable the Individual Defendants, along with the rest of the team of clinicians, to perform the complicated, multi-phase head and neck cancer procedures that have historically been performed at MUSC. *Dr. Cawley's Affidavit ¶ 19; Dean DuBois' Affidavit ¶ 21; Affidavit of Mr. Brendle ¶ 5.*

Upon information and belief, Defendants Day, Hornig, Lentsch, and Neskey directed a registered nurse employed by MUSC to send Plaintiffs' physician preference cards to an employee of Trident Medical Center. *Dr. Cawley's Affidavit ¶ 23; Dean DuBois' Affidavit ¶ 25.* The registered nurse did as she was told. *Id.; Exhibit #6.* Defendant Hornig obtained Plaintiffs' instrument lists and sent it via email directly to an employee of Trident Medical Center. *Dr. Cawley's Affidavit ¶ 25; Dean DuBois' Affidavit ¶ 27; Exhibit #7.*

The Individual Defendants did not stop there. While working for MUSC and while members of UMA, the Individual Defendants engaged in the following acts and obtained the following information:

- Defendant Davis attempted to obtain Plaintiffs' patient list. *Dr. Cawley's Affidavit ¶ 29; Dean DuBois' Affidavit ¶ 31; Exhibit #8.*
- Defendant Day obtained information showing the amount of revenue generated by four of the Individual Defendants during their employment with MUSC. *Dr. Cawley's Affidavit ¶ 31; Dean DuBois' Affidavit ¶ 33; Exhibit #9.*
- Defendant Day obtained financial information showing the salaries for four Individual Defendants while employed by MUSC. *Dr. Cawley's Affidavit ¶ 31; Dean DuBois' Affidavit ¶ 33; Exhibit #9.*
- Defendant Day obtained his case logs for the fiscal years 2019, 2020, and 2021. *Dr. Cawley's Affidavit ¶ 33; Dean DuBois' Affidavit ¶ 35; Exhibit #10.*
- Defendants Davis and Nesky obtained salary information for MUSC's residents and signed contracts for incoming fellows in the HNO Fellowship Program. *Dr. Cawley's Affidavit ¶¶ 35-36; Dean DuBois' Affidavit ¶¶ 37-38; Exhibit #14-#15.*

Upon information and belief, the Individual Defendants provided the foregoing information to the Hospital Defendants. *Dr. Cawley's Affidavit ¶¶ 54-55; Dean DuBois' Affidavit ¶¶ 55-56; Complaint ¶¶ 67, 70, 74.* The Individual Defendants have provided Plaintiffs' confidential and proprietary information to the Hospital Defendants in an attempt to develop a head and neck cancer treatment department at Trident Medical Center. *Dr. Cawley's Affidavit ¶¶ 54-55; Dean DuBois' Affidavit ¶¶ 55-56; Complaint ¶ 74.* Without Plaintiffs' confidential and proprietary information, of which the Defendants are in wrongful and unlawful possession, the Defendants would be unable to provide quality head and neck oncology surgical services for many years. *Dr. Cawley's Affidavit ¶ 14; Dean DuBois' Affidavit ¶ 16.*

The Individual Defendants resigned from MUSC and as members of UMA on November 30, 2021. *Complaint ¶ 34.* Effective December 1, 2021, the Individual Defendants commenced

work for a competitor of MUSC, Trident Medical Center, located in North Charleston. *Affidavit of Dr. Cawley* ¶ 11; *Affidavit of Dean DuBois* ¶ 13; *Complaint* ¶¶ 3-4, 35.

***The development and protection of Plaintiffs' confidential and proprietary information.***

Plaintiffs developed the aforementioned confidential and proprietary information over the course of the last two decades in building the HNO Division. *Dr. Cawley's Affidavit* ¶ 16; *Dean DuBois' Affidavit* ¶ 18. Plaintiffs' confidential and proprietary information is not available in the public domain. *Dr. Cawley's Affidavit* ¶¶ 20, 28, 30, 32, 37; *Dean DuBois' Affidavit* ¶¶ 22, 30, 32, 34, 39. Plaintiffs restrict access to their confidential and proprietary information, allowing access only to those individuals who have a legitimate need for the information. *Dr. Cawley's Affidavit* ¶ 21; *Dean DuBois' Affidavit* ¶ 23. Plaintiffs also maintain policies and procedures to protect this information from disclosure to unauthorized persons. *Dr. Cawley's Affidavit* ¶¶ 21-22; *Dean DuBois' Affidavit* ¶¶ 23-24; *Exhibit #5*. Of particular note, MUSC's Code of Conduct, which is part of the MUSC Faculty Handbook, explicitly prohibits employees from disclosing confidential information or using such information for the employee's personal benefit. *Exhibit #5*. MUSC's Faculty Handbook is part of the contract between the Individual Defendants and MUSC. *Id.* For persons attempting to access Plaintiffs' confidential and proprietary information remotely, Plaintiffs have implemented a two-factor authentication system to further protect their confidential and proprietary information. *Dr. Cawley's Affidavit* ¶ 21; *Dean DuBois' Affidavit* ¶ 23.

***The Individual Defendants interfered with MUSC's head and neck fellowship program while employed by MUSC and while members of UMA and attempted to transport the fellows to Trident Medical Center.***

MUSC's head and neck fellowship program ("HNO Fellowship Program") is one of fewer than fifty (50) accredited fellowship programs in the United States by the American Head and

Neck Society (“AHNS”). *Affidavit of Dr. Cawley* ¶ 42; *Affidavit of Dean DuBois* ¶ 42. The HNO Fellowship Program has been continuously accredited since 2010. *Affidavit of Dr. Cawley* ¶ 45. Each academic year, MUSC employs two fellows who have completed their residency to work in the HNO Fellowship Program. *Affidavit of Dr. Cawley* ¶ 40; *Affidavit of Dean DuBois* ¶ 40. The fellows in MUSC’s HNO Fellowship Program enter into contracts with MUSC, which require the fellows, among other things, to work as a fellow for MUSC for a one-year period of time. *Complaint* ¶ 107. As part of their fellowship, fellows in the HNO Fellowship Program receive the highest level of training in the management and surgical treatment of head and neck cancer patients. *Affidavit of Dr. Cawley* ¶ 40; *Affidavit of Dean DuBois* ¶ 40. The fellows participate in numerous operations during the course of their one-year fellowship. *Affidavit of Dr. Cawley* ¶ 45(d); *Affidavit of Dean DuBois* ¶ 45(d).

The HNO Fellowship Program provides unquantifiable reputational benefits and distinction to MUSC. *Affidavit of Dr. Cawley* ¶ 43; *Affidavit of Dean DuBois* ¶ 43. The HNO Fellowship Program assists MUSC in recruiting high-quality faculty members and in attracting research funding opportunities. *Id.* Through the HNO Fellowship Program, MUSC is able to train the next generation of head and neck cancer clinicians, and is able to extend and make more enjoyable the lives of those who have been touched by cancer. *Affidavit of Dr. Cawley* ¶ 57; *Affidavit of Dean DuBois* ¶ 58. The HNO Fellowship Program further plays a critical role in the innovation and research efforts of the HNO Division. *Id.*

Prior to his resignation, Defendant Neskey served as the Director of MUSC’s HNO Fellowship Program. *Dr. Cawley’s Affidavit* ¶ 47; *Dean DuBois’ Affidavit* ¶ 47. While still serving as Director of the Program but after announcing his intent to resign from MUSC, Defendant Neskey attempted to interfere with and did in fact interfere with MUSC’s contracts with

its fellows in the HNO Fellowship Program. *Dr. Cawley's Affidavit* ¶¶ 48-51; *Dean DuBois' Affidavit* ¶¶ 48-50; *Complaint* ¶ 45. Defendant Neskey did so in an effort to take the fellows from MUSC to Trident Medical Center. *Id.*

Without notice to or permission from anyone at MUSC, Defendant Neskey directly contacted AHNS, the accreditation body for the HNO Fellowship Program, and informed it of the Individual Defendants planned departure from MUSC. *Dr. Cawley's Affidavit* ¶ 50; *Dean DuBois' Affidavit* ¶ 50; *Exhibit #12*. Defendant Neskey did this so he, along with the other Defendants, could convince the existing fellows to breach their agreements with MUSC and join the Individual Defendants at Trident Medical Center. *Dr. Cawley's Affidavit* ¶ 48; *Dean DuBois' Affidavit* ¶ 48; *Exhibit #11*. Defendant Neskey also obtained a copy of MUSC's completed 2019 AHNS application packet. *Dr. Cawley's Affidavit* ¶ 51; *Dean DuBois' Affidavit* ¶ 51. Five days later, Defendant Neskey requested a blank AHNS application packet. *Id.* He did this so he, along with the other Defendants, could use the information on MUSC's 2019 application packet when completing a new application for Trident Medical Center. In short, Defendant Neskey made clear what the Defendants' plan was as it relates to the fellows. In Defendant Neskey's words, the Defendants' plan was to "hav[e] [the fellows] transition with us," to Trident Medical Center. *Dr. Cawley's Affidavit* ¶ 48; *Dean DuBois' Affidavit* ¶ 48; *Exhibit #11*.

Defendant Neskey and the Individual Defendants interfered with MUSC's HNO Fellowship Program to benefit all of the Defendants. MUSC's HNO Fellowship Program was an integral part of the success of the HNO Division. *Affidavit of Dr. Cawley* ¶ 46; *Affidavit of Dean DuBois* ¶ 46. Fellows play an important role in the HNO Division's ability to perform the complicated, multi-phase procedures that span ten (10) to fifteen (15) hours. *Affidavit of Dr. Cawley* ¶ 46; *Affidavit of Dean DuBois* ¶ 46. The fellows provide necessary physician-hours

during these long and complicated procedures. *Id.* Without the fellows, the physicians themselves would be required to be present at all times for these long operations and/or Hospital Defendants would need to expend resources to hire or assign additional physicians to assist. *Id.* The Individual Defendants knew they needed fellows to perform the head and neck procedures so they tried to take the fellowship program from MUSC and deliver it to Trident.

MUSC's HNO Fellowship Program "is under attack," and Defendants are in "pursuit" of it. *Affidavit of Dr. Cawley* ¶ 56. As a result of the aforementioned actions, the HNO Fellowship Program has been harmed. The incoming fellows for academic year 2022-23 have been released from their commitments to MUSC, and it is unclear whether MUSC can participate in the fellowship match cycle for academic year 2023-24. *Affidavit of Dr. Cawley* ¶ 53; *Affidavit of Dean DuBois* ¶ 53. Dean DuBois offers an extremely insightful perspective on the Individual Defendants' conduct. Dean DuBois stated:

Over my entire career, I have never seen or heard of a group of physicians engage in a wholesale abandonment of their students, colleagues, and patients similar to what the defendant physicians have orchestrated over the past several months. In the medical centers I have been associated with, like the Vanderbilt Medical Center in Nashville, Tennessee, from time to time physicians did leave to take an opportunity to work in the HCA Health System in Nashville, but these departures were carried out in an orderly well-timed fashion so that no harm came to any of the trainees or to the patients.

*Affidavit of Dean DuBois* ¶ 54.

***The Individual Defendants and the Hospital Defendants worked together to solicit members of HNO Division from MUSC, and upon information and belief, the Hospital Defendants used the Plaintiffs' confidential and proprietary information to do so.***

Plaintiffs' head and neck team consists of more than just physicians. *Affidavit of Dr. Cawley* ¶ 10; *Affidavit of Dean DuBois* ¶ 12; *Exhibit #3*. It is composed of a comprehensive multidisciplinary team of clinicians, including highly skilled nurses. *Id.* After the Individual

Defendants informed MUSC of their intent to resign, other members of the team followed suit and upon information and belief, are or will be working at Trident Medical Center, along with the Individual Defendants. *Affidavit of Dr. Cawley* ¶ 11 n.1; *Affidavit of Dean DuBois* ¶ 13 n.1. For example, after the Individual Defendants resigned from MUSC, four nurses and approximately a dozen staff members resigned as well. *Id.*

Upon information and belief, the Individual Defendants, while employed by MUSC and while members of UMA, actively solicited these and other highly skilled individuals to quit their jobs with MUSC and to work for Trident Medical Center. *Complaint* ¶¶ 89-92. Additionally, upon information and belief, Trident Medical Center, when soliciting MUSC's employees, was in wrongful and unlawful possession of confidential and proprietary information belonging to the Plaintiffs, including, but not limited to, sensitive financial information about MUSC's operations. *Affidavit of Dr. Cawley* ¶¶ 30-31; *Affidavit of Dean DuBois* ¶¶ 32-33; *Complaint* ¶¶ 92-94. The Defendants worked together to unlawfully solicit MUSC's employees. *Complaint* ¶ 90.

***There are many differences between the Hospital Defendants and MUSC.***

Trident Medical Center has never performed complex head and neck procedures at Trident's North Charleston location. *Affidavit of Dr. Cawley* ¶ 13; *Affidavit of Dean DuBois* ¶ 15. Upon information and belief, Trident Medical Center does not have the equipment, manpower, and know-how to provide patients with the level of care that MUSC's HNO Division provides. *Affidavit of Dr. Cawley* ¶ 14; *Affidavit of Dean DuBois* ¶ 16. Mr. Timothy Brendle (the Chief Perioperative Operations Officer at MUSC) estimates it would take Trident Medical Center eight (8) to ten (10) years to independently grow the high-quality, multi-disciplinary HNO Division MUSC has developed. *Affidavit of Tim Brendle* ¶ 7.

Trident Medical Center has a different mission than MUSC. Trident Medical Center is a for-profit hospital owned and operated by Defendant Trident Medical Center, LLC, which is owned by wholly owned subsidiaries of HCA. *Affidavit of Dr. Cawley* ¶ 12; *Affidavit of Dean DuBois* ¶ 14; *Complaint* ¶¶ 3-4. HCA is a for-profit operator of healthcare facilities that is publicly traded on the New York Stock Exchange and is obligated to earn profits for its shareholders. *Affidavit of Dr. Cawley* ¶ 12; *Affidavit of Dean DuBois* ¶ 14; *Complaint* ¶ 3.

In stark contrast to the Hospital Defendants, MUSC is a public health system with a tripartite mission of education, research, and providing clinical care. *Affidavit of Dr. Cawley* ¶ 12; *Affidavit of Dean DuBois* ¶ 14. MUSC's mission is not to earn money for shareholders; MUSC's mission is to preserve and optimize human life in South Carolina and beyond through education, research, and patient care. *Affidavit of Dr. Cawley* ¶ 15; *Affidavit of Dean DuBois* ¶ 17.

MUSC's main hospital in Charleston is one of five Level I adult trauma centers in South Carolina. *Affidavit of David Levitt* ¶ 10. It is the only Level 4 NICU provider, and the only Level I pediatric trauma provider. *Id.* Trident Medical Center offers Level II trauma services and Intermediate Care level neonatal services. *Affidavit of David Levitt* ¶ 11. Trident routinely transfers many critically ill patients to MUSC because Trident lacks the ability to provide the necessary specialized care and resources to these patients. *Id.*

### **Analysis**

A party seeking an injunction must establish three elements: (1) it would suffer irreparable harm if the injunction is not granted; (2) it would likely succeed on the merits of litigation; and (3) there is no adequate remedy at law. *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). The purpose of an injunction is to preserve the status quo and prevent irreparable harm to the party seeking the relief. *Compton v. S.C. Dep't of*

*Corrs.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). “The plaintiff is not required to prove an absolute legal right when seeking a preliminary injunction, but the plaintiff must present a **reasonable question** as to the existence of such a right.” *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009), *modified on other grounds by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 587, 694 S.E.2d 15, 17 (2010) (emphasis added).<sup>4</sup> The party moving for the injunction must demonstrate that it “is **reasonably necessary** to preserve the rights of the parties during the litigation.” *Compton*, 392 S.C. at 366, 709 S.E.2d at 642 (emphasis added).

**I. Confidential and Proprietary Information**

**A. Plaintiffs will suffer irreparable harm if the Hospital Defendants are not ordered to stop using Plaintiffs’ confidential and proprietary information and to return it.**

Whether a wrong is irreparable in the sense that equity may intervene is not a question decided by narrow and artificial rules. *Peek v. Spartanburg Reg. Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 36 (Ct. App. 2005), *modified on other grounds by Poynter*, 387 S.C. at 587, 694 S.E.2d at 17 (citing *Kirk v. Clark*, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939)). “Irreparable injury as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages.” *Bethel M.E. Church v. City of Greenville*, 211 S.C. 442, 451, 45 S.E.2d 841, 845 (1947).

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<sup>4</sup> *Poynter* modified the Court of Appeals’ decisions in *AJG Holdings* and *Peek* (both cases authored by now Justice Hearn) only to clarify that the balancing of the equities is not an independent element in deciding whether an injunction should be issued. In *Poynter*, the Supreme Court made clear that “the balancing requirement is subsumed by the irreparable harm and inadequate remedy at law components of the three-part test.” 387 S.C. at 587, 694 S.E.2d at 17. *AJG Holdings* and *Peek* remain good law.

Plaintiffs move for the following injunction related to the Individual Defendants' taking of their confidential and proprietary information and the sharing of this information with the Hospital Defendants. First, Plaintiffs move to prohibit the Hospital Defendants from *using* their confidential and proprietary information. Second, Plaintiffs move for the Hospital Defendants to *return* their confidential and proprietary information. Third, Plaintiffs move to prohibit the Hospital Defendants from *billing or collecting* money for services performed utilizing any of Plaintiffs' confidential and proprietary information. Fourth, Plaintiffs move to require the Hospital Defendants to *forever delete* any and all copies of any of Plaintiffs' confidential and proprietary information that is in their possession and to submit affidavits to the Court *confirming* this has taken place.

The essential facts of this case are not unique. There are many cases where employees have taken confidential and proprietary information belonging to their former employer, taken this information to their new employer, and the employee and new employer have used (or attempted to use) this information to compete with their former employer. Universally, courts show disdain for this type of conduct and routinely issue injunctions to protect the former employer's confidential and proprietary information. *See Milliken & Co. v. Morin*, 399 S.C. 23, 37, 731 S.E.2d 288, 295 (2012) (“[A]n employer may restrain a former employee from disclosing and using confidential information which was developed as a result of the employer's initiative and investment and which the employee learned as a result of the employee relationship.”). The case of *Indus. Packaging Supplies, Inc. v. Martin*, No. CA 6:12-713-HMH, 2012 WL 1067650 (D.S.C. Mar. 29, 2012) serves as an example of the willingness of South Carolina courts to enter injunctions in these types of situations. In addition to this, courts in South Carolina have issued injunctions in the following cases to protect the former employer's confidential and proprietary

information: *Rockford Mfg., Ltd. v. Bennet*, 296 F.Supp.2d 681 (D.S.C. 2003), *Standard Lighting Distribs., Inc. v. Sweatman*, 2006 WL 4911571 (S.C. Com. Pl. 2006), *Lewallen Automation, LLC v. Lewallen*, 2014 WL 7925812 (S.C. Comm. Pl. 2014), and *Boone Ins. Agency, Inc. v. Lloyd*, No. 3:20-CV-02980-JMC, 2020 WL 5052956 (D.S.C. Aug. 27, 2020).

In *Indus. Packaging Supplies, Inc. v. Martin*, No. CA 6:12-713-HMH, 2012 WL 1067650, at 1 (D.S.C. Mar. 29, 2012), the employee worked as a salesperson for IPS, a distributor of packaging supplies. During his final week of employment with IPS, the employee scheduled appointments with numerous IPS customers in a coordinated attempt to convert IPS' customer base to his new employer, Unisource, which was engaged in the same business as IPS. *Id.* Immediately prior to his departure from IPS, the employee removed and disclosed proprietary and confidential information belonging to IPS and disclosed it to Unisource, so he and Unisource could unfairly compete with IPS. *Id.* Without an injunction, IPS feared that Martin and Unisource would use its confidential and proprietary information to unfairly compete with IPS and convert its customer base. *Id.* at \*5. Under these facts, Judge Herlong enjoined the employee and Unisource from using, disclosing or transmitting IPS' confidential and proprietary information. *Id.* at \*7. In addition, Judge Herlong enjoined the employee and Unisource from selling any product based in whole or in part on any confidential and proprietary information belonging to IPS. *Id.*

Another case worthy of discussion is *Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 191 S.E.2d 761 (1972). *Lowndes* illustrates two situations where the new employer (here the Hospital Defendants) faces liability for actions taken by a newly hired employee (Individual Defendants) with respect to his former employer (MUSC). First, the new employer is liable if the new employee brings the former employer's confidential and proprietary information to the new

employer. Second, the new employer is liable if it uses information or gains an advantage deriving from the employee's breach of duties of loyalty and fidelity to his former employer.

Lowndes Products was engaged in the manufacture of a textile fabric. *Id.* at 325, 191 S.E.2d at 763. Three employees (Brower, Loftin, and Stanford), while still employed by Lowndes Products, solicited other current employees of Lowndes Products to join them in starting a competing company, B.L.S. Corporation. *Id.* at 334, 191 S.E.2d at 768. This was a breach of the three employees' duty of loyalty to Lowndes Products. *Id.* at 334-35, 191 S.E.2d at 768. In addition, the Lowndes Products employees took Lowndes Products "processes" for creating the finished product with them to B.L.S. Corporation. *Id.* at 333, 191 S.E.2d at 767. Under these facts, the Supreme Court held that B.L.S. Corporation was "jointly and severally" liable with the employees for any profits it received from the employee's wrongful conduct as it relates to his former employee. *Id.* at 337-38, 191 S.E.2d at 769-70. The Court pointed out that "B.L.S. Corporation has profited from the wrongful conduct of the parties that brought it into and should be held liable along with the individuals, jointly and severally." *Id.*

In this case, the affidavits of Dr. Patrick J. Cawley (the CEO of MUSC Health), Dr. Raymond N. DuBois (the Dean of the College of Medicine at MUSC), and Timothy Brendle (Chief Perioperative Operations Officer at MUSC Health, Charleston Division) establish that the Individual Defendants were in unlawful possession of confidential and proprietary information belonging to MUSC, and that the Individual Defendants have shared this information with the Hospital Defendants. The affiants identify the following information as confidential and proprietary data belonging to MUSC:

1. Physician preference cards,
2. Instrument lists,

3. Financial information showing the amount of revenue generated by four of the Individual Defendants during their employment with MUSC,
4. Financial information showing the salaries four of the Individual Defendants received while employed by MUSC,
5. Case logs for Defendant Day, and salaries for MUSC's residents and signed contracts for incoming fellows in the HNO Fellowship Program.

*Dr. Cawley's Affidavit ¶¶ 17-20, 30-37; Dean DuBois' Affidavit ¶¶ 19-22, 32-39; Mr. Brendle's Affidavit ¶¶ 5-6.*

The Individual Defendants were contractually prohibited from disclosing any of Plaintiffs' confidential information; likewise, they were contractually prohibited from using any of Plaintiffs' confidential information for their personal benefit. *Dr. Cawley's Affidavit ¶¶ 21-22; Dean DuBois' Affidavit ¶¶ 23-24; Exhibit #5.* Despite these contractual obligations, the Individual Defendants, while employed by MUSC and while members of UMA, obtained access to all of the aforementioned confidential and proprietary information. The Individual Defendants did not access this information for the legitimate business purposes of MUSC or UMA. Instead, the Individual Defendants accessed this information so they could use it to compete against MUSC while they worked for MUSC's competitor, the Hospital Defendants.

In the case of the physician preference cards and instrument lists, this information was sent directly to the Hospital Defendants via email transmission. *Dr. Cawley's Affidavit ¶¶ 23-25; Dean DuBois' Affidavit ¶¶ 25-27; Exhibits #6-7.* The rest of the confidential and proprietary information was obtained by the Individual Defendants prior to their departure from MUSC, *Dr. Cawley's Affidavit ¶¶ 32-39; Dean DuBois' Affidavit ¶¶ 30-37*, and upon information and belief, the Individual Defendants have provided such information to the Hospital Defendants. The irrefutable evidence demonstrates that the Individual Defendants were in possession of confidential and

proprietary information belonging to Plaintiffs, and they have, at least with the physician preference cards and instrument lists, provided such information to the Hospital Defendants.

Plaintiffs took reasonable steps to protect the confidential and proprietary information from unauthorized disclosure. The confidential and proprietary information 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 this information from disclosure to unauthorized recipients; and a two-factor authentication system protects this information from remote access. *Dr. Cawley's Affidavit* ¶¶ 20-22; *Dean DuBois' Affidavit* ¶¶ 22-24; *Exhibit #5*. In addition, Plaintiffs contractually obligated the Individual Defendants in such a way as to preserve and protect their confidential information. *Dr. Cawley's Affidavit* ¶¶ 21-22; *Dean DuBois' Affidavit* ¶¶ 23-24; *Exhibit #5*.

Plaintiffs will suffer obvious irreparable harm if an injunction is not entered to protect their confidential and proprietary information. If such an injunction is not entered, Plaintiffs will be deprived of their confidential and proprietary information, and this information will be in the hands of a competitor. *See Indus. Packaging Supplies, Inc. v. Martin*, No. CA 6:12-713-HMH, 2012 WL 1067650, at \*5 (“Courts consistently have recognized that the loss of permanent relationships with customers and the misappropriation of proprietary information constitutes irreparable harm to an employer.”); *see also Peek*, 367 S.C. at 455 n.2, 626 S.E.2d at 37 n.2 (“[A]ppellate courts have upheld injunctive relief to prevent the loss of a business or business goodwill.”); *Nucor Corp. v. Bell*, No. 2:06-CV-02972-DCN, 2008 WL 9894350, at \*20 (D.S.C. Mar. 14, 2008) (unreported) (“The loss of even a single trade secret is irreparable harm, and the threatened disclosure of a trade secret supports the imposition of injunctive relief.”). As the affidavits of Dr. Cawley and Dean DuBois demonstrate, Plaintiffs spent two decades worth of time and countless amount of resources

to develop their confidential and proprietary information. *Dr. Cawley's Affidavit* ¶¶ 6-7; *Dean DuBois' Affidavit* ¶¶ 8-9.

By contrast, the Hospital Defendants would suffer no harm if the Court entered an injunction protecting Plaintiffs' confidential and proprietary information. Two federal district courts in South Carolina have found that the defendants will suffer no harm at all when an injunction is issued protecting the confidential and proprietary information of the former employer, because all the injunction does is prevent the defendants from using information that does not belong to them in the first place. *Rockford Mfg.*, 296 F.Supp.2d at 685; *Boone*, 2020 WL 5052956, at \*6. Here, if the Court grants the injunction that Plaintiffs seek with respect to their confidential and proprietary information, the Hospital Defendants would suffer no harm. The Hospital Defendants have no legal right to access or use Plaintiffs' confidential and proprietary information. Because they have no right to use the information, they will suffer no harm if the injunction is granted.

**B. Plaintiffs have demonstrated a prima facie case, showing they are likely to succeed on the merits of their causes of action related to the Hospital Defendants' misappropriation and unlawful possession and use of their confidential and proprietary information.**

The Court need examine the merits of the plaintiff's underlying claims "only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief." *Compton*, 392 S.C. at 367, 709 S.E.2d at 642; *see Peek*, 367 S.C. at 456, 626 S.E.2d at 37 ("The determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made."). "Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate [determination] of the case on the merits." *Helsel v. City of N. Myrtle Beach*, 307 S.C.

29, 32, 413 S.E.2d 824, 826 (1991). “Prima facie evidence is evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted.” *LaCount v. Gen. Asbestos & Rubber Co.*, 184 S.C. 232, 192 S.E. 262, 266 (1937).

1. Plaintiffs can demonstrate a prima facie case under the South Carolina Trade Secrets Act.

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

Plaintiffs make the required prima facie showing under the SCTSA. The affidavits of Dr. Cawley and Dean DuBois identify the information that belongs to Plaintiffs that qualifies as trade secrets under the SCTSA.<sup>5</sup> The physician preference cards and instrument lists are in the hands of the Hospital Defendants. *Dr. Cawley’s Affidavit* ¶¶ 23, 25; *Dean DuBois’ Affidavit* ¶¶ 25, 27; *Exhibit #7*. The remaining trade secret information is, upon information and belief, in the hands of the Hospital Defendants. *Dr. Cawley’s Affidavit* ¶¶ 31, 33, 35-36; *Dean DuBois’ Affidavit* ¶¶ 33, 35, 37-38; *Exhibit #9-#10, #14-#15*.

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<sup>5</sup> Plaintiffs’ trade secret information consists of: 1. Physician preference cards, 2. Instrument Lists, 3. Financial information showing the amount of revenue generated by four of the Individual Defendants during their employment with MUSC, 4. Financial information showing the salaries four of the Individual Defendants received while employed by MUSC, and 5. Case logs for Defendant Day, and salaries for MUSC’s residents and signed contracts for incoming fellows in the HNO Fellowship Program.

Plaintiffs benefit greatly from the fact that its physician preference cards, instrument lists, and case logs are not generally known to the public. This information enables Plaintiffs to perform complex, multi-faceted head and neck procedures to treat patients suffering from head and neck cancer. *Dr. Cawley's Affidavit* ¶ 55; *Dean DuBois' Affidavit* ¶ 56. Plaintiffs' financial information (both the amount of revenue generated by the Individual Defendants over the past ten (10) years and the salaries paid to them during this time) derives economic value from not being generally known. Likewise, the salaries of MUSC's residents and the signed contracts of its fellows also derive economic value from not being generally known for the same reasons. The secrecy of this information allows MUSC to be competitive against other hospitals and to compete against other accredited AHNS fellowship programs for residents and fellows.

Plaintiffs take reasonable steps to protect their confidential and proprietary information. Plaintiffs' confidential and proprietary information is not available in the public domain. *Dr. Cawley's Affidavit* ¶¶ 20, 28, 30, 32, 37; *Dean DuBois' Affidavit* ¶¶ 22, 30, 32, 34, 39. Plaintiffs limit access to their confidential and proprietary information only to those individuals who have a legitimate need to access it. *Dr. Cawley's Affidavit* ¶ 21; *Dean DuBois' Affidavit* ¶ 23. Plaintiffs also maintain policies and procedures to protect this information from disclosure to unauthorized persons. *Dr. Cawley's Affidavit* ¶¶ 21-22; *Dean DuBois' Affidavit* ¶¶ 23-24; *Exhibit #5*. For persons attempting to access Plaintiffs' confidential and proprietary information remotely, Plaintiffs have implemented a two-factor authentication system to further protect its confidential and proprietary information. *Dr. Cawley's Affidavit* ¶ 21; *Dean DuBois' Affidavit* ¶ 23. In addition, Plaintiffs contractually prohibit faculty physicians, including the Individual Defendants, from disclosing their confidential information and prevent them from using it for their own benefit.

*Exhibit #5.* Under these facts, the Plaintiffs have satisfied the elements for a prima facie case for violation of the SCTSA.

2. Plaintiffs can demonstrate a prima facie case on their breach of duty of loyalty cause of action.

More fundamentally, and even if Plaintiffs' confidential and proprietary information does not constitute a trade secret under the SCTSA (which it does), the information still belongs to Plaintiffs. The Individual Defendants have taken information that belongs to Plaintiffs in breach of their duties of loyalty to Plaintiffs, and the Individual Defendants have provided this information to the Hospital Defendants, which seek to use it in competition with and to harm Plaintiffs.

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. *Foreign Academic & Cultural Exch. Servs., Inc. v. Tripon*, 394 S.C. 197, 204, 715 S.E.2d 331, 334 (2011); *Nucor Corp. v. Bell*, 482 F.Supp.2d 714, 727 n.9 (D.S.C. 2007); *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); *Lowndes Products, Inc. v. Brower*, 259 S.C. 322, 191 S.E.2d 761 (1972). "Where an employee acts adversely to the interest of his employer, he is disloyal ...." *Berry*, 270 S.C. 491, 242 S.E.2d at 551.

Here, the Individual Defendants have clearly breached their duties of loyalty to Plaintiffs. While employed by MUSC and while members of UMA, they took actions to take valuable information that belongs to Plaintiffs, and they have provided it to the Hospital Defendants. Under

these facts, Plaintiffs have satisfied the elements for a prima facie case for breach of the duty of loyalty.

**C. There is no adequate remedy at law to provide redress for the Hospital Defendants' unlawful possession of Plaintiffs' confidential and proprietary information, so an injunction should be issued.**

Whether there is an adequate remedy at law is not a question decided by narrow and artificial rules. *Peek*, 367 S.C. 450, 455, 626 S.E.2d 34, 36 (citing *Kirk*, 191 S.C. at 211, 4 S.E.2d at 16). An injunction is appropriate “where no remedy at law exists or where the legal remedy would fail to make the party whole.” *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 370, 588 S.E.2d 635, 639 (Ct. App. 2003). The loss of a trade secret is “difficult to measure in monetary damages because ‘[a] trade secret lost is, of course, lost forever.’” *Nucor Corp. v. Bell*, No. 2:06-CV-02972-DCN, 2008 WL 9894350, at \*20 (D.S.C. Mar. 14, 2008) (unreported) (citing *FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 62 (2d Cir.1984)).

Money alone cannot replace the loss of Plaintiffs' confidential and proprietary information. The value of such information is in its secrecy and exclusive use in the marketplace. Plaintiffs have developed their confidential and proprietary information over the course of two decades. Plaintiffs have developed this information in the name of research, training, and patient care, not in the name of shareholder profits. If the Hospital Defendants are allowed to use Plaintiffs' confidential and proprietary information, there is no way to make Plaintiffs whole for the damage they would sustain. The only way to protect Plaintiffs' confidential and proprietary information is to enjoin the Defendants from using it, require the return of it, and prohibit the Defendants from realizing any economic benefit from it.

**D. The injunction would preserve the status quo.**

In addition, by issuing the injunction, the Court would preserve, rather than upset the status quo. *See Poynter Invs., Inc.*, 387 S.C. at 586, 694 S.E.2d at 17 (Injunctions should be issued only if necessary to preserve the status quo ante.”). Here, the status quo is unmistakable: Plaintiffs are the rightful and sole owners of their confidential and proprietary information, and the Hospital Defendants have no right to this information. The Individual Defendants possessed a right to use Plaintiffs’ confidential and proprietary information only as employees of MUSC and as members of UMA, and even then, the Individual Defendants had the right to use such information only for the legitimate business purposes of MUSC and UMA. The Individual Defendants had no right to use Plaintiffs’ confidential and proprietary information for their own purposes, or for the purposes of MUSC’s competitors. Likewise, the Hospital Defendants have no right to use Plaintiffs’ confidential and proprietary information. The Defendants only have access to Plaintiffs’ confidential and proprietary information because of the Individual Defendants’ unlawful actions in obtaining this information and sharing it with their new employer. The Court would be preserving the status quo if it granted Plaintiffs’ motion for injunctive relief and entered an order protecting Plaintiffs’ confidential and proprietary information.

For the foregoing reasons, this Court should enter the injunction Plaintiffs seek with respect to their confidential and proprietary information. The Court should order the Hospital Defendants to do the following with respect to Plaintiffs’ confidential and proprietary information: (1) stop *using* it; (2) *return* it; (3) prohibit the Hospital Defendants from *billing or collecting* money for services performed utilizing any of Plaintiffs’ confidential and proprietary information;<sup>6</sup> (4) *forever delete* it and *submit affidavits* to the Court confirming this has taken place.

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<sup>6</sup> This third-part of the injunction is essentially a derivation of the first-part of the injunction (if the Hospital Defendants cannot use the information, they cannot bill or collect money for services performed using it either). Further, it is a recognition that the law does not allow former

## II. Fellowship Program<sup>7</sup>

### A. **Plaintiffs will suffer irreparable harm if the Court does not enjoin the Hospital Defendants from interfering with MUSC's HNO Fellowship Program.**

Plaintiffs seek an injunction to prevent the Hospital Defendants from interfering with MUSC's contractual relationships with the fellows in MUSC's HNO Fellowship Program.

MUSC's accredited Fellowship Program will not function without fellows, and thus without them, there would be no Program to be accredited. MUSC's accreditation through AHNS provides unquantifiable reputational benefits and distinction to MUSC. *Affidavit of Dr. Cawley* ¶ 43; *Affidavit of Dean DuBois* ¶ 43. The HNO Fellowship Program assists MUSC in recruiting high-quality faculty members and in attracting research funding opportunities. *Id.* Through the HNO Fellowship Program, MUSC is able to train the next generation of head and neck cancer clinicians, and is able to extend and make more enjoyable the lives of those who have been touched by cancer. *Affidavit of Dr. Cawley* ¶ 57; *Affidavit of Dean DuBois* ¶ 58. The HNO Fellowship Program also plays a critical role in the innovation and research efforts of the HNO Division. *Id.*

It took MUSC approximately seven (7) years to establish an AHNS accredited HNO Fellowship Program. *Affidavit of Dr. Cawley* ¶¶ 40, 45; *Affidavit of Dean DuBois* ¶¶ 40, 45. MUSC established a non-accredited fellowship program in 2003, and ultimately, the program obtained AHNS accreditation in 2010. *Id.* In fact, the cumulative rigor needed to obtain and maintain AHNS accreditation is reflected by the statistic that there are fewer than fifty (50) such

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employees, such as the Individual Defendants, to take the fruits of their former employer's work, provide it to their new employer, and use it for economic gain. *See Milliken*, 399 S.C. at 32, 731 S.E.2d at 293 (“[E]mployees sometimes carry with them to new employers inventions or ideas so related to work done for a former employer that in equity and good conscience the fruits of that work should belong to the former employer”).

<sup>7</sup> The case law pertaining to the three elements a court must consider in deciding whether to enter an injunction is set forth above and will not be repeated in Roman Numerals II and III.

accredited programs in the United States. *Affidavit of Dr. Cawley* ¶ 42; *Affidavit of Dean DuBois* ¶ 42.

Defendant Neskey has made the Defendants' plan clear—their plan is to “have [the fellows] transition with us” to Trident Medical Center. *Dr. Cawley's Affidavit* ¶ 48; *Dean DuBois' Affidavit* ¶ 48; *Exhibit #11*. Defendants have already taken initial steps to interfere with MUSC's HNO Fellowship Program. *Dr. Cawley's Affidavit* ¶ 50; *Dean DuBois' Affidavit* ¶ 50; *Exhibit #12*. If the Hospital Defendants are allowed to continue to interfere with MUSC's HNO Fellowship Program, the existence and continuation of MUSC's accredited HNO Fellowship Program will be in jeopardy. If MUSC loses its accredited HNO Fellowship Program, it will negatively impact MUSC's ability to do those things that the accredited Fellowship Program makes possible, such as recruit high-quality faculty members, attract research funding opportunities, and train the next generation of head and neck cancer clinicians. *Affidavit of Dr. Cawley* ¶¶ 43-44, 57; *Affidavit of Dean DuBois* ¶¶ 43-44, 58.

If MUSC's HNO Fellowship Program loses its accreditation status, the public will also suffer. *Affidavit of Dr. Cawley* ¶¶ 57-58, 57; *Affidavit of Dean DuBois* ¶¶ 58-59. MUSC's HNO Fellowship Program “has played a significant part in extending and making more enjoyable the lives of those who have been touched by cancer.” *Id.* MUSC's HNO Fellowship Program has allowed MUSC to “continue with its mission to preserve and optimize human life in South Carolina and beyond through education, research and patient care.” *Affidavit of Dr. Cawley* ¶ 58, 57; *Affidavit of Dean DuBois* ¶ 59.

MUSC will suffer obvious irreparable harm if an injunction is not entered: it may well lose its accredited HNO Fellowship Program. This type of harm is analogous to the loss of a business. Courts have issued injunctions to prevent the loss of a business and to protect business

goodwill. *Peek*, 367 S.C. at 455 n.2, 626 S.E.2d at 37 n.2. On the other hand, the Hospital Defendants will suffer no harm if this injunction is entered. All the injunction would do is prohibit the Hospital Defendants from doing what they are prohibited from doing anyway—interfering with MUSC’s contractual relationships with its fellows. *Rockford Mfg.*, 296 F.Supp.2d at 685; *Boone*, 2020 WL 5052956, at \*6.

**B. Plaintiffs can demonstrate a prima facie case for their civil conspiracy cause of action.**

A plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff. *Paradis v. Charleston Cty. Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021), *reh’g denied* (Aug. 18, 2021).

The Individual Defendants, along with the Hospital Defendants, have conspired to unlawfully interfere with MUSC’s HNO Fellowship Program and to transport the fellows in this program to Trident Medical Center. The Defendants have taken overt acts in furtherance of this conspiracy. Defendant Neskey has put the Defendants’ plan in writing. *Exhibit #11*. Additionally, Defendant Neskey, without notifying Plaintiffs and without receiving their authorization to do so, contacted AHNS and attempted to discredit MUSC’s HNO Fellowship Program by informing AHNS of the Individual Defendants’ planned departure from MUSC. *Dr. Cawley’s Affidavit* ¶ 50; *Dean DuBois’ Affidavit* ¶ 50; *Exhibit #12*. Also, before the end of his employment with MUSC, Defendant Neskey obtained a copy of MUSC’s completed 2019 AHNS application packet. *Dr. Cawley’s Affidavit* ¶ 51; *Dean DuBois’ Affidavit* ¶ 51. Five days later, Defendant Neskey requested a blank AHNS application packet. *Id.* These acts reflect the Defendants’ clear intent to use the information on MUSC’s 2019 application packet when Defendants complete a new

application for Trident Medical Center. In terms of damage, because of Defendants' actions, AHNS has released the incoming fellows from their commitments to MUSC, and it is unclear whether AHNS will allow MUSC to participate in the fellowship match cycle for the following year. *Affidavit of Dr. Cawley* ¶ 53; *Affidavit of Dean DuBois* ¶ 53. Accordingly, Plaintiffs have demonstrated a prima facie case for a civil conspiracy cause of action.

**C. Plaintiffs do not have an adequate remedy at law to provide redress for the loss of the accredited status of the HNO Fellowship Program.**

As set forth above, it has taken MUSC seven (7) years to attain AHNS accreditation status with its HNO Fellowship Program. If the Hospital Defendants are allowed to interfere with MUSC's contractual relationships with its fellows, MUSC could lose its accreditation status with the AHNS. If the accreditation status were lost, it would take a significant amount of time and resources to attempt to attain accreditation once again, if that were even possible. As it relates to MUSC's HNO Fellowship Program, if it loses accreditation, money damages would be inadequate. The only adequate remedy to protect MUSC's accredited HNO Fellowship Program is an injunction to protect that program from interference by the Hospital Defendants.

**D. If the Court were to issue the requested injunction, it would preserve the status quo.**

If this Court were to issue the requested injunction, it would preserve the status quo, as it would ensure that the Hospital Defendants do not interfere with the contractual relationships with MUSC's fellows. In order for MUSC's HNO Fellowship Program to continue to keep its accredited status, its fellows must keep their one-year commitments to MUSC. MUSC's fellowship program "is under attack" from the Hospital Defendants, who are in "pursuit" of MUSC's fellows and are seeking to transport the fellowship program to Trident Medical Center.

*Affidavit of Dr. Cawley* ¶ 56. This Court should not allow the Hospital Defendants to engage in such unlawful conduct and should issue an order preserving the status quo.

### **III. Soliciting Plaintiffs' Employees in the HNO Division**

#### **A. Plaintiffs will suffer irreparable harm if the Court does not enjoin the Hospital Defendants from any further solicitation of employees in the HNO Division.**

The thrust of Defendants' unlawful plan has been to steal MUSC's entire HNO Division (employees, fellows, and confidential and proprietary information) and deliver it to the Hospital Defendants. So far, Defendants have taken a great deal. They have taken numerous employees. They have reduced their plan to writing to take the fellows from MUSC to Trident Medical Center, and their interference with the fellowship program has caused MUSC to lose its committed fellows for the upcoming year and potentially to lose its ability to participate in the match cycle the following year. In addition, the Defendants have taken valuable confidential and proprietary information from Plaintiffs.

The disloyal Individual Defendants are no longer employees and members of Plaintiffs. This means they will no longer be able to actively take any more of the Plaintiffs' confidential and proprietary information. However, the solicitation of other MUSC employees (and fellows) began while the Individual Defendants were still employees of MUSC. Take for instance, an email sent from Dax Kurbegov, Physician in Chief of Clinical Programs of HCA, to Defendant Neskey while Defendant Neskey was still an employee of MUSC. In that email, Mr. Kurbegov invited Defendant Neskey to a meeting in Nashville with "HCA leaders." *Exhibit #16*. The meetings were to discuss Defendant Neskey's interest in working for Trident Medical Center, which is owned by HCA. *Id.* In Mr. Kurbegov's email, he acknowledges the unlawful solicitation that apparently was already underway from Defendant Day, when he states, "Terry Day may have already spoken to you about this opportunity." *Id.*

From there, upon information and belief, the solicitation continued as Defendant Day (the ringleader) solicited the other Individual Defendants to resign from their positions with MUSC and work at Trident Medical Center. Then, upon information and belief, nurses, technicians, and staff were solicited as well by the Individual Defendants, and they too resigned and accepted employment with Trident Medical Center. *Affidavit of Dr. Cawley* ¶ 11 n.1; *Affidavit of Dean DuBois* ¶ 13 n.1.

The Defendants have worked together in this illegal solicitation of employees making up MUSC's HNO Division. Because this solicitation was illegal when it began, it should not be allowed to continue. In other words, the Individual Defendants breached their duties of loyalty to Plaintiffs by soliciting one another and the other individuals making-up MUSC's HNO Division to quit their employment with MUSC and work for the Hospital Defendants. *See Lowndes Prods.*, 259 S.C. at 335, 191 S.E.2d at 768 (noting employees have a duty to notify their employer if they know an employee is going to leave); *Berry*, 270 S.C. 491, 242 S.E.2d at 551 ("Where an employee acts adversely to the interest of his employer, he is disloyal ...."); *Sonoco Prods. Co. v. Guven*, No. 4:12-cv-00790-BHH, 2015 WL 127990, at \*1 (D.S.C. Jan. 8, 2015) (unpublished) (finding an employee's solicitation of its employers' employees in forming a competitive business could constitute a breach of the duty of loyalty). The Hospital Defendants should not be allowed to continually benefit from this unlawful conduct. *See Lowndes Prods.*, 259 S.C. at 337-38, 191 S.E.2d at 769-70 (noting the new employer is jointly and severally liable for the wrongful conduct of disloyal employees and employees who bring confidential and proprietary information from their former employer).

This Court should not allow the continued theft of MUSC's HNO Division. If this Court were to allow it to continue, MUSC would experience continued irreparable harm, as it may

experience a complete loss of its HNO Division. *See Peek*, 367 S.C. at 455 n.2, 626 S.E.2d at 37 n.2 (“[A]ppellate courts have upheld injunctive relief to prevent the loss of a business or business goodwill.”). This Court should not allow this to happen. *See Ephesians 4:28* (“Let the thief no longer steal, but rather let him labor, doing honest work with his own hands ....”).

**B. Plaintiffs can demonstrate a prima facie case for their civil conspiracy cause of action.**

As set forth above in Roman Numerals I and II and above in Roman Numeral III(A), Plaintiffs can demonstrate a prima facie cause of action for their causes of action for breach of duty of loyalty and civil conspiracy.

**C. Plaintiffs do not have an adequate remedy at law to provide redress for the loss of their HNO Division.**

It has taken MUSC more than two decades to create its HNO Division. *Affidavit of Dr. Cawley* ¶¶ 6-7; *Affidavit of Dean DuBois* ¶ 8-9. Prior to the *en masse* departure of members of MUSC’s HNO Division, it was one of the largest programs in the country devoted to the care of the head and neck cancer patient. *Id.* MUSC’s HNO Division cannot be rebuilt overnight, and if the Hospital Defendants are allowed to continue doing what was illegal in inception, Plaintiffs may be left without an HNO Division or with a crippled HNO Division. There is no remedy adequate to address this wrong either from the perspective of the Plaintiffs or the public at large. The public will suffer greatly if MUSC is no longer able to continue to act as a leading innovator to treat head and neck cancers.

**D. If the Court were to issue the requested injunction, it would preserve the status quo.**

If this Court were to issue the requested injunction, it would preserve the status quo, as it would ensure that the Hospital Defendants do nothing to further solicit employees from MUSC’s HNO Division. Prior to Defendants engaging in this wrongful conduct, MUSC had a thriving

HNO Division. This Court should preserve MUSC's HNO Division during the pendency of this action, so that it will not be totally eradicated by the Hospital Defendants' unlawful acts.

### **CONCLUSION**

Plaintiffs respectfully move and request this Court to enter the following injunction:

1. Prohibit the Hospital Defendants from using Plaintiffs' confidential and proprietary information,
2. Require the Hospital Defendants to return Plaintiffs' confidential and proprietary information,
3. Prohibit the Hospital Defendants from billing or collecting money for services performed utilizing any of Plaintiffs' confidential and proprietary information,
4. Require the Hospital Defendants to forever delete any and all copies of any of Plaintiffs' confidential and proprietary information that is in their possession and to submit affidavits to the Court confirming this has taken place,
5. Prohibit the Hospital Defendants from interfering with MUSC's contractual relationships with the fellows in MUSC's HNO Fellowship Program, and
6. Prohibit the Hospital Defendants from soliciting any of MUSC's employees supporting the HNO Division.

In addition to the foregoing, the Plaintiffs pray for such other and further relief as this Court may deem just and proper under the circumstances.

*[signature block to follow]*

Respectfully submitted,

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SOUTH CAROLINA*

Columbia, South Carolina  
December 8, 2021

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

MEDICAL UNIVERSITY OF SOUTH )  
CAROLINA and UNIVERSITY MEDICAL )  
ASSOCIATES OF THE MEDICAL )  
UNIVERSITY OF SOUTH CAROLINA, )

Civil Action No. 2021-CP-10-05289

Plaintiffs, )

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, )

**TRIDENT MEDICAL CENTER, LLC'S  
MEMORANDUM OF LAW IN  
OPPOSITION TO THE MOTION FOR  
TEMPORARY INJUNCTION**

Defendants. )

Defendant Trident Medical Center, LLC ("Trident") by and through undersigned counsel, submits this Memorandum of Law in Opposition to the Motion for Temporary Injunction filed by Plaintiffs Medical University of South Carolina ("MUSC") and University Medical Associations of the Medical University of South Carolina ("UMA").

**FACTS AND ALLEGATIONS**

Plaintiffs commenced this litigation against HCA and Trident<sup>1</sup>, and six physicians who were employed by UMA, after those physicians decided to move their employment from MUSC to Trident. Plaintiffs alleged various 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) S.C. Unfair Trade Practices Act; (7) S.C. Trade Secrets Act; (8) breach of covenant not to

<sup>1</sup> Plaintiffs also named HCA Healthcare, Inc. ("HCA") as a defendant in this lawsuit. As discussed more fully below and in the Rule 12(b)(2) Motion to Dismiss filed by HCA, Plaintiffs have not met their burden of establishing that the Court has personal jurisdiction over HCA, and given that, the Court cannot order injunctive relief against HCA.

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. Of those claims, Plaintiffs alleged claims (2), (3), (6), (7) and (11) against Trident and HCA as well.

Piggy-backed onto those purported causes of action is the Plaintiffs' request that the physicians and Trident 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.

Plaintiffs subsequently decided to settle their claims against the six physicians and now are seeking injunctive relief only against HCA and Trident.<sup>2</sup> As discussed more fully below, Plaintiffs are not entitled to any legal relief or remedy against HCA or Trident. Simply put, Plaintiffs could not "force" the six physicians to keep their medical practices at MUSC. The six physicians were legally and contractually allowed to terminate their employment with UMA and to obtain new employment elsewhere. No law or agreement prohibits Trident from encouraging or allowing the physicians to move their medical practices to Trident. Upon the anticipation of the physicians'

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<sup>2</sup> See Footnote 1.

medical practice coming to Trident, there is no law or contract that prohibits Trident from advertising, or even “soliciting” for new staff positions and employees—even from employees at MUSC. As is clearly shown below, the documents such as instrument lists, physician preference cards, case logs and physician salary information are not protectable by MUSC or UMA as trade secrets, or confidential or proprietary; therefore, if Trident received such documents or information from the physicians or other employees at MUSC it did nothing wrong.

MUSC asks the Court to restrain trade and employment through what it wants to call a temporary injunction. The Court should not use the drastic and extraordinary remedy of injunctive relief to facilitate MUSC’s attempt. The physicians were willing and able to move their medical practices to Trident. Plaintiffs should not be allowed to use litigation, or even the threat of it, to “punish” physicians who choose to work elsewhere, nor should they be allowed to “tie the hands” of the hospitals at which those physicians wish to work with needless injunctive relief. Trident, MUSC, and the six physicians all have patients to serve, and this ongoing litigation and the requested injunctive relief does absolutely nothing to benefit those patients.

### **STANDARD OF REVIEW**

Although the decision whether to grant a motion for temporary injunction rests within the sound discretion of the court, *Atwood Agency v. Black*, 374 S.C. 68, 72, 646 S.E.2d 882, 884 (2007), precedent is clear that a court should not grant a motion for temporary injunction except as an extraordinary and drastic measure to preserve the status quo of the parties. *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).

Plaintiffs bear the heavy burden of demonstrating that the facts and circumstances warrant the issuance of a temporary injunction. *Strategic Resources Co.*, 367 S.C. at 544, 627 S.E.2d at

689 (2006); *Calcutt v. Calcutt*, 282 S.C. 565, 320 S.E.2d 55 (Ct. App. 1984). This means that Plaintiffs’ “entitlement to an injunction requires the [C]omplaint to allege facts sufficient to constitute a cause of action for an injunction while establishing that an injunction is reasonably necessary to protect the legal rights of the [Plaintiffs] during the litigation.” *FOC Lawshe Ltd. P’ship v. Int’l Paper Co.*, 352 S.C. 408, 416, 574 S.E.2d 228, 232 (Ct. App. 2002) (citing *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 480-81, 167 S.E.2d 313, 315 (1969)).

All elements of entitlement to an injunction must be established by Plaintiffs through verified facts. Generally, entitlement to an injunction cannot be established by allegations submitted merely upon “information and belief.” *See Tallevast v. Kaminski*, 146 S.C. 225, 143 S.E. 796, 800 (1928); *Touchston v. McDermott*, 120 F. Supp. 2d 1055, 1059–60 (M.D. Fla.), *aff’d*, 234 F.3d 1133 (11th Cir. 2000). Furthermore, while Plaintiffs have the burden of demonstrating the necessity of the requested injunctive relief, the Court may consider the whole case—the showing made by the plaintiffs as well as that made by defendants—in determining whether to grant or deny Plaintiffs’ Motion. *Alston*, 93 S.C. 553, 77 S.E. at 727-28. In fact, at the pre-trial stage the Court “can and ought to look into the merits, whether they present issues of law or fact, and consider them to the extent necessary to enable [the Court] to exercise [its] discretion wisely.” *Id.*

For a preliminary injunction to be granted, Plaintiffs bear the burden of establishing that:

1. Plaintiffs would suffer irreparable harm if the injunction is not granted;
2. Plaintiffs are likely to succeed in the litigation; and
3. Plaintiffs have no adequate remedy at law.

*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).

## **ARGUMENT**

The injunctive relief requested by Plaintiffs cannot be granted against HCA or Trident. The Motion for Temporary Injunction must be denied. Plaintiffs simply have not established their entitlement to the extraordinary relief they seek.

The defects in Plaintiffs' Motion seeking to enjoin HCA and Trident, and their failure to satisfy the essential burdens and conditions to justify the Court granting them the relief requested against HCA and Trident are set forth in greater detail below.

1. **This Court lacks personal jurisdiction over Defendant HCA and in the absence of such jurisdiction it may not impose an injunction on HCA.**

The Court must have jurisdiction over HCA to issue an injunction that is binding on HCA. *See* Rule 65(d), SCRPC; *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"). As demonstrated by HCA's Motion to Dismiss for lack of jurisdiction pursuant to Rule 12(b)(2), Plaintiffs have not satisfied their burden of establishing that the Court has personal jurisdiction over HCA. *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2012).

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). Rule 65(d), SCRPC, 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 enjoin 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).

Accordingly, the Court must deny any request for injunctive relief relating to HCA on the grounds that the Court lacks the authority to issue an injunction that is binding on an entity over whom the Court lacks jurisdiction.

2. **Plaintiffs purported causes of action against HCA and Trident fail as a matter of law and, thus, cannot support any injunctive relief against the Defendants.**

Plaintiffs must allege facts sufficient to state a cause of action in order to prove their entitlement to an injunction. *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011) (citing *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App.2002)). Plaintiffs cannot merely state self-serving conclusory allegations and recite the legal elements of a claim. They must allege facts sufficient to establish the three elements of a claim for temporary injunctive relief: (1) Plaintiffs will suffer immediate, irreparable harm without the injunction; (2) Plaintiffs have a likelihood of success on the merits; and (3) Plaintiffs have no adequate remedy at law. *Id.* (citing *Scratch Golf Co.*, 361 S.C. at 121, 603 S.E.2d at 908). When a plaintiff fails to allege facts establishing the purported claim for injunctive relief, the cause of action should be dismissed and the requested relief denied. *See* Rule 8, SCRCPP; *Jones v. Gilstrap*, 288 S.C. 525, 528, 343, S.E.2d 646, 648 (Ct. App. 1986); *Power Prod. & Servs. Co. v. Kozma*, 379 S.C. 423, 433, 665 S.E.2d 660, 665 (Ct. App. 2008).

Moreover, for purposes of obtaining an injunction, Plaintiffs cannot succeed on allegations based on “information and belief.” Complaints that fail to state more than general allegations based upon “information and belief” related to the elements for a claim for temporary injunction are insufficient. *See S.C. Pub. Serv. Auth. v. Carolina Power & Light Co.*, 244 S.C. 466, 473-74, 137 S.E.2d 507, 509 (1964) (“While the complaint contains the general allegation that the plaintiff will suffer irreparable injury, there is no factual allegation to support it. This is insufficient to constitute a cause of action for injunctive relief.”); *Knohl v. Duke Power Co.*, 260 S.C. 374, 376,

196 S.E.2d 115, 116 (1973) (holding that a “complaint fails to state a cause of action for injunctive relief unless facts are alleged which show that the plaintiff has no adequate and complete remedy at law”).

Plaintiffs have failed sufficiently even to allege a valid claim for injunctive relief and they utterly fail to meet their burden to establish a valid cause of action for injunctive relief. Plaintiffs’ submissions to the Court (Complaint, Motion, Affidavits and Exhibits) are overwhelmingly premised not upon facts, but only upon “information and belief.” A request for the issuance of an injunction must be based upon facts—not the Plaintiffs’ unsupported beliefs. *See Tallevast v. Kaminski*, 146 S.C. 225, 143 S.E. 796, 800 (1928) (citing *Pickman v. Georgetown Cty.*, 130 S.C. 18, 125 S.E. 191 (1924); *see also Pickman*, 130 S.C. 18, 125 S.E. 191 (1924) (“[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.”); *Touchston v. McDermott*, 120 F. Supp. 2d 1055, 1059–60 (M.D. Fla.), *aff’d*, 234 F.3d 1133 (11th Cir. 2000) (“[W]hen the primary evidence introduced is an affidavit made on information and belief rather than on personal knowledge, it generally is considered insufficient to support a motion for preliminary injunction.” (quoting 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2949 (2d ed.1995))).

In order to qualify for and obtain injunctive relief, it is also necessary for a plaintiff to act on its alleged rights and to seek relief in a timely fashion. *Arceneaux v. Arrington*, 284 S.C. 500, 502-03, 327 S.E.2d 357, 358 (Ct. App. 1985). Plaintiffs failed to timely assert any of their rights in this case. According to the Complaint, the defendant physicians gave notice that they were resigning their positions with MUSC and UMA in July and August 2021. (Complaint ¶ 34). Thereafter, Plaintiffs sat on their alleged rights through September, October, and most of November, not filing their Complaint or seeking an injunction until November 22, 2021.

Prior to Plaintiffs' filing of the Complaint, Trident spent or committed, through purchase orders, approximately \$9 million dollars for the acquisition of equipment, surgical instrumentation, office space, furniture, and fixtures for the new facility. (Miller Affidavit ¶ 6). Additionally, Trident has reserved at least an additional \$6.1 million dollars to procure additional goods to support the physicians' practice. (Miller Affidavit ¶ 7). South Carolina law does not allow Plaintiffs to sit on their rights while Trident takes action, incurs expenses, and enters into obligations constituting a change in its positions. *See Mack v. Edens*, 306 S.C. 433, 435–36, 412 S.E.2d 431, 433 (Ct. App. 1991) (“[I]f a party, knowing his rights, does not seasonably assert them, but by unreasonable delay suffers his adversary to incur expense or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights, especially if an injunction is asked.”). In this case, Plaintiffs unreasonably delayed in attempting to enforce the rights they now claim. Because of this delay, they do not qualify for the injunction they now seek.

3. **Plaintiffs have not, and cannot, show that they will suffer irreparable harm if the Motion is denied.**

It is fundamental that an injunction cannot issue unless Plaintiffs 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. diss'm'd*, 284 U.S. 574, 52 S. Ct. 17 (1931); *see also S.C. Pub. Serv. Auth.*, 244 S.C. at 474, 137 S.E.2d at 509-10.

To satisfy this burden, Plaintiffs must demonstrate “more than the mere ‘possibility’ of being irreparably harmed; rather, the [Plaintiffs] must ‘demonstrate that irreparable injury is likely in the absence of an injunction.’” *George Sink, P.A. Inj. Laws. v. George Sink II L. Firm LLC*, 407 F. Supp. 3d 539, 559 (D.S.C. 2019), *modified sub nom. George Sink PA Inj. Laws. v. George Sink*

*II L. Firm LLC*, No. 2:19-CV-01206-DCN, 2019 WL 6318778 (D.S.C. Nov. 26, 2019) (emphasis in original).

It is not enough for Plaintiffs to assert or argue that the irreparable harm is “merely problematic” or “conditioned on possible future events.” *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4th Cir. 1991). Plaintiffs must present probative evidence that there exists a “present threat of irreparable harm.” *Id.*

In this case, Plaintiffs have couched their allegations of irreparable harm as being “potential.” Specifically, in their Motion for Temporary Injunction (Page 6, Section II), Plaintiffs candidly admit “MUSC’s Head and Neck Fellowship Program faces potential irreparable harm without issuance of this requested injunctive relief.” (emphasis added). Mere potential irreparable harm is not sufficient to satisfy the requirement for existing or likely irreparable harm in order to justify injunctive relief. *See S.C. Pub. Serv. Auth.*, 244 S.C. at 474, 137 S.E.2d at 509-10.

Because, as shown in other sections of this Memorandum, there is no viable assertion or claim of a trade secret complying with the Trade Secrets Act, there is no presumption of irreparable harm applicable in this case. *Atwood Agency v. Black*, 374 S.C. 68, 72-73, 646 S.E.2d 882, 884 (2007).

4. **Plaintiffs are not likely to be successful on the merits.**

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.*, 952 F. 2d at 813 (citing 2 McCarthy on Trademarks and Unfair Competition, §30.16, at 485-86 (2d ed. 1980)).

Because Plaintiffs have specifically and expressly grounded their Motion for a Temporary Injunction on the South Carolina Trade Secrets Act (“Plaintiffs seek preliminary injunctive relief in accordance with the South Carolina Trade Secrets Act . . .”), it is necessary and critical to assess whether Plaintiffs have established that they are likely to succeed on the merits of their Trade Secrets Act claim. Examination of that issue leads overwhelmingly to the conclusion that Plaintiffs are not likely to be successful on the merits.

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

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

- a. The instrument lists and physician preference cards at issue in the case were developed by the six Defendant Physicians based on their know-how. (Affidavit of Timothy Brendle, ¶ 4 – “defendant Day and others on the Head and Neck team began developing the processes, procedures, and staffing requirements . . .”). (Affidavit of Timothy Brendle, ¶ 5 – “Defendants Day, Hornig, Lentsch, and

Neskey collectively have developed over 100 preference cards over the years for a broad range of specialized procedures.”)

- b. The “confidentiality obligations imposed on MUSC employees – which MUSC and UMA conclude to be “reasonable efforts to maintain the secrecy,” consists of no more than a provision of the so-called “Code of Conduct” incorporated in the bowels of the so-called “MUSC Faculty Handbook.” (Affidavit of Raymond N. Dubois, ¶ 24) This Handbook, and the incorporated Code of Conduct are Exhibit 5 to the Complaint. 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.”
- c. Nowhere does MUSC allege that it identified, to the physicians or anyone else, what was claimed to be “confidential information.”
- d. Nowhere does MUSC allege that the “instrument lists,” “patient lists,” “physician preference cards,” or “financial data” placed at issue in the Motion for Temporary Injunction were identified to anyone, or labeled in any way as “Trade Secret,” or “confidential,” or “proprietary” at any time prior to the allegations in this case.
- e. It is a fact that the “instrument lists” and “physician preference cards” which are alleged in this case to have been provided to Trident were not: (i) labeled or identified in any way as involving or belonging to MUSC or UMA; (ii) labeled or identified in any way as being “Trade Secret,” or (iii) labeled or identified in any way as being “confidential” or “proprietary.”
- f. The evidence (Plaintiffs’ Master Exhibits 6 and 7) reflects that the transmissions of those lists and cards to Trident were by employees of MUSC using MUSC emails, and there is no allegation or evidence that Trident knew such lists or cards had been

misappropriated from MUSC or that the transmissions of those lists and cards (by way of MUSC employees and MUSC email system) were not authorized.

It is axiomatic that there can be no claim or protection available under the Trade Secrets Act unless Plaintiffs establish that there is a trade secret. To constitute a trade secret, the information must be secret. *Carolina Chem. Equip., Co. v. Muckenfuss*, 322 S.C. 289, 296, 471 S.E.2d 721, 724 (Ct. App. 1996). When the information claimed to be a trade secret is readily ascertainable from other sources, it does not qualify for protection under the Trade Secrets Act, S.C. CODE ANN. §39-8-20 (5). Information does not qualify for trade secret protection when the information can, with reasonable effort, be properly acquired or duplicated by or through others. *See Carolina Chem. Equip., Co.*, 322 S.C. at 296, 471 S.E.2d at 724.

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

More broadly, a person otherwise entitled to trade secret protection must take all proper and reasonable steps to keep it secret, in order to maintain legal protection. *See Lowndes Prod., Inc. v. Brower*, 259 S.C. 322, 331, 191 S.E.2d 761, 766 (1972). When 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.

In order to establish that it has taken proper and reasonable steps to protect trade secrets, a plaintiff must exercise “eternal vigilance,” and prove it has taken steps to provide “constant warnings to all persons to whom the trade secret has become known” along with requiring an acknowledgement from such persons that they have been advised of the secrecy of the information and a promise to respect it, preferably in writing. *Id.* Further, South Carolina law is clear that “warnings alone are insufficient to place a trade secret within the sphere of protection provided by the [Trade Secrets] Act.” *Hill Holliday Connors Cosmopolos, Inc. v. Greenfield*, 433 Fed App’s 207, 215 (4th Cir. 2011). In order to enjoy protection under the Trade Secrets Act, a plaintiff must demonstrate reasonable efforts to maintain secrecy and “isolated steps” toward secrecy are not enough. *See Lowndes Prods.*, 259 S.C. at 331, 191 S.E.2d at 766.

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, and case logs 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. (Horwich Affidavit ¶¶ 7, 8); (Meuli Affidavit ¶¶ 7 -13).

##### 5. **Plaintiffs have an Adequate Remedy at Law**

It is fundamental that Plaintiffs can only establish an entitlement to injunctive relief if they meet the burden of demonstrating to the Court that they have no adequate remedy at law. “The party seeking an injunction must prove it has no adequate remedy at law.” *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).

This means that Plaintiffs must show the Court it is impracticable for them to obtain full and adequate compensation at law. *Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011) (citation omitted). This means that due to its drastic and extraordinary nature, courts should issue injunctions with caution and only where no adequate remedy exists at law. *Hampton v. Haley*, 403 S.C. 395, 409, 743 S.E.2d 258, 265 (2013). However, in this case Plaintiffs have alleged an entitlement to money damages for each and every cause of action. Because the availability of money damages destroys the contention that there is no adequate remedy at law, Plaintiffs' own Complaint and the allegations therein reflects that there is available an adequate remedy at law. *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 irreparable injury was not entitled to injunctive relief); *Hughes Network Systems, Inc. v. InterDigital Communications Corp.*, 17 F.3d 691 (4th Cir. 1994) (noting the presumption that preliminary injunctions will not issue in cases where the harm suffered may be remedied by money damages); *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) (holding that plaintiff's claims for monetary damages provide an adequate remedy and "obviate the need for an injunction").

6. **Plaintiffs' requested relief is improperly vague, ambiguous, and overbroad.**

Rule 65(d) provides,

Every order granting an injunction ... *shall* set forth the reasons for its issuance; **shall be specific in terms; shall describe in reasonable detail**, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action ....

(emphasis added). The use of the word “shall” means an action is mandatory. *Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 608-09, 790 S.E.2d 430, 434 (Ct. App. 2016).

In this case, Plaintiffs’ requested “injunctive relief” lacks the necessary specificity. For instance, Plaintiffs seek an Order prohibiting Defendants from “recruiting or soliciting, or otherwise contacting” MUSC employees regarding any potential employment. However, the term “solicit” is ambiguous and, therefore, an injunction prohibiting the Defendants from “further recruiting or soliciting, or otherwise contacting current MUSC and UMA employees, associates, agents, and fellows regarding any potential employment with HCA” is improperly vague and ambiguous and lacks the necessary specificity for the issuance of an injunction. *See Omnicare, Inc. v. Henwood*, No. CIV.A.02C03208WCC, 2003 WL 22290905, at \*1 (Del. Super. Ct. Oct. 2, 2003) (holding that the term “solicit” “can encompass a wide range of possible conduct” and, therefore, is ambiguous).

Similarly, Plaintiffs seek an Order prohibiting “Defendants from further utilizing Plaintiffs’ confidential and proprietary information, including instrument lists, patient lists, physician preference cards and financial data” (emphasis added); “billing or collecting money for services performed utilizing any of Plaintiffs’ confidential or proprietary information, including instrument lists, patient lists, physician preference cards, and financial data” (emphasis added); further interfering with MUSC’s Fellowship Program in any way or recruiting any MUSC Fellow” (emphasis added); “further recruiting or soliciting, or otherwise contacting current MUSC and UMA employees, associates, agents and Fellows regarding any potential employment with HCA,” (emphasis added).

Trident cannot possibly conform behavior to an injunction (or any restriction) which does not define what it means to “solicit,” or “contact,” or “recruit,” or “utilize.” Similarly, it is not possible to conform to a restriction “including,” but not limited to, same things. What else will

MUSC and UMA assert was included when they desire to take further disruptive action against Trident. The law does not sanction such uncertainty.

The same is true about a restriction on “utilizing” information. How does one possibly understand the restriction imposed upon it not to “utilize” information. Imposing the threat of contempt on a party based on such non-specific, vague and ambiguous terms cannot be condoned. South Carolina law does not allow it.

7. **The proposed Injunction has the direct effect of binding and limiting (enjoining) persons not party to this action.**

In their proposed injunction, Plaintiffs seek to restrict the ability of HCA or Trident to recruit (employ) “any MUSC Fellow,” and any “current MUSC and UMA employee, associates, agents and fellows regarding any potential employment with HCA.” However, in July 2021, the Biden Administration issued an executive order specifically directing that the FTC undertake rulemaking to restrain the use of non-compete clauses and other contractual restrictions that limit employee mobility in the health care industry. In fact, the Department of Justice (DOJ) has commenced criminal prosecutions against companies and executives in the healthcare industry who are alleged to have agreed to so-called “No-Poach Agreements,” which are agreements among employees to not hire or solicit each other’s employees. *See U.S. v. DaVita Inc. and Kent Thiry*, Criminal Action No. 21-cv-00229-RBJ (U.S.D.C. – D. Colo.).

In the present case, Plaintiffs ask the Court to issue an injunction order requiring the parties to do that which they could not legally do by agreement. Such a request is misplaced and wrong. This Court should not take the bait and should deny the Motion for Temporary Injunction.

Injunctive relief prohibiting the movement of employees is not favored and has a negative effect on employment and trade. *See Cox v. Altus Healthcare & Hospice, Inc.*, 706 S.E.2d 660, 664 (Ga. Ct. App. 2011) (holding that a covenant precluding unsolicited contact with former

employees is unenforceable). As recognized by the court in *Orkin Exterminating Co. v. Martin Co.*, 240 Ga. 662, 666, 242 S.E.2d 135, 138-39 (1978), “Overly-restrictive covenants in employment contracts or other similar considerations which place a restraint upon the free movement of employees in the marketplace as opportunity, experience and competition permits is contrary to this court's view of fair competition.” In fact, such restrictions on HCA and Trident—which also cause similar restrictions for MUSC Fellows, employees, associates and agents—are fundamentally improper.

8. **Plaintiffs have not made an adequate showing to warrant the imposition of the extraordinary remedy of an injunction against HCA or Trident in this case.**

The issuance of an injunction is a drastic and extraordinary equitable remedy. *Hampton v. Haley*, 403 S.C. 395, 409, 743 S.E.2d 258, 265 (2013). Plaintiffs have failed to present any evidence or argument through which the Court may determine that equity favors the issuance of an injunction having the potential effect of limiting or prohibiting Trident and the Defendant physicians from providing medical treatment to head and neck cancer patients in need of such treatment. Plaintiffs ask the Court to enjoin Trident “from billing or collecting money for services performed utilizing any of Plaintiffs’ confidential and proprietary information” (emphasis added) which they say includes the instrument lists and physician preference cards. Those are the same lists and cards which Plaintiffs’ own witness swore in an Affidavit had been developed by the physicians themselves utilizing their knowledge and experience. Thus, Plaintiffs’ seek to prevent Trident from having those services performed at its hospital (since it would be prohibited from billing and collecting for the services and procedures). It is clear by this proposed injunction, MUSC seeks to prevent cancer patients from having their needed surgeries performed. Such request by MUSC and UMA is shocking and untenable. As discussed above, it is not in the public

interest for an injunction to restrict or prohibit the delivery of necessary medical services or employment opportunities and choices for persons not even party to this case.

In exercising this drastic and extraordinary equitable power in relation to a healthcare provider, courts frequently issue rulings based upon the outcome that allows for the continuation of medical services to patients. *See Wound Care Centers, Inc. v. Catalane*, No. CIV.A. 10-336, 2011 WL 553875 (W.D. Pa. Feb. 8, 2011) (denying a request for an injunction barring the defendants from providing treatment to patients based upon a process the plaintiff argued was a trade secret). In this case, the affidavit of Dr. Horwich confirms that, contrary to the rank speculation by Plaintiffs expressed in “upon information and belief” allegations, Trident is capable of providing the necessary medical services to the head and neck cancer patients. (Horwich Affidavit ¶ 16). In fact, the head and neck oncology reconstructive practice is currently performing surgeries for patients in need of such care. (Horwich Affidavit ¶ 16). In addition to being capable of actually providing the medical services, Trident’s facilities are brand new, state-of-the-art, and the best instruments and supplies available for purchase today. (Horwich Affidavit ¶ 17). In fact, the surgical equipment provided at Trident is the best collection of equipment for the treatment of head and neck oncology patients that he has ever seen in any setting, and Dr. Horwich formerly practiced at MUSC. (Horwich Affidavit ¶ 17).

In constructing this state-of-the-art facility, Trident has spent or committed approximately \$9 million dollars for the acquisition of equipment, surgical instrumentation, office space, furniture, and fixtures necessary for the physicians to practice medicine in the field of head and neck oncology. (Miller Affidavit ¶ 6). Additionally, Trident has reserved at least an additional \$6.1 million dollars to procure additional goods to support the physicians’ practice. (Miller Affidavit ¶ 7).

Furthermore, the “sole purpose of a temporary injunction is to preserve the status quo” and prevent irreparable harm. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). The status quo is not preserved if patients are barred from receiving necessary medical treatment from their chosen doctors at their chosen healthcare provider. Rather, the requested injunction only serves to disrupt the status quo, prevent free and fair competition for medical services and bar head and neck cancer patients from receiving necessary treatment.

### **CONCLUSION**

Based on the foregoing, Plaintiffs’ Motion for Temporary Injunction should be DENIED.

s/James Lynn Werner

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December 9, 2021  
 Columbia, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

MEDICAL UNIVERSITY OF SOUTH  
CAROLINA AND UNIVERSITY MEDICAL  
ASSOCIATES OF THE MEDICAL  
UNIVERSITY OF SOUTH CAROLINA,

Case No. 2021-CP-10-05289

Plaintiffs,

**PLAINTIFFS' REPLY  
MEMORANDUM OF LAW**

vs.

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.

The Medical University of South Carolina ("MUSC") and University Medical Associates of the Medical University of South Carolina ("UMA") (collectively "Plaintiffs") submit this Reply Memorandum in regards to their Motion for Temporary Injunction.

**ARGUMENT**

I. **NO "LABEL" IS REQUIRED UNDER THE SCTSA.**

During the motion hearing, counsel for Trident Medical Center, LLC and HCA Healthcare, Inc. (collectively "Hospital Defendants") argued that Plaintiffs' Motion for Temporary Injunction should fail because Plaintiffs did not label their confidential and proprietary information with the words "confidential." The Hospital Defendants' argument presupposes that in order for documents and information to enjoy protection under the South Carolina Trade Secrets Act ("SCTSA"), they must be marked "confidential." The Hospital Defendants cite no legal support for this position. They cite no legal support for this position because none exists. In order for a document or piece

of information to have trade secret protection under the SCTSA, a party is only required to engage in reasonable efforts to maintain the secrecy of the documents or information. S.C. Code § 39–8–20(5)(a). There is no requirement that documents or information be marked “confidential.”

Here, Plaintiffs clearly took reasonable steps to protect their confidential and proprietary information. Plaintiffs limit access to their confidential and proprietary information only to those individuals who have a legitimate need to access it. *Dr. Cawley’s Affidavit* ¶ 21; *Dean DuBois’ Affidavit* ¶ 23. Plaintiffs also maintain policies and procedures to protect this information from disclosure to unauthorized persons. *Dr. Cawley’s Affidavit* ¶¶ 21-22; *Dean DuBois’ Affidavit* ¶¶ 23-24; *Exhibit #5*. For persons attempting to access Plaintiffs’ confidential and proprietary information remotely, Plaintiffs have implemented a two-factor authentication system to further protect its confidential and proprietary information. *Dr. Cawley’s Affidavit* ¶ 21; *Dean DuBois’ Affidavit* ¶ 23. In addition, Plaintiffs contractually prohibit faculty physicians, including the Individual Defendants, from disclosing their confidential information and prevent them from using it for their own benefit. *Exhibit #5*.

## II. THE CONFIDENTIAL INFORMATION BELONGS TO THE PLAINTIFFS.

The Hospital Defendants never argued that the information at issue belongs to them. It does not. As the Court observed in the settlement agreement with the Individual Defendants, the Individual Defendants agreed to destroy Plaintiffs’ confidential and proprietary information (physician preference cards, case logs, instrument lists, and other financial information) and to not use this information going forward. During the motion hearing, the Hospital Defendants argued that some of Plaintiffs’ confidential and proprietary information (particularly the case logs) belonged to the Individual Physician Defendants, but the settlement agreement between the Plaintiffs and the Individual Defendants demonstrates otherwise. The Hospital Defendants never

argued that Plaintiffs' confidential and proprietary information belongs to the Hospital Defendants. They did not argue this because it does not. Therefore, for all of the Hospital Defendants' attempts to maneuver around the issue, the simple reality is that the information at issue belongs to Plaintiffs and no one else and certainly not to the Hospital Defendants.

III. UNDER SCTSA, A "TRADE SECRET" IS "INFORMATION" THAT DERIVES ECONOMIC VALUE FROM NOT BEING READILY ASCERTAINABLE BY THE PUBLIC, § 39-8-20(5).

The Hospital Defendants do not deny they are in possession of information belonging to someone else—the Plaintiffs. They have argued in court to keep what is not theirs and to have the ability to use it going forward. The law demands that the Hospital Defendants be required to return the information that belongs to Plaintiffs and not use it going forward. The Individual Defendants took information that belonged to Plaintiffs in breach of their duties of loyalty to Plaintiffs, and the Individual Defendants have provided this information to the Hospital Defendants, which seek to use it in competition with and to harm Plaintiffs. This puts this factual scenario on all fours with *Indus. Packaging Supplies, Inc. v. Martin*, No. CA 6:12-713-HMH, 2012 WL 1067650, at 1 (D.S.C. Mar. 29, 2012), where Judge Herlong ordered the new employer to return and not use the former employer's information. This court should do the same.

To be sure, the Plaintiffs have never sought to prevent the Individual Defendants from using "what is in their head." They certainly can use their know-how, but there is a critical difference between know-how in one's head and the detailed documents and information that an employer devotes significant resources to reduce to tangible form over a long period of time. Former employees cannot steal tangible documents and information from their former employer, provide it to their new employer, and use it compete with their former employer. That is what is going on here. During the motion hearing, the Hospital Defendants argued that the Individual

Defendants could, independent of the information taken from Plaintiffs, write down all of the tangible information they misappropriated from the Plaintiffs. Whether they could or could not is not the point. They did not and have not. They took Plaintiffs' property and provided it to the Hospital Defendants. When one looks behind the Hospital Defendants' words and to their actions, one sees the truth. The truth is the Hospital Defendants are fighting vigorously in court to retain possession of Plaintiffs' documents and information. Indeed, such efforts by the Hospital Defendants reinforce the value that they themselves believe the information has. These actions speak loudly. They seek to do what the law clearly prohibits: to use information that does not belong to them for economic gain.

#### IV. THE SETTLEMENT AGREEMENTS WITH THE INDIVIDUAL DEFENDANTS.

Lastly, during oral argument, the Hospital Defendants insinuated that the settlement amount paid by the Individual Defendants was solely so they could be released from their non-compete obligations. The court should note that not all of the Individual Defendants had non-compete agreements with MUSC. Only three Individual Defendants did—Neskey, Horning, and Lentsch. *Complaint* ¶¶ 135-143. There are a total of six Individual Defendants. Three had non-compete obligations (Neskey, Horning, and Lentsch), and three did not (Individual Defendants Day, Davis, and Sharma). All six Individual Defendants paid part of the settlement total of \$1.7 Million to Plaintiffs. Such settlement required the Individual Defendants to return or destroy the very information the Hospital Defendants seek to keep – ironically, provided by the Individual Defendants to the Hospital Defendant.

In conclusion, Plaintiffs repeat and reiterate their request for injunctive relief as reflected in their motion.

Respectfully submitted,

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MEDICAL ASSOCIATES OF THE  
MEDICAL UNIVERSITY OF  
SOUTH CAROLINA*

Columbia, South Carolina  
December 14, 2021

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

MEDICAL UNIVERSITY OF SOUTH  
CAROLINA AND UNIVERSITY MEDICAL  
ASSOCIATES OF THE MEDICAL  
UNIVERSITY OF SOUTH CAROLINA,

Case No. 2021-CP-10-05289

Plaintiffs,

vs.

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.

**PLAINTIFFS' MEMORANDUM IN  
OPPOSITION TO DEFENDANT  
HCA HEALTHCARE, INC.'S  
MOTION TO DISMISS FOR LACK  
OF PERSONAL JURISDICTION**

Defendant HCA Healthcare, Inc. (HCA) incorrectly contends this Court does not have personal jurisdiction over HCA. As shown below, the currently known facts, without the benefit of any discovery, establish a *prima facie* case that this Court has general and/or specific personal jurisdiction over HCA. For ease of reference, this memo uses “Master Exh. [1, 2 ...]” to cite the exhibits in “Plaintiffs’ Master Exhibits” previously submitted to this Court in connection with Plaintiffs’ motion for a temporary injunction. Additional matters are cited as “Exh. [A, B ...]” and filed separately with this memorandum. These additional Exhibits contain publicly available information from HCA’s 10-K filings with the United States Securities and Exchange Commission (SEC), HCA’s website, and the websites of HCA hospitals in South Carolina. The evidence in the Master Exhibits and the additional Exhibits, together with the allegations of the complaint and the affidavits filed in support of the temporary injunction motion, plainly establishes a *prima facie* showing of general and specific personal jurisdiction over HCA.

## ARGUMENT

For the most part, HCA correctly cites and describes the applicable law on personal jurisdiction but misapplies it to the facts of this case. More fundamentally, HCA overlooks the controlling rule that, at the pre-trial stage of the proceedings (as here), a plaintiff need only make a *prima facie* showing that the court has personal jurisdiction over the defendant. *Brown v. Investment Mgmt. and Research, Inc.*, 475 S.E.2d 754, 756 (S.C. 1996); *Mid-State Distributors v. Century Importers, Inc.*, 426 S.E.2d 777, 779 (S.C. 1993). In making this determination, the court must accept as true the allegations of the complaint and any other evidentiary submissions by the plaintiff in support of personal jurisdiction. *Brown*, 475 S.E.2d at 756, 757. All evidence must be viewed in the light most favorable to the plaintiff. *Mid-State*, 426 S.E.2d at 779. To the extent the defendant presents conflicting evidence, all factual disputes must be resolved in favor of the plaintiff. *Brown*, 475 S.E.2d at 756, 757.<sup>1</sup>

### **I. The affidavit of Michael Bray fails to support the motion to dismiss.**

HCA relies solely upon the affidavit of Michael Bray to support its argument that this Court does not have personal jurisdiction over HCA. This reliance is misplaced for several reasons. First, upon reading Bray's affidavit, one would think that he had never heard of defendant Trident

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<sup>1</sup> In *Brown v. Investment Mgmt. and Research, Inc.*, 475 S.E.2d 754 (S.C. 1996), the Court explained:

When challenged, the plaintiff has the burden of showing jurisdiction is properly asserted; however, the law is well-settled that at the pre-trial stage only a *prima facie* showing is required. Affidavits may be submitted to show jurisdiction; however, the allegations contained in the complaint are normally sufficient to warrant the exercise of jurisdiction. Courts will take as true the allegations of the nonmoving party and resolve all factual disputes in its favor. This includes any factual disputes brought up by submitted affidavits.

475 S.E.2d at 756 (internal quotation marks and citations omitted); see also *id.* at 757 (holding that trial court erred in relying on factual assertions in affidavit presented by the defendant in support of motion to dismiss, because those assertions "were in direct conflict with [Plaintiff's] assertions [and any] conflict should have been resolved, at least at this stage, in [Plaintiffs'] favor."). See also *Mid-State Distributors v. Century Importers, Inc.*, 426 S.E.2d 777, 779 (S.C. 1993) ("Looking at the evidence in a light most favorable to the non-moving party, [the plaintiff] has made a *prima facie* showing of personal jurisdiction over [the defendant]. There are genuine questions of fact remaining . . . and [the plaintiff's] *prima facie* showing is sufficient to warrant further inquiry.").

Medical Center, LLC (Trident).<sup>2</sup> In fact, however, Bray is a vice president of Trident with the address of “One Park Plaza, Nashville, TN.”<sup>3</sup> Of Trident’s 29 officers, 25 of them are at this same address in Nashville,<sup>4</sup> which is the same address as HCA Healthcare, Inc.<sup>5</sup>

Second, Bray asserts that HCA is a “non-operating holding company” that merely holds investments in the stock or other equity interests of its subsidiaries.<sup>6</sup> In stark contrast, HCA has told the federal government in its Form 10-K filing with the SEC that “HCA Healthcare, Inc. is one of the leading health care services companies in the United States” and its “primary objective is to provide a comprehensive array of quality health care services ....”<sup>7</sup> In like manner, HCA has told the general public through its website at [hcahealthcare.com](http://hcahealthcare.com) that it “is one of the nation’s leading providers of healthcare services” and “[m]ade up of locally managed facilities that include more than 180 hospital and 2,000+ sites of care.”<sup>8</sup> HCA Healthcare, Inc. specifically told the SEC that this website was its website.<sup>9</sup>

## **II. This Court has general personal jurisdiction over HCA.**

As admitted by HCA, a court has general personal jurisdiction over a corporation, if the corporation has an “enduring relationship” with South Carolina or has continuous and systematic “affiliations” with the state that render it essentially at home in the state. (HCA Memo at 4 (citations omitted). The following evidence, accepted as true and viewed in the light most favorable to Plaintiffs, shows that HCA has an “enduring relationship” and such “affiliations” with South Carolina:

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<sup>2</sup> See Bray Aff., *passim*.

<sup>3</sup> Master Exh. 4 at 11.

<sup>4</sup> Master Exh. 4 at 10-11.

<sup>5</sup> Master Exh. 4 at 15.

<sup>6</sup> Bray Aff. at 1, ¶¶ 2-3.

<sup>7</sup> Exh. A at page 3 (HCA’s 2020 Form 10-K filed with SEC).

<sup>8</sup> Exh. B at page 2 (from HCA’s website at [hcahealthcare.com](http://hcahealthcare.com)).

<sup>9</sup> Exh. A at page 3 (HCA’s 2020 Form 10-K filed with SEC, advising that “[o]ur website address is [www.hcahealthcare.com](http://www.hcahealthcare.com).”).

1. According to its website at [hcahealthcare.com](http://hcahealthcare.com), HCA has five medical centers in South Carolina, to-wit: Colleton Medical Center in Walterboro; Moncks Corner Medical Center in Moncks Corner; Summerville Medical Center in Summerville; Grand Strand Medical Center in Myrtle Beach; and Trident Medical Center in Charleston.<sup>10</sup>

2. According to Trident's website at [tridenthealthsystem.com](http://tridenthealthsystem.com), "Trident Health is 445-bed HCA facility comprised of two acute care hospitals – Trident Medical Center and Summerville Medical Center – and three freestanding emergency departments – Brighton Park Emergency, Moncks Corner Medical Center and Centre Pointe Emergency."<sup>11</sup> According to Colleton Medical Center's website at [colletonmedical.com](http://colletonmedical.com), it is "an HCA facility, with 135 beds, offering both inpatient and outpatient medical services, as well as 24/7 Emergency Care for adults and children."<sup>12</sup>

3. Searches on the websites for HCA's South Carolina facilities produces numerous "hits" when searching for "HCA" – 33 hits at Trident's website ([tridenthealthsystem.com](http://tridenthealthsystem.com)); 16 hits at Colleton's website ([colletonmedical.com](http://colletonmedical.com)); and 61 hits at Grand Strand's website ([mygrandstrandhealth.com](http://mygrandstrandhealth.com)).

4. HCA personnel were heavily involved in recruiting, interviewing, and hiring the defendant physicians and numerous other MUSC employees. These HCA personnel were often based in Nashville with the same address as HCA Healthcare, Inc., and they had an "@hcahealthcare.com" email address.<sup>13</sup> This indicates that HCA routinely involves itself in the recruiting and hiring of medical personnel for its South Carolina facilities.

5. One of these HCA recruiters is Taylor Tallon, the "Talent Acquisition Recruiter, HCA Healthcare, South Atlantic Division." Her office is in South Carolina at "HCA Healthcare, 115 Central Island Street, Suite 400, Charleston, SC 29492-7319."<sup>14</sup>

The foregoing evidence is sufficient at this pre-trial stage of this action to establish a *prima facie* case of general personal jurisdiction over defendant HCA.

### **III. This Court has specific personal jurisdiction over HCA.**

As admitted by HCA, and assuming this Court cannot exercise general personal jurisdiction over HCA as argued above, the long-arm statute permits this Court to exercise personal jurisdiction over HCA in connection with the commission of a tortious act in whole or in part in South Carolina.

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<sup>10</sup> These five facilities are identified in the results of a search for South Carolina locations on HCA's website.

<sup>11</sup> Exh. C.

<sup>12</sup> Exh. D.

<sup>13</sup> See previously submitted Affidavit of Patrick J. Crawley at pages 8-10, ¶ 38(a, c, e, g, h, r, s, t, u, v) and Master Exhibits cited therein.

<sup>14</sup> Master Exh. 34.

(HCA Memo. at 5-6). As also admitted by HCA, jurisdiction is proper for conduct causing tortious injury in South Carolina by acts outside the state through a persistent course of conduct in this state. *Id.* The following allegations of the complaint and Plaintiff's evidentiary submissions to this Court, which must be accepted as true and viewed in the light most favorable to Plaintiffs, demonstrate compliance with the long-arm statute:

1. HCA unlawfully interfered with the contracts between MUSC and the defendant doctors and with the membership agreements between UMA and the defendant doctors. (Cmplnt. at ¶¶ 100-109). HCA conspired with the individual defendants to cause unlawful injury to Plaintiffs. (Cmplnt. at ¶¶ 110-113). HCA engaged in unlawful conduct, together with the defendant doctors, that violated the South Carolina Unfair Trade Practices Act and the South Carolina Trade Secrets Act. (Cmplnt. at ¶¶ 121-126 and 127-133).
2. The tortious acts by HCA were committed in part within the boundaries of the state. For example, Mario Gonzalez of HCA Physician Services Group met with defendant Day and another MUSC employee in Charleston (see Master Exh. 23), and Tallon Taylor's recruitment efforts were made from her office in South Carolina (see Exh. 34). Numerous emails from HCA personnel outside of South Carolina, that were part of the overall conspiracy and other claims alleged against HCA, were directed to and received by persons in South Carolina. (See, *e.g.* nn. 13-14 and accompanying text, *supra*). In like fashion, HCA personnel outside South Carolina made phone calls to MUSC employees as part of the conspiracy and other claims alleged against HCA. (See, *e.g.*, Master Exhs. 18, 31).

In addition, the complaint alleges that HCA conspired with the other defendants, all of whom reside in South Carolina, to injure Plaintiffs and that the conspiracy resulted in injury. This satisfies the requirements of the long-arm statute. *Hammond v. Butler, Means, Evins & Brown*, 388 S.E.2d 796, 798 (S.C. 1990). Moreover, the "reach" of South Carolina's long-arm statute is co-extensive with and extends as far as permitted by the due process concept of minimum contacts and, thus, the long-arm statute is satisfied if the allegations and evidence, taken as true and viewed in the light most favorable to Plaintiffs, satisfies the due process test for exercising jurisdiction over a non-resident. *State of S.C. v. NV Sumatra Tobacco Trading, Co.*, 666 S.E.2d 218, 222 (S.C. 2008). ("Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due

process.”). As shown below, the allegations and evidence in this case, taken as true and viewed in the light most favorable to Plaintiffs, establish *prima facie* compliance with due process.

In *Hammond, supra*, the plaintiff alleged that the defendant (Kramer) conspired with three other defendants to cause harm to the plaintiff. Although defendant Kramer was not located in South Carolina and had never been to South Carolina, he participated in the underlying transaction with out-of-state conduct that lasted for months, including out-of-state meetings with the other defendants. The Supreme Court held that South Carolina had jurisdiction over Kramer under the following analysis of the due process requirements:

The record in this case shows that the transaction in which Kramer participated involving South Carolina parties lasted for several months. The pleadings allege that Hammond was the object of the tortious conduct which resulted in a financial benefit for Kramer, to Hammond's detriment. Finally, we conclude that conferring jurisdiction upon this state would pose no unusual inconvenience since all parties to the suit except Kramer are South Carolina residents.

Moreover, jurisdiction may not be avoided merely because the defendants did not physically enter South Carolina. The constitutional touchstone remains whether the defendant purposely established minimum contacts in the forum state. This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitious," or "attenuated" contacts.

388 S.E.2d at 799. Here, the pleadings and evidence show *prima facie* a course of conduct by the defendants, including HCA, that lasted for almost a year, that Plaintiffs were the object of tortious conduct that resulted in a financial benefit to HCA and to Plaintiffs' detriment, and all other defendants are residents of or located in South Carolina. Accordingly, as in *Hammond*, exercising personal jurisdiction over HCA in this case comports with the requirements of due process.

The due process analysis consists of two prongs – the power prong and the fairness prong. To satisfy the power prong at this pre-trial stage of the proceedings, Plaintiffs need only make a *prima facie* showing that HCA “directed [its] activities to residents of South Carolina and that the cause of action arises out of or relates to those activities.” *Cribb v. Spatholt*, 676 S.E.2d 714, 719

(S.C. App. 2009). Viewing the allegations of the complaint and the other evidentiary submissions by Plaintiffs in the light most favorable to them, Plaintiffs have demonstrated that HCA directed numerous activities towards Plaintiffs and that those activities give rise to or are related to the claims made against HCA. See, *e.g.*, nn. 13-14 and accompanying text, *supra*.

Under the fairness prong, “the court must consider the following factors: (1) the duration of the defendant's activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties; and (4) the State's interest in exercising jurisdiction.” *Cribb*, 676 S.E.2d at 719. Viewing the allegations of the complaint and the other evidentiary submissions by Plaintiffs in the light most favorable to them, Plaintiffs have satisfied the fairness prong at this pre-trial stage of the proceedings as set forth below:

1. HCA’s activities in this State that relate to the controversy at issue have lasted for almost a year. See, *e.g.*, nn. 13-14 and accompanying text, *supra*. Moreover, HCA’s wrongful activities continue to this date through HCA’s continued possession of and refusal to relinquish Plaintiffs’ confidential and proprietary information.
2. The character and circumstances of HCA’s acts include but are not limited to: (a) unlawfully interfering with contracts between MUSC and the defendant doctors, and the membership agreements between UMA and the defendant doctors; (b) conspiring with and assisting the defendant doctors in their breaches of their duty of loyalty, including the solicitation of other employees to leave MUSC while still employees of MUSC; (c) conspiring with the other defendants to unlawfully obtain, retain, and use MUSC’s confidential and proprietary information; and (d) engaging in conduct, together with the other defendants, that violated the Unfair Trade Practices Act and the Trade Secrets Act.
3. All of HCA’s co-conspirators are in South Carolina -- the defendant doctors are South Carolina residents; Trident is authorized to do business in and physically located in South Carolina. Thus, it is not inconvenient for the parties. *Hammond*, 388 S.E.2d at 799. Moreover, the evidence shows that HCA has a physical presence in South Carolina beyond its relationship with Trident – the recruiter for HCA Healthcare, South Atlantic Division has an office in Mt. Pleasant, S.C. (See Master Exh. 34).
4. Finally, South Carolina undeniably has a paramount interest in exercising jurisdiction to remedy the harm done to the South Carolina Plaintiffs, particularly given that MUSC is a state agency charged with promoting the health of South Carolina’s citizens, that HCA’s conduct was in concert with the other defendants, and that all of the other defendants are plainly subject to personal jurisdiction in South Carolina.

In summary, when viewed in the light most favorable to Plaintiffs and accepted as true, the complaint and other evidence in this case, including the evidence presented in support of Plaintiffs' temporary injunction motion, demonstrate that this Court has specific jurisdiction over HCA.<sup>15</sup>

### CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny HCA's motion to dismiss it from this action for lack of personal jurisdiction.

Respectfully submitted,

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Associates of the Medical University of  
South Carolina*

Columbia, South Carolina  
December 14, 2021

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<sup>15</sup> Assuming there is any doubt about the propriety of exercising general or specific personal jurisdiction over HCA at this preliminary stage of the proceedings under the *prima facie* standard, the complaint and evidence sufficiently demonstrate that further inquiry through discovery is warranted before any dismissal of HCA from this action. *Graham Law Firm, P.A. v. Makawi*, 721 S.E.2d 430, 435 (S.C. 2012) (court should permit discovery on a motion to dismiss for lack of personal jurisdiction when needed to meet a defendant's challenge to jurisdiction).

# **EXHIBIT A**

**(Excerpt from 2020 Form 10-K  
filing with SEC by HCA Healthcare, Inc.)**

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**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

**Form 10-K**

(Mark One)

☒ **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the fiscal year ended December 31, 2020

Or

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the transition period from to

Commission File Number 1-11239

**HCA Healthcare, Inc.**

(Exact Name of Registrant as Specified in Its Charter)

Delaware  
(State or Other Jurisdiction of  
Incorporation or Organization)

27-3865930  
(I.R.S. Employer  
Identification No.)

One Park Plaza  
Nashville, Tennessee  
(Address of Principal Executive Offices)

37203  
(Zip Code)

Registrant's telephone number, including area code: (615) 344-9551

Securities Registered Pursuant to Section 12(b) of the Act:

| Title of Each Class            | Trading<br>Symbol(s) | Name of Each Exchange<br>on Which Registered |
|--------------------------------|----------------------|----------------------------------------------|
| Common Stock, \$0.01 Par Value | HCA                  | New York Stock Exchange                      |

Securities Registered Pursuant to Section 12(g) of the Act: None

Indicate by check mark if the Registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☒ No ☐

Indicate by check mark if the Registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether the Registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the Registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the Registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§ 232.405 of this chapter) during the preceding 12 months (or for such shorter period that the Registrant was required to submit such files). Yes ☒ No ☐

Indicate by check mark whether the Registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company" and "emerging growth company" in Rule 12b-2 of the Exchange Act.

|                         |                                     |                           |                          |
|-------------------------|-------------------------------------|---------------------------|--------------------------|
| Large accelerated filer | <input checked="" type="checkbox"/> | Accelerated filer         | <input type="checkbox"/> |
| Non-accelerated filer   | <input type="checkbox"/>            | Smaller reporting company | <input type="checkbox"/> |
|                         |                                     | Emerging growth company   | <input type="checkbox"/> |

If an emerging growth company, indicate by check mark if the Registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

Indicate by check mark whether the Registrant has filed a report on and attestation to its management's assessment of the effectiveness of its internal control over financial reporting under Section 404(b) of the Sarbanes-Oxley Act (15 U.S.C. 7262(b)) by the registered public accounting firm that prepared or issued its audit report. ☒

Indicate by check mark whether the Registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes ☐ No ☒

As of January 31, 2021, there were 339,917,500 outstanding shares of the Registrant's common stock. As of June 30, 2020, the aggregate market value of the common stock held by nonaffiliates was approximately \$25.836 billion. For purposes of the foregoing calculation only, Hercules Holding II and the Registrant's directors and executive officers have been deemed to be affiliates.

**DOCUMENTS INCORPORATED BY REFERENCE**

Portions of the Registrant's definitive proxy materials for its 2021 Annual Meeting of Stockholders are incorporated by reference into Part III hereof.

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HCA Healthcare, Inc. is one of the leading health care services companies in the United States. At December 31, 2020, we operated 185 hospitals, comprised of 178 general, acute care hospitals; five psychiatric hospitals; and two rehabilitation hospitals. In addition, we operated 121 freestanding surgery centers and 21 freestanding endoscopy centers. Our facilities are located in 20 states and England.

The terms "Company," "HCA," "we," "our" or "us," as used herein and unless otherwise stated or indicated by context, refer to HCA Healthcare, Inc. and its affiliates. The term "affiliates" means direct and indirect subsidiaries of HCA Healthcare, Inc. and partnerships and joint ventures in which such subsidiaries are partners. The terms "facilities" or "hospitals" refer to entities owned and operated by affiliates of HCA, and the term "employees" refers to employees of affiliates of HCA.

Our primary objective is to provide a comprehensive array of quality health care services in the most cost-effective manner possible. Our general, acute care hospitals typically provide a full range of services to accommodate such medical specialties as internal medicine, general surgery, cardiology, oncology, neurosurgery, orthopedics and obstetrics, as well as diagnostic and emergency services. Outpatient and ancillary health care services are provided by our general, acute care hospitals, freestanding surgery centers, freestanding emergency care facilities, urgent care facilities, walk-in clinics, diagnostic centers and rehabilitation facilities. Our psychiatric hospitals provide a full range of mental health care services through inpatient, partial hospitalization and outpatient settings.

Our common stock is traded on the New York Stock Exchange (symbol "HCA"). Through our predecessors, we commenced operations in 1968. The Company was incorporated in Delaware in October 2010. Our principal executive offices are located at One Park Plaza, Nashville, Tennessee 37203, and our telephone number is (615) 344-9551.

**Available Information**

We file certain reports with the Securities and Exchange Commission (the "SEC"), including annual reports on Form 10-K, quarterly reports on Form 10-Q and current reports on Form 8-K. The SEC maintains an Internet site at <http://www.sec.gov> that contains the reports, proxy and information statements and other information we file. Our website address is [www.hcahealthcare.com](http://www.hcahealthcare.com). Please note that our website address is provided as an inactive textual reference only. We make available free of charge, through our website, our annual report on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K and all amendments to those reports filed or furnished pursuant to Section 13 or 15(d) of the Exchange Act, as soon as reasonably practicable after such material is electronically filed with or furnished to the SEC. The information provided on our website is not part of this report, and is therefore not incorporated by reference unless such information is specifically referenced elsewhere in this report.

Our Code of Conduct is available free of charge upon request to our Corporate Secretary, HCA Healthcare, Inc., One Park Plaza, Nashville, Tennessee 37203, and is also available on the Ethics and Compliance and Corporate Governance portion of our website at [www.hcahealthcare.com](http://www.hcahealthcare.com).

# **EXHIBIT B**

**(Excerpt from website of  
HCA Healthcare, Inc. ([hcahealthcare.com](http://hcahealthcare.com)))**



Search



Alerts

Who We Are Patients Physicians Nurses Investors Careers

## Our History

Who We Are Our History

### The way healthcare was intended\*



HCA Healthcare founders Dr. Thomas Frist Sr., Dr. Thomas Frist Jr. and Jack Massey envisioned a healthcare company with the scale, resources and clinical expertise to provide care focused on the patient.

In 1968, they formed Hospital Corporation of America (HCA). At that time, HCA Healthcare was one of the first hospital companies in the United States. Many communities were quickly growing and needed more access to healthcare.

**"Bricks and mortar do not make a hospital. People do."**

Dr. Thomas Frist, Sr.  
HCA Healthcare Co-Founder

HCA Healthcare worked with local physicians and used new business practices and its access to capital to bring healthcare to growing areas throughout the country.

The company expanded. HCA Healthcare built new hospitals in under-served communities, bought and upgraded existing facilities, and collaborated to manage hospitals for other owners.

HCA Healthcare built a core group of leading hospitals by using its medical background, financial resources and management expertise. This approach continues more than 50 years later.

**"The great hospitals will always put the patient and the patient's family first, and the really great institutions will provide care with warmth, compassion, and dignity for the individual."**

Dr. Thomas Frist, Sr.  
HCA Healthcare Co-Founder

Today, HCA Healthcare is one of the nation's leading providers of healthcare services.

- Located in 21 states and the United Kingdom
- Made up of locally managed facilities that include more than 180 hospitals and 2,000+ sites of care
- Uses data from approximately 35 million patient encounters each year to advance science and improve care everywhere
- Shares knowledge and insights with the larger healthcare community

#### WHO WE ARE

- Our History
- Our Mission and Values
- Diversity, Equity and Inclusion
- How We Build Better Communities
- Doing Business with HCA Healthcare
- Executive Leadership
- Our Technology
- Ethics & Compliance
- Quality Care
- HCA Healthcare Data and the Affordable Care Act
- Press Kit
- Contact Us
- 2021 Sustainability Report
- HCA Healthcare Impact Report



HCA Healthcare founders Dr. Thomas Frist Sr., Dr. Thomas Frist Jr. and Jack Massey envisioned a healthcare company with the scale, resources and clinical expertise to provide care focused on the patient.

In 1968, they formed Hospital Corporation of America (HCA). At that time, HCA Healthcare was one of the first hospital companies in the United States. Many communities were quickly growing and needed more access to healthcare.

### “Bricks and mortar do not make a hospital. People do.”

Dr. Thomas Frist, Sr.  
HCA Healthcare Co-Founder

HCA Healthcare worked with local physicians and used new business practices and its access to capital to bring healthcare to growing areas throughout the country.

The company expanded. HCA Healthcare built new hospitals in under-served communities, bought and upgraded existing facilities, and collaborated to manage hospitals for other owners.

HCA Healthcare built a core group of leading hospitals by using its medical background, financial resources and management expertise. This approach continues more than 50 years later.

### “The great hospitals will always put the patient and the patient’s family first, and the really great institutions will provide care with warmth, compassion, and dignity for the individual.”

Dr. Thomas Frist, Sr.  
HCA Healthcare Co-Founder

Today, HCA Healthcare is one of the nation’s leading providers of hospital services.

- Located in 21 states and the United Kingdom
- Made up of locally managed facilities that include more than 180 hospitals and 2,000+ sites of care
- Uses data from approximately 35 million patient encounters each year to advance science and improve care everywhere
- Shares knowledge and insights with the larger healthcare community
- Published several medical studies in peer-reviewed journals by conducting large-scale clinical research with partners including Harvard Pilgrim Health Care Institute and the Centers for Disease Control and Prevention (CDC)



HCA Healthcare  
One Park Plaza  
Nashville, TN 37203  
Telephone: (615) 344-9551

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The terms “HCA” or the “Company” as used in this website refer to HCA Healthcare, Inc. and its affiliates, unless otherwise stated or indicated by context. The term “facilities” refers to entities owned or operated by subsidiaries or affiliates of HCA Healthcare, Inc. References herein to “HCA employees” or to “our employees” refer to employees of affiliates of HCA Healthcare, Inc.

# **EXHIBIT C**

**(Excerpt from website of Trident Medical  
Center, LLC ([tridenthealthsystem.com](http://tridenthealthsystem.com)))**



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Average ER Wait Time

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Trident Health is a 445-bed HCA Healthcare hospital system comprised of two acute care hospitals — Trident Medical Center and Summerville Medical Center — and three freestanding emergency departments — Brighton Park Emergency, Moncks Corner Medical Center and Centre Pointe Emergency. Everyday Trident Health's more than 2,600 employees, more than 500 physicians and more than 130 volunteers are dedicated to fulfilling the health system's mission — Above all else, we are committed to the care and improvement of human life. Our hope is that as you review our website you have confidence in the people who provide care to nearly 375,000 South Carolina Lowcountry residents each year. If you are new to our area, Welcome! If you need to find a physician we can help. Go to [our physicians page](#) to find a doctor and make an appointment.

### Locations



#### Trident Medical Center

9330 Medical Plaza Dr  
Charleston, SC 29406  
Phone: (843) 797-7000



#### Summerville Medical Center

295 Midland Pkwy  
Summerville, SC 29485  
Phone: (843) 832-5900



#### Moncks Corner Medical Center

401 North Live Oak Dr. Hwy 17A  
Moncks Corner, SC 29461  
Phone: (843) 791-8721



#### Brighton Park Emergency

1626 N. Main Street  
Summerville, SC 29483  
Phone: (843) 486-5561



#### Centre Pointe Emergency

5249 Emmett I. Davis Jr. Ave  
North Charleston, SC 29418  
Phone: (843) 746-2400



TRIDENT

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## Locations



**Trident Medical Center**  
 9330 Medical Plaza Dr  
 Charleston, SC 29406  
 Phone: (843) 797-7000



**Summerville Medical Center**  
 295 Midland Pkwy  
 Summerville, SC 29485  
 Phone: (843) 832-5000



**Moncks Corner Medical Center**  
 401 North Live Oak Dr, Hwy 17A  
 Moncks Corner, SC 29461  
 Phone: (843) 761-8721



**Brighton Park Emergency**  
 1626 N. Main Street  
 Summerville, SC 29483  
 Phone: (843) 434-5561



**Centre Pointe Emergency**  
 5249 Emmett I. Davis Jr. Ave  
 North Charleston, SC 29418  
 Phone: (843) 746-2450



Trident Medical Center  
 9330 Medical Plaza Dr.  
 Charleston, SC 29406  
 Telephone: (843) 797-7000

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# **EXHIBIT D**

**(Excerpt from website of Colleton Medical  
Center (colletonmedical.com))**



Average ER Wait Time

Colleton Medi... **13 mins** as of 2:14pm EST today

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Located in the heart of Walterboro, Colleton Medical has a longstanding history as a leader in the community with a commitment to patient-centered care. CMC is an HCA facility, with 135 beds, offering both inpatient and outpatient medical services, as well as 24/7 Emergency Care for adults and children.



Expert physicians and staff combined with outstanding medical treatment leads to quality outcomes for our patients. But it's the compassionate and caring touch of our Colleton Medical Center family that makes the extra difference to our patients and their families.

I am proud to share with you that, as a result of our skilled and dedicated staff, physicians and volunteers, Colleton Medical Center has been named a Top Performer on Key Quality Measures by The Joint Commission for five consecutive years. CMC ranks in the top 15 percent of U.S. hospitals for quality care. Committed to quality services and compassionate care, CMC continues to expand and advance to meet the needs of a growing community.

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**Jimmy Hlott**  
 CEO, Colleton Medical Center

**Colleton**  
 Medical Center

Colleton Medical Center  
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 Walterboro, SC 29488  
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STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

MEDICAL UNIVERSITY OF SOUTH  
CAROLINA AND UNIVERSITY MEDICAL  
ASSOCIATES OF THE MEDICAL  
UNIVERSITY OF SOUTH CAROLINA,

Case No. 2021-CP-10-05289

Plaintiffs,

**PLAINTIFFS' MOTION TO ALTER OR  
AMEND THE ORDER DENYING  
PLAINTIFFS' MOTION FOR  
TEMPORARY INJUNCTION**

vs.

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.

Pursuant to Rules 52 and 59(e) of the South Carolina Rules of Civil Procedure, the Medical University of South Carolina ("MUSC") and University Medical Associates of the Medical University of South Carolina ("UMA") (collectively "Plaintiffs") move to alter or amend the circuit court's order denying Plaintiffs' motion for temporary injunction.

**Introduction**

Plaintiffs moved for injunctive relief to enjoin the unlawful actions taken by Terry Day, Betsy Davis, Joshua Hornig, Eric Lentsch, David Neskey, and Anand Sharma (collectively "Individual Defendants") in concert with the Individual Defendants' new employer, Trident Medical Center, LLC and HCA Healthcare, Inc. (collectively "Hospital Defendants").

While employed by MUSC and while members of UMA, the Individual Defendants misappropriated valuable confidential and proprietary information belonging to Plaintiffs. The Individual Defendants misappropriated this information and disseminated it to the Hospital

Defendants. The confidential and proprietary information which the Individual Defendants misappropriated from the Plaintiffs consist of the following:

1. Physician preference cards,
2. Instrument lists,
3. Financial information showing the amount of revenue generated by four of the Individual Defendants during their employment with MUSC,
4. Financial information showing the salaries four of the Individual Defendants received while employed by MUSC,
5. Case logs for Defendant Day, and salaries for MUSC's residents and signed contracts for incoming fellows in the HNO Fellowship Program.

In this Memorandum, the property identified above shall be referred to as "Plaintiffs' Property." Prior to the hearing on Plaintiffs' motion for temporary injunction, the Individual Defendants agreed to settle with the Plaintiffs. The terms of the settlement required the Individual Defendants to pay the sum of \$1.7 Million to the Plaintiffs and required the Individual Defendants to agree to the injunctive relief sought by the Plaintiffs.<sup>1</sup> In the settlement agreements, the Plaintiffs agreed to destroy the Plaintiffs' Property in their possession and to refrain from using the Plaintiffs' Property in the future. *See* Settlement Agreement, ¶ 2. Further, the Individual Defendants agreed to refrain from soliciting fellows in MUSC's fellowship program and to refrain from communicating with the fellowship program's accreditation body about MUSC's fellowship program. *See* Settlement Agreement, ¶ 3(a)-(b). Lastly, the Individual Defendants agreed to

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<sup>1</sup> The settlement agreements between the Plaintiffs and Individual Defendants were submitted to the circuit court during the hearing on Plaintiffs' motion for temporary hearing. For ease of reference, the Plaintiffs are re-submitting these agreements to the circuit court as Exhibit 1 to this motion.

refrain from soliciting any current MUSC employee or member of UMA to terminate their employment with MUSC or their membership with UMA. *See* Settlement Agreement, ¶ 3(c).

The Hospital Defendants have not entered into any similar agreement with Plaintiffs. Instead, the Hospital Defendants remain in possession of Plaintiffs' Property and have refused to return it. The only plausible reason the Hospital Defendants could have for refusing to return Plaintiffs' Property is that they intend to use it for their own economic gain in unlawful competition with MUSC. Further, the Hospital Defendants presumably intend to continue using this information to solicit and interfere with MUSC's fellowship program and in soliciting MUSC's employees and UMA's members.

The circuit court heard arguments on Plaintiffs' motion for temporary injunction on December 9, 2021. In support of their motion, Plaintiffs submitted four affidavits and thirty-four exhibits. On December 15, 2021, the circuit court issued a Form 4 Order, denying Plaintiffs' motion for temporary injunction.<sup>2</sup> Plaintiffs then filed this motion.

### **Analysis**

#### **I. The circuit court did not rule on whether Plaintiffs satisfied the second element necessary to obtain an injunction—likelihood of success on the merits of the litigation.**

The circuit court's Form 4 order was silent as to whether Plaintiffs demonstrated a likelihood of success on the merits of the litigation. *See Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004) (identifying the three elements the plaintiff must satisfy in seeking an injunction). Presumably, the circuit court was silent on whether Plaintiffs satisfied the likelihood of success on the merits element because the circuit court found Plaintiffs satisfied this element. However, in order to ensure this issue is preserved,

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<sup>2</sup> The Parties received notice of the circuit court's decision on December 15, 2021 as well.

Plaintiffs would respectfully request that the circuit court alter or amend its order to rule on whether Plaintiffs satisfied this element. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (An issue must be raised to and ruled upon by the trial court to be preserved for appellate review); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (observing that a Rule 59(e) motion may be filed when “the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue”). Respectfully, Plaintiffs move for the circuit court to alter or amend its order to rule on whether Plaintiffs satisfied the likelihood of success on the merits element. Plaintiffs reassert the previous arguments made during the hearing and in its memorandum of law in support of this argument.

**II. The circuit court did not rule on whether granting the injunction would preserve the status quo.**

The circuit court’s order was silent as to whether granting the injunction would preserve the status quo. As the court is well aware, the purpose of issuing an injunction is to preserve the status quo. *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010). Here, it is quite clear that the status quo would be preserved by granting the injunction.

Prior to the Individual Defendants misappropriating Plaintiffs’ Property and disseminating it to the Hospital Defendants, the status quo was in accordance with the injunctive relief sought by Plaintiffs. *First*, Plaintiffs retained sole possession of Plaintiffs’ Property, and the Hospital Defendants did not have this information. Therefore, if the circuit court were to grant the injunction, it would preserve the status quo by requiring the Defendants to return Plaintiffs’ Property and keeping them from using it. *Second*, prior to the Individual Defendants and Hospital Defendants working together to interfere with and sabotage MUSC’s fully-accredited head and neck fellowship program (which occurred while the Individual Defendants were employees of

MUSC and members of UMA), the status quo was that MUSC had a fully accredited fellowship program, no fellows had been released of their commitments to MUSC, and MUSC had the ability to participate in the match cycle for the academic year 2023-2024. Again, the granting of the injunction would preserve the status quo as it would prevent the Hospital Defendants from interfering with MUSC's fellowship program and would prevent them from contacting the fellowship program's accreditation body. *Third*, prior to the Individual Defendants and Hospital Defendants working together to solicit MUSC's employees (which again occurred while the Individual Defendants were employees of MUSC and members of UMA), the status quo was that MUSC possessed one of the largest programs in the country devoted to the care of the head and neck cancer patient. The granting of the injunction would preserve the status quo as it would preserve MUSC's head and neck cancer team.

The facts clearly demonstrate that the court would preserve the status quo if it granted the injunctive relief. Plaintiffs would respectfully request that the circuit court alter or amend the order to rule on this issue.

**III. The circuit court should alter or amend its order and find that Plaintiffs have demonstrated that they would suffer irreparable harm if the injunction were not entered.**

Whether a wrong is irreparable in the sense that equity may intervene is not a question decided by narrow and artificial rules. *Peek v. Spartanburg Reg. Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 36 (Ct. App. 2005). "Irreparable injury as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages." *Bethel M.E. Church v. City of Greenville*, 211 S.C. 442, 451, 45 S.E.2d 841, 845 (1947).

**A. Plaintiffs will suffer irreparable harm if an injunction is not entered requiring the Hospital Defendants to return Plaintiffs' Property and to refrain from using it in the future.**

The first type of injunctive relief Plaintiffs seek pertains to Plaintiffs' Property. Plaintiffs seek an injunction requiring the Hospital Defendants to return Plaintiffs' Property and preventing the Hospital Defendants from using it in the future. There are a litany of cases where South Carolina courts have found irreparable harm where a competitor is in possession of specific property belonging to another. *See Boone Ins. Agency, Inc. v. Lloyd*, No. 3:20-CV-02980-JMC, 2020 WL 5052956 (D.S.C. Aug. 27, 2020); *Indus. Packaging Supplies, Inc. v. Martin*, No. CA 6:12-713-HMH, 2012 WL 1067650 (D.S.C. Mar. 29, 2012); *Rockford Mfg., Ltd. v. Bennet*, 296 F.Supp.2d 681 (D.S.C. 2003); *Milliken & Co. v. Morin*, 399 S.C. 23, 37, 731 S.E.2d 288, 295 (2012); *Lewallen Automation, LLC v. Lewallen*, 2014 WL 7925812 (S.C. Comm. Pl. 2014). Respectfully, Plaintiffs are not aware of any case in South Carolina where a court has refused to enter an injunction under facts such as these—where a competitor acknowledges possession of property belonging to another and seeks to use that information to compete.

Courts view this particular circumstance—where a competitor has possession of information that belongs to another—as irreparable harm because of the unique damage caused by the possession and use of such information. *See Milliken*, 399 S.C. at 37, 731 S.E.2d at 295 (“[A]n employer may restrain a former employee from disclosing and using confidential information which was developed as a result of the employer’s initiative and investment and which the employee learned as a result of the employee relationship.”). Here, the Hospital Defendants have no right to Plaintiffs' Property.<sup>3</sup> By virtue of possessing and using Plaintiffs' Property, the Hospital Defendants are gaining an unfair competitive advantage on MUSC and others who play

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<sup>3</sup> The Hospital Defendants have not presented any evidence to demonstrate that Plaintiffs' Property belongs to anyone other than Plaintiffs. The lone affidavit the Hospital Defendants submitted on this issue was the affidavit of Dr. Peter Horwich. Even if the court found Dr. Horwich's affidavit credible, his affidavit does nothing to establish that Plaintiffs' Property belongs to anyone other than Plaintiffs.

by the rules. The evidence shows it would have taken the Hospital Defendants eight to ten years to independently cultivate the type of head and neck cancer practice that MUSC has developed. *Affidavit of Timothy Brendle* ¶ 7. By possessing and using Plaintiffs' Property, the Hospital Defendants have been allowed to jump-the-line. The Hospital Defendants have not devoted the type of resources, time, energy, and effort MUSC and others have devoted to develop a head and neck cancer division. Instead, the Hospital Defendants have been allowed to steal it. This is bad public policy, and it is harm that cannot be repaired by monetary damages.

Even if Plaintiffs prevail at trial and are awarded damages, the fact remains that the Hospital Defendants have been allowed to jump-the-line. They have received the unfair competitive advantage of having unlawful access to Plaintiffs' Property. If courts refuse to enter injunctions under this particular set of facts, it could encourage competitors to receive misappropriated information, knowing that it may be more economically desirable to receive such information and pay damages later. Such a policy might prompt the competitor to accept misappropriated property, if it saves them time and money on research and development.

Also, when this court balances the equities, which is part of the irreparable harm and inadequate remedy at law analysis, the equities demonstrate an injunction should be issued to protect Plaintiffs' Property. *Poynter Invs.*, 387 S.C. at 587, 694 S.E.2d at 17 (observing that the balancing of the equities is part of the irreparable harm and inadequate remedy at law analysis). This analysis involves looking at the equities of each party and determining which side, if any, is more entitled to equitable relief. *Peek*, 367 S.C. at 455, 626 S.E.2d at 36-37. The Plaintiffs are more entitled to equitable relief than the Hospital Defendants as it relates to Plaintiffs' Property. Plaintiffs' Property belongs to Plaintiffs, not the Hospital Defendants. Equity dictates that an injunction should be issued to preserve and protect Plaintiffs' Property and to keep the Hospital

Defendants from continued possession of Plaintiffs' Property and further use of it. The Hospital Defendants would suffer no harm (in either law or equity) if the injunction were entered as it relates to Plaintiffs' Property.

**B. Plaintiffs will suffer irreparable harm if an injunction is not entered protecting MUSC's fellowship program.**

Plaintiffs seek an injunction to preserve its fellowship program and prevent the Hospital Defendants from further interference with that program. The Hospital Defendants have set their sights on misappropriating MUSC's head and neck cancer team. The fellowship program is a vital part of the head and neck cancer team. If MUSC were to lose its accredited fellowship program, monetary damages could not replace it. It took MUSC approximately seven years to establish an accredited fellowship program. Through the accredited fellowship program, MUSC has been able to attain funding for research opportunities, and MUSC has been able to attract high-quality faculty members. The fellowship program has allowed MUSC to provide not only excellent patient care, but also to train the next generation of head and neck cancer clinicians. If MUSC lost its fellowship program, it would be analogous to the loss of a business. There is no certainty that MUSC could rebuild its fellowship program. Court have issued injunctions to prevent the loss of a business and to protect business goodwill, *Id.* at 455 n.2, 626 S.E.2d at 37 n.2, and in this instance, this court should issue an injunction to protect MUSC's fellowship program from further interference by the Hospital Defendants.

In addition, if an injunction is not entered to restrain the Hospital Defendants' from unlawfully interfering with MUSC's fellowship program, the Hospital Defendants would be allowed to jump-the-line. Again, it has taken MUSC extensive amount of time, energy, effort, and resources to build its fellowship program. Similarly, it has taken other healthcare systems similar amounts of time, energy, effort, and resources to build similar programs. If an injunction is not

entered to prevent the Hospital Defendants' further interference with MUSC's fellowship program, it would have the effect of allowing the Hospital Defendants to jump-the-line and simply steal the fellowship program that MUSC has created. Even if MUSC received all of the monetary damages it asked for at trial, there would still be irreparable harm if an injunction is not entered. The irreparable harm would consist of the unfair advantage the Hospital Defendants have obtained in using inside employees (the Individual Defendants) and using Plaintiffs' Property to interfere with MUSC's fellowship program.

Lastly, when the equities are balanced, the Hospital Defendants have no right to interfere with MUSC's fellowship program through the use of inside employees and with Plaintiffs' Property. Equity dictates that an injunction should be entered to protect MUSC's fellowship program because MUSC has built its fellowship program through lawful means and by investing time, energy, and effort to the construction of this program. By contrast, the Hospital Defendants seek to destroy MUSC's fellowship program and construct its own fellowship program by unlawful means. Therefore, on balance, the equities favor granting the injunction.

**C. Plaintiffs will suffer irreparable harm if the Hospital Defendants are not enjoined from soliciting members of MUSC's head and neck cancer team.**

The Hospital Defendants have been soliciting MUSC's head and neck cancer team in two unlawful ways. First, the solicitation has relied on inside employees—the Individual Defendants—actively soliciting members of the head and neck cancer team to resign from their employment with MUSC and accept employment with the Hospital Defendants. Second, the solicitation has occurred while the Hospital Defendants are in possession of Plaintiffs' Property. If this unlawful solicitation continues, MUSC could experience further losses to its head and neck cancer team. If MUSC were to lose its head and neck cancer team, it would be the equivalent of a loss of a business, *Id.* at 455 n.2, 626 S.E.2d at 37 n.2, and this court should issue an injunction

to protect MUSC's head and neck cancer team. Also, this type of loss would be extremely difficult to quantify and therefore would be irreparable. MUSC built the head and neck cancer team over the course of two decades. MUSC receives a great benefit from its prestigious and highly regarded head and neck cancer team. It is integral in the success and good reputation MUSC enjoys, and if the head and neck cancer team were lost, the damage caused would be difficult (if not impossible) to ascertain.

Even if the Plaintiffs could somehow obtain complete monetary relief from the Hospital Defendants for the loss of its head and neck cancer team, the irreparable harm comes in the form of the benefit received by the Hospital Defendants in being allowing to jump-the-line and unfairly compete against MUSC as it relates to its head and neck cancer team. The Hospital Defendants should have to play by the rules and build their head and neck cancer team in the same lawful ways as MUSC and others have. If the Hospital Defendants are not required to play by the rules, MUSC will suffer irreparable harm.

Lastly, when the equities are balanced, the Hospital Defendants have no right to interfere with MUSC's head and neck cancer through the use of inside employees and with Plaintiffs' Property. Equity dictates that an injunction should be entered to protect MUSC's head and neck cancer team because MUSC has built this team through lawful means and by investing time, energy, and effort. By contrast, the Hospital Defendants seek to destroy MUSC's head and neck cancer team and construct its own competing team by unlawful means. Therefore, on balance, the equities favor granting the injunction.

**IV. The circuit court should alter or amend its order and find that Plaintiffs have demonstrated that they do not have an adequate remedy at law if an injunction is not entered.**

The inquiries of whether a party suffers irreparable harm and whether it maintains an adequate remedy at law call for 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 ....”). As set forth above, monetary damages alone will not provide adequate relief to the Plaintiffs in this case. *See MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 370, 588 S.E.2d 635, 639 (Ct. App. 2003) (An injunction is available when monetary damages will fail to make the party whole.). Even with monetary relief, if an injunction is not entered, the Hospital Defendants would be allowed to engage in unlawful competition and to jump-the-line of those playing by the rules and engaging in legal competition. The result would be to allow the Hospital Defendants to compete against MUSC’s head and neck cancer division in the Charleston area without requiring the Hospital Defendants to devote the same resources that MUSC (and the people of the State) had to devote to develop its head and neck cancer division. It would allow the Hospital Defendants to fast-track their competitive efforts and to compete against MUSC’s head and neck cancer team without committing the resources necessary to do so. Equity should not allow that to happen. Monetary damages would not (and could not) make Plaintiffs whole for the damage they would suffer if an injunction is not entered to put an immediate halt to the Hospital Defendants’ unlawful conduct.

**V. The circuit court’s order does not comply with Rule 52(a) of the South Carolina Rules of Civil Procedure.**

Rule 52(a) requires the circuit court, in granting or refusing an injunction, to set forth findings of fact and conclusions of law in support of its decision. Rule 52(a), SCRCPP. While circuit courts are not required to set forth findings on all the myriad factual questions arising in a particular case, circuit courts must make factual findings that allow the appellate court to ensure the law is faithfully executed. *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 133, 568

S.E.2d 338, 343 (2002). The absence of factual findings makes the appellate task of reviewing a circuit court order impossible because the reasons underlying the decision are left to speculation. *Id.*

Here, the circuit court issued a Form 4 Order denying Plaintiffs' motion for temporary injunction. The Form 4 Order sets forth no factual findings in support of the decision to deny Plaintiffs' motion for temporary injunction. Because there are no factual findings to support the circuit court's order, the order does not comply with Rule 52(a). *See* Rule 52(a), SCRCPP (requiring the circuit court to set forth findings of fact and conclusions of law in granting or denying a motion for injunctive relief). Respectfully, Plaintiffs move for the circuit court to alter or amend its order to comply with Rule 52(a) as contemplated by Rule 52(b). *See* Rule 52(b), SCRCPP (allowing the circuit court to amend its findings or make additional findings upon a timely Rule 52 motion). In doing so, Plaintiffs move for the court to reassess its previous conclusion. As set forth below, the factual evidence before the court demonstrates that the Plaintiffs have made the required showing for injunctive relief, and Plaintiffs move for the circuit court to issue an injunction to this effect.

### CONCLUSION

Plaintiffs respectfully move and request this Court to enter the following injunction:

1. Prohibit the Hospital Defendants from using Plaintiffs' confidential and proprietary information,
2. Require the Hospital Defendants to return Plaintiffs' confidential and proprietary information,
3. Prohibit the Hospital Defendants from billing or collecting money for services performed utilizing any of Plaintiffs' confidential and proprietary information,
4. Prohibit the Hospital Defendants from interfering with MUSC's fellowship program in any way or recruiting any MUSC fellow, and
5. Prohibit the Hospital Defendants from contacting any fellowship accreditation bodies regarding MUSC's fellowship program; and

6. Prohibit the Hospital Defendants from soliciting any of MUSC's employees supporting the HNO Division.

In addition to the foregoing, the Plaintiffs pray for such other and further relief as this Court may deem just and proper under the circumstances.

Respectfully submitted,

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MEDICAL UNIVERSITY OF  
SOUTH CAROLINA*

Columbia, South Carolina  
December 28, 2021

# **EXHIBIT 1**

**(Part 1)**

## ***Settlement Agreements***

### **SETTLEMENT AGREEMENT & RELEASE**

This “**Agreement**” is made by and between the Medical University of South Carolina (“**MUSC**”), the University Medical Associates of the Medical University of South Carolina (“**UMA**”) and David M. Neskey, M.D. (“**Physician**”) effective December 1, 2021 (“**Effective Date**”). MUSC, UMA, and Physician are collectively referred to as the “**Parties**” in this Agreement, or they may be individually referred to as a “**Party**” in this Agreement. As consideration for the mutual promises and covenants expressed hereinbelow, the Parties agree as follows:

1. **Payment.** For the consideration stated herein, Physician agrees to issue payments totaling \$330,867.00 as directed by MUSC and UMA in written payment instructions provided by MUSC and UMA at the time of their execution and delivery of this Agreement: \$97,313.82 by or before January 6, 2022; and twenty-four equal, consecutive monthly payments of \$9,731.38 which shall begin to be due and payable on February 6, 2022, and shall continue to be due and payable on the sixth day of the following twenty-three months. If the sixth day of a month falls on a weekend or a bank holiday, then the due date shall not occur until the next business day. If Physician fails to make timely payment of any of the payment obligations in this Paragraph 1 and MUSC/UMA brings an action for collection, the Parties agree that MUSC/UMA can recover reasonable attorney’s fees and costs associated with such action.

2. **Destruction of Information and Return of Personal Property.** Physician hereby warrants that he has destroyed, or shall destroy by December 8, 2021, the following specific documents or records (including photocopies) to the extent that any are in Physician’s possession, custody or control: physician preference cards, case logs, or instrument lists created during his employment with MUSC & membership with UMA; documents reflecting MUSC & UMA’s

revenues from work performed by Physician; and documents or copies reflecting the salary information or contracts of other employees or recruits of MUSC & members of UMA. Likewise, Physician hereby warrants that beginning on the Effective Date, he will refrain from using any of the documents or records specifically referenced in this Section 2. Physician acknowledges that MUSC & UMA contend that the documents or records specifically referenced in this Section 2 are confidential and/or proprietary.

3. **Restrictive Covenants.** Physician makes the following covenants subject to the agreement that these do not restrict him from making any statement, testimony, or affidavit in connection with the initiation, commencement, defense, or participation as a witness in a civil action, judicial, administrative, or other formal proceeding.

a. **Fellows.** Beginning on the Effective Date and continuing for a period of twenty-four (24) months (the “**Restriction Period**”), Physician covenants that he shall not take any action to solicit Drs. Amin, Aylward, Thal and Hanba to leave or not participate in MUSC’s head and neck fellowship program (“**HNO Fellowship Program**”). Rather, as material consideration for this Agreement and in exchange for the release provided herein, Physician has executed and delivered to MUSC & UMA a letter of encouragement to Drs. Amin, Aylward, Thal and Hanba provided herewith for MUSC & UMA to deliver to the fellows.

b. **ATC.** During the Restriction Period, Physician covenants that he will also refrain from having any communication with the Advanced Training Council of the American Head & Neck Society (“**ATC**”) regarding the condition or status of the HNO Fellowship Program after December 1, 2021. If a member of the ATC asks Physician any question about the condition of the HNO Fellowship Program after December 1, 2021, Physician will respond by stating that he is contractually prohibited from discussing the HNO Fellowship Program. This paragraph shall

not be construed to prevent the Physician from answering or communicating with the ATC about the training of fellows under Physician or that fellow's qualification for membership and letters.

Likewise, during the Restriction Period, MUSC and UMA covenants that it will instruct Patrick J. Cawley, M.D., Ramond N. Dubois, M.D., Robert Labadie, M.D., Jason Newman, M.D., and Paul R. Lambert, M.D. and any faculty in the Head and Neck Oncology Division to refrain from making any disparaging comments or statements to the Advance Training Council of the American Head & Neck Society regarding the Physician.

c. **Other current employees.** During the Restriction Period, Physician covenants that he shall not take any action to knowingly solicit any then-current employee of MUSC or member of UMA to terminate their employment with MUSC or membership with UMA.

4. **Physician Covenants and Warranties Regarding Other Claims.** Physician makes the following covenants subject to the agreement that these do not restrict him from making any statement, testimony, or affidavit in connection with the initiation, commencement, defense, or participation as a witness in a civil action, judicial, administrative, or other formal proceeding.

a. Physician warrants that he has not knowingly engaged, directly or indirectly, in any acts or omissions that he believes to be negligent or unlawful during his employment with MUSC or membership with UMA;

b. Physician covenants that he will reasonably cooperate, at MUSC or UMA's expense, in any investigation that MUSC or UMA undertakes into any third-party allegation or lawsuit arising out of the alleged acts or omissions of Physician during his former employment with MUSC or membership with UMA except that litigation now pending in the court of common pleas of Charleston, South Carolina as civil action number 2021-CP-10-05289 (the "**Civil Action**"); and

c. Physician covenants that he will notify the General Counsel for MUSC in writing within seven calendar days of receiving a subpoena for his testimony, other than the Civil Action, that Physician believes arises out of the alleged acts or omissions of Physician during his former employment with MUSC or membership with UMA.

5. **Release by MUSC & UMA.**

a. **General Release.** In exchange for the promises set forth in this Agreement, MUSC and UMA, on behalf of themselves and their current and former board members, members, employees, officers, directors, attorneys, insurers, successors, and assigns, hereby agree to fully release, remise, forever discharge, and acquit Physician and his heirs, assigns, agents, attorneys, and any trustee, administrator, or beneficiary of Physician's estate ("**Physician Released Parties**") from any and all actions, causes of action, suits, claims sounding in tort or contract, demands, appeals, charges, debts, injuries of any kind, claims for sums of money, claims for attorney's fees and costs, controversies, agreements, damages, judgments, and/or executions of any kind whatsoever, which existed at any time prior to the execution of this Agreement, whether known or unknown, in law, in equity, or otherwise, whether based on common law, state law, federal law, or otherwise, including any and all claims that were or could have been asserted in the Civil Action. In further consideration of the covenants and promises of the Physician set forth herein, MUSC hereby releases Physician from any past, present, and future obligations associated in any way with the non-compete agreement and any other restrictive covenant agreement existing by and between Physician and MUSC and forever discharges Physician from any and all claims that were raised or could have been raised by MUSC in the lawsuit. MUSC agrees that Physician may engage in the practice of medicine in the restricted territory and may accept compensation for such services.

b. **Exception to Release.** Notwithstanding anything herein, the Parties agree that MUSC and UMA do not release, alter, or limit any claims they may have against Trident, LLC, HCA Healthcare, Inc., or any affiliate or related company of Trident, LLC or HCA Healthcare, Inc.

c. **Covenant Not to Sue Physician.** MUSC and UMA covenant that they will take all action necessary to dismiss, without prejudice, Physician from the Civil Action prior to December 9, 2021 and with prejudice from the Civil Action immediately upon the receipt of first payment recounted in paragraph 1 hereof. MUSC and UMA further covenant that they will not initiate, file, or assert any action, lawsuit, claim, or cause of action (whether common law, statutory, regulatory, federal, state, legal, or equitable) against Physician or any Physician Released Parties for any event, transaction, or occurrence preceding the date of this Agreement.

6. **Release By Physician.**

a. **General Release.** In exchange for the promises set forth in this Agreement, Physician, on behalf of himself, and his heirs, assigns, agents, attorneys, and any trustee, administrator, or beneficiary of Physician's estate, hereby agree to fully release, remise, forever discharge, and acquit MUSC & UMA, and their current and former board members, members, employees, officers, directors, attorneys, insurers, successors, and assigns, both individually and in their business capacities and their employee benefit plans and programs and their administrators and fiduciaries, as well as Carolina Primary Care Physicians, LLC, its affiliated entities (including but not limited to MUSC Health Partners), Carolina Family Care, Inc., Medical University Hospital Authority, MUSC Health Alliance, LLC, and all of the foregoing entities' predecessors and subsidiaries, as well as their current and former board members, members, employees, officers, directors, assigns, attorneys, insurers, successors, and assigns, both individually and in

their business capacities and their employee benefit plans and programs and their administrators and fiduciaries (“**University Released Parties**”), from any and all actions, causes of action, suits, claims sounding in tort or contract, demands, appeals, charges, debts, injuries of any kind, claims for sums of money, claims for attorney’s fees and costs, controversies, agreements, damages, judgments, and/or executions of any kind whatsoever, which existed at any time prior to the execution of this Agreement, whether known or unknown, in law, in equity, or otherwise, whether based on common law, state law, federal law, or otherwise, including, without limiting the generality of this General Release, any and all claims or causes of action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq., the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. (“ADEA”), the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. and all amendments thereto, including but not limited to the Amendments to the Americans with Disabilities Act, the Family and Medical Leave Act, 29 U.S.C. § 2601, et seq., the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq., the Equal Pay Act, 29 U.S.C. § 201, et seq., the Lilly Ledbetter Fair Pay Act of 2009, the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10, et seq., the South Carolina Human Affairs Law, S.C. Code Ann. § 1-13-10, et seq., the wrongful termination doctrine of the State of South Carolina, and any other similar federal, state, and local laws. This Release includes all known and unknown claims, and any right to relief resulting from a class action alleging employment related claims filed on behalf of other current or former employees.

b. **Release of Claims under the ADEA.** As this Agreement pertains to the release of claims under the ADEA, Physician, pursuant to and in compliance with the Older Workers Benefit Protection Act: (a) has been advised in writing to consult with an attorney prior to executing this Agreement; (b) has been afforded a period of twenty-one (21) calendar days to consider this

Agreement; and (c) may revoke this Agreement (only with regard to their ADEA waiver and release) during the seven (7) calendar days following its execution. To the extent Physician executes this Agreement prior to the expiration of the twenty-one (21) calendar day period specified above, he acknowledges and agrees that he was afforded the opportunity to have at least twenty-one (21) calendar days to consider it before executing it and that his execution of the Agreement prior to the expiration of said period was his own voluntary act. If Physician chooses to execute this Agreement before the expiration of the twenty-one (21) calendar day review period, Physician must execute and return a Waiver of Consideration Period, which is attached hereto. Physician also agrees that this Agreement is written in a manner that enables him to fully understand its content and meaning. Physician also agrees that he is waiving and releasing claims (including their ADEA claims) in exchange for valuable consideration.

This Agreement, as it pertains to a release of claims under the ADEA, shall become effective and enforceable seven (7) calendar days after its execution. All other provisions of this Agreement or parts thereof shall become effective and enforceable upon execution and on the Effective Date; provided, however, that if Physician revokes this Agreement as provided above, MUSC & UMA may revoke this Agreement in its entirety during the seven (7) calendar day period following receipt of Physician's revocation.

c. **Exception to Release by Physician.** Notwithstanding the foregoing, the Parties agree that Physician retains any right that may exist to insurance coverage or for the immunities and limitations prescribed by the South Carolina Tort Claims Act for any claims that may be asserted against him for any alleged act or omission arising out of or in the course of his employment with MUSC or membership with UMA. Likewise, Physician does not hereby release, alter or limit his entitlement to receive any payment or benefit due to Physician, to the extent

Physician actually has any entitlement to such payment or benefit, or his beneficiaries or assigns under any pension, retirement plan, deferred compensation plan, incentive payments under the Health Alliance ACO for past performance, or other benefit plan, e.g. tax-sheltered annuity plan, or PTO reimbursement, which accrued during Physician's employment with MUSC or membership with UMA.

d. **Covenant Not to Sue.** Physician covenants that he has not and will not initiate, file, or assert any action, motion, proceeding, lawsuit, claim, or cause of action (whether common law, statutory, regulatory, federal, state, legal, or equitable) against MUSC, UMA or any University Released Parties for any event, transaction, or occurrence preceding the date of this Agreement except as specifically provided for in this Agreement.

7. **Non-Interference.** If any one or more of the individual defendants identified in the Civil Action choose to return to work with MUSC or UMA, Physician covenants to refrain from then taking any action that prevents such individual defendant from returning to work with MUSC or UMA.

8. **Arms' Length Settlement.** This Agreement is a compromise of disputed claims and is entered into solely to obtain peace and bring an end to litigation. Nothing in this Agreement shall be construed as an admission of liability by the Physician and Physician specifically denies the allegations in the Civil Action. The Parties have knowing and voluntarily entered into this Agreement with the assistance of independent legal counsel and with the intent of settling the dispute between them in full compliance with all applicable local, state and federal laws including, but not limited to, the Medicare/Medicaid Anti-Fraud and Abuse and Stark Laws. Accordingly, the compensation payable to MUSC & UMA has been negotiated in good faith and in arm's length negotiations and represents the fair market value of the disputed claims covered by this Agreement.

The Parties acknowledge that none of the remuneration granted either Party herein is conditioned on any requirement that either Party or any of their respective physicians or investors make referrals to or be able to make or influence referrals to, or otherwise generate business for the other Party hereto, or any of their respective physicians or investors.

9. **Waiver and Amendment.** This Agreement may only be amended, modified or supplemented by an agreement in writing signed by each Party. The terms, covenants, representations, warranties and conditions hereof may be waived only by written instrument executed by the Party waiving compliance. Waiver by any Party hereto of any breach by another Party to this Agreement or any duties imposed upon them by law shall not be construed as a waiver of rights to any subsequent or continuing breach of this Agreement of such other Party's duties, obligations or agreements herein contained or imposed by law or for any other cause.

10. **Enforcement.** This Agreement shall be construed, interpreted, and applied in accordance with the law of the State of South Carolina. Should any question arise regarding the breach of this Agreement, or should one of the Parties to this Agreement attempt to enforce this Agreement, the exclusive venue for such issues to be resolved shall be in a state or federal court situated in Charleston County, South Carolina and possessing subject matter jurisdiction over the dispute. Should any question arise regarding the breach of this Agreement, or should one of the Parties to this Agreement attempt to enforce this Agreement, the Parties waive any right to a jury trial on any issues/claims in dispute and hereby agree that any and all disputed issues/claims shall be determined by a single judge.

11. **Entire Agreement and Separability.** This Agreement constitutes the entire agreement and understanding between the Parties and supersedes and abrogates all prior and contemporaneous oral and written agreements, instructions, directives, or understandings of any

kind between the Parties to this Agreement, including but not limited to any agreement not to compete. The Parties also understand and agree that in the event any provision of this Agreement is deemed to be invalid or unenforceable by any court or administrative agency of competent jurisdiction, the Agreement shall be deemed to be restricted in scope or otherwise modified to the extent necessary to render the same valid and enforceable.

12. **Execution.** The persons signing below on behalf of MUSC and UMA each individually warrants that he or she possesses all necessary authorization to agree to each of the terms in this Agreement and so bind the entity or agency. This Agreement will be executed in duplicate counterparts that may be transmitted to the other party electronically as an .pdf, .jpeg, or .gif file, each of which may be deemed an original hereof.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed.

**By Physician:**

  
David M. Neskey, M.D.

**Witness to Signature by Physician:**

  
Printed Name: Dr. [illegible] [illegible]

Dated: December 8, 2021

[MUSC and UMA Signatures on Following Page]

Medical University of South Carolina

  
Signature

By: PATRICK T. CAWLEY, MD

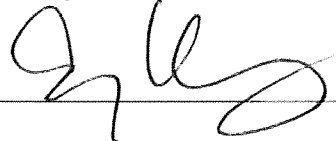
Its: VPOF HEALTH AFFAIRS

Witness to Signature by MUSC

  
Printed Name: ANDREA H. BRISBON

Dated: December 8, 2021

University Medical Associates of the  
Medical University of South Carolina

  
Signature

By: EUGENE HONE, MD

Its: CHIEF PHYSICIAN EXECUTIVE

Witness to Signature by UMA

  
Printed Name: ANDREA H. BRISBON

Dated: December 8, 2021

Dear Drs. Amin, Aylward, Thal, and Hanba:

As you know, I made the difficult decision to leave MUSC and continue my practice elsewhere. MUSC and I have resolved our legal dispute, and we agree that your best interests as current and incoming fellows are our collective priority.

I am advised that MUSC has engaged in extensive efforts to ensure that MUSC's AHNS accreditation is maintained and the ATC quantitative and qualitative accreditation requirements are met through the remainder of this academic year. I trust that MUSC has recruited physicians and physician leaders who will continue MUSC's strong tradition of offering a high quality AHNS accredited fellowship.

I understand that Dr. Leila Mady has joined as a clinical instructor in the MUSC Head and Neck Division, Dr. Robert Labadie is the incoming Chair of Otolaryngology - Head and Neck Surgery, and Dr. Jason Newman is joining MUSC as the Division Director. These are all outstanding physicians and faculty.

MUSC has an exceptional reputation, and through my independent experience and accumulated knowledge prior to joining MUSC, myself and the Head and Neck Division faculty have built an outstanding reputation over the last two decades. I am confident MUSC is committed to maintaining its high quality for both patient care and resident and fellow education and training. As you have trusted in me to assist in your training from 2021-22, I hope to continue to assist your training however possible. While I acknowledge that your decision to continue your training at MUSC or other locations is your decision and at the discretion of the ATC, I encourage you to complete your fellowship at MUSC.

Sincerely,

A handwritten signature in black ink, appearing to read 'DN', with a stylized flourish extending from the end.

David M. Neskey, M.D.

Dated: December 7, 2021

WAIVER OF CONSIDERATION PERIOD

In compliance with the Older Workers Benefit Protection Act and Age Discrimination in Employment Act (ADEA), I, David K. Neskey, M.D. knowingly and voluntarily, with access to and advice of counsel, waive the remainder of the twenty-one (21) day period (the "*Consideration Period*") to further review and consider my release of ADEA claims, which I have now fully considered and reviewed, along with the terms of the Agreement. I affirmatively state that my waiver of the remainder of the Consideration Period is knowing and voluntary, and that my waiver is not induced by MUSC/UMA through fraud, misrepresentation or threat to withdraw or alter the terms of the consideration available to me.

  
David M. Neskey, M.D. 12/08/2021  
Date

  
Witness (Name)  
Date 12/8/21

## **SETTLEMENT AGREEMENT & RELEASE**

This "Agreement" is made by and between the Medical University of South Carolina ("MUSC"), the University Medical Associates of the Medical University of South Carolina ("UMA") and Betsy K. Davis, D.M.D. ("Physician") effective December 1, 2021 ("Effective Date"). MUSC, UMA, and Physician are collectively referred to as the "Parties" in this Agreement, or they may be individually referred to as a "Party" in this Agreement. As consideration for the mutual promises and covenants expressed hereinbelow, the Parties agree as follows:

1. **Payment.** For the consideration stated herein, Physician agrees to issue payments totaling \$201,150.00 as directed by MUSC and UMA in written payment instructions provided by MUSC and UMA at the time of their execution and delivery of this Agreement: \$59,161.76 by or before January 6, 2022; and twenty-four equal, consecutive monthly payments of \$5,916.18, which shall begin to be due and payable on February 6, 2022, and shall continue to be due and payable on the sixth day of the following twenty-three months. If the sixth day of a month falls on a weekend or a bank holiday, then the due date shall not occur until the next business day. If Physician fails to make timely payment of any of the payment obligations in this Paragraph 1 and MUSC/UMA brings an action for collection, the Parties agree that MUSC/UMA can recover reasonable attorney's fees and costs associated with such action.

2. **Destruction of Information and Return of Personal Property.** Physician hereby warrants that she has destroyed, or shall destroy by December 8, 2021, the following specific documents or records (including photocopies) to the extent that any are in Physician's possession, custody or control: physician preference cards, case logs, or instrument lists created during his employment with MUSC & membership with UMA; documents reflecting MUSC & UMA's revenues from work performed by Physician; and documents or copies reflecting the salary

information or contracts of other employees or recruits of MUSC & members of UMA. Likewise, Physician hereby warrants that beginning on the Effective Date, she will refrain from using any of the documents or records specifically referenced in this Section 2. Physician acknowledges that MUSC & UMA contend that the documents or records specifically referenced in this Section 2 are confidential and/or proprietary.

3. **Restrictive Covenants**. Physician makes the following covenants subject to the agreement that these do not restrict her from making any statement, testimony, or affidavit in connection with the initiation, commencement, defense, or participation as a witness in a civil action, judicial, administrative, or other formal proceeding.

a. **Fellows**. Beginning on the Effective Date and continuing for a period of twenty-four (24) months (the "**Restriction Period**"), Physician covenants that he shall not take any action to solicit Drs. Amin, Aylward, Thal and Hanba to leave or not participate in MUSC's head and neck fellowship program ("**HNO Fellowship Program**").

b. **ATC**. During the Restriction Period, Physician covenants that she will also refrain from having any communication with the Advanced Training Council of the American Head & Neck Society ("**ATC**") regarding the condition or status of the HNO Fellowship Program after December 1, 2021. If a member of the ATC asks Physician any question about the condition of the HNO Fellowship Program after December 1, 2021, Physician will respond by stating that she is contractually prohibited from discussing the HNO Fellowship Program. This paragraph shall not be construed to prevent the Physician from answering or communicating with the ATC about the training of fellows under Physician or that fellow's qualification for membership and letters.

Likewise, during the Restriction Period, MUSC and UMA covenants that it will instruct Patrick J. Cawley, M.D., Ramond N. Dubois, M.D., Robert Labadie, M.D., Jason Newman, M.D.,

and Paul R. Lambert, M.D. and any faculty in the Head and Neck Oncology Division to refrain from making any disparaging comments or statements to the Advance Training Council of the American Head & Neck Society regarding the Physician.

c. **Other current employees.** During the Restriction Period, Physician covenants that she shall not take any action to knowingly solicit any then-current employee of MUSC or UMA to terminate their employment with MUSC or membership with UMA.

4. **Physician Covenants and Warranties Regarding Other Claims.** Physician makes the following covenants subject to the agreement that these do not restrict her from making any statement, testimony, or affidavit in connection with the initiation, commencement, defense, or participation as a witness in a civil action, judicial, administrative, or other formal proceeding.

a. Physician warrants that she has not knowingly engaged, directly or indirectly, in any acts or omissions that she believes to be negligent or unlawful during her employment with MUSC or membership with UMA;

b. Physician covenants that she will reasonably cooperate, at MUSC or UMA's expense, in any investigation that MUSC or UMA undertakes into any third-party allegation or lawsuit arising out of the alleged acts or omissions of Physician during her former employment with MUSC or membership with UMA except that litigation now pending in the court of common pleas of Charleston, South Carolina as civil action number 2021-CP-10-05289 (the "Civil Action"); and

c. Physician covenants that she will notify the General Counsel for MUSC in writing within seven calendar days of receiving a subpoena for her testimony, other than the Civil Action, that Physician believes arises out of the alleged acts or omissions of Physician during her former employment with MUSC or membership with UMA.

5. **Release by MUSC & UMA.**

a. **General Release.** In exchange for the promises set forth in this Agreement, MUSC and UMA, on behalf of themselves and their current and former board members, members, employees, officers, directors, attorneys, insurers, successors, and assigns, hereby agree to fully release, remise, forever discharge, and acquit Physician, and her heirs, assigns, agents, attorneys, and any trustee, administrator, or beneficiary of Physician's estate ("**Physician Released Parties**") from any and all actions, causes of action, suits, claims sounding in tort or contract, demands, appeals, charges, debts, injuries of any kind, claims for sums of money, claims for attorney's fees and costs, controversies, agreements, damages, judgments, and/or executions of any kind whatsoever, which existed at any time prior to the execution of this Agreement, whether known or unknown, in law, in equity, or otherwise, whether based on common law, state law, federal law, or otherwise, including any and all claims that were or could have been asserted in the Civil Action.

b. **Exception to Release.** Notwithstanding anything herein, the Parties agree that MUSC and UMA do not release, alter, or limit any claims they may have against Trident, LLC or HCA Healthcare, Inc., or any affiliate or related company of Trident, LLC or HCA Healthcare, Inc.

c. **Covenant Not to Sue Physician.** MUSC and UMA covenant that they will take all action necessary to dismiss, without prejudice, Physician from the Civil Action prior to December 9, 2021 and with prejudice from the Civil Action immediately upon the receipt of first payment recounted in paragraph 1 hereof. MUSC and UMA further covenant that they will not initiate, file, or assert any action, lawsuit, claim, or cause of action (whether common law, statutory, regulatory, federal, state, legal, or equitable) against Physician or any Physician Released Parties for any event, transaction, or occurrence preceding the date of this Agreement.

6. **Release By Physician.**

a. **General Release.** In exchange for the promises set forth in this Agreement, Physician, on behalf of herself and her heirs, assigns, agents, attorneys, and any trustee, administrator, or beneficiary of Physician's estate, hereby agree to fully release, remise, forever discharge, and acquit MUSC & UMA, and their current and former board members, members, employees, officers, directors, attorneys, insurers, successors, and assigns, both individually and in their business capacities and their employee benefit plans and programs and their administrators and fiduciaries, as well as Carolina Primary Care Physicians, LLC, its affiliated entities (including but not limited to MUSC Health Partners), Carolina Family Care, Inc., Medical University Hospital Authority, MUSC Health Alliance, LLC, and all of the foregoing entities' predecessors and subsidiaries, as well as their current and former board members, members, employees, officers, directors, assigns, attorneys, insurers, successors, and assigns, both individually and in their business capacities and their employee benefit plans and programs and their administrators and fiduciaries ("**University Released Parties**"), from any and all actions, causes of action, suits, claims sounding in tort or contract, demands, appeals, charges, debts, injuries of any kind, claims for sums of money, claims for attorney's fees and costs, controversies, agreements, damages, judgments, and/or executions of any kind whatsoever, which existed at any time prior to the execution of this Agreement, whether known or unknown, in law, in equity, or otherwise, whether based on common law, state law, federal law, or otherwise, including, without limiting the generality of this General Release, any and all claims or causes of action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq., the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. ("**ADEA**"), the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. and all amendments thereto,

including but not limited to the Amendments to the Americans with Disabilities Act, the Family and Medical Leave Act, 29 U.S.C. § 2601, et seq., the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq., the Equal Pay Act, 29 U.S.C. § 201, et seq., the Lilly Ledbetter Fair Pay Act of 2009, the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10, et seq., the South Carolina Human Affairs Law, S.C. Code Ann. § 1-13-10, et seq., the wrongful termination doctrine of the State of South Carolina, and any other similar federal, state, and local laws. This Release includes all known and unknown claims, and any right to relief resulting from a class action alleging employment related claims filed on behalf of other current or former employees.

b. **Release of Claims under the ADEA.** As this Agreement pertains to the release of claims under the ADEA, Physician, pursuant to and in compliance with the Older Workers Benefit Protection Act: (a) has been advised in writing to consult with an attorney prior to executing this Agreement; (b) has been afforded a period of twenty-one (21) calendar days to consider this Agreement; and (c) may revoke this Agreement (only with regard to their ADEA waiver and release) during the seven (7) calendar days following its execution. To the extent Physician executes this Agreement prior to the expiration of the twenty-one (21) calendar day period specified above, she acknowledges and agrees that he was afforded the opportunity to have at least twenty-one (21) calendar days to consider it before executing it and that her execution of the Agreement prior to the expiration of said period was her own voluntary act. Physician also agrees that this Agreement is written in a manner that enables her to fully understand its content and meaning. If Physician chooses to execute this Agreement before the expiration of the twenty-one (21) calendar day review period, Physician must execute and return a Waiver of Consideration Period, which is attached hereto. Physician also agrees that she is waiving and releasing claims (including their ADEA claims) in exchange for valuable consideration.

This Agreement, as it pertains to a release of claims under the ADEA, shall become effective and enforceable seven (7) calendar days after its execution. All other provisions of this Agreement or parts thereof shall become effective and enforceable upon execution and on the Effective Date; provided, however, that if Physician revokes this Agreement as provided above, MUSC & UMA may revoke this Agreement in its entirety during the seven (7) calendar day period following receipt of Physician's revocation.

c. **Exception to Release by Physician.** Notwithstanding the foregoing, the Parties agree that Physician retains any right that may exist to insurance coverage or for the immunities and limitations prescribed by the South Carolina Tort Claims Act for any claims that may be asserted against her for any alleged act or omission arising out of or in the course of her employment with MUSC or membership with UMA. Likewise, Physician does not hereby release, alter or limit her entitlement to receive any payment or benefit due to Physician, to the extent Physician actually has any entitlement to such payment or benefit, or her beneficiaries or assigns under any pension, retirement plan, deferred compensation plan, incentive payments under the Health Alliance ACO for past performance, or other benefit plan, e.g. tax-sheltered annuity plan, or PTO reimbursement, which accrued during Physician's employment with MUSC or membership with UMA.

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7. **Non-Interference.** If any one or more of the individual defendants identified in the Civil

Action choose to return to work with MUSC or UMA, Physician covenants to refrain from then taking any action that prevents such individual defendant from returning to work with MUSC or UMA.

8. **Arms' Length Settlement.** This Agreement is a compromise of disputed claims and is entered into solely to obtain peace and bring an end to litigation. Nothing in this Agreement shall be construed as an admission of liability by the Physician and Physician specifically denies the allegations in the Civil Action. The Parties have knowing and voluntarily entered into this Agreement with the assistance of independent legal counsel and with the intent of settling the dispute between them in full compliance with all applicable local, state and federal laws including, but not limited to, the Medicare/Medicaid Anti-Fraud and Abuse and Stark Laws. Accordingly, the compensation payable to MUSC & UMA has been negotiated in good faith and in arm's length negotiations and represents the fair market value of the disputed claims covered by this Agreement. The Parties acknowledge that none of the remuneration granted either Party herein is conditioned on any requirement that either Party or any of their respective physicians or investors make referrals to or be able to make or influence referrals to, or otherwise generate business for the other Party hereto, or any of their respective physicians or investors.

9. **Waiver and Amendment.** This Agreement may only be amended, modified or supplemented by an agreement in writing signed by each Party. The terms, covenants, representations, warranties and conditions hereof may be waived only by written instrument executed by the Party waiving compliance. Waiver by any Party hereto of any breach by another Party to this Agreement or any duties imposed upon them by law shall not be construed as a waiver of rights to any subsequent or continuing breach of this Agreement of such other Party's duties, obligations or agreements herein contained or imposed by law or for any other cause.

10. **Enforcement.** This Agreement shall be construed, interpreted, and applied in accordance with the law of the State of South Carolina. Should any question arise regarding the breach of this Agreement, or should one of the Parties to this Agreement attempt to enforce this Agreement, the exclusive venue for such issues to be resolved shall be in a state or federal court situated in Charleston County, South Carolina and possessing subject matter jurisdiction over the dispute. Should any question arise regarding the breach of this Agreement, or should one of the Parties to this Agreement attempt to enforce this Agreement, the Parties waive any right to a jury trial on any issues/claims in dispute and hereby agree that any and all disputed issues/claims shall be determined by a single judge.

11. **Entire Agreement and Separability.** This Agreement constitutes the entire agreement and understanding between the Parties and supersedes and abrogates all prior and contemporaneous oral and written agreements, instructions, directives, or understandings of any kind between the Parties to this Agreement, including but not limited to any agreement not to compete. The Parties also understand and agree that in the event any provision of this Agreement is deemed to be invalid or unenforceable by any court or administrative agency of competent jurisdiction, the Agreement shall be deemed to be restricted in scope or otherwise modified to the extent necessary to render the same valid and enforceable.

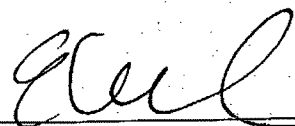
12. **Execution.** The persons signing below on behalf of MUSC and UMA each individually warrants that he or she possesses all necessary authorization to agree to each of the terms in this Agreement and so bind the entity or agency. This Agreement will be executed in duplicate counterparts that may be transmitted to the other party electronically as an .pdf, .jpeg, or .gif file, each of which may be deemed an original hereof.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed.

By Physician:

Betsy K. Davis, DMD, MS  
Betsy K. Davis, D.M.D.

Witness to Signature by Physician:

  
Printed Name: ERIC LENSCH

Dated: December 7, 2021

[MUSC and UMA Signatures on Following Page]

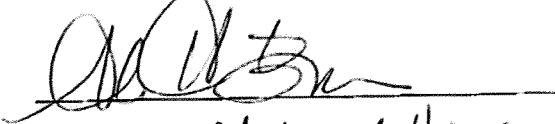
Medical University of South Carolina

  
Signature

By: PATRICK J. CAWLEY, MD

Its: VP of HEALTH AFFAIRS

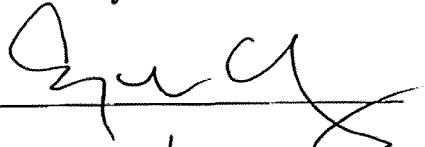
Witness to Signature by MUSC



Printed Name: ANDREA H. BRISBIN

Dated: December 8, 2021

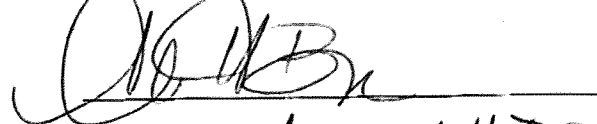
University Medical Associates of the  
Medical University of South Carolina

  
Signature

By: EUGENE Y. HONG, MD

Its: CHIEF PHYSICIAN EXECUTIVE

Witness to Signature by UMA



Printed Name: ANDREA H. BRISBIN

Dated: December 8, 2021

**WAIVER OF CONSIDERATION PERIOD**

In compliance with the Older Workers Benefit Protection Act and Age Discrimination in Employment Act (ADEA), I, **Betsy K. Davis, D.M.D.** knowingly and voluntarily, with access to and advice of counsel, waive the remainder of the twenty-one (21) day period (the "*Consideration Period*") to further review and consider my release of ADEA claims, which I have now fully considered and reviewed, along with the terms of the Agreement. I affirmatively state that my waiver of the remainder of the Consideration Period is knowing and voluntary, and that my waiver is not induced by MUSC/UMA through fraud, misrepresentation or threat to withdraw or alter the terms of the consideration available to me.

Betsy K. Davis, DMD, MS  
Betsy K. Davis, D.M.D.

12/7/2021  
Date

Evel  
Witness (Name)

12/7/21  
Date

## **SETTLEMENT AGREEMENT & RELEASE**

This “**Agreement**” is made by and between the Medical University of South Carolina (“**MUSC**”), the University Medical Associates of the Medical University of South Carolina (“**UMA**”) and Terry A. Day, M.D. (“**Physician**”) effective December 1, 2021 (“**Effective Date**”). MUSC, UMA, and Physician are collectively referred to as the “**Parties**” in this Agreement, or they may be individually referred to as a “**Party**” in this Agreement. As consideration for the mutual promises and covenants expressed hereinbelow, the Parties agree as follows:

1. **Payment.** For the consideration stated herein, Physician agrees to issue payments totaling \$201,150.00 as directed by MUSC and UMA in written payment instructions provided by MUSC and UMA at the time of their execution and delivery of this Agreement: \$59,161.76 by or before January 6, 2022; and twenty-four equal, consecutive monthly payments of \$5,916.18, which shall begin to be due and payable on February 6, 2022, and shall continue to be due and payable on the sixth day of the following twenty-three months. If the sixth day of a month falls on a weekend or a bank holiday, then the due date shall not occur until the next business day. If Physician fails to make timely payment of any of the payment obligations in this Paragraph 1 and MUSC/UMA brings an action for collection, the Parties agree that MUSC/UMA can recover reasonable attorney’s fees and costs associated with such action.

2. **Destruction of Information and Return of Personal Property.** Physician hereby warrants that he has destroyed, or shall destroy by December 8, 2021, the following specific documents or records (including photocopies) to the extent that any are in Physician’s possession, custody or control: physician preference cards, case logs, or instrument lists created during his employment with MUSC & membership with UMA; documents reflecting MUSC & UMA’s revenues from work performed by Physician; and documents or copies reflecting the salary

information or contracts of other employees or recruits of MUSC & members of UMA. Likewise, Physician hereby warrants that beginning on the Effective Date, he will refrain from using any of the documents or records specifically referenced in this Section 2. Physician acknowledges that MUSC & UMA contend that the documents or records specifically referenced in this Section 2 are confidential and/or proprietary.

3. **Restrictive Covenants.** Physician makes the following covenants subject to the agreement that these do not restrict him from making any statement, testimony, or affidavit in connection with the initiation, commencement, defense, or participation as a witness in a civil action, judicial, administrative, or other formal proceeding.

a. **Fellows.** Beginning on the Effective Date and continuing for a period of twenty-four (24) months (the “**Restriction Period**”), Physician covenants that he shall not take any action to solicit Drs. Amin, Aylward, Thal and Hanba to leave or not participate in MUSC’s head and neck fellowship program (“**HNO Fellowship Program**”). Rather, as material consideration for this Agreement and in exchange for the release provided herein, Physician has executed and delivered to MUSC & UMA a letter of encouragement to Drs. Amin, Aylward, Thal and Hanba provided herewith for MUSC & UMA to deliver to the fellows.

b. **ATC.** During the Restriction Period, Physician covenants that he will also refrain from having any communication with the Advanced Training Council of the American Head & Neck Society (“**ATC**”) regarding the condition or status of the HNO Fellowship Program after December 1, 2021. If a member of the ATC asks Physician any question about the condition of the HNO Fellowship Program after December 1, 2021, Physician will respond by stating that he is contractually prohibited from discussing the HNO Fellowship Program. This paragraph shall not be construed to prevent the Physician from answering or communicating with the ATC about

the training of fellows under Physician or that fellow's qualification for membership and letters.

Likewise, during the Restriction Period, MUSC and UMA covenants that it will instruct Patrick J. Cawley, M.D., Ramond N. Dubois, M.D., Robert Labadie, M.D., Jason Newman, M.D., and Paul R. Lambert, M.D. and any faculty in the Head and Neck Oncology Division to refrain from making any disparaging comments or statements to the Advance Training Council of the American Head & Neck Society regarding the Physician.

c. **Other current employees.** During the Restriction Period, Physician covenants that he shall not take any action to knowingly solicit any then-current employee of MUSC or member of UMA to terminate their employment with MUSC or membership with UMA.

4. **Physician Covenants and Warranties Regarding Other Claims.** Physician makes the following covenants subject to the agreement that these do not restrict him from making any statement, testimony, or affidavit in connection with the initiation, commencement, defense, or participation as a witness in a civil action, judicial, administrative, or other formal proceeding.

a. Physician warrants that he has not knowingly engaged, directly or indirectly, in any acts or omissions that he believes to be negligent or unlawful during his employment with MUSC or membership with UMA;

b. Physician covenants that he will reasonably cooperate, at MUSC or UMA's expense, in any investigation that MUSC or UMA undertakes into any third-party allegation or lawsuit arising out of the alleged acts or omissions of Physician during his former employment with MUSC or membership with UMA except that litigation now pending in the court of common pleas of Charleston, South Carolina as civil action number 2021-CP-10-05289 (the "**Civil Action**"); and

c. Physician covenants that he will notify the General Counsel for MUSC in writing

within seven calendar days of receiving a subpoena for his testimony, other than the Civil Action, that Physician believes arises out of the alleged acts or omissions of Physician during his former employment with MUSC or membership with UMA.

5. **Release by MUSC & UMA.**

**General Release.** In exchange for the promises set forth in this Agreement, MUSC and UMA, on behalf of themselves and their current and former board members, members, employees, officers, directors, attorneys, insurers, successors, and assigns, hereby agree to fully release, remise, forever discharge, and acquit Physician, and his heirs, assigns, agents, attorneys, and any trustee, administrator, or beneficiary of Physician's estate ("**Physician Released Parties**") from any and all actions, causes of action, suits, claims sounding in tort or contract, demands, appeals, charges, debts, injuries of any kind, claims for sums of money, claims for attorney's fees and costs, controversies, agreements, damages, judgments, and/or executions of any kind whatsoever, which existed at any time prior to the execution of this Agreement, whether known or unknown, in law, in equity, or otherwise, whether based on common law, state law, federal law, or otherwise, including any and all claims that were or could have been asserted in the Civil Action.

b. **Exception to Release.** Notwithstanding anything herein, the Parties agree that MUSC and UMA do not release, alter, or limit any claims they may have against Trident, LLC, HCA Healthcare, Inc., or any affiliate or related company of Trident, LLC or HCA Healthcare, Inc.

c. **Covenant Not to Sue Physician.** MUSC and UMA covenant that they will take all action necessary to dismiss, without prejudice, Physician from the Civil Action prior to December 9, 2021 and with prejudice from the Civil Action immediately upon the receipt of first payment recounted in paragraph 1 hereof. MUSC and UMA further covenant that they will not initiate, file,

or assert any action, lawsuit, claim, or cause of action (whether common law, statutory, regulatory, federal, state, legal, or equitable) against Physician or any Physician Released Parties for any event, transaction, or occurrence preceding the date of this Agreement.

6. **Release By Physician.**

a. **General Release.** In exchange for the promises set forth in this Agreement, Physician, on behalf of himself, and his heirs, assigns, agents, attorneys, and any trustee, administrator, or beneficiary of Physician's estate, hereby agree to fully release, remise, forever discharge, and acquit MUSC & UMA, and their current and former board members, members, employees, officers, directors, attorneys, insurers, successors, and assigns, both individually and in their business capacities and their employee benefit plans and programs and their administrators and fiduciaries, as well as Carolina Primary Care Physicians, LLC, its affiliated entities (including but not limited to MUSC Health Partners), Carolina Family Care, Inc., Medical University Hospital Authority, MUSC Health Alliance, LLC, and all of the foregoing entities' predecessors and subsidiaries, as well as their current and former board members, members, employees, officers, directors, assigns, attorneys, insurers, successors, and assigns, both individually and in their business capacities and their employee benefit plans and programs and their administrators and fiduciaries ("**University Released Parties**"), from any and all actions, causes of action, suits, claims sounding in tort or contract, demands, appeals, charges, debts, injuries of any kind, claims for sums of money, claims for attorney's fees and costs, controversies, agreements, damages, judgments, and/or executions of any kind whatsoever, which existed at any time prior to the execution of this Agreement, whether known or unknown, in law, in equity, or otherwise, whether based on common law, state law, federal law, or otherwise, including, without limiting the generality of this General Release, any and all claims or causes of action arising under Title VII of

the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq., the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. (“ADEA”), the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. and all amendments thereto, including but not limited to the Amendments to the Americans with Disabilities Act, the Family and Medical Leave Act, 29 U.S.C. § 2601, et seq., the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq., the Equal Pay Act, 29 U.S.C. § 201, et seq., the Lilly Ledbetter Fair Pay Act of 2009, the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10, et seq., the South Carolina Human Affairs Law, S.C. Code Ann. § 1-13-10, et seq., the wrongful termination doctrine of the State of South Carolina, and any other similar federal, state, and local laws. This Release includes all known and unknown claims, and any right to relief resulting from a class action alleging employment related claims filed on behalf of other current or former employees.

b. **Release of Claims under the ADEA.** As this Agreement pertains to the release of claims under the ADEA, Physician, pursuant to and in compliance with the Older Workers Benefit Protection Act: (a) has been advised in writing to consult with an attorney prior to executing this Agreement; (b) has been afforded a period of twenty-one (21) calendar days to consider this Agreement; and (c) may revoke this Agreement (only with regard to their ADEA waiver and release) during the seven (7) calendar days following its execution. To the extent Physician executes this Agreement prior to the expiration of the twenty-one (21) calendar day period specified above, he acknowledges and agrees that he was afforded the opportunity to have at least twenty-one (21) calendar days to consider it before executing it and that his execution of the Agreement prior to the expiration of said period was his own voluntary act. If Physician chooses to execute this Agreement before the expiration of the twenty-one (21) calendar day review period, Physician must execute and return a Waiver of Consideration Period, which is attached hereto.

Physician also agrees that this Agreement is written in a manner that enables him to fully understand its content and meaning. Physician also agrees that he is waiving and releasing claims (including their ADEA claims) in exchange for valuable consideration.

This Agreement, as it pertains to a release of claims under the ADEA, shall become effective and enforceable seven (7) calendar days after its execution. All other provisions of this Agreement or parts thereof shall become effective and enforceable upon execution and on the Effective Date; provided, however, that if Physician revokes this Agreement as provided above, MUSC & UMA may revoke this Agreement in its entirety during the seven (7) calendar day period following receipt of Physician's revocation.

c. **Exception to Release by Physician.** Notwithstanding the foregoing, the Parties agree that Physician retains any right that may exist to insurance coverage or for the immunities and limitations prescribed by the South Carolina Tort Claims Act for any claims that may be asserted against him for any alleged act or omission arising out of or in the course of his employment with MUSC or membership with UMA. Likewise, Physician does not hereby release, alter or limit his entitlement to receive any payment or benefit due to Physician, to the extent Physician actually has any entitlement to such payment or benefit, or his beneficiaries or assigns under any pension, retirement plan, deferred compensation plan, incentive payments under the Health Alliance ACO for past performance, or other benefit plan, e.g. tax-sheltered annuity plan, or PTO reimbursement, which accrued during Physician's employment with MUSC or membership with UMA.

d. **Covenant Not to Sue.** Physician covenants that he has not and will not initiate, file, or assert any action, motion, proceeding, lawsuit, claim, or cause of action (whether common law, statutory, regulatory, federal, state, legal, or equitable) against MUSC, UMA or any University

Released Parties for any event, transaction, or occurrence preceding the date of this Agreement except as specifically provided for in this Agreement.

7. **Non-Interference.** If any one or more of the individual defendants identified in the Civil Action choose to return to work with MUSC or UMA, Physician covenants to refrain from then taking any action that prevents such individual defendant from returning to work with MUSC or UMA.

8. **Arms' Length Settlement.** This Agreement is a compromise of disputed claims and is entered into solely to obtain peace and bring an end to litigation. Nothing in this Agreement shall be construed as an admission of liability by the Physician and Physician specifically denies the allegations in the Civil Action. The Parties have knowing and voluntarily entered into this Agreement with the assistance of independent legal counsel and with the intent of settling the dispute between them in full compliance with all applicable local, state and federal laws including, but not limited to, the Medicare/Medicaid Anti-Fraud and Abuse and Stark Laws. Accordingly, the compensation payable to MUSC & UMA has been negotiated in good faith and in arm's length negotiations and represents the fair market value of the disputed claims covered by this Agreement. The Parties acknowledge that none of the remuneration granted either Party herein is conditioned on any requirement that either Party or any of their respective physicians or investors make referrals to or be able to make or influence referrals to, or otherwise generate business for the other Party hereto, or any of their respective physicians or investors.

9. **Waiver and Amendment.** This Agreement may only be amended, modified or supplemented by an agreement in writing signed by each Party. The terms, covenants, representations, warranties and conditions hereof may be waived only by written instrument executed by the Party waiving compliance. Waiver by any Party hereto of any breach by another

Party to this Agreement or any duties imposed upon them by law shall not be construed as a waiver of rights to any subsequent or continuing breach of this Agreement of such other Party's duties, obligations or agreements herein contained or imposed by law or for any other cause.

10. **Enforcement.** This Agreement shall be construed, interpreted, and applied in accordance with the law of the State of South Carolina. Should any question arise regarding the breach of this Agreement, or should one of the Parties to this Agreement attempt to enforce this Agreement, the exclusive venue for such issues to be resolved shall be in a state or federal court situated in Charleston County, South Carolina and possessing subject matter jurisdiction over the dispute. Should any question arise regarding the breach of this Agreement, or should one of the Parties to this Agreement attempt to enforce this Agreement, the Parties waive any right to a jury trial on any issues/claims in dispute and hereby agree that any and all disputed issues/claims shall be determined by a single judge.

11. **Entire Agreement and Separability.** This Agreement constitutes the entire agreement and understanding between the Parties and supersedes and abrogates all prior and contemporaneous oral and written agreements, instructions, directives, or understandings of any kind between the Parties to this Agreement, including but not limited to any agreement not to compete. The Parties also understand and agree that in the event any provision of this Agreement is deemed to be invalid or unenforceable by any court or administrative agency of competent jurisdiction, the Agreement shall be deemed to be restricted in scope or otherwise modified to the extent necessary to render the same valid and enforceable.

12. **Execution.** The persons signing below on behalf of MUSC and UMA each individually warrants that he or she possesses all necessary authorization to agree to each of the terms in this Agreement and so bind the entity or agency. This Agreement will be executed in duplicate

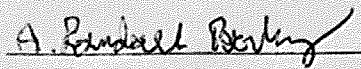
counterparts that may be transmitted to the other party electronically as an .pdf, .jpeg, or .gif file, each of which may be deemed an original hereof.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed.

**By Physician:**

  
Terry A. Day, M.D.

**Witness to Signature by Physician:**

  
A. Barkowitz

Printed Name: ALAN BARKOWITZ

Dated: December 7, 2021

[MUSC and UMA Signatures on Following Page]

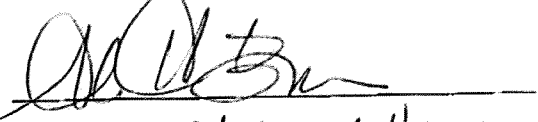
Medical University of South Carolina

  
Signature

By: PATRICK J. CAWLEY, MD

Its: VP of HEALTH AFFAIRS

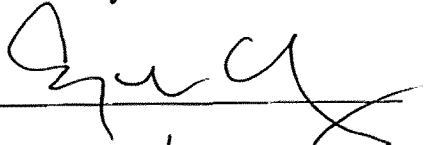
Witness to Signature by MUSC



Printed Name: ANDREEA H. BRISBIN

Dated: December 8, 2021

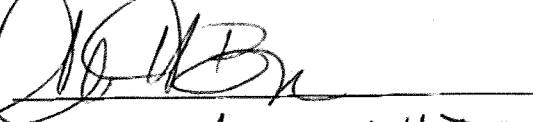
University Medical Associates of the  
Medical University of South Carolina

  
Signature

By: EUGENE Y. HONG, MD

Its: CHIEF PHYSICIAN EXECUTIVE

Witness to Signature by UMA



Printed Name: ANDREEA H. BRISBIN

Dated: December 8, 2021

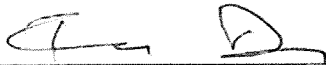
# **EXHIBIT 1**

## **(Part 2)**

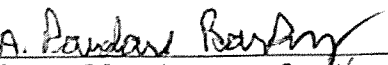
### ***Settlement Agreements***

**WAIVER OF CONSIDERATION PERIOD**

In compliance with the Older Workers Benefit Protection Act and Age Discrimination in Employment Act (ADEA), I, **Terry A. Day, M.D.** knowingly and voluntarily, with access to and advice of counsel, waive the remainder of the twenty-one (21) day period (the "***Consideration Period***") to further review and consider my release of ADEA claims, which I have now fully considered and reviewed, along with the terms of the Agreement. I affirmatively state that my waiver of the remainder of the Consideration Period is knowing and voluntary, and that my waiver is not induced by MUSC/UMA through fraud, misrepresentation or threat to withdraw or alter the terms of the consideration available to me.

  
 Terry A. Day, M.D.

12/7/2021  
 Date

  
 Witness (Name) ALAN BARKOW+2

12/7/2021  
 Date

# **EXHIBIT 1**

## **(Part 3)**

### ***Settlement Agreements***

### **SETTLEMENT AGREEMENT & RELEASE**

This “**Agreement**” is made by and between the Medical University of South Carolina (“**MUSC**”), the University Medical Associates of the Medical University of South Carolina (“**UMA**”) and Joshua D. Hornig, M.D. (“**Physician**”) effective December 1, 2021 (“**Effective Date**”). MUSC, UMA, and Physician are collectively referred to as the “**Parties**” in this Agreement, or they may be individually referred to as a “**Party**” in this Agreement. As consideration for the mutual promises and covenants expressed hereinbelow, the Parties agree as follows:

1. **Payment.** For the consideration stated herein, Physician agrees to issue payments totaling \$447,866.00 as directed by MUSC and UMA in written payment instructions provided by MUSC and UMA at the time of their execution and delivery of this Agreement: \$131,725.29 by or before February 6, 2022; and twenty-four equal, consecutive monthly payments of \$13,172.53 which shall begin to be due and payable on March 6, 2022, and shall continue to be due and payable on the sixth day of the following twenty-three months. If the sixth day of a month falls on a weekend or a bank holiday, then the due date shall not occur until the next business day. If Physician fails to make timely payment of any of the payment obligations in this Paragraph 1 and MUSC/UMA brings an action for collection, the Parties agree that MUSC/UMA can recover reasonable attorney’s fees and costs associated with such action.

2. **Destruction of Information and Return of Personal Property.** Physician hereby warrants that he has destroyed, or shall destroy by December 8, 2021, the following specific documents or records (including photocopies) to the extent that any are in Physician’s possession, custody or control: physician preference cards, case logs, or instrument lists created during his employment with MUSC & membership with UMA; documents reflecting MUSC & UMA’s

revenues from work performed by Physician; and documents or copies reflecting the salary information or contracts of other employees or recruits of MUSC & members of UMA. Likewise, Physician hereby warrants that beginning on the Effective Date, he will refrain from using any of the documents or records specifically referenced in this Section 2. Physician acknowledges that MUSC & UMA contend that the documents or records specifically referenced in this Section 2 are confidential and/or proprietary.

3. **Restrictive Covenants**. Physician makes the following covenants subject to the agreement that these do not restrict him from making any statement, testimony, or affidavit in connection with the initiation, commencement, defense, or participation as a witness in a civil action, judicial, administrative, or other formal proceeding.

a. **Fellows**. Beginning on the Effective Date and continuing for a period of twenty-four (24) months (the “**Restriction Period**”), Physician covenants that he shall not take any action to solicit Drs. Amin, Aylward, Thal and Hanba to leave or not participate in MUSC’s head and neck fellowship program (“**HNO Fellowship Program**”). Rather, as material consideration for this Agreement and in exchange for the release provided herein, Physician has executed and delivered to MUSC & UMA a letter of encouragement to Drs. Amin, Aylward, Thal and Hanba provided herewith for MUSC & UMA to deliver to the fellows.

b. **ATC**. During the Restriction Period, Physician covenants that he will also refrain from having any communication with the Advanced Training Council of the American Head & Neck Society (“**ATC**”) regarding the condition or status of the HNO Fellowship Program after December 1, 2021. If a member of the ATC asks Physician any question about the condition of the HNO Fellowship Program after December 1, 2021, Physician will respond by stating that he is contractually prohibited from discussing the HNO Fellowship Program. This paragraph shall

not be construed to prevent the Physician from answering or communicating with the ATC about the training of fellows under Physician or that fellow's qualification for membership and letters.

Likewise, during the Restriction Period, MUSC and UMA covenants that it will instruct Patrick J. Cawley, M.D., Ramond N. Dubois, M.D., Robert Labadie, M.D., Jason Newman, M.D., and Paul R. Lambert, M.D. and any faculty in the Head and Neck Oncology Division to refrain from making any disparaging comments or statements to the Advance Training Council of the American Head & Neck Society regarding the Physician.

c. **Other current employees.** During the Restriction Period, Physician covenants that he shall not take any action to knowingly solicit any then-current employee of MUSC or member of UMA to terminate their employment with MUSC or membership with UMA.

4. **Physician Covenants and Warranties Regarding Other Claims.** Physician makes the following covenants subject to the agreement that these do not restrict him from making any statement, testimony, or affidavit in connection with the initiation, commencement, defense, or participation as a witness in a civil action, judicial, administrative, or other formal proceeding.

a. Physician warrants that he has not knowingly engaged, directly or indirectly, in any acts or omissions that he believes to be negligent or unlawful during his employment with MUSC or membership with UMA;

b. Physician covenants that he will reasonably cooperate, at MUSC or UMA's expense, in any investigation that MUSC or UMA undertakes into any third-party allegation or lawsuit arising out of the alleged acts or omissions of Physician during his former employment with MUSC or membership with UMA except that litigation now pending in the court of common pleas of Charleston, South Carolina as civil action number 2021-CP-10-05289 (the "**Civil Action**"); and

c. Physician covenants that he will notify the General Counsel for MUSC in writing within seven calendar days of receiving a subpoena for his testimony, other than the Civil Action, that Physician believes arises out of the alleged acts or omissions of Physician during his former employment with MUSC or membership with UMA.

5. **Release by MUSC & UMA.**

a. **General Release.** In exchange for the promises set forth in this Agreement, MUSC and UMA, on behalf of themselves and their current and former board members, members, employees, officers, directors, attorneys, insurers, successors, and assigns, hereby agree to fully release, remise, forever discharge, and acquit Physician, and his heirs, assigns, agents, attorneys, and any trustee, administrator, or beneficiary of Physician's estate ("**Physician Released Parties**") from any and all actions, causes of action, suits, claims sounding in tort or contract, demands, appeals, charges, debts, injuries of any kind, claims for sums of money, claims for attorney's fees and costs, controversies, agreements, damages, judgments, and/or executions of any kind whatsoever, which existed at any time prior to the execution of this Agreement, whether known or unknown, in law, in equity, or otherwise, whether based on common law, state law, federal law, or otherwise, including any and all claims that were or could have been asserted in the Civil Action. In further consideration of the covenants and promises of the Physician set forth herein, MUSC hereby releases Physician from any past, present, and future obligations associated in any way with the non-compete agreement and any other restrictive covenant agreement existing by and between Physician and MUSC and forever discharges Physician from any and all claims that were raised or could have been raised by MUSC in the lawsuit. MUSC agrees that Physician may engage in the practice of medicine in the restricted territory and may accept compensation for such services.

b. **Exception to Release.** Notwithstanding anything herein, the Parties agree that MUSC and UMA do not release, alter, or limit any claims they may have against Trident, LLC, HCA Healthcare, Inc., or any affiliate or related company of Trident, LLC or HCA Healthcare, Inc.

c. **Covenant Not to Sue Physician.** MUSC and UMA covenant that they will take all action necessary to dismiss, without prejudice, Physician from the Civil Action prior to December 9, 2021 and with prejudice from the Civil Action immediately upon the receipt of first payment recounted in paragraph 1 hereof. MUSC and UMA further covenant that they will not initiate, file, or assert any action, lawsuit, claim, or cause of action (whether common law, statutory, regulatory, federal, state, legal, or equitable) against Physician or any Physician Released Parties for any event, transaction, or occurrence preceding the date of this Agreement.

6. **Release By Physician.**

a. **General Release.** In exchange for the promises set forth in this Agreement, Physician, on behalf of himself, and his heirs, assigns, agents, attorneys, and any trustee, administrator, or beneficiary of Physician's estate, hereby agree to fully release, remise, forever discharge, and acquit MUSC & UMA, and their current and former board members, members, employees, officers, directors, attorneys, insurers, successors, and assigns, both individually and in their business capacities and their employee benefit plans and programs and their administrators and fiduciaries, as well as Carolina Primary Care Physicians, LLC, its affiliated entities (including but not limited to MUSC Health Partners), Carolina Family Care, Inc., Medical University Hospital Authority, MUSC Health Alliance, LLC, and all of the foregoing entities' predecessors and subsidiaries, as well as their current and former board members, members, employees, officers, directors, assigns, attorneys, insurers, successors, and assigns, both individually and in

their business capacities and their employee benefit plans and programs and their administrators and fiduciaries (“**University Released Parties**”), from any and all actions, causes of action, suits, claims sounding in tort or contract, demands, appeals, charges, debts, injuries of any kind, claims for sums of money, claims for attorney’s fees and costs, controversies, agreements, damages, judgments, and/or executions of any kind whatsoever, which existed at any time prior to the execution of this Agreement, whether known or unknown, in law, in equity, or otherwise, whether based on common law, state law, federal law, or otherwise, including, without limiting the generality of this General Release, any and all claims or causes of action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq., the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. (“ADEA”), the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. and all amendments thereto, including but not limited to the Amendments to the Americans with Disabilities Act, the Family and Medical Leave Act, 29 U.S.C. § 2601, et seq., the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq., the Equal Pay Act, 29 U.S.C. § 201, et seq., the Lilly Ledbetter Fair Pay Act of 2009, the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10, et seq., the South Carolina Human Affairs Law, S.C. Code Ann. § 1-13-10, et seq., the wrongful termination doctrine of the State of South Carolina, and any other similar federal, state, and local laws. This Release includes all known and unknown claims, and any right to relief resulting from a class action alleging employment related claims filed on behalf of other current or former employees.

b. **Release of Claims under the ADEA.** As this Agreement pertains to the release of claims under the ADEA, Physician, pursuant to and in compliance with the Older Workers Benefit Protection Act: (a) has been advised in writing to consult with an attorney prior to executing this Agreement; (b) has been afforded a period of twenty-one (21) calendar days to consider this

Agreement; and (c) may revoke this Agreement (only with regard to their ADEA waiver and release) during the seven (7) calendar days following its execution. To the extent Physician executes this Agreement prior to the expiration of the twenty-one (21) calendar day period specified above, he acknowledges and agrees that he was afforded the opportunity to have at least twenty-one (21) calendar days to consider it before executing it and that his execution of the Agreement prior to the expiration of said period was his own voluntary act. If Physician chooses to execute this Agreement before the expiration of the twenty-one (21) calendar day review period, Physician must execute and return a Waiver of Consideration Period, which is attached hereto. Physician also agrees that this Agreement is written in a manner that enables him to fully understand its content and meaning. Physician also agrees that he is waiving and releasing claims (including their ADEA claims) in exchange for valuable consideration.

This Agreement, as it pertains to a release of claims under the ADEA, shall become effective and enforceable seven (7) calendar days after its execution. All other provisions of this Agreement or parts thereof shall become effective and enforceable upon execution and on the Effective Date; provided, however, that if Physician revokes this Agreement as provided above, MUSC & UMA may revoke this Agreement in its entirety during the seven (7) calendar day period following receipt of Physician's revocation.

c. **Exception to Release by Physician.** Notwithstanding the foregoing, the Parties agree that Physician retains any right that may exist to insurance coverage or for the immunities and limitations prescribed by the South Carolina Tort Claims Act for any claims that may be asserted against him for any alleged act or omission arising out of or in the course of his employment with MUSC or membership with UMA. Likewise, Physician does not hereby release, alter or limit his entitlement to receive any payment or benefit due to Physician, to the extent

Physician actually has any entitlement to such payment or benefit, or his beneficiaries or assigns under any pension, retirement plan, deferred compensation plan, incentive payments under the Health Alliance ACO for past performance, or other benefit plan, e.g. tax-sheltered annuity plan, or PTO reimbursement, which accrued during Physician's employment with MUSC or membership with UMA.

d. **Covenant Not to Sue.** Physician covenants that he has not and will not initiate, file, or assert any action, motion, proceeding, lawsuit, claim, or cause of action (whether common law, statutory, regulatory, federal, state, legal, or equitable) against MUSC, UMA or any University Released Parties for any event, transaction, or occurrence preceding the date of this Agreement except as specifically provided for in this Agreement.

7. **Non-Interference.** If any one or more of the individual defendants identified in the Civil Action choose to return to work with MUSC or UMA, Physician covenants to refrain from then taking any action that prevents such individual defendant from returning to work with MUSC or UMA.

8. **Arms' Length Settlement.** This Agreement is a compromise of disputed claims and is entered into solely to obtain peace and bring an end to litigation. Nothing in this Agreement shall be construed as an admission of liability by the Physician and Physician specifically denies the allegations in the Civil Action. The Parties have knowing and voluntarily entered into this Agreement with the assistance of independent legal counsel and with the intent of settling the dispute between them in full compliance with all applicable local, state and federal laws including, but not limited to, the Medicare/Medicaid Anti-Fraud and Abuse and Stark Laws. Accordingly, the compensation payable to MUSC & UMA has been negotiated in good faith and in arm's length negotiations and represents the fair market value of the disputed claims covered by this Agreement.

The Parties acknowledge that none of the remuneration granted either Party herein is conditioned on any requirement that either Party or any of their respective physicians or investors make referrals to or be able to make or influence referrals to, or otherwise generate business for the other Party hereto, or any of their respective physicians or investors.

9. **Waiver and Amendment.** This Agreement may only be amended, modified or supplemented by an agreement in writing signed by each Party. The terms, covenants, representations, warranties and conditions hereof may be waived only by written instrument executed by the Party waiving compliance. Waiver by any Party hereto of any breach by another Party to this Agreement or any duties imposed upon them by law shall not be construed as a waiver of rights to any subsequent or continuing breach of this Agreement of such other Party's duties, obligations or agreements herein contained or imposed by law or for any other cause.

10. **Enforcement.** This Agreement shall be construed, interpreted, and applied in accordance with the law of the State of South Carolina. Should any question arise regarding the breach of this Agreement, or should one of the Parties to this Agreement attempt to enforce this Agreement, the exclusive venue for such issues to be resolved shall be in a state or federal court situated in Charleston County, South Carolina and possessing subject matter jurisdiction over the dispute. Should any question arise regarding the breach of this Agreement, or should one of the Parties to this Agreement attempt to enforce this Agreement, the Parties waive any right to a jury trial on any issues/claims in dispute and hereby agree that any and all disputed issues/claims shall be determined by a single judge.

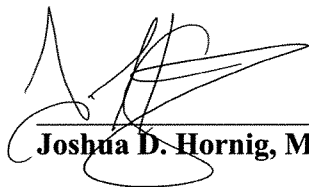
11. **Entire Agreement and Separability.** This Agreement constitutes the entire agreement and understanding between the Parties and supersedes and abrogates all prior and contemporaneous oral and written agreements, instructions, directives, or understandings of any

kind between the Parties to this Agreement, including but not limited to any agreement not to compete. The Parties also understand and agree that in the event any provision of this Agreement is deemed to be invalid or unenforceable by any court or administrative agency of competent jurisdiction, the Agreement shall be deemed to be restricted in scope or otherwise modified to the extent necessary to render the same valid and enforceable.

12. **Execution**. The persons signing below on behalf of MUSC and UMA each individually warrants that he or she possesses all necessary authorization to agree to each of the terms in this Agreement and so bind the entity or agency. This Agreement will be executed in duplicate counterparts that may be transmitted to the other party electronically as an .pdf, .jpeg, or .gif file, each of which may be deemed an original hereof.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed.

**By Physician:**

  
 Joshua D. Hornig, M.D.

**Witness to Signature by Physician:**

  
 Printed Name: Alison Shroder  
 Dated: December 8, 2021

[MUSC and UMA Signatures on Following Page]

Medical University of South Carolina

Signature

By: PATRICK T. CAULEY, MD

Its: VP of HEALTH AFFAIRS

Witness to Signature by MUSC



Printed Name: ANDREA H. BRISBIN

Dated: December 8, 2021

University Medical Associates of the  
Medical University of South Carolina

Signature

By: EUGENE HONG, MD

Its: CHIEF PHYSICIAN EXECUTIVE

Witness to Signature by UMA



Printed Name: ANDREA H. BRISBIN

Dated: December 8, 2021

Dear Drs. Amin, Aylward, Thal, and Hanba:

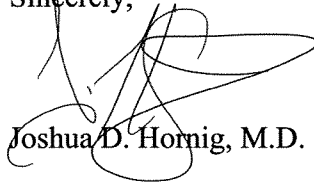
As you know, I made the difficult decision to leave MUSC and continue my practice elsewhere. MUSC and I have resolved our legal dispute, and we agree that your best interests as current and incoming fellows are our collective priority.

I am advised that MUSC has engaged in extensive efforts to ensure that MUSC's AHNS accreditation is maintained and the ATC quantitative and qualitative accreditation requirements are met through the remainder of this academic year. I trust that MUSC has recruited physicians and physician leaders who will continue MUSC's strong tradition of offering a high quality AHNS accredited fellowship.

I understand that Dr. Leila Mady has joined as a clinical instructor in the MUSC Head and Neck Division, Dr. Robert Labadie is the incoming Chair of Otolaryngology - Head and Neck Surgery, and Dr. Jason Newman is joining MUSC as the Division Director. These are all outstanding physicians and faculty.

MUSC has an exceptional reputation, and through my independent experience and accumulated knowledge prior to joining MUSC, myself and the Head and Neck Division faculty have built an outstanding reputation over the last two decades. I am confident MUSC is committed to maintaining its high quality for both patient care and resident and fellow education and training. As you have trusted in me to assist in your training from 2021-22, I hope to continue to assist your training however possible. While I acknowledge that your decision to continue your training at MUSC or other locations is your decision and at the discretion of the ATC, I encourage you to complete your fellowship at MUSC.

Sincerely,

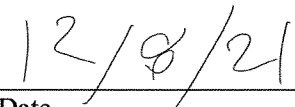


Joshua D. Hornig, M.D.

Dated: December 7, 2021

**WAIVER OF CONSIDERATION PERIOD**

In compliance with the Older Workers Benefit Protection Act and Age Discrimination in Employment Act (ADEA), I, **Joshua D. Hornig, M.D.** knowingly and voluntarily, with access to and advice of counsel, waive the remainder of the twenty-one (21) day period (the "***Consideration Period***") to further review and consider my release of ADEA claims, which I have now fully considered and reviewed, along with the terms of the Agreement. I affirmatively state that my waiver of the remainder of the Consideration Period is knowing and voluntary, and that my waiver is not induced by MUSC/UMA through fraud, misrepresentation or threat to withdraw or alter the terms of the consideration available to me.

|                                                                                                                                |                                                                                                     |
|--------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------|
| <br>_____<br><b>Joshua D. Hornig, M.D.</b>    | <br>_____<br>Date |
| <br>_____<br>Witness (Name)<br>Alissa Shrader | <br>_____<br>Date |

### **SETTLEMENT AGREEMENT & RELEASE**

This “**Agreement**” is made by and between the Medical University of South Carolina (“**MUSC**”), the University Medical Associates of the Medical University of South Carolina (“**UMA**”) and Eric J. Lentsch, M.D. (“**Physician**”) effective December 1, 2021 (“**Effective Date**”). MUSC, UMA, and Physician are collectively referred to as the “**Parties**” in this Agreement, or they may be individually referred to as a “**Party**” in this Agreement. As consideration for the mutual promises and covenants expressed hereinbelow, the Parties agree as follows:

1. **Payment.** For the consideration stated herein, Physician agrees to issue payments totaling \$317,817.00 as directed by MUSC and UMA in written payment instructions provided by MUSC and UMA at the time of their execution and delivery of this Agreement: \$93,475.59 by or before January 6, 2022; and twenty-four equal, consecutive monthly payments of \$9,347.56, which shall begin to be due and payable on February 6, 2022, and shall continue to be due and payable on the sixth day of the following twenty-three months. If the sixth day of a month falls on a weekend or a bank holiday, then the due date shall not occur until the next business day. If Physician fails to make timely payment of any of the payment obligations in this Paragraph 1 and MUSC/UMA brings an action for collection, the Parties agree that MUSC/UMA can recover reasonable attorney’s fees and costs associated with such action.
2. **Destruction of Information and Return of Personal Property.** Physician hereby warrants that he has destroyed, or shall destroy by December 8, 2021, the following specific documents or records (including photocopies) to the extent that any are in Physician’s possession, custody or control: physician preference cards, case logs, or instrument lists created during his

employment with MUSC & membership with UMA; documents reflecting MUSC & UMA's revenues from work performed by Physician; and documents or copies reflecting the salary information or contracts of other employees or recruits of MUSC & members of UMA. Likewise, Physician hereby warrants that beginning on the Effective Date, he will refrain from using any of the documents or records specifically referenced in this Section 2. Physician acknowledges that MUSC & UMA contend that the documents or records specifically referenced in this Section 2 are confidential and/or proprietary.

3. **Restrictive Covenants.** Physician makes the following covenants subject to the agreement that these do not restrict him from making any statement, testimony, or affidavit in connection with the initiation, commencement, defense, or participation as a witness in a civil action, judicial, administrative, or other formal proceeding.

a. **Fellows.** Beginning on the Effective Date and continuing for a period of twenty-four (24) months (the "**Restriction Period**"), Physician covenants that he shall not take any action to solicit Drs. Amin, Aylward, Thal and Hanba to leave or not participate in MUSC's head and neck fellowship program ("**HNO Fellowship Program**"). Rather, as material consideration for this Agreement and in exchange for the release provided herein, Physician has executed and delivered to MUSC & UMA a letter of encouragement to Drs. Amin, Aylward, Thal and Hanba provided herewith for MUSC & UMA to deliver to the fellows.

b. **ATC.** During the Restriction Period, Physician covenants that he will also refrain from having any communication with the Advanced Training Council of the American Head & Neck Society ("**ATC**") regarding the condition or status of the HNO Fellowship Program after December 1, 2021. If a member of the ATC asks Physician any question about the condition of the HNO Fellowship Program after December 1, 2021, Physician will respond by stating that he

is contractually prohibited from discussing the HNO Fellowship Program. This paragraph shall not be construed to prevent the Physician from answering or communicating with the ATC about the training of fellows under Physician or that fellow's qualification for membership and letters.

Likewise, during the Restriction Period, MUSC and UMA covenants that it will instruct Patrick J. Cawley, M.D., Ramond N. Dubois, M.D., Robert Labadie, M.D., Jason Newman, M.D., and Paul R. Lambert, M.D. and any faculty in the Head and Neck Oncology Division to refrain from making any disparaging comments or statements to the Advance Training Council of the American Head & Neck Society regarding the Physician. Physician agrees to return his MUSC issued laptop by December 8, 2021.

c. **Other current employees.** During the Restriction Period, Physician covenants that he shall not take any action to knowingly solicit any then-current employee of MUSC or member of UMA to terminate their employment with MUSC or membership with UMA.

4. **Physician Covenants and Warranties Regarding Other Claims.** Physician makes the following covenants subject to the agreement that these do not restrict him from making any statement, testimony, or affidavit in connection with the initiation, commencement, defense, or participation as a witness in a civil action, judicial, administrative, or other formal proceeding.

a. Physician warrants that he has not knowingly engaged, directly or indirectly, in any acts or omissions that he believes to be negligent or unlawful during his employment with MUSC or membership with UMA;

b. Physician covenants that he will reasonably cooperate, at MUSC or UMA's expense, in any investigation that MUSC or UMA undertakes into any third-party allegation or lawsuit arising out of the alleged acts or omissions of Physician during his former employment with MUSC or membership with UMA except that litigation now pending in the court of common

pleas of Charleston, South Carolina as civil action number 2021-CP-10-05289 (the “**Civil Action**”); and

c. Physician covenants that he will notify the General Counsel for MUSC in writing within seven calendar days of receiving a subpoena for his testimony, other than the Civil Action, that Physician believes arises out of the alleged acts or omissions of Physician during his former employment with MUSC or membership with UMA.

5. **Release by MUSC & UMA.**

a. **General Release.** In exchange for the promises set forth in this Agreement, MUSC and UMA, on behalf of themselves and their current and former board members, members, employees, officers, directors, attorneys, insurers, successors, and assigns, hereby agree to fully release, remise, forever discharge, and acquit Physician, and his heirs, assigns, agents, attorneys, and any trustee, administrator, or beneficiary of Physician’s estate (“**Physician Released Parties**”) from any and all actions, causes of action, suits, claims sounding in tort or contract, demands, appeals, charges, debts, injuries of any kind, claims for sums of money, claims for attorney’s fees and costs, controversies, agreements, damages, judgments, and/or executions of any kind whatsoever, which existed at any time prior to the execution of this Agreement, whether known or unknown, in law, in equity, or otherwise, whether based on common law, state law, federal law, or otherwise, including any and all claims that were or could have been asserted in the Civil Action. In further consideration of the covenants and promises of the Physician set forth herein, MUSC hereby releases Physician from any past, present, and future obligations associated in any way with the non-compete agreement and any other restrictive covenant agreement existing by and between Physician and MUSC and forever discharges Physician from any and all claims that were raised or could have been raised by MUSC in the lawsuit. MUSC agrees that Physician may

engage in the practice of medicine in the restricted territory and may accept compensation for such services.

b. **Exception to Release.** Notwithstanding anything herein, the Parties agree that MUSC and UMA do not release, alter, or limit any claims they may have against Trident, LLC, HCA Healthcare, Inc., or any affiliate or related company of Trident, LLC or HCA Healthcare, Inc.

c. **Covenant Not to Sue Physician.** MUSC and UMA covenant that they will take all action necessary to dismiss, without prejudice, Physician from the Civil Action. prior to December 9, 2021 and with prejudice from the Civil Action immediately upon the receipt of the first payment recounted in paragraph 1 hereof. MUSC and UMA further covenant that they will not initiate, file, or assert any action, lawsuit, claim, or cause of action (whether common law, statutory, regulatory, federal, state, legal, or equitable) against Physician or any Physician Released Parties for any event, transaction, or occurrence preceding the date of this Agreement.

6. **Release By Physician.**

a. **General Release.** In exchange for the promises set forth in this Agreement, Physician, on behalf of himself and his heirs, assigns, agents, attorneys, and any trustee, administrator, or beneficiary of Physician's estate, hereby agree to fully release, remise, forever discharge, and acquit MUSC & UMA, and their current and former board members, members, employees, officers, directors, attorneys, insurers, successors, and assigns, both individually and in their business capacities and their employee benefit plans and programs and their administrators and fiduciaries, as well as Carolina Primary Care Physicians, LLC, its affiliated entities (including but not limited to MUSC Health Partners), Carolina Family Care, Inc., Medical University Hospital Authority, MUSC Health Alliance, LLC, and all of the foregoing entities' predecessors

and subsidiaries, as well as their current and former board members, members, employees, officers, directors, assigns, attorneys, insurers, successors, and assigns, both individually and in their business capacities and their employee benefit plans and programs and their administrators and fiduciaries (“**University Released Parties**”), from any and all actions, causes of action, suits, claims sounding in tort or contract, demands, appeals, charges, debts, injuries of any kind, claims for sums of money, claims for attorney’s fees and costs, controversies, agreements, damages, judgments, and/or executions of any kind whatsoever, which existed at any time prior to the execution of this Agreement, whether known or unknown, in law, in equity, or otherwise, whether based on common law, state law, federal law, or otherwise, including, without limiting the generality of this General Release, any and all claims or causes of action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq., the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. (“ADEA”), the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. and all amendments thereto, including but not limited to the Amendments to the Americans with Disabilities Act, the Family and Medical Leave Act, 29 U.S.C. § 2601, et seq., the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq., the Equal Pay Act, 29 U.S.C. § 201, et seq., the Lilly Ledbetter Fair Pay Act of 2009, the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10, et seq., the South Carolina Human Affairs Law, S.C. Code Ann. § 1-13-10, et seq., the wrongful termination doctrine of the State of South Carolina, and any other similar federal, state, and local laws. This Release includes all known and unknown claims, and any right to relief resulting from a class action alleging employment related claims filed on behalf of other current or former employees..

b. **Release of Claims under the ADEA.** As this Agreement pertains to the release of claims under the ADEA, Physician, pursuant to and in compliance with the Older Workers Benefit

Protection Act: (a) has been advised in writing to consult with an attorney prior to executing this Agreement; (b) has been afforded a period of twenty-one (21) calendar days to consider this Agreement; and (c) may revoke this Agreement (only with regard to their ADEA waiver and release) during the seven (7) calendar days following its execution. To the extent Physician executes this Agreement prior to the expiration of the twenty-one (21) calendar day period specified above, he acknowledges and agrees that he was afforded the opportunity to have at least twenty-one (21) calendar days to consider it before executing it and that his execution of the Agreement prior to the expiration of said period was his own voluntary act. If Physician chooses to execute this Agreement before the expiration of the twenty-one (21) calendar day review period, Physician must execute and return a Waiver of Consideration Period, which is attached hereto. Physician also agrees that this Agreement is written in a manner that enables him to fully understand its content and meaning. Physician also agrees that he is waiving and releasing claims (including their ADEA claims) in exchange for valuable consideration.

This Agreement, as it pertains to a release of claims under the ADEA, shall become effective and enforceable seven (7) calendar days after its execution. All other provisions of this Agreement or parts thereof shall become effective and enforceable upon execution and on the Effective Date; provided, however, that if Physician revokes this Agreement as provided above, MUSC & UMA may revoke this Agreement in its entirety during the seven (7) calendar day period following receipt of Physician's revocation.

c. **Exception to Release by Physician.** Notwithstanding the foregoing, the Parties agree that Physician retains any right that may exist to insurance coverage or for the immunities and limitations prescribed by the South Carolina Tort Claims Act for any claims that may be asserted against him for any alleged act or omission arising out of or in the course of his

employment with MUSC or membership with UMA. Likewise, Physician does not hereby release, alter or limit his entitlement to receive any payment or benefit due to Physician, to the extent Physician actually has any entitlement to such payment or benefit, or his beneficiaries or assigns under any pension, retirement plan, deferred compensation plan, incentive payments under the Health Alliance ACO for past performance, or other benefit plan, e.g. tax-sheltered annuity plan, or PTO reimbursement, which accrued during Physician's employment with MUSC or membership with UMA.

d. **Covenant Not to Sue.** Physician covenants that he has not and will not initiate, file, or assert any action, motion, proceeding, lawsuit, claim, or cause of action (whether common law, statutory, regulatory, federal, state, legal, or equitable) against MUSC, UMA or any University Released Parties for any event, transaction, or occurrence preceding the date of this Agreement except as specifically provided for in this Agreement.

7. **Non-Interference.** If any one or more of the individual defendants identified in the Civil Action choose to return to work with MUSC or UMA, Physician covenants to refrain from then taking any action that prevents such individual defendant from returning to work with MUSC or UMA.

8. **Arms' Length Settlement.** This Agreement is a compromise of disputed claims and is entered into solely to obtain peace and bring an end to litigation. Nothing in this Agreement shall be construed as an admission of liability by the Physician and Physician specifically denies the allegations in the Civil Action. The Parties have knowing and voluntarily entered into this Agreement with the assistance of independent legal counsel and with the intent of settling the dispute between them in full compliance with all applicable local, state and federal laws including, but not limited to, the Medicare/Medicaid Anti-Fraud and Abuse and Stark Laws. Accordingly,

the compensation payable to MUSC & UMA has been negotiated in good faith and in arm's length negotiations and represents the fair market value of the disputed claims covered by this Agreement. The Parties acknowledge that none of the remuneration granted either Party herein is conditioned on any requirement that either Party or any of their respective physicians or investors make referrals to or be able to make or influence referrals to, or otherwise generate business for the other Party hereto, or any of their respective physicians or investors.

9. **Waiver and Amendment.** This Agreement may only be amended, modified or supplemented by an agreement in writing signed by each Party. The terms, covenants, representations, warranties and conditions hereof may be waived only by written instrument executed by the Party waiving compliance. Waiver by any Party hereto of any breach by another Party to this Agreement or any duties imposed upon them by law shall not be construed as a waiver of rights to any subsequent or continuing breach of this Agreement of such other Party's duties, obligations or agreements herein contained or imposed by law or for any other cause.

10. **Enforcement.** This Agreement shall be construed, interpreted, and applied in accordance with the law of the State of South Carolina. Should any question arise regarding the breach of this Agreement, or should one of the Parties to this Agreement attempt to enforce this Agreement, the exclusive venue for such issues to be resolved shall be in a state or federal court situated in Charleston County, South Carolina and possessing subject matter jurisdiction over the dispute. Should any question arise regarding the breach of this Agreement, or should one of the Parties to this Agreement attempt to enforce this Agreement, the Parties waive any right to a jury trial on any issues/claims in dispute and hereby agree that any and all disputed issues/claims shall be determined by a single judge.

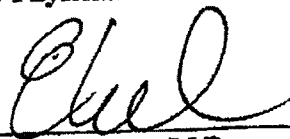
11. **Entire Agreement and Separability.** This Agreement constitutes the entire agreement

and understanding between the Parties and supersedes and abrogates all prior and contemporaneous oral and written agreements, instructions, directives, or understandings of any kind between the Parties to this Agreement, including but not limited to any agreement not to compete. The Parties also understand and agree that in the event any provision of this Agreement is deemed to be invalid or unenforceable by any court or administrative agency of competent jurisdiction, the Agreement shall be deemed to be restricted in scope or otherwise modified to the extent necessary to render the same valid and enforceable.

12. **Execution.** The persons signing below on behalf of MUSC and UMA each individually warrants that he or she possesses all necessary authorization to agree to each of the terms in this Agreement and so bind the entity or agency. This Agreement will be executed in duplicate counterparts that may be transmitted to the other party electronically as an .pdf, .jpeg, or .gif file, each of which may be deemed an original hereof.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed.

By Physician:

  
Eric J. Lentsch, M.D.

Witness to Signature by Physician:

  
Printed Name: Kristi Lentsch

Dated: December 7, 2021

Medical University of South Carolina

Witness to Signature by MUSC

Signature

By: PATRICK J CAWLEY, MD

Its: VP of HEALTH AFFAIRS

Printed Name: ANDREA A. BRISBIN

Dated: December 8, 2021

University Medical Associates of the  
Medical University of South Carolina

Witness to Signature by UMA

Signature

By: EUGENE S. YONG, MD.

Its: CHIEF PHYSICIAN EXECUTIVE

Printed Name: ANDREA A. BRISBIN

Dated: December 8, 2021

Dear Drs. Amin, Aylward, Thal, and Hanba:

As you know, I made the difficult decision to leave MUSC and continue my practice elsewhere. MUSC and I have resolved our legal dispute, and we agree that your best interests as current and incoming fellows are our collective priority.

I am advised that MUSC has engaged in extensive efforts to ensure that MUSC's AHNS accreditation is maintained and the ATC quantitative and qualitative accreditation requirements are met through the remainder of this academic year. I trust that MUSC has recruited physicians and physician leaders who will continue MUSC's strong tradition of offering a high quality AHNS accredited fellowship.

I understand that Dr. Leila Mady has joined as a clinical instructor in the MUSC Head and Neck Division, Dr. Robert Labadie is the incoming Chair of Otolaryngology - Head and Neck Surgery, and Dr. Jason Newman is joining MUSC as the Division Director. These are all outstanding physicians and faculty.

MUSC has an exceptional reputation, and through my independent experience and accumulated knowledge prior to joining MUSC, myself and the Head and Neck Division faculty have built an outstanding reputation over the last two decades. I am confident MUSC is committed to maintaining its high quality for both patient care and resident and fellow education and training. As you have trusted in me to assist in your training from 2021-22, I hope to continue to assist your training however possible. While I acknowledge that your decision to continue your training at MUSC or other locations is your decision and at the discretion of the ATC, I encourage you to complete your fellowship at MUSC.

Sincerely,

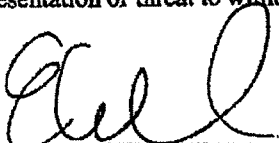


Eric J. Lentsch, M.D.

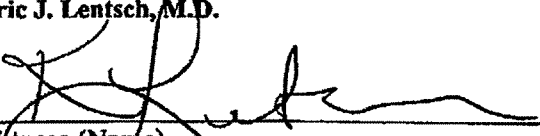
Dated: December 7, 2021

**WAIVER OF CONSIDERATION PERIOD**

In compliance with the Older Workers Benefit Protection Act and Age Discrimination in Employment Act (ADEA), I, **Eric J. Lentsch, M.D.**, knowingly and voluntarily, with access to and advice of counsel, waive the remainder of the twenty-one (21) day period (the "*Consideration Period*") to further review and consider my release of ADEA claims, which I have now fully considered and reviewed, along with the terms of the Agreement. I affirmatively state that my waiver of the remainder of the Consideration Period is knowing and voluntary, and that my waiver is not induced by MUSC/UMA through fraud, misrepresentation or threat to withdraw or alter the terms of the consideration available to me.

  
\_\_\_\_\_  
Eric J. Lentsch, M.D.

12/7/21  
Date

  
\_\_\_\_\_  
Witness (Name)

12/7/21  
Date

### **SETTLEMENT AGREEMENT & RELEASE**

This “**Agreement**” is made by and between the Medical University of South Carolina (“**MUSC**”), the University Medical Associates of the Medical University of South Carolina (“**UMA**”) and Anand K. Sharma, M.D. (“**Physician**”) effective December 1, 2021 (“**Effective Date**”). MUSC, UMA, and Physician are collectively referred to as the “**Parties**” in this Agreement, or they may be individually referred to as a “**Party**” in this Agreement. As consideration for the mutual promises and covenants expressed hereinbelow, the Parties agree as follows:

1. **Payment.** For the consideration stated herein, Physician agrees to issue payments totaling \$201,150.00 as directed by MUSC and UMA in written payment instructions provided by MUSC and UMA at the time of their execution and delivery of this Agreement: \$59,161.76 by or before January 6, 2022; and twenty-four equal, consecutive monthly payments of \$5,916.18, which shall begin to be due and payable on February 6, 2022, and shall continue to be due and payable on the sixth day of the following twenty-three months. If the sixth day of a month falls on a weekend or a bank holiday, then the due date shall not occur until the next business day. If Physician fails to make timely payment of any of the payment obligations in this Paragraph 1 and MUSC/UMA brings an action for collection, the Parties agree that MUSC/UMA can recover reasonable attorney’s fees and costs associated with such action.

2. **Destruction of Information and Return of Personal Property.** Physician hereby warrants that he has destroyed, or shall destroy by December 8, 2021, the following specific documents or records (including photocopies) to the extent that any are in Physician’s possession, custody or control: physician preference cards, case logs, or instrument lists created during her employment with MUSC & membership with UMA; documents reflecting MUSC & UMA’s revenues from work performed by Physician; and documents or copies reflecting the salary

information or contracts of other employees or recruits of MUSC & members of UMA. Likewise, Physician hereby warrants that beginning on the Effective Date, he will refrain from using any of the documents or records specifically referenced in this Section 2. Physician acknowledges that MUSC & UMA contend that the documents or records specifically referenced in this Section 2 are confidential and/or proprietary.

3. **Restrictive Covenants.** Physician makes the following covenants subject to the agreement that these do not restrict him from making any statement, testimony, or affidavit in connection with the initiation, commencement, defense, or participation as a witness in a civil action, judicial, administrative, or other formal proceeding.

a. **Fellows.** Beginning on the Effective Date and continuing for a period of twenty-four (24) months (the “**Restriction Period**”), Physician covenants that he shall not take any action to solicit Drs. Amin, Aylward, Thal and Hanba to leave or not participate in MUSC’s head and neck fellowship program (“**HNO Fellowship Program**”).

b. **ATC.** During the Restriction Period, Physician covenants that he will also refrain from having any communication with the Advanced Training Council of the American Head & Neck Society (“**ATC**”) regarding the condition or status of the HNO Fellowship Program after December 1, 2021. If a member of the ATC asks Physician any question about the condition of the HNO Fellowship Program after December 1, 2021, Physician will respond by stating that he is contractually prohibited from discussing the HNO Fellowship Program. This paragraph shall not be construed to prevent the Physician from answering or communicating with the ATC about the training of fellows under Physician or that fellow’s qualification for membership and letters.

Likewise, during the Restriction Period, MUSC and UMA covenants that it will instruct Patrick J. Cawley, M.D., Ramond N. Dubois, M.D., Robert Labadie, M.D., Jason Newman, M.D.,

and Paul R. Lambert, M.D. and any faculty in the Head and Neck Oncology Division to refrain from making any disparaging comments or statements to the Advance Training Council of the American Head & Neck Society regarding the Physician.

c. **Other current employees.** During the Restriction Period, Physician covenants that he shall not take any action to knowingly solicit any then-current employee of MUSC or UMA to terminate their employment with MUSC or membership with UMA.

4. **Physician Covenants and Warranties Regarding Other Claims.** Physician makes the following covenants subject to the agreement that these do not restrict him from making any statement, testimony, or affidavit in connection with the initiation, commencement, defense, or participation as a witness in a civil action, judicial, administrative, or other formal proceeding.

a. Physician warrants that he has not knowingly engaged, directly or indirectly, in any acts or omissions that he believes to be negligent or unlawful during his employment with MUSC or membership with UMA;

b. Physician covenants that he will reasonably cooperate, at MUSC or UMA's expense, in any investigation that MUSC or UMA undertakes into any third-party allegation or lawsuit arising out of the alleged acts or omissions of Physician during his former employment with MUSC or membership with UMA except that litigation now pending in the court of common pleas of Charleston, South Carolina as civil action number 2021-CP-10-05289 (the "**Civil Action**"); and

c. Physician covenants that he will notify the General Counsel for MUSC in writing within seven calendar days of receiving a subpoena for his testimony, other than the Civil Action, that Physician believes arises out of the alleged acts or omissions of Physician during his former employment with MUSC or membership with UMA.

5. **Release by MUSC & UMA.**

a. **General Release.** In exchange for the promises set forth in this Agreement, MUSC and UMA, on behalf of themselves and their current and former board members, members, employees, officers, directors, attorneys, insurers, successors, and assigns, hereby agree to fully release, remise, forever discharge, and acquit Physician and his heirs, assigns, agents, attorneys, and any trustee, administrator, or beneficiary of Physician's estate ("**Physician Released Parties**") from any and all actions, causes of action, suits, claims sounding in tort or contract, demands, appeals, charges, debts, injuries of any kind, claims for sums of money, claims for attorney's fees and costs, controversies, agreements, damages, judgments, and/or executions of any kind whatsoever, which existed at any time prior to the execution of this Agreement, whether known or unknown, in law, in equity, or otherwise, whether based on common law, state law, federal law, or otherwise, including any and all claims that were or could have been asserted in the Civil Action.

b. **Exception to Release.** Notwithstanding anything herein, the Parties agree that MUSC and UMA do not release, alter, or limit any claims they may have against Trident, LLC or HCA Healthcare, Inc., or any affiliate or related company of Trident, LLC or HCA Healthcare, Inc.

c. **Covenant Not to Sue Physician.** MUSC and UMA covenant that they will take all action necessary to dismiss, without prejudice, Physician from the Civil Action prior to December 9, 2021 and with prejudice from the Civil Action immediately upon the receipt of first payment recounted in paragraph 1 hereof. MUSC and UMA further covenant that they will not initiate, file, or assert any action, lawsuit, claim, or cause of action (whether common law, statutory, regulatory, federal, state, legal, or equitable) against Physician or any Physician Released Parties for any event, transaction, or occurrence preceding the date of this Agreement.

6. **Release By Physician.**

a. **General Release.** In exchange for the promises set forth in this Agreement, Physician, on behalf of himself and his heirs, assigns, agents, attorneys, and any trustee, administrator, or beneficiary of Physician's estate, hereby agree to fully release, remise, forever discharge, and acquit MUSC & UMA, and their current and former board members, members, employees, officers, directors, attorneys, insurers, successors, and assigns, both individually and in their business capacities and their employee benefit plans and programs and their administrators and fiduciaries, as well as Carolina Primary Care Physicians, LLC, its affiliated entities (including but not limited to MUSC Health Partners), Carolina Family Care, Inc., Medical University Hospital Authority, MUSC Health Alliance, LLC, and all of the foregoing entities' predecessors and subsidiaries, as well as their current and former board members, members, employees, officers, directors, assigns, attorneys, insurers, successors, and assigns, both individually and in their business capacities and their employee benefit plans and programs and their administrators and fiduciaries ("**University Released Parties**"), from any and all actions, causes of action, suits, claims sounding in tort or contract, demands, appeals, charges, debts, injuries of any kind, claims for sums of money, claims for attorney's fees and costs, controversies, agreements, damages, judgments, and/or executions of any kind whatsoever, which existed at any time prior to the execution of this Agreement, whether known or unknown, in law, in equity, or otherwise, whether based on common law, state law, federal law, or otherwise, including, without limiting the generality of this General Release, any and all claims or causes of action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq., the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. ("**ADEA**"), the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. and all amendments thereto,

including but not limited to the Amendments to the Americans with Disabilities Act, the Family and Medical Leave Act, 29 U.S.C. § 2601, et seq., the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq., the Equal Pay Act, 29 U.S.C. § 201, et seq., the Lilly Ledbetter Fair Pay Act of 2009, the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10, et seq., the South Carolina Human Affairs Law, S.C. Code Ann. § 1-13-10, et seq., the wrongful termination doctrine of the State of South Carolina, and any other similar federal, state, and local laws. This Release includes all known and unknown claims, and any right to relief resulting from a class action alleging employment related claims filed on behalf of other current or former employees.

b. **Release of Claims under the ADEA.** As this Agreement pertains to the release of claims under the ADEA, Physician, pursuant to and in compliance with the Older Workers Benefit Protection Act: (a) has been advised in writing to consult with an attorney prior to executing this Agreement; (b) has been afforded a period of twenty-one (21) calendar days to consider this Agreement; and (c) may revoke this Agreement (only with regard to their ADEA waiver and release) during the seven (7) calendar days following its execution. To the extent Physician executes this Agreement prior to the expiration of the twenty-one (21) calendar day period specified above, he acknowledges and agrees that he was afforded the opportunity to have at least twenty-one (21) calendar days to consider it before executing it and that his execution of the Agreement prior to the expiration of said period was his own voluntary act. Physician also agrees that this Agreement is written in a manner that enables him to fully understand its content and meaning. If Physician chooses to execute this Agreement before the expiration of the twenty-one (21) calendar day review period, Physician must execute and return a Waiver of Consideration Period, which is attached hereto. Physician also agrees that he is waiving and releasing claims (including their ADEA claims) in exchange for valuable consideration.

This Agreement, as it pertains to a release of claims under the ADEA, shall become effective and enforceable seven (7) calendar days after its execution. All other provisions of this Agreement or parts thereof shall become effective and enforceable upon execution and on the Effective Date; provided, however, that if Physician revokes this Agreement as provided above, MUSC & UMA may revoke this Agreement in its entirety during the seven (7) calendar day period following receipt of Physician's revocation.

c. **Exception to Release by Physician.** Notwithstanding the foregoing, the Parties agree that Physician retains any right that may exist to insurance coverage or for the immunities and limitations prescribed by the South Carolina Tort Claims Act for any claims that may be asserted against him for any alleged act or omission arising out of or in the course of his employment with MUSC or membership with UMA. Likewise, Physician does not hereby release, alter or limit his entitlement to receive any payment or benefit due to Physician, to the extent Physician actually has any entitlement to such payment or benefit, or his beneficiaries or assigns under any pension, retirement plan, deferred compensation plan, incentive payments under the Health Alliance ACO for past performance, or other benefit plan, e.g. tax-sheltered annuity plan, or PTO reimbursement, which accrued during Physician's employment with MUSC or membership with UMA.

d. **Covenant Not to Sue.** Physician covenants that he has not and will not initiate, file, or assert any action, motion, proceeding, lawsuit, claim, or cause of action (whether common law, statutory, regulatory, federal, state, legal, or equitable) against MUSC, UMA or any University Released Parties for any event, transaction, or occurrence preceding the date of this Agreement except as specifically provided for in this Agreement.

7. **Non-Interference.** If any one or more of the individual defendants identified in the Civil

Action choose to return to work with MUSC or UMA, Physician covenants to refrain from then taking any action that prevents such individual defendant from returning to work with MUSC or UMA.

8. **Arms' Length Settlement.** This Agreement is a compromise of disputed claims and is entered into solely to obtain peace and bring an end to litigation. Nothing in this Agreement shall be construed as an admission of liability by the Physician and Physician specifically denies the allegations in the Civil Action. The Parties have knowing and voluntarily entered into this Agreement with the assistance of independent legal counsel and with the intent of settling the dispute between them in full compliance with all applicable local, state and federal laws including, but not limited to, the Medicare/Medicaid Anti-Fraud and Abuse and Stark Laws. Accordingly, the compensation payable to MUSC & UMA has been negotiated in good faith and in arm's length negotiations and represents the fair market value of the disputed claims covered by this Agreement. The Parties acknowledge that none of the remuneration granted either Party herein is conditioned on any requirement that either Party or any of their respective physicians or investors make referrals to or be able to make or influence referrals to, or otherwise generate business for the other Party hereto, or any of their respective physicians or investors.

9. **Waiver and Amendment.** This Agreement may only be amended, modified or supplemented by an agreement in writing signed by each Party. The terms, covenants, representations, warranties and conditions hereof may be waived only by written instrument executed by the Party waiving compliance. Waiver by any Party hereto of any breach by another Party to this Agreement or any duties imposed upon them by law shall not be construed as a waiver of rights to any subsequent or continuing breach of this Agreement of such other Party's duties, obligations or agreements herein contained or imposed by law or for any other cause.

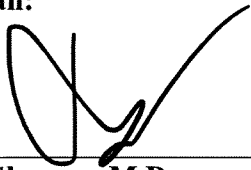
10. **Enforcement.** This Agreement shall be construed, interpreted, and applied in accordance with the law of the State of South Carolina. Should any question arise regarding the breach of this Agreement, or should one of the Parties to this Agreement attempt to enforce this Agreement, the exclusive venue for such issues to be resolved shall be in a state or federal court situated in Charleston County, South Carolina and possessing subject matter jurisdiction over the dispute. Should any question arise regarding the breach of this Agreement, or should one of the Parties to this Agreement attempt to enforce this Agreement, the Parties waive any right to a jury trial on any issues/claims in dispute and hereby agree that any and all disputed issues/claims shall be determined by a single judge.

11. **Entire Agreement and Separability.** This Agreement constitutes the entire agreement and understanding between the Parties and supersedes and abrogates all prior and contemporaneous oral and written agreements, instructions, directives, or understandings of any kind between the Parties to this Agreement, including but not limited to any agreement not to compete. The Parties also understand and agree that in the event any provision of this Agreement is deemed to be invalid or unenforceable by any court or administrative agency of competent jurisdiction, the Agreement shall be deemed to be restricted in scope or otherwise modified to the extent necessary to render the same valid and enforceable.

12. **Execution.** The persons signing below on behalf of MUSC and UMA each individually warrants that he or she possesses all necessary authorization to agree to each of the terms in this Agreement and so bind the entity or agency. This Agreement will be executed in duplicate counterparts that may be transmitted to the other party electronically as an .pdf, .jpeg, or .gif file, each of which may be deemed an original hereof.

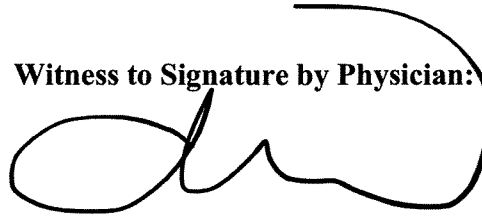
IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed.

**By Physician:**



Anand K. Sharma, M.D.

**Witness to Signature by Physician:**



Printed Name: Chrystal Wilson

Dated: December 08, 2021

[MUSC and UMA Signatures on Following Page]

Medical University of South Carolina

Signature

By: PATRICK J. CAWLEY, MD  
Its: Chief of HEALTH AFFAIRS

Witness to Signature by MUSC

Andrea H. Brisson

Printed Name: ANDREA H. BRISBON

Dated: December 8, 2021

University Medical Associates of the  
Medical University of South Carolina

Signature

By: EUGENE JONG, MD  
Its: CHIEF PHYSICIAN EXECUTIVE

Witness to Signature by UMA

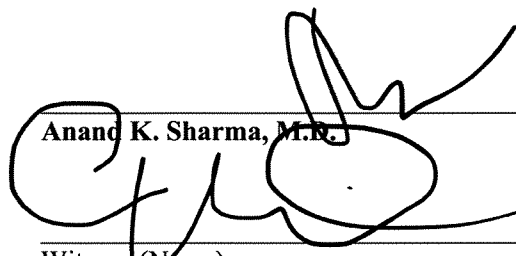
Andrea H. Brisson

Printed Name: ANDREA H. BRISBON

Dated: December 8, 2021

**WAIVER OF CONSIDERATION PERIOD**

In compliance with the Older Workers Benefit Protection Act and Age Discrimination in Employment Act (ADEA), I, **Anand K. Sharma, M.D.** knowingly and voluntarily, with access to and advice of counsel, waive the remainder of the twenty-one (21) day period (the "***Consideration Period***") to further review and consider my release of ADEA claims, which I have now fully considered and reviewed, along with the terms of the Agreement. I affirmatively state that my waiver of the remainder of the Consideration Period is knowing and voluntary, and that my waiver is not induced by MUSC/UMA through fraud, misrepresentation or threat to withdraw or alter the terms of the consideration available to me.



Anand K. Sharma, M.D.

12/8/2021

Date

Witness (Name)

12/8/2021

Date

Chrystal Wilson

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

MEDICAL UNIVERSITY OF SOUTH  
CAROLINA and UNIVERSITY MEDICAL  
ASSOCIATES OF THE MEDICAL  
UNIVERSITY OF SOUTH CAROLINA,

Civil Action No. 2021-CP-10-05289

Plaintiffs,

v.

**DEFENDANTS' MEMORANDUM IN  
OPPOSITION TO PLAINTIFFS'  
MOTION TO ALTER OR AMEND THE  
ORDER DENYING PLAINTIFFS'  
MOTION FOR TEMPORARY  
INJUNCTION**

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.

**INTRODUCTION**

This matter was originally before the Court because Plaintiffs moved the Court for the drastic remedy of a Temporary Injunction as follows:

- (1) Prohibit Defendants from further utilizing Plaintiffs' confidential and proprietary information, including instrument lists, patient lists, physician preference cards and financial data;
- (2) Require 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) Prohibit Defendants from 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) Prohibit Defendants from further interfering with MUSC's Fellowship Program in any way or recruiting any MUSC Fellow;
- (5) Prohibit Defendants from contacting any Fellowship accreditation bodies regarding MUSC; and
- (6) Prohibit Defendants from further recruiting or soliciting, or otherwise contacting, current MUSC and UMA employees, associates, agents, and fellows regarding any potential employment with HCA.

By so moving, Plaintiffs assumed the burden of proof and persuasion on each of the following elements of their claim:

- (a) To present facts sufficient to constitute a cause of action for injunction and to demonstrate that an injunction is reasonably necessary to protect the legal rights of the Plaintiffs pending in the litigation;
- (b) To prove that Plaintiffs would suffer irreparable harm if the injunction is not granted;
- (c) To prove that Plaintiffs would likely succeed on the merits of the litigation; and
- (d) To prove that Plaintiffs have no adequate remedy at law.

*See Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006).

Furthermore, 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). Since the relief sought by Plaintiffs in this matter involved efforts to enforce or impose restrictive covenants, Plaintiffs also have the burden of proving that they had not unreasonably delayed in asserting the claim.

Following hearing, and consideration by the Court of the existing Record before it, the Court denied the Motion. Specifically, the Court found that:

- a. "Plaintiffs . . . have not sufficiently demonstrated that irreparable harm would occur if the temporary injunction was not granted";
- b. "nor that an inadequate remedy at law exists. . . ."

Now, Plaintiffs have moved the Court to alter or amend its Order denying the Motion for Temporary Injunction. In that new Motion, Plaintiffs argue:

- 1. The Court failed to make a specific ruling on the issue of whether Plaintiffs have a likelihood of success on the merits of the litigation.

2. The Court failed to make a specific ruling on the issue of whether the injunction would preserve the status quo.
3. The Court's Order denying Plaintiffs' Motion for Temporary Injunction violated Rule 52(a), SCRCP because it allegedly did not set forth the findings of fact and conclusions of law in support of its Order.
4. A repeat and rehash of their prior arguments in support of the contention that they would suffer irreparable harm if the injunction is not granted and that they have no adequate remedy at law—in other words, Plaintiffs merely attempt a second bite of the apple.

### **SUMMARY OF DEFENDANTS' OPPOSITION**

Defendants oppose Plaintiffs' Motion to Alter or Amend the Order Denying Plaintiffs' Motion for Temporary Injunction on multiple grounds; however an overview of the opposition is summarized as follows:

1. Plaintiffs erroneously suggest that Defendants had a burden of proof in connection with the opposition to the Motion for Temporary Injunction when, in fact, Plaintiffs had the entire burden of proof and persuasion in connection with that Motion. And, as the Court correctly concluded, Plaintiffs failed to meet their burden.
2. Plaintiffs are wrong in their argument that the Court was required to make a specific and detailed finding on each element of the claim for injunctive relief and that it was error for the Court not to have announced a specific decision on each element.
3. Plaintiffs are wrong in their argument that it may be presumed that the Court found that Plaintiffs had satisfied any element of their claim for a temporary injunction if the Court did not expressly state that Plaintiffs had failed to meet their burden on that element.
4. Plaintiffs are wrong in their argument that the Court was in any way required to make a finding on whether granting the injunction would preserve the status quo.
5. Plaintiffs are wrong in their argument that the Court's Order Denying Plaintiffs' Motion for Temporary Injunction violated Rule 52(a), SCRCP.
6. Plaintiffs are not permitted to repackage and repeat their arguments in support of the original Motion—to attempt a second bite of the apple—under the guise of a Motion to Alter or Amend.

In order to prevail upon their Motion for Temporary Injunction, and to obtain the injunctive relief in the first instance, Plaintiffs were required to carry a heavy burden of proof and persuasion.

Specifically, Plaintiffs were required to prove: (1) they would suffer irreparable harm if the injunction is not granted; (2) they will likely succeed on the merits of the claims in the litigation; and (3) they have no adequate remedy at law. *Strategic Resources Co.*, 367 S.C. at 544, 627 S.E.2d at 689.

In full context, Plaintiffs have the burden to establish facts proving each of these elements. Under South Carolina law, they cannot meet this burden merely by asserting conclusory allegations. *S.C. Pub. Serv. Auth.*, 244 S.C. at 473-74, 137 S.E.2d at 509. When a complaint, and the record before the court in connection with the motion 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.*

To reinforce the seriousness and weight of this burden, the Court of Appeals and Supreme Court have repeatedly held and emphasized that the issuance of an injunction is a “drastic” remedy and one only to be applied with extreme caution. *See Strategic Resources*, 627 S.E. 2d at 689 (citing *Forest Land Co. v. Black*, 216 S.C. 255, 57 S.E. 2d 420 (1950)). Furthermore, the courts have reiterated the weight of the plaintiff’s burden by holding that an injunction cannot issue based upon allegations made on information and belief. *Pickman v. Georgetown Cty.*, 130 S.C. 18, 125 S.E. 191 (1924).

In this case, Plaintiffs’ Motion for Temporary Injunction was expressly and specifically premised upon the South Carolina Trade Secrets Act (S.C. CODE ANN. § 39-8-10). Thus, in addition to the burdens associated with any request for injunctive relief, Plaintiffs have the burden to prove that there exists proprietary, confidential or trade secret information deserving protection

as requested. In order to meet this burden, South Carolina law requires that Plaintiffs prove by facts the following:

- i. That proprietary, confidential or trade secret information exists, in fact, which is deserving of protection against alleged misappropriation;
- ii. Even if plaintiff in his own mind believed he possessed confidential, proprietary or trade secret information, did plaintiff prove that secrecy is justified and that he took all proper precautions against publication of the allegedly secret or confidential information—which means proving:
  - a. Plaintiffs consistently (not just occasionally or in isolated instances) took all reasonable positive steps to preserve the secrets or confidentiality;
  - b. Plaintiffs' employees were required to execute employment contracts with appropriate secrecy agreements;
  - c. Plaintiffs' employees were required to execute non-competition agreements;
  - d. Plaintiffs' employees were consistently admonished about the secrecy of the relevant information and the requirement to maintain that secrecy; and
  - e. Plaintiffs exercised "eternal vigilance" in protecting constant warnings to all persons to whom the claimed proprietary, confidential or secret information became known about the secrecy of the information and the requirement to maintain that secrecy—including obtaining from each person an agreement (preferably in writing) acknowledging the secrecy of the particular information and promising to maintain that secrecy.

*Lowndes Products, Inc. v. Brower*, 259 S.C. 322, 329-331, 191 S.E. 2d 761, 764-766 (1972); *see also Wilson v. Gandis*, 430 S.C. 282, 315, 844 S.E.2d 631, 649 (2020); *Uhlig LLC v. Shirley*, No. 6:08-CV-01208-JMC, 2012 WL 2923242, at \*16-17 (D.S.C. July 17, 2012).

The Court's Order denying the Motion for Temporary Injunction was correct in the finding the Plaintiffs had failed to meet their burdens of proof on the essential elements of the claim.

### **ARGUMENT**

1. **The Court was not, and is not, required to rule specifically on whether Plaintiffs would likely succeed on the merits because the Court had already concluded that**

**Plaintiffs failed to carry their burden to establish the other elements of the claim for a temporary injunction.**

It is clear and explicit that the Court applied the correct legal standard in considering and deciding Plaintiffs' Motion for Temporary Injunction—namely, that an applicant for injunctive relief must establish each of three elements of proof: (1) irreparable harm; (2) likelihood of success on the merits; and (3) the absence 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 Court held that Plaintiffs failed to demonstrate the existence of irreparable harm or that no adequate remedy at law existed. Thus, having found that Plaintiffs could not meet their burden of proving the existence of all three required elements for their claim, nothing more was required from the Court.

It is well established in South Carolina law that once a dispositive issue is decided by the Court, the Court need not address remaining issues in the case. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

Furthermore, contrary to Plaintiffs' unwarranted and unsupported pronouncement, the Court's Order, which did not include a specific statement about Plaintiffs' failure to satisfy their burden to establish that there is a likelihood of success on the merits in the litigation, cannot justify an inference that Plaintiffs had satisfied this element.

2. **A specific ruling on the question of whether the issuance of the injunction would preserve the status quo is unnecessary because that is not an element of a claim for injunctive relief and not an issue for decision before the Court.**

In its Order denying Plaintiffs' Motion for Temporary Injunction, the Court correctly stated the necessary elements which constitute the legal standard for deciding whether injunctive relief may be granted. Specifically, the Court cited *Rawlinson Road Homeowners Ass'n., Inc. v. Jackson*, 395 S.C. 25, 35, 716 S.E. 2d 337, 343 (2011), and identified that "[a] party seeking injunctive relief must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law." While a purpose of an injunction might legitimately

include preserving the status quo between the parties, nowhere in the law is that an element of the claim.

Thus, since preservation of the status quo is not an element of the claim, it is not a necessary or proper component on the Court's decision and ruling on the motion. As former Chief Judge Alex Sanders articulated, every court should recognize the overriding rule of procedure: "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E. 2d 26, 28 (Ct. App. 1987).

**3. The Court's Order denying Plaintiffs' Motion for Temporary Injunction fully satisfies the direction of Rule 52(a), SCRPC.**

Plaintiffs seek to argue that the Court's Order denying their Motion for Temporary Injunction somehow fails to satisfy the direction of Rule 52(a), SCRPC, 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 obviously ignore the fact that in its Order the Court set forth its conclusion of law: in order to qualify for injunctive relief Plaintiffs had the burden to demonstrate three elements: irreparable harm; likelihood of success on the merits; and the absence of an adequate remedy at law. It also set forth the findings of fact: Plaintiffs failed sufficiently to demonstrate "that irreparable harm would occur if the temporary injunction was not granted," or "that an inadequate remedy at law exists." Based on these plainly stated conclusions of law and findings of fact, the Court ordered that "therefore this Court respectfully DENIES Plaintiffs' Motion for Temporary Injunction."

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 a 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. *Luckabaugh* was a case involving a voluminous record with competing evidence and expert opinions regarding the commitment of a sexually violent predator. It did not involve a more simple case of whether Plaintiffs had satisfied their burden of proof on two essential elements of their claim. Plaintiffs now want the Court to disprove the negative. Neither Rule 52(a), nor the law generally, entitle the Plaintiffs to such materials, nor require such an exercise from the Court.

4. **Plaintiffs' Motion to Alter or Amend is merely an unpermitted and improper repackaging and rehashing of their original Motion and argument—and it should not be condoned.**

Sections III and IV of Plaintiffs' Motion to Alter or Amend are merely a repackaging of Plaintiffs' original Motion for Temporary Injunction and the materials and arguments already presented in support thereof. Such an effort is not proper and is not condoned by Rules 52 or 59(e), SCRCP. *See Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) (stating the purpose of a Rule 59(e) motion is when a party believes a court has misunderstood an argument or for the preservation of arguments that were raised but not ruled upon by the Court); *see also R.E. Goodson Constr. Co v. Int'l Paper Co.*, No. 4:02-4184, 2006 WL 1677136, at \*1 (D.S.C. June 14, 2006) (finding that motions made pursuant to Rule 59(e) are not "opportunities to rehash issues already ruled upon because a litigant is displeased with the result"). Plaintiffs simply rehash their prior arguments and repeat allegations based upon presumptions the Court already found were insufficient to carry their heavy burden to obtain the requested injunctive relief.

Despite a second attempt, Plaintiffs still fail to prove by verified facts that they satisfy any of the three threshold elements of their claim for injunctive relief. They still provide no supported basis for the Court to conclude that they:

- a. Will suffer irreparable harm;
- b. Have a likelihood of success on the merits of the litigation;  
and
- c. Have no adequate remedy at law.

Furthermore, while the Motion for Temporary Injunction seeks to foreclose Defendants from “using” what Plaintiffs merely assert to be “proprietary,” “confidential,” or trade secret “information,” plaintiffs provide no evidence that protectable proprietary, confidential or trade secret information is even present in the case. A party cannot by mere *ipsa dixit* declare the existence of valid and protectable proprietary, confidential or trade secret material. Rather, Plaintiffs were required to prove the existence of such protectable material and to prove that Defendants knew or should have known the material was protected and then misappropriated it or received from another who they knew had misappropriated it and was not authorized to provide it to them. Plaintiffs utterly failed to make any such showings. The only “information” Plaintiffs reference is “physician preference cards,” “instrument lists,” “case logs,” and “financial data.” But Plaintiffs never provide the Court any factual evidence that such “physician preference cards,” “instrument lists,” “case logs,” or “financial data” ever:

- a. Qualified as *bona fide* proprietary, confidential, or trade secret information;
- b. Were ever identified to anyone—let alone the Physicians and Defendants against whom Plaintiffs sought the drastic remedy of the injunction—to be proprietary, confidential or trade secret; and
- c. Were monitored and protected by Plaintiffs with “eternal vigilance”, as necessary to preserve their protectability.

In fact, the Exhibits presented to the Court, and comprising the Record in this case, reflect plainly that the physician preference cards and instrument lists identified by Plaintiffs as having been transmitted to Defendants had no marking, designation or identification as belonging to Plaintiffs or as being proprietary, confidential or trade secret. [See Plaintiffs' Exhibits 6,7,10]. In fact the materials had no indicia of protection or protectability.

It is fundamental that in order for Plaintiffs to establish their claim against Defendants for injunctive relief as requested, Plaintiffs must have proved to the Court by verified facts that their *bona fide* proprietary, confidential and trade secret information was misappropriated and that it was provided to Defendants when they knew or should have known that it was misappropriated and provided to them by a person not authorized to do so. *See Wilson*, 430 S.C. at 315, 844 S.E.2d at 649; *Uhlig LLC*, 2012 WL 2923242, at \*16-17; *Lowndes Prod., Inc.*, 259 S.C. at 331, 191 S.E.2d at 766. Plaintiffs utterly failed to provide verified facts to the Court establishing those essential elements.

In their Complaint, every single allegation about the alleged misappropriation of proprietary, confidential or trade secret information indicated that the Physician Defendants were the ones who took or misappropriated the information. [Complaint ¶¶ 48-74]. Even in their Motion Plaintiffs state plainly: "the individual Defendant[] [Physicians] misappropriated valuable confidential and proprietary information belonging to Plaintiffs." In like fashion, every single allegation about any alleged interference with the Fellowship Program or the Fellowship accreditation organization were directed specifically at the Physician Defendants as having been the persons who committed the acts about which Plaintiffs complained. [Complaint ¶¶ 42-47].

Despite Plaintiffs' allegations that the Physician Defendants were the persons perpetrating the actions for which Plaintiffs sought the injunction, Plaintiffs chose to settle their claims and disputes with the Physician Defendants. And, now while Plaintiffs misrepresent the terms of those

settlements to the Court and claim that the Physician Defendants agreed “to the injunctive relief sought by the Plaintiffs,” no such agreement was made by the Physician Defendants. Instead, by virtue of the settlement terms and the releases therein, the Physician Defendants are themselves free to use what Plaintiffs say were their proprietary, confidential or trade secret information. By virtue of the Settlement Agreements, Physician Defendants were only required to:

[D]estroy . . . the following specific documents or records . . . to the extent they are in Physician’s possession, custody or control: physician preference cards, case logs, or instrument lists created during his employment with MUSC & membership with UMA; documents reflecting MUSC & UMA’s revenues from work performed by Physician; and documents or copies reflecting the salary information or contracts of other employees or recruits of MUSC & members of UMA. Likewise, Physician . . . will refrain from using any of the documents or records specifically referenced in this Section 2.

Of course, the comparison of this settlement term (which clearly does not provide that the Physician Defendants “agree to the injunctive relief sought by the Plaintiffs”) with the specific terms of the injunctive relief sought by Plaintiffs reveals the stark and material differences. Plaintiffs’ requested injunctive relief was to:

1. Prohibit Defendants from further “utilizing Plaintiffs’ confidential and proprietary information. . . .”
2. Return all “confidential and proprietary information taken. . . .”
3. Prohibit Defendants from “billing or collecting money for services performed utilizing any of Plaintiffs’ confidential and proprietary information. . . .”

The Defendant Physicians’ Settlement Agreements apply to the physical documents—not the information and knowledge that is the basis of those documents. The Defendant Physicians made no agreement not to use information. Thus, the Defendant Physicians did not agree to the injunctive relief sought by the Plaintiffs and the Defendant Physicians are free to use the information that was the framework for the Defendant Physicians’ development of the physician

cards, instrument lists, and case logs. Accordingly, the Court should reject Plaintiffs' incongruous argument that is based upon a misrepresentation of the terms of the Defendant Physicians' Settlement Agreements. It is inconceivable that Plaintiffs could make an argument that the Defendant Physicians who developed the information subsequently repeated in the documents in question are free to use that information while only not retaining the documents, yet claim that they would be irreparably harmed by those Physicians use of that information while employed by Defendants.

### **CONCLUSION**

Based on the foregoing, Plaintiffs' Motion to Alter or Amend the Court's Order Denying Plaintiffs' Motion for Temporary Injunction should be **DENIED**.

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